FEDERAL CIRCUIT COURT OF AUSTRALIA

SZQRM & ORS v MINISTER FOR IMMIGRATION & ANOR *[2013] FCCA 772*

Catchwords:
MIGRATION – Application for review of decision of Refugee Review Tribunal – alleged failure by the Tribunal to consider claim and evidence – alleged failure to consider whether right to stay in another country for three months was consistent with s.36 of the Act – no jurisdictional error – application dismissed.

Legislation:
Migration Act 1958 (Cth), ss.36, 425, 476

Cases cited:
S395 /2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71; 216 CLR 473; 203 ALR 112; 78 ALJR 18
Win v Minister for Immigration [2001] FCA 132
SZMWQ v Minister for Immigration (2010) 187 FCR 109; [2010] FCAFC 97
Minister for Immigration v QAAH of 2004 (2006) 231 CLR
WAGH v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 269
Minister for Immigration v SZRTC & Ors [2013] FCCA 1
NBLC v Minister for Immigration and Multicultural and Indigenous Affairs & Anor [2005] FCAFC 272
SZOVB v Minister for Immigration [2011] FCA 1462
VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 365
Minister for Immigration & Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Wang [2003] HCA 11; 215 CLR 518; 196 ALR 385; 77 ALJR 786
SZFYW v Minister for Immigration & Citizenship [2008] FCA 1259
SZECD v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 31
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor (2006) 228 CLR 152; [2006] HCA 63
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2005) 144 FCR 1; [2005] FCAFC 263
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802; (2001) 194 ALR 244
SZOYH v Minister for Immigration & Citizenship [2012] FCA 713

SZQPW v Minister for Immigration & Anor [2012] FMCA 471
Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs [1994] FCA 1253; (1994) 52 FCR 437; (1994) 124 ALR 265
SZATV v Minister for Immigration and Citizenship and Another [2007] HCA 40; (2007) 233 CLR 18; (2007) 237 ALR 634
SZMCD v Minister for Immigration and Citizenship [2009] FCAFC 46; (2009) 174 FCR 415
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; (2000) 168 ALR 407
Applicant C v Minister for Immigration & Multicultural Affairs [2001] FCA 229
Minster for Immigration and Multicultural Affairs v Applicant C [2001] FCA 1332
V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018; (2001) 114 FCR 408

First Applicant:	SZQRM
Second Applicant:	SZQRN
Third Applicant:	SZQRO
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2755 of 2012
Judgment of:	Judge Nicholls
Hearing date:	18 April 2013
Date of Last Submission:	18 April 2013
Delivered at:	Sydney
Delivered on:	11 July 2013

REPRESENTATION

The Applicants:	The first named applicant appeared in person and on behalf of the second named application and as litigation guardian for the third named applicant
Counsel for the Respondents:	Mr P Knowles
Solicitors for the Respondents:	DLA Piper

ORDERS

(1) The first respondent is known as Minister for Immigration, Multicultural Affairs and Citizenship.

(2) The application made on 26 November 2012 and amended on 20 March 2013 is dismissed.

(3) The first and second named applicants pay the first respondent's costs set in the amount of $6,646.00.

FEDERAL CIRCUIT
COURT OF AUSTRALIA
AT SYDNEY

SYG 2755 of 2012

SZQRM
First Applicant

SZQRN
Second Applicant

SZQRO
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made on 26 November 2012, pursuant to s.476 of the *Migration Act 1958* (Cth) ("the Act"), and amended on 20 March 2013, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal"), made on 30 October 2012, to affirm the decision of the respondent Minister's delegate to refuse the grant of protection visas to the applicants.

Background

2. The applicants are citizens of Lithuania (Court Book – "CB" – [2] at CB 243). The first named applicant and the second named applicant are husband and wife ("the applicant" and "the applicant's wife",

respectively) (CB 1). The third named applicant is their daughter, who was two years old at the time of the Tribunal's decision ("the applicants' daughter") (CB 1).

3. The applicant arrived in Australia on 12 November 2010 (CB 14). The applicant's wife and daughter arrived on 13 December 2010 (CB 69). They applied for protection visas on 24 December 2010 (CB 1 to CB 50, including attachments).

4. The applicant's and his wife's claims were set out in a statement attached to their protection visa applications (CB 39 to CB 42). The statement was written from the perspective of the applicant, although it made reference to claims advanced on behalf of his wife. The claims made in that statement can be summarised as follows:

    1) The applicant and his wife were persecuted in Lithuania "for reason of [their] different sexual and moral orientation" (CB 39.2). In particular, the applicant was bisexual and engaged in relationships with men. He and his wife believed that "…human beings, genetically, has a wish to make love with different people" (CB 39.7) and that, in part, the issues in society were a result of people trying to "…comply with traditional moral and sexual values" (CB 39.8).

    2) As a result of their sexual and moral views, the applicant and his wife were physically assaulted and received threatening phone calls (CB 40.5 to CB 40.9). Despite reporting these attacks to the police, the police did nothing to find the perpetrators (CB 40.5 to CB 40.9).

    3) Further, as a result of the attacks and the awareness of their sexual and moral views, the applicant and his wife were referred to a psychologist and "social worker" (CB 41). The "social worker" told the applicant and his wife that they lived "amoral, anti-social life" (CB 41.3) and that "that situation needs to be sorted out because [they] have a child" (CB 41.3).

    4) Following these events, the applicant's wife wrote to "a Lithuanian Human Rights organisation called Ombudsman" (CB 41.5). Shortly after sending her letter, "as a 'reply'", the

applicant and his wife were telephoned by the police and were invited to the police station (CB 41.6). On arrival, the applicant and his wife were told that the police had "got some information" that they held "debauches (wild parties)" and that they had to end "such anti-social activity" (CB 41.6).

5) As a result of these events and stresses, the applicant became depressed and, ultimately, he attempted suicide. Subsequently, he was placed on antidepressants, however he felt "complete apathy" (CB 42.1 to CB 42.5).

6) Since moving to Australia the applicant's "moral state has been improved magically" (CB 42.6).

5. On 9 February 2011, the applicant provided written submissions in support of the application (CB 52 to CB 62).

6. On 24 February 2011, a delegate of the respondent Minister decided to refuse the grant of protection visas to the applicants (CB 63 to CB 80).

The Differently Constituted Tribunal

7. On 24 March 2011 the applicants applied to the Tribunal for review of the delegate's decision (CB 81 to CB 84). In a letter dated 19 March 2011, the applicant set out the reasons why he "disagreed" with the delegate's decision (CB 85). The Tribunal (as differently constituted) affirmed the delegate's decision.

8. Ultimately, on 9 May 2012 Smith FM (as he then was) made orders, by consent, remitting the matter to the Tribunal for determination according to law on the basis that the Tribunal's finding was (CB 153 to CB 154):

> *"... affected by jurisdictional error in that a breach of section 425 of the Migration Act 1958 (Cth) ('the Act') occurred in relation to the Second Respondent's finding, at [108] of its decision, in relation to section 36(3) of the Act."*

The Tribunal

9. The applicant attended a hearing before the Tribunal on 28 August 2012 (CB 159 and CB 162 to CB 163). The applicant's wife did not attend ([46] at CB 250). At the hearing, the applicant provided various documents in support of his and his wife's claims to protection (CB 166 to CB 210).

