FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGIZ v MINISTER FOR IMMIGRATION *[2013] FMCA 215*

MIGRATION – Application for review of decision by an officer of the respondent Minister's department – complementary protection – whether applicant 'barred' by s.48A of the Migration Act from making an application for a protection visa following the commencement of the complementary protection amendments to s.36 and s.48A where the applicant had previously made an application for a protection visa on refugees grounds and been refused – s.48A still applicable – no error – application dismissed.

Migration Act 1958 (Cth), ss. 5, 29, 31, 36, 45, 48A, 48B, 50, 65, 91R, 414, 417, 476, Div.3
Migration Amendment (Complementary Protection) Act 2011 (Cth), Sch.1
Acts Interpretation Act 1901 (Cth), ss.13, 15AB

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27
Douglas & Western Australia v Tickner (1994) 49 FCR 507
Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (In Liq) [1978] HCA 10; (1978) 138 CLR 210
SZGME v Minister for Immigration and Citizenship [2008] FCAFC 91
V*alma Elizabeth Buck v Comcare* [1996] FCA 1485; (1996) 66 FCR 358
Minister for Immigration and Citizenship v Haneef [2007] FCAFC 203; (2007) 160 CLR 414
NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54; (2006) 231 ALR 380; (2006) 231 CLR 52
Jumbunna Coal Mine v Victorian Coal Miners' Association (No.2) [1908] HCA 95; (1908) 6 CLR 309
Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144
Applicant NAGM of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 395
Kolotau v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1145
SZAAM v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 917
Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33

United Nations Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

Applicant:	SZGIZ
Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
File Number:	SYG 2530 of 2012
Judgment of:	Nicholls FM
Hearing date:	28 February 2013
Date of Last Submission:	28 February 2013
Delivered at:	Sydney
Delivered on:	3 April 2013

REPRESENTATION

Counsel for the Applicant:	Mr SEJ Prince
Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondent:	Mr G Kennett SC with Mr P Knowles
Solicitors for the Respondent:	DLA Piper

ORDERS

(1) The application made on 11 October 2012 is dismissed.

(2) The hearing of the Minister's application for costs in this matter is adjourned to 10 April 2013 at 11am

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 2530 of 2012

SZGIZ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
Respondent

REASONS FOR JUDGMENT

1. The application before the Court, made on 11 October 2012, under s.476 of the *Migration Act 1958* (Cth) ("the Act") is in relation to the decision made by an officer of the department ("the departmental officer") of the Minister for Immigration and Citizenship ("the Minister"), made on 10 October 2012, that an application for a protection visa, lodged by the applicant on 10 October 2012, was not a valid application because the applicant was "barred" under s.48A of the Act from making a further application for a protection visa.

2. The question raised in this case is whether s.48A(1) of the Act, and with reference to s.48A(2)(aa) as inserted by item 16 of Sch.1 to the *Migration Amendment (Complementary Protection) Act 2011* (Act No.121 of 2011) ("the Amending Act") applied in respect of an application for a protection visa made prior to the commencement of the Amending Act.

Relevant Background

3. The applicant is a national of Bangladesh. He arrived in Australia on 24 January 1996 (Court Book – "CB" – CB 210.3) as a visitor

(CB 13.3). On 11 March 2005 he applied for a protection visa (CB 1 to CB 24). He gave his address in Australia at that time as "Villawood Immigration Detention" (CB 12.6).

4. His claims to protection were set out in an attached statement (CB 25 to CB 32). He gave as his reason ([1] at CB 25):

> *" …religious discriminatory ground. I am a newly converted Christian. Because of my conversion (from Islam to Christianity) background, I have lost everything in my country Bangladesh and now fear of my life."*

5. The application was refused by a delegate of the respondent Minister on 18 March 2005 (CB 35 to CB 38). The delegate disregarded the applicant's conduct in Australia (his claimed conversion to Christianity) pursuant to s.91R(3) of the Act. The delegate found that, in the absence of any other claims to fear persecutory harm, he was not satisfied that there was a real chance of Refugees Convention[1] based persecution if the applicant were to return to Bangladesh (CB 38).