10. By letter dated 13 September 2012, a Tribunal officer wrote to the applicants and advised them that the Tribunal needed to discuss a "further legal issue" with them (CB 211 to CB 213). Specifically, s.36(5) of the Act (CB 211). The "further" hearing was scheduled for 16 October 2012 (CB 212). Again, only the applicant attended on that occasion (CB 217 and [67] at CB 253). The applicant requested, and was provided with, a Russian interpreter (CB 216 to CB 217). On that occasion, the applicant also provided to the Tribunal a "report" on "third country protection" (CB 228 to CB 240).

11. On 30 October 2012, the Tribunal decided to affirm the decision of the Minister's delegate (CB 242). The applicants were notified of that decision by letter dated 31 October 2012 (CB 241). A copy of the Tribunal decision record, setting out its findings and reasons, was provided to the applicants ([76] at CB 258 to [93] at CB 263).

12. The Tribunal noted the applicant's evidence that he and his wife had not engaged in homosexual or extra-marital sexual activity for some years ([81] at CB 259). Further, given the absence of medical evidence, the Tribunal did not accept the applicant's explanation for this (his "ill health" and "mental state") ([81] at CB 259). In the circumstances, the Tribunal found that the applicant and his wife would not, if they returned to Lithuania, engage in homosexual behaviour ([81] at CB 259).

13. Further, the Tribunal did not accept that the "…modification of their past behaviour [was] the result of fear of persecution" ([81] at CB 259). Further, the Tribunal noted that the applicant did not claim that the modification in their behaviour was a result of fear of persecution. Rather, his evidence was said, by the Tribunal, to be that the modification in their behaviour was "…a consequence of the events that happened in the past".

14. In any event, the Tribunal went on to state that ([81] at CB 259 to CB 260):

> *"In any case, I find that even if the applicant husband and the applicant wife could be said to be modifying their behaviour out of fear of persecution, the evidence does not suggest that the result of this required behavioural change is itself persecution. The evidence does not suggest that the applicant husband and wife have been denied an essential aspect of their freedom of sexual expression or forced to subjugate elements of their essential nature that are integral to their personal beliefs or identity."*

15. That was said to be because the applicant and his wife had not, since being in Australia, "manifested these beliefs…on the internet". Further, the applicant gave evidence at the hearing that he did not feel that he had compromised his beliefs by ceasing his sexual activity as "his health is the priority" ([81] at CB 260).

16. Based on the above, the Tribunal found that the applicants' "priorities" had changed and that they "would not engage in the activity which they did previously" ([81] – [82] at CB 260). In light of that finding, the Tribunal found that there was no real chance that the applicants would face persecution if they returned to Lithuania. Further, the Tribunal found that the possibility of the applicants being targeted as a result of their past behaviour was "remote" ([82] at CB 260).

17. In relation to their fear emanating from the Lithuanian police and child welfare authorities, the Tribunal found, variously, that the possibility of any action being taken by those authorities against the applicants, because of their past conduct, was "remote". Further, that their profile was "…not such that the national authorities would locate them in order to harm them" ([83] at CB 260).

18. Having concluded that the applicants did not satisfy s.36(2)(a) of the Act, the Tribunal proceeded to consider their claims with respect to the complementary protection criterion (s.36(2)(aa) of the Act) ([85] at CB 261). The Tribunal found that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Lithuania, there was not a real risk that they would suffer significant harm ([85] at CB 261).

19. Despite finding that the applicants did not meet the criterion in s.36(2)(a) of the Act, and expressing "confidence" in relation to that finding, the Tribunal went on to make findings in relation to s.36(3) of the Act ([86] at CB 261). In particular, the Tribunal found that "the provisions of the relevant [European Union ("EU")] and [United Kingdom ("UK")] regulations provided a presently existing and legally enforceable right to EU citizens [the applicants as Lithuanian citizens were EU citizens] to enter and reside in other EU countries for three months" ([89] at CB 262).

20. The Tribunal found that s.36(3) of the Act did not impose a test of "whether it is reasonable, preferable or possible (subjectively) for an applicant to avail themselves" of that right and that the applicants had not taken all possible steps to avail themselves of that right ([89] at CB 262). In those circumstances, the Tribunal found that Australia did not have protection obligations in respect of the applicants ([90] at CB 262). In particular, that the applicants could enter and reside, temporarily, in the UK. Further if they did so, there would not be a real risk of them suffering harm. That is, s.36(4) of the Act did not apply ([91] at CB 262).

The Amended Application

21. The grounds of the amended application are as follows:

> *"Particulars*
>
> *1.*
>
> *The Tribunal failed to consider and determine our application for protection.*
>
> *I would like to refer t S395/200 v Minister for Immigration and Multicultural Affairs. AT [43] it was said that:*
>
> > 'the notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. That is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of

> nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.'

a. The Tribunal found that we were not refugees because we would not, on return to Lithuania, engage in homosexual activity (as the applicant husband and wife have not engaged in homosexual activity for some two years) [81]. The Tribunal failed to consider the claim made that 'it was not just about the sex, we want to change society's values' and the intolerance and hatred that persist at [53] and the fear of persecution that may result from that attitude and belief.

b. The Tribunal failed to properly consider and determine whether our 'change of conduct' is a consequence of the fear of persecution and whether its continuation if we were to return to Lithuania is the consequence of the fear of persecution.

c. In finding that we could relocate to another part of Lithuania the Tribunal failed to consider the very small size of Lithuania and the attitudes found to exist in Vilnius and throughput the country and in failing to consider such matters the Tribunal has failed to consider the reasonableness of relocation elsewhere.

d. In dealing with the issue of 'fear of persecution' the Tribunal failed to take into account my dire health state, the fact that I was so desperate that tried to commit suicide. It should be noted that the previously constituted Tribunal, given our circumstances, accepted that our fear had been well founded and that we would be persecuted should we were to return to Lithuania now or in foreseeable future.

2.

a. The Tribunal failed to properly consider and determine whether the right to stay for at least three months is consistent with s.36 of the Migration Act.

The applicability of s.36 was the basis of the previous Tribunal's decision. During the course of the hearing the Tribunal again concentrated on operation of s.36(5) of the Act. On 13 September 2012 I was invited to attend second hearing to discuss 'the issues regarding the operation of s.36' (no other issues were discussed at the second hearing). It is regrettable that this issue has not been laid to rest by the Tribunal after the Federal Magistrates court referred my case back to the Tribunal. Furthermore, it appears the Tribunal clearly misconstrued the issue. The Tribunal referred to information taken from the 'Europa website' which among other things states: 'if you stay here (in EU) for less than 3 months, all you need is a valid identity card or passport' *[70]*. *Given that the Tribunal made the following conclusion:* 'based on information about the requirements for EU nationals entering the UK, I find that the applicant have a right to enter and reside temporarily, that is, for a period of at least three (3) months in any EU country' *[90]. It concluded:* 'I find that, in these circumstances and pursuant to s 36(3) of the Act, Australia does not have protection obligations in respect of the applicants' *[90]*.

b. In determining whether I took 'all possible steps to relocate' the Tribunal failed to properly consider the fact that I had been suffering from severe depression, tried to commit suicide, had severe health problems, etc. The Tribunal should have asked itself whether, given my physical and mental states it would be reasonable practical and possible in the circumstances to take 'all possible steps to relocate' as it was discussed at [33] in SZMWQ v MIC [2010].

c. Given that 'the right to reside in UK or Ireland' is strictly conditional (i.e. subject to strict compliance with residential requirements and the failure to comply with these requirements (for whatever reasons) would result in our removal from that countries) the Tribunal failed to properly consider and determine whether ***in our circumstances*** *we did have the 'right to reside' in Ireland or UK and whether the 'right to reside' for at least 3 months in the mentioned countries included the right to obtain effective protection in these countries."*

[Emphasis in the original. Errors in the original]

Before the Court

22. At the final hearing the applicant appeared in person. Mr P Knowles of counsel appeared for the first respondent. The applicant confirmed that he would speak on behalf of his wife, who did not appear at the hearing. At the first Court date, the applicant had been appointed the litigation guardian for his daughter. I confirmed with him that he was content to continue to act as her litigation guardian.

23. The Court had before it the Court Book and written submission filed on behalf of the applicants and the first respondent. At the hearing, Mr Knowles sought to read the affidavit of Michelle Elizabeth Stone, affirmed on 8 January 2013, which annexed at "A", a transcript ("T") of the Tribunal hearing. There was no objection by the applicant and that evidence was admitted

Submissions

24. In relation to ground one, the applicants submitted that the Tribunal failed to consider their claims that they feared harm, and persecution, because they "wanted to change society's values". Further, the applicants submitted that the Tribunal had failed to consider their evidence of political opinion and "persecution" that they claimed had occurred as a result of their desire to change society's values.

25. The applicant submitted that the previously constituted Tribunal had been satisfied that the applicants had a "subjective fear of the risk of serious harm now and in the future for reasons of [their] bisexuality". Further, that the (presently constituted) Tribunal had failed to consider their "change of conduct" in light of *S395 /2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 CLR 473; 203 ALR 112; 78 ALJR 18 ("*S395*"). The applicant also submitted that the Tribunal failed to consider the limitations of "relocation within Lithuania".

26. Before the Court, the applicant sought to further explain his case. He submitted that the Tribunal had focused on his lack of "sexual activity" as opposed to the claims he made about his active political and social opinions. Further, that the Tribunal had failed to properly understand his and his wife's claims.

27. The Minister accepted that, if the Tribunal had approached these claims by "considering whether [they] could avoid persecution by modifying their behaviour", it would have fallen into error ([15] of the Minister's written submissions). The Minister also submitted that the Tribunal demonstrated, at [30] (at CB 247) of its decision record, that it had not failed to separate the applicant's claims regarding his practice and his convictions. Rather, the Tribunal was "aware and recounted the applicant's evidence of his convictions".

28. Further, from the Tribunal's decision record, it was clear that the Tribunal had considered the separate issues ([81] at CB 260). Even further that, on the evidence, the applicant had acknowledged that he would not continue his homosexual activity in Lithuania (T13, line 20). Also, that the applicant had not given any evidence to the Tribunal that he would continue his "advocacy work".

29. The Minister submitted that, the Tribunal had found that, even if the applicant and the applicant's wife had modified their behaviour, it did not, in and of itself, amount to persecution. Namely, with reference to Madgwick J in *Win v Minister for Immigration* [2001] FCA 132 (*"Win*"), that "it will depend on the nature of the restriction and the circumstances of the particular applicant" whether there is an error, ([17] at the Minister's written submissions). Before the Court, the Minister submitted that the Tribunal had asked the correct questions. Specifically, "what would, in fact, happen", and "why is the applicant restraining himself from that activity"?

30. On the issue of "relocation" and mental illness, the Minister submitted that the Tribunal had considered both, and that its relevant findings were open to it on what was before it. Further, that the issue of "relocation" to the UK was "secondary" as the Tribunal had already given its "primary" finding that "there was only a remote chance that the applicants would be exposed to harm".

31. In relation to ground two, the applicant submitted that the Tribunal had "failed to properly consider and determine whether the right to stay for at least three months is consistent with s.36 of the Migration Act."

32. The applicant submitted that, in light of the previous remittal of the matter back to the Tribunal, it was "regrettable that this issue has not

been laid to rest by the Tribunal". Further, the applicant submitted that he and his wife were not able to take "all steps" to relocate, as evidenced by his mental illness. Further, he submitted, that the Tribunal had asked itself the wrong question. The question the Tribunal should have asked itself was:

> *"**given [his] physical and mental states** it would be reasonably practical and possible, in the circumstances, to take 'all possible steps'?"*
>
> [Emphasis in Original]

The applicant sought to rely on *SZMWQ v Minister for Immigration* (2010) 187 FCR 109; [2010] FCAFC 97 ("*SZMWQ*") (at [33] per Rares J) to argue that the Tribunal applied the wrong test.

33. Further, the applicant submitted that the Tribunal had "failed to properly consider" whether the applicants, in their current state, would be able to comply with the "residential requirements" in the UK and Ireland. Following this, the applicant submitted ([25] of the applicants' written submissions):

> *"(i) there would be a real risk that we would suffer harm in relation to the country (i.e. UK or Ireland);*
>
> *(ii) having well-founded fear of persecution (as it was accepted by the Tribunal) there was a possibility we would be returned to Lithuania to our immanent failure to comply with the mentioned above residential requirements."*

34. The Minister submitted that, as the right to the enter and stay within the UK for at least three months was an enforceable legal right, following the discussion in *SZMWQ*, it was capable of engaging s.36(3) of the Act.

35. Further, that the Tribunal had asked itself the correct question. Namely, whether the temporary right to enter could "properly be characterised as including a right to 'reside'" ([26] of the Minister's written submissions). In support of this, the Minister referred to *Minister for Immigration v QAAH of 2004* (2006) 231 CLR 1 ("*QAAH*") at [37] to [37] per Gummow ACJ, Heydon and Crennan JJ, *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 269 ("*WAGH*") at [62] per Hill J and *Minister for Immigration v*

SZRTC & Ors [2013] FCCA 1 ("*SZRTC*") per Judge Driver at [25] and [26].

36. Referring to the applicant's alleged physical and mental state, the Minister submitted that the test should not be "read down" following the decision in *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* [2005] FCAFC 272 per Graham J at [63] – [64]:

> *"[63] The relevant right in respect of which a non-citizen must take all possible steps to avail himself is the bare right, if it exists, to enter and reside in a country, not a right to enter and reside comfortably in a country.*
>
> *[64] I am disinclined to the view that 'all possible steps' should be construed as 'all steps reasonably practicable in the circumstances', 'all reasonably available steps' or 'all reasonably possible steps'. Indeed, I would conclude, given the object underlying the Act, that 'all possible steps' means what it says and should not, be read down in any way."*

37. The Minister's submission can be summarised as that, following *SZMWQ*, an "enforceable legal right to enter and reside will enliven the operation of s.36(3) even where that right is subject to restrictions or conditions" (see [30] of the Minister's written submissions).

38. Finally, the Minister submitted that if the applicants established only one of the grounds of the application, as the findings of the Tribunal were "separate and independent", the Court should use refuse relief (*SZOVB v Minister for Immigration* [2011] FCA 1462 ("*SZOVB*") at [55] – [60] per Katzmann J).

Relevant Law

39. The relevant parts of the Act are as follows:

> ***"Section 36***
>
> *...*
>
> *(2) A criterion for a protection visa is that the applicant for the visa is:*

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion."

Consideration

40. It is convenient at this point to address a number of threshold matters.

41. The two grounds of the amended application each address different, and separate, parts of the Tribunal's analysis and conclusions. The first is the Tribunal's findings that the applicant and his wife did not have a well founded fear of Convention related persecution, nor was there a real risk of significant harm, if they were to return to Lithuania. In short, they did not meet the criterion in s.36(2)(a) or (aa) of the Act for the grant of a protection visa. The second ground of the amended application addressed the Tribunal's conclusion that s.36(3) of the Act applied to the applicants' circumstances, and therefore Australia did not have protection obligations towards them. Further, that s.36(4) of the Act did not apply and, in addressing s.36(5) of the Act, that the UK would not take steps to return them to Lithuania.