6. Although no application to the Refugee Review Tribunal ("the Tribunal") is reproduced in the Court Book, it would appear, given the subsequent Tribunal decision record (CB 40 to CB 59), that the applicant applied for review to the Tribunal on 21 March 2005 (CB 41).

7. The Tribunal found that the applicant (CB 58.7):

> *"…has never been subject to past persecution in Bangladesh or Australia, for reason of his religion, political opinion or for any other reason. It does not have before it any credible material to indicate that he faces a real chance of being subject to persecution for these or any other reasons in Bangladesh. The Tribunal is therefore not satisfied that he has a well-founded fear of Convention-related persecution in the reasonably foreseeable future if he returns to Bangladesh. It is not satisfied he is refugee."*

[1] *United Nations Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol Relating to the Status of Refugees,* opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (" Refugees Convention ")

8. The material in the Court Book reveals that the applicant sought the favourable intervention of the Minister pursuant to either, or both, s.417 and s.48B of the Act on a number of occasions:

    1) 26 August 2005 (CB 60 to CB 63)

    2) 6 October 2006 (CB 130 to CB 133)

    3) 16 October 2007 (CB 135 to CB 138)

    4) 14 December 2007 (CB 140 to CB 142)

    5) 26 May 2008 (CB 144 to CB 156)

    6) 22 March 2010 (CB 158 to CB 162)

    7) 17 January 2012 (CB180 to CB 183)

9. Each of the responses (unfavourable to the applicant) to these requests was dated:

    1) 21 February 2006 (CB 129)

    2) 13 March 2007 (CB 134)

    3) 16 November 2007 (CB 139)

    4) 2 May 2008 (CB 143)

    5) 20 June 2008 (CB 157)

    6) 23 December 2011 (CB 178 to CB 179)

    7) 6 March 2012 (CB 191 to CB 192)

    [I note the applicant formally objected to these parts of the Court Book set out at [8] – [9] being put before the Court – see further below.]

10. On 24 March 2012 Sch.1 of the Amending Act commenced operation (see further below).

11. On 10 October 2012 the applicant lodged, what his representatives (who continue to act for the applicant in these proceedings) described

as, an "Application for a Complementary Protection Visa under Section 36 (2) (aa)" (CB 193 to CB 226)

12. On 10 October 2012 the applicant was advised by the departmental officer that "…the application for this visa…was not a valid application" (CB 229).

The Application to the Court

13. The sole ground of the application to the Court is:

> *"1. The application for a Protection Visa was not invalid because the applicant was not prevented by s 48A of the Migration Act 1958 from lodging a Protection Visa application.*
>
> ***Particulars***
>
> *The application was expressly made in reliance only on the grounds in s 36(2)(aa) of the Act (the 'complementary protection grounds'). No previous application relying on these grounds has been made by the applicant. An 'application for a protection visa' is defined in subsection 48A(2) as an application for a visa a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c). The applicant has never before applied for a protection visa in reliance on the complementary protection grounds. The correct interpretation of s 48A(2) is that it does not prevent an application being made now in reliance on the complementary protection grounds if a prior application was made and finalised before those grounds were available for consideration."*

Relevant Legislation

14. Prior to the commencement of item 16 of Sch.1 to the Amending Act, s.48A of the Act (on 23 March 2012) was in the following terms:

> ***"48A Non-citizen refused a protection visa may not make further application for protection visa***
>
> *(1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:*

(a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or

(b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa while in the migration zone.

(1A) For the purposes of this section, a non-citizen who:

(a) has been removed from the migration zone under section 198; and

(b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);

is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

(1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

(2) In this section:

***application for a protection visa** includes:*

(aa) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

(ab) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen in Australia:

(i) to whom Australia has protection obligations under the Refugees

Convention as amended by the Refugees Protocol; and

(ii) who holds a protection visa; and

(a) an application for a visa, or entry permit (within the meaning of this Act as in force immediately before 1 September 1994), a criterion for which is that the applicant is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(c) an application covered by paragraph (a) or (b) that is also covered by section 39 of the Migration Reform Act 1992."