42. It is the case that the first finding (that s.36(2)(a) and (aa) of the Act did not apply) is sufficient to ground the Tribunal's affirmation of the delegate's decision. As indeed, separately, is the second (that s.36(3) of the Act applied).

43. There is some seeming inconsistency, in circumstances where the Tribunal found that the applicants did not have a well founded fear of persecution, or a real risk of significant harm, and then went on to say that, in any event, they could avail themselves of the protection of a third country. However, no legal error arises in these circumstances.

44. On a plain reading of its decision record the Tribunal was well aware of the distinction here. It made plain that its consideration of the second matter (s.36(3) of the Act) was done absent doubt about the first

(s.36(2)(a) and (aa) of the Act). The Tribunal said it went on to consider the second matter (s.36(3) of the Act) so as to address a matter raised, extensively, by the applicant. Further, it is clear that that was connected to the issue on which the applicant had, in part, succeeded earlier before this Court and in relation to the decision of the earlier, differently constituted, Tribunal.

45. In any event, the import for the current case is that, for the applicants to succeed in their application to this Court, both grounds would need to reveal legal error in the Tribunal's decision as the grounds relate to the findings of the Tribunal which are separate and independent of one another. (Noting the Minister's reference to *SZOVB*, I have also had regard to *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 365 at [33] per North J for this proposition).

46. Second, it is clear that the applicant has engaged in some legal research, in that he refers to authorities such as *S395*. The difficulty for the applicant is that he lacks understanding of the legal questions raised by his complaint before the Court, and the application of the legal authorities to his case. With respect to the applicant, I say this in a factual, not pejorative, sense.

47. I note the applicants were referred to a lawyer on the panel of the Court's "RRT Legal Advice Scheme". They were provided with the opportunity of a meeting with the lawyer, and were also subsequently given written legal advice. Whatever came of this, if anything, it has not demonstrably advanced the applicant's understanding. In significant ways, the challenge by the applicants to the Tribunal's decision is really a challenge to the facts as found. It does not rise above a request for impermissible merits review (*Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 ("*Wu Shan Liang*")).

48. Further, the applicant, in part, laboured under the misapprehension that the Tribunal was bound by the findings made by the previously constituted Tribunal, or even to take the same view and understanding of the claims as presented previously before the earlier constituted Tribunal.

49. It is, of course, the case that the Tribunal, on constitution for a second time, is not bound by what was found earlier. It is obliged in the conduct of the review, to consider the relevant matters afresh (*Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11; 215 CLR 518; 196 ALR 385; 77 ALJR 786 at [16] per Gleeson CJ, [68] and [77] per Gummow and Hayne JJ and *SZFYW v Minister for Immigration & Citizenship* [2008] FCA 1259 at [10] per Flick J). Noting of course that the Tribunal can be informed by what occurred earlier before the previously constituted Tribunal. (*SZECD v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 31 at [28] – [33] per Bennett J).

50. Even further, with reference to ground two and the issue regarding the operation of ss.36(3), (4) and (5) of the Act, in his written submissions the applicant made reference to "[i]t is regrettable that this issue has not been laid to rest by the Tribunal after the Federal Magistrates consented to return my matter back to the Tribunal" ([15] of the applicants' written submissions).

51. It is clear, with reference to the "Annexure to Consent Orders" (CB 154) made by Smith FM (as he then was), that the jurisdictional error conceded by the Minister in relation to the earlier constituted Tribunal decision was not the analysis of s.36(3) of the Act, but the failure to afford procedural fairness pursuant to s.425 of the Act. That is, the failure to raise "the s.36(3) issue" at the hearing such that it could be said that it was satisfied (*SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2006) 228 CLR 152; [2006] HCA 63).

52. Such a submission from the applicant now cannot assist him. In relation to the current Tribunal decision, no such failure is apparent.

53. In any event, in turning to each particular under the grounds, it is the case that, even on the most charitable view of the applicants' case, their grounds do not succeed.

Consideration: Ground One

54. Ground one refers to *S395* at [43] per Gleeson CJ. Not all of the particulars to ground one relate directly to that case at the particular

paragraphs. However, it may be allowed that the applicants intended to make this reference as representing some general direction to the Tribunal as to how to approach cases of this type, and questions of the "modification" of behaviour on return to the country of claimed persecution.

55. In any event, particular (a) to ground one can more properly be seen as a complaint that the Tribunal failed to deal with an integer of the claims made by the applicants. In his oral submissions before the Court the applicant emphasised this particular. Although not articulated as such, I understood the applicants' complaint to be that the Tribunal failed to deal with a claim clearly arising from the circumstances presented and that the Tribunal therefore fell into error (see *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2005) 144 FCR 1; [2005] FCAFC 263, *Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802; (2001) 194 ALR 244 and *SZOYH v Minister for Immigration & Citizenship* [2012] FCA 713).

56. That is, that the Tribunal failed to consider what had been described as the applicant and his wife's "liberal" attitude, or view, in relation to sexual activity. Further, their public expression of this view, and their desire to change society's attitude.

57. The difficulty for the applicants is that this complaint does not succeed at the factual level. In essence the applicant argued that there were, relevantly, at least two broad elements to his and his wife's claim to fear harm on return to Lithuania. The first was that, in the past, they had both engaged in homosexual activities and that that had resulted in "persecution". They feared the same on return.

58. The second was that they had engaged in, what the applicant described before the Court as, "public discussion" about family, homosexuality, human rights and persecution. He submitted that that resulted in the fabrication of criminal charges against them, beatings, and the attempted removal of his child from his and his wife's custody.

59. The applicant sought to emphasise the distinction between the harm he and his wife had endured (and feared on return) because of their homosexual practices, and the harm endured because of their public expression of their views about society's values, in relation to

homosexual activity. The applicant submitted that at the hearing the Tribunal had confined itself to asking him about his past and future sexual conduct. The Tribunal did not ask about the expression of his views and convictions. Further, his views and conviction remained, and would if returned to Lithuania, be unchanged.

60. First, it is important to note what the Tribunal understood, relevantly, as the claims as made. These were presented by the Tribunal at [30] (at CB 247):

> *"The applicant husband has presented his claims consistently in a detailed statement submitted with the protection visa application, in subsequent written submissions and before the previous Tribunal, where the applicant husband and the applicant [wife] gave consistent evidence about their circumstances in Lithuania and the basis for the applicant husband's claims to refugee status.* ***Essentially, he claims that he and the applicant wife are committed to certain strongly held values concerning freedom and honesty in relationships. They lived out these values*** *by pursuing same sex relationships outside their marriage* ***and initially by establishing an internet forum with like-minded people, where they shared their views****. As a result the applicant husband and the applicant wife received threatening phone calls; the front door of their apartment was set on fire; and they were both attacked and beaten on separate occasions. The police did not provide effective protection, and indeed, after the police became involved, threats were made to remove the applicant's daughter from their care on the basis that they were immoral and engaged in debauched behaviour. As a consequence of these events, and after a car accident, the applicant husband became profoundly depressed and attempted suicide. To escape their situation and for the sake of the applicant husband's mental health they came to Australia.*
>
> [Emphasis added.]