15. Section 48A(2)(aa) and (ab) was repealed by item 16 of Sch.1 to the Amending Act, which commenced on 24 March 2012 and which substituted a "new" s.48A(2)(aa) into the Act. Item 16 of Sch.1 to the Amending Act is in the following terms:

> *"**16 Subsection 48A(2) (paragraphs (aa) and (ab) of the definition of application for a protection visa)***
>
> *Repeal the paragraphs, substitute:*
>
> *(aa) an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c); and"*

16. Section 48A, following the commencement of the Amending Act and at the time the applicant lodged his application for a protection visa on 10 October 2012, was in the following terms:

> *"**48A Non-citizen refused a protection visa may not make further application for protection visa***
>
> *(1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:*

(a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or

(b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa while in the migration zone.

(1A) For the purposes of this section, a non-citizen who:

(a) has been removed from the migration zone under section 198; and

(b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);

is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

(1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

(2) In this section:

***application for a protection visa** includes:*

(aa) an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c); and

(a) an application for a visa, or entry permit (within the meaning of this Act as in force immediately before 1 September 1994), a criterion for which is that the applicant is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(c) an application covered by paragraph (a) or (b) that is also covered by section 39 of the Migration Reform Act 1992."

17. Sub-Sections 36(1) and (2) of the Act, prior to the commencement of the Amending Act and at the time the applicant lodged his first application for a protection visa, were in the following terms:

"36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

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

18. Items 12 and 13 of Sch.1 to the amending Act amended s.36(2) of the Act. They were in the following terms:

"12 After paragraph 36(2)(a)

Insert:

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to 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

13 At the end of subsection 36(2)

Add:

; 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."

19. Following the commencement of the Amending Act, and at the time the applicant purportedly lodged an application for a protection visa, s.36(1) and (2) of the Act were in following terms:

*"**Protection visas***

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to 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)) to 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."*

20. Finally, item 35 of Sch.1 to the Amending Act is as follows:

> *"**35 Application***
>
> *The amendments made by this Schedule apply in relation to an application for a protection visa (within the meaning of the Migration Act 1958):*
>
> *(a) that is made on or after the day on which this item commences; or*
>
> *(b) that is not finally determined (within the meaning of subsection 5(9) of that Act) before the day on which this item commences."*

Before the Court

21. The issue requiring determination in this matter is whether s.48A(2)(aa), as inserted by the Amending Act and in operation at the time that the applicant lodged the application for a protection visa on 10 October 2012, operates to render not valid a protection visa application made after the commencement of the Amending Act, where the applicant has previously applied for a protection visa prior to the commencement of the Amending Act and that application was refused.

22. The following can be relevantly ascertained from the material before the Court.

23. First, the applicant applied for, and was refused, and as affirmed by the Tribunal, a protection visa considered under the version of the Act in force in 2005. That consideration involved an assessment of the applicant's claims under the Refugees Convention.

24. Second, the applicant was in the "migration zone" (see s.5 of the Act for the meaning of "migration zone" and s.48A(1) and (1A) of the Act as it then was) when he made, and was refused, his application for a protection visa in 2005. He was in the migration zone when he lodged

his application in 2012. There is no suggestion, let alone evidence (with reference to the Court Book), that the applicant left and re-entered the migration zone in the intervening period.

25. Third, in the previous versions of s.48A and s.36(2) of the Act a criterion for a protection visa was said to be, relevantly, the satisfaction of the Minister that Australia had protection obligations toward an applicant under the Refugees Convention.

26. In the current version that criterion is retained. However, relevant to our current purpose, a further criterion was added such that a visa must be granted (s.65 of the Act) where the Minister is satisfied that Australia has protection obligations to the applicant because there are substantial grounds for the Minister to form a belief that a necessary and foreseeable consequence of the non-citizen being removed from Australia is that there would be a real risk that the applicant would suffer "significant harm".

27. That criterion is described and defined in s.36(2A) of the Act. There was no dispute between the parties that the insertion of this criterion, in addition to the obligation under the Refugees Convention, was done to give statutory effect to Australia's protection obligations arising under other international treaties to which Australia is a signatory. These are (with reference to the Explanatory Memorandum at pg.1):

    1) *International Covenant on Civil and Political Rights* ("ICCPR"), including the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.*

    2) *Convention on the Rights of the Child* ("CROC").