61. In addition, the public dissemination of their views and convictions was specifically understood to be ([33] at CB 247):

> *"The applicant husband stated that the internet forum opened in February or March 2010 but it was closed down in June 2010, because of the negative feedback that they were receiving on the site. It was a page within the website www.vkontakte.ru (Russian Facebook). Private details of the applicant husband were available as the moderator of that web page. He stated that he*

tried to get evidence of this page to support his claims for protection, but after the page was closed down in June 2010, posts from the page were deleted. The applicant husband is not sure why this happened."

62. Three things may be said about this. One, the Tribunal understood that an element of the applicants' claims was their strongly held convictions about family stability, homosexuality, and the like. Two, it understood their claimed public advocacy of these convictions. Three, on any plain reading of the applicant's statement and submissions ultimately before the Tribunal, there is nothing to say that the Tribunal misunderstood or misrepresented these claims when setting them out in its decision record.

63. The Tribunal's understanding of the distinction between sexual activity and the public advocacy of these convictions can also be seen in the Tribunal's account of the hearing with the applicant.

64. The Tribunal's account of the hearing makes reference to the two (albeit interrelated) elements of the applicants' claims. For example see ([52] – [53] at CB 251):

> *"[52] I asked whether the applicant husband feels compromised, given* ***his views about the philosophical and personal importance*** *of pursuing open relationships. He said that he does not, his depression is an ongoing issue that makes him feel unwell. His thoughts here are about survival, not about sexual relationships or about propagating his views.*
>
> *[53] I asked the applicant husband whether, if it was the case that he returned to Lithuania and chose not to resume his former lifestyle, he felt that he would be safe there. He said that if the same people saw him again they would not ask whether he was still having sex with men.* ***He said, in any case, it was not just about the sex, they wanted to change society's values****. The same level of intolerance and hatred for this and their lifestyle still persists."*
>
> [Emphasis added]

65. The Tribunal was not just reproducing the applicant's written claims, or a transcript of the hearing, verbatim. Rather, it was setting out its account of what was presented to it. In these circumstances, it may be allowed that the Tribunal reproduced its understanding of the claims as

put to it by the applicant. In this regard, I cannot see that the Tribunal misunderstood the extent and nature of the applicants' claims, and certainly not in the way alleged by the applicants.

66. Nor does the transcript of the Tribunal hearing, and in particular the evidence given by the applicant, reveal any error in the Tribunal's subsequent understanding of the nature and extent of the claims.

67. In this regard, the applicants' attack in relation to particular (b) of ground one proceeds from a similar factual basis to the attack in particular (a) of ground one. It is important to note the following.

68. During the course of the Tribunal hearing it emerged from the applicant that in the two years that he and his wife had been in Australia they had not engaged in sexual relationships outside of their marriage (see, for example, T12, lines 23 – 27, T12, lines 41 – 46 and T15, lines 31 – 40).

69. To this must be added the applicants' written submissions to the Tribunal, which included a reference to (CB 198.8):

> *"During the last months in Lithuania we did not have homosexual relationships. Yet, I nearly died.*
>
> *We will not be involved in any homosexual activities it we are deported back to Lithuania."*

70. In relation to particular (a) of ground one the applicants assert that the Tribunal did not deal with an aspect of their claims. They rely on [81] (at CB 259) of the Tribunal's decision record for this assertion. In particular the Tribunal's finding (at [81] at CB 259) that the applicants had not engaged in any homosexual activity for some two years.

71. It is the case that at [81] (at CB 259) the Tribunal does focus on the applicants' past sexual activity. However, any plain, and certainly fair, reading of the Tribunal's decision record reveals that the Tribunal also dealt with the element of the applicants' claims involving their relevant beliefs and their past public expression of them. The following part of [81] (at CB 260) makes that plain:

> *"I therefore find that the applicant husband and applicant wife would not engage in homosexual activity or* ***in publicly espousing related issues*** *if they return to Lithuania…"*

[Emphasis added]

72. The applicants also complain that the Tribunal failed to consider whether their "change of conduct" was a result of a fear of persecution. That is, with *S395* in mind, whether they modified their behaviour, and would need to modify their behaviour, to avoid persecution.

73. In my respectful view, and again with *S395* in mind (at [43] per McHugh and Kirby JJ and [83] per Gummow and Hayne JJ) there is a distinction to be drawn between the imposition of a requirement by the Tribunal of what it "expects" an applicant to do to avoid persecution and a finding as to what an applicant "would" do, or how an applicant "would behave in a particular way", on return to the country of claimed persecution.

74. In his submissions to the Court, the applicant referred to what he said was a question asked of him by the Tribunal at the hearing. That is, whether he and his wife would continue to engage in the "same sexual life" in the future as they did previously. Although the applicant did not make specific reference to any part of the Tribunal's account of the hearing, or the transcript, it would appear that that reference was directed to the following part of the transcript (T16, lines 34 – 42):

> *"[Tribunal Member]: So it seems to that here in Australia you've done nothing that would cause you to be identified as a homosexual man, a bisexual man, someone who wanted to challenge the values of society.* ***If you lived the same lifestyle now if you went back to Lithuania there would be nothing new to identify you as a homosexual or bisexual or person who wanted to change values if you continued to live there the way you have been living here.*** *So if you moved to a different area of Vilnius, say, where you weren't likely to bump into these people again, it's two years later, would you be safe?"*
>
> [Emphasis added]

75. It is open to say that, if regard were had only to that part of the transcript then the applicant's submission to the Court is understandable. The use of the word "if", as emphasised above, could have conveyed the view that the Tribunal was imposing some modification of behaviour on the applicant.

76. However, when this part of the transcript is read in context and, in particular, with what precedes it with the references to the real chance test (see for example T14, line 36 "…a real chance of happening if you go back to Lithuania…"), the Tribunal was exploring what the applicants would do, rather than what the applicants should do.

77. In any event, on any plain reading of [81] (at CB 259) the matter is put beyond doubt (see as set out above at [13]). Contrary to the applicant's assertion, it does not even take a fair reading of the Tribunal's analysis to see that it did not proceed down the path of any expectation that the applicants modify their behaviour to avoid persecutory harm.

78. It is also clear that the Tribunal, again in conformity with the direction provided in *S395*, directed its consideration as to whether its findings that the two applicants would not engage in their previous behaviour was, in and of itself, because of any fear of persecution. The Tribunal answered this question with reference to the applicant's evidence and the circumstances of the claims presented.

79. Before the Court, the applicant complained that the Tribunal failed to consider that the applicant's "change of conduct" was a result of his severe depression and attempted suicide. Given the Tribunal's clear analysis ([81] at CB 259, in particular, see the reference to the applicant's "mental state"), the complaint is no more than a disagreement with the facts as found by the Tribunal. That is, it seeks that the Court engage in impermissible merits review (*Wu Shan Liang*).

80. In all, therefore, particular (b) to ground one does not assist the applicants. The Tribunal asked the right questions in light of *S395*. Its analysis in answer to those questions conformed with High Court authority.

81. I should note that I also agree with the Minister's submission that, while it was not necessary to do so given its findings (referred to above), there is no error in the Tribunal proceeding to consider whether the applicants' past conduct, and their expression of that conduct, was so fundamental (in the sense, say, of civil rights) that the applicants' change in behaviour was restricted in the sense that it would amount to persecution (*Win* and see *SZQPW v Minister for Immigration & Anor*

[2012] FMCA 471). The Tribunal's reasoning and finding here did not offend relevant authority.

82. At particular (c) of ground one, the applicants complain that, in finding that the applicants could relocate to another part of Lithuania, the Tribunal failed to consider certain facts and therefore failed to consider the reasonableness of relocation.

83. The applicant's submission before the Court that Lithuania had been criticised by various human rights groups for its intolerance and violence towards "sexual minorities" ([10] of applicants' written submissions) can only be relevant to these proceedings if that was a factor relevant to the consideration of relocation, or was presented by the applicant to the Tribunal as an objection to relocation. (*Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437; (1994) 124 ALR 265, *SZATV v Minister for Immigration and Citizenship and Another* [2007] HCA 40; (2007) 233 CLR 18; (2007) 237 ALR 634 and *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46; (2009) 174 FCR 415). As explained below, it was not relevant. Nor, was it raised as an objection to the consideration of relocation.

84. On its own, and as presented to the Court, this submission again impermissibly seeks the Court's intervention to impose different factual findings (*Wu Shan Liang*).

85. The applicants' complaint must be considered in the context of the Tribunal's analysis and consideration of their claims. A number of elements are relevant. One, as set out above, the Tribunal found that the applicants would not resume their previous conduct, including the expression of their views, on return to Lithuania. No legal error is evident here.

86. Two, it was in that context that the Tribunal went on to consider the claim arising from the circumstances presented by the applicant. That is, they would be recognised on the street by those who had harmed them in the past and would, as a result, suffer further harm on return to Lithuania ([82] at CB 260).

87. Three, the Tribunal found that "the prospect that they would be recognised and targeted as a result of their past activity [was] remote…" ([82] at CB 260). That was sufficient to deal with the claim.

88. Four, given that finding (see [87] above), it was not necessary for the Tribunal to proceed to consider internal relocation. In that light, the subsequent relocation finding, as the Minister submits, cannot be said to be central to the Tribunal's findings. Nor, importantly, was it part of the basis for the Tribunal affirming the delegate's decision under review.

89. Five, and in any event, there was no legal error in the Tribunal proceeding to consider whether the "remote" risk could be further reduced by internal relocation.

90. Six, the applicants now claim that, in this consideration, the Tribunal did not consider the size of Lithuania. That is, that it is a "small" country and they would be more readily recognised by the people who harmed them in the past. However, this complaint does not reveal error because, as the Minister submitted, it is not a relevant factor. The Tribunal's relevant finding was that the applicants could move to a "different area of Vilnius [the capital] or a different city in Lithuania" ([82] at CB 260).

91. Seven, as the Minister submits, the applicant's complaint that the Tribunal failed to take into account (in the context of the reasonableness of relocation) that intolerance against homosexuals and bisexuals is widespread throughout Lithuania does not reveal legal error because, in the circumstances, this was not a relevant consideration. The relocation consideration, and attendant findings, were in regard to the specific matter of how the applicants could further reduce the otherwise remote risk of being recognised and targeted because of their past activity. This "remote" possibility of recognition was limited to, and localised to, those in their local area in the past, and who had been aware of their former activities. In the circumstances, and in light of the Tribunal's earlier findings, widespread attitudes in Lithuania were not relevant to the question posed by the Tribunal.

92. Particular (c) of ground one, therefore, does not assist the applicant in revealing jurisdictional error in the Tribunal's decision.

93. In particular (d) to ground one the applicants assert that the Tribunal failed to take into account the applicant's "mental state". Given the Tribunal's relevant analysis at [81] (at CB 259) this complaint can only be really understood as a complaint that the Tribunal did not consider, in the sense of accept, that the first applicant's claimed "mental state" was such as to be related to, or arise from, his claimed fear of persecution. As such it seeks impermissible merits review in circumstances where the Tribunal's relevant finding was reasonably open to it on what was before it (*Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407).

94. In all, ground one is not made out. As set out above, this is sufficient to lead to the dismissal of the application to the Court (see above at [41] – [42]). However, and in any event, I cannot see legal error in the Tribunal decision arising in the way asserted in ground two.

Consideration: Ground Two

95. Ground two seeks to attack the Tribunal's conclusion that the applicants had not taken all possible steps to avail themselves of a right to enter and reside in a third country and thus fell within the provisions in s.36(3) of the Act in circumstances where s.36(4) and s.36(5) did not apply.

96. Sections 36(3), (4), and (5) of the Act are in the following terms:

> *"**Section 36 Protection Visas***
>
> ...
>
> *(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion."

97. Having regard to the applicants' ground, as amended, and the applicant's oral and written submissions, the complaint centres on the following elements. First, that the Tribunal was in error to make its finding because it failed to properly consider whether the right to enter the UK and Ireland for three months fell within s.36 of the Act, such that it could be said that the applicants had not taken all possible steps to avail themselves of the protection of a third country. Second, with regard to the same question, the Tribunal failed to properly consider the applicant's mental and emotional condition. Third, the applicants sought to challenge the Tribunal's understanding of "right to reside" as that phrase appears at s.36(3) of the Act.

98. These questions centre around the issue of whether the applicants' right to enter and remain in the UK (in relation to Ireland, see further below) was such as to engage s.36(3) of the Act and, if so, whether ss.36(4) and (5) of the Act served to exempt the operation of s.36(3) of the Act. In oral submissions, the applicant presented two matters which incorporated the ground as stated and the written submissions. First, and this was the focus of the applicant's oral submissions, that the circumstances of their case were such that, in the sense of what was

"possible", it could be said they had taken all "possible" steps to avail themselves of the protection of a third country. Second, the applicant questioned whether the right to enter and reside in the UK for three months amounted to a right to enter and reside for the purposes of s.36(3) of the Act.

99. There are relevantly two questions for the Court derived from whether Australia owes protection obligations to the applicants. The first is whether the Tribunal's consideration of the applicants' right to enter and reside in a third country, whether permanently or temporarily, was infected with legal error. The second is whether the Tribunal's consideration of whether the applicants had taken all possible steps to avail themselves of that right was infected with legal error.

100. It is important to note the following findings made by the Tribunal. First, the Tribunal accepted that all of the applicants were nationals of Lithuania ([76] at CB 258). That is not disputed by the applicants now. Second, the country of claimed persecution, and the country in respect of which the applicants feared significant harm, was Lithuania ([80] at CB 259 and [85] at CB 261).

101. Third, Lithuania is a member of the EU ([87] at CB 261) (no dispute). Fourth, the Tribunal found, based on country information before it, that ([87] at CB 261):

> *"…nationals of Lithuania have the right to enter any other EU country and reside there for a period of three months, on presentation of a current passport of an EU member state."*

102. Fifth, the UK is an EU country. The Tribunal limited its relevant consideration to the UK because of some relevant circumstances set out at [87] (at CB 261).

103. The Tribunal found that ([89] at CB 262):

> *"… the provisions of the relevant EU and UK regulations provide a presently existing and legally enforceable right to EU citizens to enter and reside in other EU countries for three months, which I am satisfied comprises temporary residence within the meaning of s.36(3). The legislation does not look to whether a person may have had reason (as the applicant husband argues) for not*

availing himself of that right; it is sufficient that it exists and is legally enforceable, which I find is the case."

104. This finding is the focus of the dispute between the parties in the current case. Perhaps understandably, the applicants' submissions were scant in this regard. (At the hearing the applicant stated that it was difficult for him to argue against what had orally been put on behalf of the Minister because: "I am not very good in the laws".)