    3) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT").

28. Fourth, before the Court, the applicant "formally" objected to the Court taking into evidence CB 60 to CB 192. These pages refer to the applicant's various requests for Ministerial intervention (see as set out at [8] – [9] above). The basis of the objection was relevance. The Minister pressed these documents for the "very limited purpose", said

to be, that they were relevant to "practices that have existed in the past".

29. I understood, therefore, the Minister's argument as to relevance to be that these practices, in the past and presumably relevant to the period when the applicant made his various Ministerial intervention requests, would have included some assessment, or consideration, of Australia's international protection obligations or, more precisely, "non-refoulement obligations" (pg.1 of the Explanatory Memorandum) as they arise from these treaties. That is, the matters now generally referred to as "complementary protection".

30. I admitted these pages (CB 60 to CB 192) into evidence. However, it is convenient at this stage to note that they are of limited assistance to the Minister, even for the "limited" purpose stated. Apart from evidencing that the applicant wrote to the Minister on seven occasions seeking he exercise his powers to intervene, the documents say nothing about what, if any, consideration was given by the Minister, or officers of his department, to the matters relevant to these proceedings.

31. The various correspondence (see [8] – [9] above) from the Minister's department to the applicant makes reference to an assessment in accordance with what are described as the "Minister's instructions" or the "Minister's guidelines". There is nothing in the correspondence to show whether those "instructions" or "guidelines" involved any reference to complementary protection. Nor, importantly in this regard, has the Minister put these "instructions" or "guidelines" before the Court to allow any comparison to be made.

32. While some of the applicant's correspondence to the Minister makes reference to some of the matters that may be relevant here (for example, see CB 160.1: "4. Minister's Guidelines page 7: Circumstances that may bring Australia's obligations as a party to the International Covenant on civil and Political rights (ICCPR) into consideration"), there is nothing in the Minister's correspondence in reply to show that it was considered (for example, see the particular correspondence in reply at CB 178).

33. Therefore, in these circumstances, the best that can be said for the Minister now is that this material shows that the applicant wrote to the

Minister, sometimes raising matters that may fall within what is now referred to as complementary protection. However, there is insufficient evidence to show that complementary protection was considered, such that it may be said that the applicant has had the consideration of matters relevant to complementary protection which he now seeks.

34. However, even if there had been some such relevant consideration it would not answer the applicant's current charge. In effect, there is a distinction to be made between any such consideration in an administrative context and consideration under statute.

The Language of the Statute

35. It is trite to state that the starting point of consideration must be the text of the statute (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47] per Hayne, Crennan and Kiefel JJ and see s.15AB(3) of the *Acts Interpretation Act 1901* (Cth)) (see further below). In the current case, s.48A(2)(aa) of the Act, as inserted by the Amending Act. There was no dispute between the parties that the primary focus must be on the current version of s.48A(2)(aa) or, more specifically, the version current at the time of the application made on 10 October 2012.

36. As set out above, s.48A(2)(aa) of the Act, following the commencement of the Amending Act and at the time the applicant attempted to lodge his application for a protection visa in 2012, was as follows:

> *"(2) In this section:*
>
> ***application for a protection visa*** *includes:*
>
> *(aa) an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c); and"*

37. Further, s.36(2)(a) and (aa) of the Act, following the commencement of the Amending Act and at the time the applicant lodged his 2012 application for a protection visa, were as follow:

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

(a) a non-citizen in Australia to 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)) to 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"

The Submissions Revealed

38. Plainly each case before this Court must be considered and determined individually in light of the evidence and arguments put before it. However, I am aware that there are well over one hundred cases before this Court, pending consideration, with similar factual scenarios and the identical legal argument. [There are over twenty in my docket alone.] In these circumstances, it is of benefit to set out the parties' submissions and arguments in this case in greater detail than may otherwise have been required.

The Applicant's Construction

39. The applicant contends that, since the Amending Act repealed the "old" s.48A(2)(aa) (that is, s.48A(2)(aa) as it stood prior to the commencement of the Amending Act), then the reference in the "new" s.48A(2) to s.36 could only be to s.36 as amended by the Amending Act.