105. In any event, I cannot see legal error in the Tribunal's approach. First, it is not necessary in the circumstances of this case to enter the "debate" as to the meaning of the word "right" as it appears in s.36(3) of the Act. That is whether it means a "legally enforceable right" (see *Applicant C v Minister for Immigration & Multicultural Affairs* [2001] FCA 229 at [28] per Carr J – upheld on appeal: *Minister for Immigration & Multicultural Affairs v Applicant C* [2001] FCA 1332 ("*Applicant C*") per Gray, Lee and Stone JJ) or, in contrast, whether it is sufficient "as a matter of practical reality and fact" that it was likely that an applicant would be given effective protection in a third country (in this case, the UK).

106. The Minister referred to a recent judgment of this Court, which he said presented a similar context to the present case (*SZRTC* at [25] per Judge Driver):

"It is, in my view, clear that ss.36(3)-(5A) should be read together and interpreted by reference to each subsection. Parliament has not specified in s.36(3) what length of time would constitute 'temporary residence' for the purposes of s.36(3). It is an error to seek to impose some arbitrary temporal limitation on what constitutes temporary residence or residence generally. The courts have speculated, as is indicated in the parties' submissions, that a period of residence would have to be sufficiently long in order for a person to obtain the protection which is to substitute for Australia's protection obligations under the Convention. There is force in the respondents' submissions in that regard. However, how long that period may be must depend upon the circumstances. The determination of whether a period of residence will be sufficient for the purposes of s.36(3) does not depend upon the interpretation of the words 'temporarily' and 'residence' in isolation. Those words should be construed by reference to the qualifying provisions in ss.36(4), (5) and (5A). It may be that, in a particular case, a stay of only a few days would

*be sufficient in order to access the protection envisaged by those subsections. In another case, a stay of many months might be necessary. That assessment requires an analysis of the legal rights of residence in a particular country and**, possibly, the practical arrangements for accessing protection in a country**."*

[Emphasis added]

107. I respectfully agree with what is set out above from *SZRTC*, save the uncertainty exposed in that part reproduced in bold. In this regard, I note, what was said in *Applicant C* per Stone J at [58] – [59] (noting that I am bound by what was said that case):

> *"[58] To the extent that Allsop J suggests that the primary judge took a strict, Hohfeldian, view of 'right' when the latter stated that 'A literal construction of the word 'right' in a statute must ... be that it is a legally enforceable right', I do not agree. A right may be 'enforceable' even though it can be revoked without notice and even without reasons. For example, the Minister has extensive powers, listed in s 116 of the Act, to cancel visas. While that visa is extant, however, the non-citizen has, in my opinion, an enforceable right, namely the right not to be prevented from entering Australia. The non-citizen would be entitled to enforce his or her right of entry against, for example, an officious immigration officer who purported to deny entry despite the non-citizen having a valid visa for entry.*
>
> *[59] Undoubtedly the extent of the Minister's power may, as a practical matter, make the enforceability of the right appear illusory. This reflects the vulnerability of the right but does not, in my view, cast doubt on its existence. The analysis may well be different if, at the time the application for a protection visa is under consideration, the circumstances which permitted the grant of the right no longer exist or the factors warranting its revocation are established. Whether or not there could be said to be a right to enter the relevant country in such a case would depend on all the circumstances of that case. However, as this is not an issue in this proceeding, it is unnecessary to consider the point further."*

[See also *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018; (2001) 114 FCR 408 at [31] per Allsop J (as he then was).]

108. See also *SZMWQ* at [98] – [99] per Flick J:

"[98] Subject to that reservation, various words of phrases within s 36 have over time received the attention of a number of Full Courts of this Court and of various Judges of the Court. Such views as have been expressed have obviously been directed to the terms of the legislation then in force.

[99] Views have thus been expressed as to whether the term 'right' refers to an 'existing legally enforceable right' (WAGH v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 194 at [32], [2003] FCAFC 194; 131 FCR 269 ('WAGH') at 278 per Lee J; SZLAN v Minister for Immigration and Citizenship [2008] FCA 904 at [68], [2008] FCA 904; 171 FCR 145 at 162 per Graham J) or a practical ability to enter and reside in a country and obtain protection (Minister for Immigration and Multicultural Affairs v Applicant C [2001] FCA 1332 at [20] to [21][2001] FCA 1332; , 116 FCR 154 at 161 ('Applicant C') per Stone J (Gray and Lee JJ agreeing); WAGH at [54] per Hill J). The phrase in s 36(3), 'however that right arose or is expressed', has been relied upon by Allsop J in V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018, 114 FCR 408 as indicating that 'the source and incidents of the right can be diverse'. His Honour continued:

> *'[31] ... It also assists in the recognition that 'right' is intended to be a wide conception. Especially in the light of the above phrase, I see no reason to restrict the meaning of the word 'right' to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning a liberty or permission or privilege which does not give rise to any particular duty upon the state in question. Such a liberty, permission or privilege would obtain its effective substance from its grant and thereafter from the lack of any withdrawal of it and from the lack of any existing prohibition or law contrary to its exercise, rather than from the existence within the positive law of the state in question of a correlative duty, justiciable and enforceable in law, to recognise the right. It may be that in many cases if the right is to survive outside, and divorced from residence in, the country in question it may well be a right in the strict sense, but I do not think that that conclusion follows as a matter of statutory construction."*

109. See also *SZMWQ* at [34] per Rares J:

> *"The right to enter and reside in the other country described in s 36(3) is not the same as the right that Australia would grant to the non-citizen were he or she to be given a protection visa under s 36(2). Section 36(3) describes a more qualified right. First, it is merely a right to enter and reside in the other country; it is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee status in the other country."*

110. In all, I am of the view that, in the current case, the right to which the Tribunal referred was a legally enforceable right. The current case does not involve a transit visa (*WAGH* at [64] per Hill J, or even a tourist or business visa (*WAGH* at [42] per Lee J).

111. Second, and flowing from the above, the right in the current case is a legal right to enter the UK for three months. The "temporary", or "limited", character suggested by that three month period does not, of itself, necessarily offend s.36(3) of the Act. (See *QAAH* at [36] – [37] per Gummow ACJ and Callinan, Heydon and Crennan JJ.)

112. In the current case, I agree with the Minister that the right to enter and reside in the UK for three months does confer a right to reside. As was said in *SZMWQ* at [34] per Rares J:

> *"Section 36(3) describes a more qualified right. First, it is merely a right to enter and reside in the other country; it is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee status in the other country."*

113. In the current circumstances, the three month period was sufficient for the applicants to establish a place of abode, even if was otherwise temporary (*WAGH* at [65] per Hill J).

114. I also agree with the Minister that there were two important indicators present in the current case which support the view that, even though the right to enter and remain in the UK was three months in length, it can still be characterised as right to "reside" in the UK as that concept is understood in s.36(3) of the Act.

115. First, the right in this case conferred privileges normally associated with residency (either of a temporary or permanent nature), including the right to work (see [70] at CB 254 to [71] at CB 256) and [90] at CB 263 and the reference to: "Based on the information set out above…"). As the Minister submits, the right to work is not necessarily an indicator of a right to residence (*SZMWQ* at [110] per Flick J), however the entitlement to work plainly makes this right more than a right to just visit.

116. Second, the UK government (through the UK Home Office) described this right as a "right of residence" (see as set out at [71] at CB 256):

> *"As an EEA or Swiss National, you have the right to live and work in the UK (known as the 'right of residence') if:*
>
> *you are working here (and have obtained our permission to work if this is required – see below); or*
>
> *you can support yourself and your family in the UK without becoming an unreasonable burden on public funds."*

117. While this description is not, of itself, determinative, it provides a basis for the Minister to submit that, in circumstance where the applicants were employed, were studying or were capable of supporting themselves, the right in the current case can be seen as extending beyond three months (CB 263). The Tribunal's reference in its analysis to these elements ([87] – [88] at CB 261) was both probative of country information before it and did not offend relevant authorities in relation to the meaning, and extent of, s.36(3) of the Act.

118. Third, as the Minister submits ([28] of the first respondent's written submissions):

> *"In any event, it would be an error to consider the right in question as if it extended only for a three month period. The right extended for as long as the Applicants were employed, were studying or were capable of supporting themselves (CB 262 at [92]). The Tribunal found that there was employment suitable to the Applicants available in the United Kingdom (CB 261 at [87]). In circumstances where the Applicants had not attempted to gain employment in the United Kingdom (and thus obtain a right of residence beyond three months in duration) it was open to the Tribunal to find that the Applicants had not taken all possible*

steps to avail themselves of a right to enter and reside in that country…"

119. That submission was made with reference *SZMWQ* at [44] per Rares J:

> *"It may be that, had the appellant found himself destitute and starving in Spain, he could have satisfied the tribunal that he had taken all possible steps to avail himself of his right to enter and reside there. That would have raised for consideration whether he had taken all possible steps to avail himself of his right to reside there."*

120. Fourth, as Rares J revealed in *SZMWQ* at [41]*:*

> *"The tribunal found that many people in Spain who enjoyed, in the sense of being entitled to, the right to reside there, were unemployed and did not have access to its social welfare benefits. Section 36(3) is carefully phrased to exclude Australia from owing protection obligations in a limited situation. The section does not use a criterion that the applicant for a protection visa be entitled to enter and reside in another country so as to be treated there as a refugee. Rather, s 36(3) requires the applicant to have taken all possible steps to exercise his or her right to enter and reside in a country in which he or she will be safe from a well-founded fear of persecution for a Convention reason or refoulment to a country where he or she would not be so safe. Thus, the right to reside described in s 36(3) precludes a liability to refoulment (s 36(5)) and includes the protection by the other country of the person from a well-founded fear of persecution for a Convention reason (s 36(4)) but does not require that country to accept the person as a refugee if he or she has some other lawful basis to enter and reside in it. The consequence of that country protecting its citizens generally from persecution for a Convention reason, coupled with the person's right to enter and reside in it, is that Australia will not have its own protection obligations owed to the person."*

121. In light of the above, none of the particulars in ground two assist the applicants. Particular (a) really does no more than complain about the Tribunal's "insistence" in applying s.36 of the Act (in context, the analysis relating to ss.36(3), (4) and (5) in circumstances where, in the applicant's submission, that issue had been dealt with in the "successful" appeal of the earlier constituted Tribunal decision (see [50] – [51] above)). For the reasons set out above, particular (a) of

ground two does not succeed in revealing error in the Tribunal's decision.

122. Particular (b) of ground two includes the matter emphasised in the applicants' written submissions, and by the applicant orally before the Court. The applicants complain that, in determining whether they had taken "all possible steps to relocate", the Tribunal failed to consider the applicant's "mental state" and his health problems.

123. The applicants submitted that, in relation to their, at least implicit, complaint that "residence" should include some notions of protection, the Tribunal should have taken the approach set out at [33] of *SZMWQ* (per Rares J). That is:

> *"… that the words 'all possible steps' should be given their literal and grammatical meaning: NBLC v Minister for Immigration and Multicultural Indigenous Affairs [2005] FCAFC 272; (2005) 149 FCR 151 at 152 [2] per Wilcox J, 154 [12] per Bennett J and 165 [63]-[64] per Graham J. They found that the expression should not be construed as meaning the lesser standards of 'all steps reasonably practical in the circumstances', 'all reasonably available steps' or 'all reasonably possible steps'. Subsequently, Callinan, Heydon and Crennan JJ had emphasised in NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54; (2006) 231 CLR 52 that the task of construction of a provision such as s 36(3) involved the Court ascertaining what the Australian law was having regard to what, and how much of an international instrument, Australian law required be implemented. That task involved ascertaining the extent to which Australian law adopted, qualified or modified the instrument by a constitutionally valid enactment. Next, the Court had to construe only so much of the instrument, and any qualifications or modifications of it, as Australian law required: NBGM 231 CLR at 71-72 [61]."*

124. The difficulty for the applicant is that this authority, as the Minister submits at [29] of his written submissions, stands for the proposition amongst others that:

> *"…The test of whether an applicant has taken all possible steps for the purposes of s. 36(3) should not be read down as if it read 'all steps reasonably practicable in the circumstances', 'all reasonably available steps' or 'all reasonably possible steps': NBLC v Minister for Immigration (2005) 149 FCR 151 at [63]-*

[64] per Graham J (with whom Wilcox J at [2] and Bennett J at [12] agreed)"

125. The Tribunal's understanding is set out at [89] (at CB 262):

> *"…s.36(3) does not impose a test of whether it is reasonable, preferable or possible (subjectively) for an applicant to avail themselves of a right to enter and reside in another country, temporarily of permanently…"*

That understanding is consistent with authority and, contrary to what is asserted by the applicants, does not reveal error.

126. Particular (c) of ground two appears to argue that s.36(3) of the Act does not apply because, contrary to the Tribunal's finding, s.36(5) of the Act applies. That is, that the UK would return the applicants to Lithuania where they would be persecuted. The applicants argue that this would come about because the conditions under which they would enter the UK (and Ireland) are subject to "strict compliance with residential requirements" and that any failure to comply with those "residential requirements" would result in their removal.

127. First, the applicants' reference here to Ireland does not relate to the Tribunal's decision. The Tribunal only considered the applicants' right to enter and reside in the UK. While the applicant told the previously constituted Tribunal that the applicant's wife had gone to Ireland in 2010 and that their child (the third named applicant) had been born there ([36] at CB 248), the Tribunal's decision to affirm the delegate's decision had no reliance on Ireland as a country to which the applicants had a right to enter and reside.

128. Second, and in answer to particular (c) of ground two, as the Minister submits, an enforceable legal right to enter and reside in the UK (as in this case) serves to enliven s.36(3) of the Act. As can be seen from *SZMWQ* (at [34] per Rares J) that is so even where the right is subject to conditions, or restrictions.

129. Third, the applicants' complaint about the Tribunal's approach to s.36(3) of the Act sought to include an argument that, in their particular circumstances, the Tribunal should have, but failed to, consider whether the "right to reside" included the right to obtain protection in the UK.

130. The applicants, in part, presented this argument as one going to s.36(3) of the Act. It is the case that the Tribunal considered the question of "effective protection" and the question of the applicants return to Lithuania in the context of s.36(5) of the Act.

131. However, in my view, given the statutory relationship between s.36(3) and s.36(5) of the Act this was the appropriate course for the Tribunal to follow. Section 36(5) is, in effect, an exemption to the operation s.36(3). The Tribunal, in my view, properly had regard to the operation of s.36(3) of the Act and then turned to see if s.36(5) of the Act would operate such that s.36(3) did not apply.

132. In this context the applicants' complaint before the Court, as pressed and explained in submissions, does no more than take issue with the Tribunal's relevant factual findings particularly as set out at [92] (at CB 262). When seen in this light, particular (c) to ground two seeks impermissible merits review (*Wu Shan Liang*).

133. In all, ground two does not reveal jurisdictional error on the part of the Tribunal.

Conclusion

134. Neither of the grounds of the amended application is made out. It is appropriate that I dismiss the application, as amended. I will make an order accordingly.

I certify that the preceding one hundred and thirty-four (134) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Associate:

Date: 11 July 2013