40. In those circumstances, it was the applicant's submission that he had never applied for a protection visa, as that term is understood with reference to the amended s.36 of the Act. In particular, that when the applicant had applied for a protection visa in March 2005, the relevant "criterion" for a protection visa was that the applicant for the visa was (s.36(2)(a) as it stood prior to the commencement of the Amending Act):

> *"(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or."*

41. However, at the time that the applicant applied for a protection visa in 2012, the "a criterion" for a protection visa was, either, relevantly (s.36(2)(a) and (aa) of the Act as amended by the Amending Act) (it is not necessary in the current case to focus on members of the family unit – s.36(2)(b) and (c) of the Act):

> *"(a) a non-citizen in Australia to 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)) to 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…"*

42. In essence, the applicant submitted that, s.36(2) described the "criterion" for the class of visa. Specifically, a protection visa. The amendment to s.36(2) to include s.36(2)(aa) meant that, in the applicant's submission, the criteria for a protection visa were "fundamentally different" and, in broadening the scope of the visa, it was a protection visa of "a different species" to that previously applied for by, and refused to, the applicant.

43. As a result, s.48A, as amended, did not bar the applicant from applying for a protection visa as the applicant had never applied for a protection visa of the type set out in s.36(2) of the Act as amended, and referred to in s.48A(2)(aa) of the Act (but for the application lodged on 12 October 2012, which was said by the departmental officer to be not valid). Further, the applicant contended that, since s.48A(2)(aa) of the Act did not make express reference to previous applications under previous incantations of the Act, it provided a strong contextual basis for suggesting that the Australian Parliament did not intend s.48A(2)(aa) to apply to applications made for different, or earlier, species of protection visas.

44. The applicant contended that his construction would mean that individuals who had previously applied for a protection visa and had those claims assessed against the Refugees Convention grounds would be eligible to apply for a protection visa not only on complementary protection grounds, but also on Refugees Convention grounds.

The Construction Advanced by the Minister

45. While in written submissions the Minister did not accept that the reference in s.48A(2) of the Act was to s.36 as amended (see [21] of the Minister's written submissions), before the Court the Minister agreed that the reference in s.48A was to s.36 of the Act as it stood following the commencement of the Amending Act.

46. However, despite accepting that s.48A(2)(aa) referred to s.36 as amended, the Minister contended that the applicant had still applied for a protection visa in 2005. In particular, that the Amending Act, contrary to the applicant's submission, had not created a "new species" of protection visa. It has simply added additional criteria to a protection visa. A protection visa in the Act, following the commencement of the Amending Act, was still "a protection visa".

47. Further, the Minister submitted that the applicant had still applied for a protection visa a "criterion for which is **mentioned** in" s.36(2) (a), (aa), (b) and (c) (emphasis added). Specifically, that the use of the phrase "mentioned in", as opposed to, for example, "under", indicated that s.36(2)(a), (aa), (b) and (c) of the Act were only referred to in s.48A of the Act to designate "types of criteria" which, if applicable to a prior application, brought that application within the coverage of s.48A and therefore prevented the applicant from lodging subsequent, or further, applications for protection visas.

48. Therefore the Minister's position was simply that, in March 2005, the applicant had applied for a protection visa, a criterion for which was that that applicant "be a non-citizen in Australia in respect of whom the Minister has protection obligations under the Refugees Conventions as amended by the Refugees Protocol". That criterion for a protection visa was "mentioned in" s.36(2) as amended and, therefore, the applicant in

the current case was precluded, by the operation of s.48A(2)(aa) of the Act, from applying, again, for a protection visa.

49. The Minister submitted that, even if the construction of s.48A(2)(aa) set out above (surrounding the use of the word "mentioned") was not accepted by the Court, the applicant was still precluded under s.48A of the Act from applying for a protection visa because the definition of an "application for a protection visa" in s.48A(2) was expansive, rather than exhaustive. Section 48A(2) provides that an "application for a protection visa **includes**" (emphasis added). That is, the use of the word "includes" is expansive (with reference to *Douglas & Western Australia v Tickner* (1994) 49 FCR 507 at 519 per Carr J and *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (In Liq)* [1978] HCA 10; (1978) 138 CLR 210 ("*St Hubert's Island*") at 216 per Stephen J).

50. As a result, the Minister submitted that, even if the applicant's previous visa application did not satisfy any of the criteria (or "examples") given in s.48A(2), it would still be an "application for a protection visa" as that term is understood in s.48A(2) of the Act. That is, that the "examples" in s.48A(2) of the Act expanded, rather than confined, the ordinary meaning of the phrase "protection visa application" and the applicant's previous application, even if not within one of the enumerated "examples", was a "protection visa application" as that term is ordinarily understood (with reference also to s.36 of the Act).

51. The Minister noted that the construction of s.48A propounded by the applicant would have the effect that the applicant was not limited to bring a protection visa application with respect to claims only under complementary protection. The applicant would be able to bring an application that made claims both under the Refugees Convention and on complementary protection grounds. The Minister submitted that that would be a "perverse consequence" of the applicant's construction. Further that that "perverse consequence" strongly argued against the construction of s.48A of the Act advanced by the applicant.

52. The respondent also asserted that the applicant's submissions deviated from the ground of review as particularised. While the application to the Court, as particularised, restricted the applicant's case to applications made only on complementary protection grounds, the

Minister submitted that, in written and oral submissions, the applicant asserted that s.48A does not prevent any person who had a protection visa application considered, and refused, prior to the commencement of the Amending Act from making a fresh application ([9] of the respondent's written submissions).

53. In response, the applicant submitted that, contrary to the Minister's submissions, the construction advanced by the applicant in his oral and written submissions did not reflect an abandonment of the particularised ground. Rather, the particularisation in the application to the Court was a smaller subset of the construction propounded by the applicant.

The Applicant's Reply to the Minister's Construction and Arguments Advanced by the Applicant in Support of his "Narrower" Construction of s.48A of the Act

54. In oral submissions before the Court, the applicant argued that the construction advanced by the Minister, with its emphasis on "**mentioned**" and "**includes**", was predicated on viewing s.48A of the Act in a way that, although "possibly suitable to the Minister's department", did not reflect Parliament's intention. That is, the Minister's construction was advanced simply on the policy consideration of "administrative convenience". Further, it was predicated on the argument that the applicant's construction could not be correct as it would result in the Minister's department being required to consider a large number of "additional" applications.

55. The applicant submitted that s.48A of the Act was not designed to preclude people from having their claims considered and to ensure "administrative convenience". Rather, its purpose was to prevent multiple applications, on the same basis, being lodged on multiple occasions. That is, to prevent a "mischief", or an abuse of process in that sense.

56. The applicant in the current case had never had his claims considered under s.36(2)(aa) of the Act. In that sense, the applicant submitted that there was no "mischief" to be resolved by s.48A of the Act. That is, the

applicant was not attempting to make a further application on the same basis as his previous application.

57. Before the Court, and in response to what he termed the Minister's "floodgates argument" the applicant submitted that s.48A was not the only "dam wall" in the Act. In particular, that s.50 of the Act operates to effectively provide a mechanism to ensure that the construction advanced by the applicant would not suffer from the "perverse consequence", or vice, suggested by the respondent.

58. Section 50 relevantly provides:

> *"**Only new information to be considered in later protection visa applications***
>
> *If a non-citizen who has made:*
>
> *(a) an application for a protection visa, where the grant of the visa has been refused and the application has been finally determined; or*
>
> *(b) applications for protection visas, where the grants of the visas have been refused and the applications have been finally determined;*
>
> *makes a further application for a protection visa, the Minister, in considering the further application:*
>
> *(c) is not required to reconsider any information considered in the earlier application or an earlier application; and*
>
> *(d) may have regard to, and take to be correct, any decision that the Minister made about or because of that information.*
>
> *Note: Section 48A prevents repeat applications for protection visas in most circumstances where the applicant is in the migration zone."*

59. Further, the applicant submitted that the Parliamentary intention expressed in the current regime of the Act was to give effect to Australia's international obligations through the implementation of a fair and measured process for assessing whether Australia would give people an "available right". That "right", the right to be granted a

protection visa, is available to a person who comes within the meaning of the Act. In that context, particularly because s.48A operates to take away a right, the applicant submitted that s.48A of the Act should be read narrowly. To do otherwise would be to make the whole of the section, and the consistency of the Act, a "slave to the word 'mentioned'".

60. In support of his "narrower" construction the applicant referred the Court to *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91 ("*SZGME*") at [18]. It was the applicant's submission that, in that case, their Honours' approach to s.48A was, in contrast to the approach urged by the Minister now, "far more narrow and precise". While recognising that the form of s.48A in that case was different to s.48A as it is in the current case, the applicant submitted that the approach taken by the Federal Court in that case was "instructive" as to the approach that should be adopted in interpreting s.48A(2)(aa). That is, a "narrow and precise" approach.

61. Further, the applicant submitted that to take a wide, or broad, approach would be inconsistent with the view that has consistently been taken to statutory construction of provisions that confer valuable legal rights on people. That is, the common law principle of legality. Specifically, that the valuable legal right here is the right to apply for a visa under s.36 of the Act and that s.48A derogates from that right and, as a result, should be construed narrowly. In support of this the applicant took the Court to *Valma Elizabeth Buck v Comcare* [1996] FCA 1485; (1996) 66 FCR 358 ("*Buck v Comcare*") at 364 per Finn J. In particular that:

> *"…the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society."*

62. Further, the applicant took the Court to *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203; (2007) 160 CLR 414 ("*Haneef*") at [105] – [113] per Black CJ, French and Weinberg JJ. In particular, (at [107]):

> *"It is an important principle that Acts should be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms…"*

63. In response to the Minister's argument surrounding the use of the word "includes", before the Court, the applicant submitted that s.36 of the Act was the only point in the Act where a protection visa "exists". That is, s.36 of the Act was the relevant part of the Act that described a protection visa. Therefore, to say that a protection visa, as referred to in s.48A, was broader than that enumerated in s.36 of the Act, would render s.48A(2)(a), (b) and (c) otiose. That is, that the respondent's construction was predicated on any visa, the criterion for which in some way coincides with, or is similar to, the type of criterion set out in s.36(2)(a), (aa), (b) or (c) of the Act, being captured by s.48A of the Act. Further, that if "application for a protection visa" in s.48A(2)(aa) of the Act meant something broader than those criteria "mentioned" in s.36(a), (aa), (a), (b) or (c) of the Act, what did "application for a protection visa" therefore mean?

64. Further, the applicant submitted that the Minister's reliance on *St Hubert's Island* was misplaced on three bases. First, that that case was not concerned with "anybody's liberty" or any international treaty obligations. It was concerned with stamp duty applicable to a transaction involving the development of an island. Second, the terms of the Act in that case were broad. In particular, the term "trading stock" was broad and there were questions about what "trading stock" meant. Finally, the Act in that case stipulated that "trading stock" "includes anything" and, while s.48A(2)(aa) of the Act uses the word "includes", much was made in *St Hubert's Island* of the use of the word "anything". That word ("anything") is not present in s.48A(2)(aa) of the Act as amended.

The Minister's Reply to the Applicant's Oral Arguments

65. In oral submissions in reply, the Minister made clear that he did not adopt the phrase "administrative convenience", nor was his argument an appeal to the Court's "sympathy for embattled bureaucrats". The Minister accepted that s.50 of the Act would, if the applicant's construction of s.48A was adopted, operate to reduce the burden on

"the Department" as a result of individuals, like the applicant, being entitled to make fresh applications.

66. However, while s.50 of the Act would "truncate" the findings that would need to be made, the Minister submitted that the Refugees Convention claims would still need to be considered and findings made in order to reach the point where complementary protection was considered. That was said to be a natural result, or what followed, from the way s.36 is constructed.

Australia's International Obligations

67. A cornerstone of the applicant's argument was that s.48A of the Act needed to be read in the context of the Act implementing Australia's relevant international obligations. Further, that the purpose of the Amending Act was to ensure that Australia implemented its obligations with respect to the ICCPR, CAT and CROC. In particular, that the Parliamentary intention of the Amending Act was to "take away from the executive fiat of the Minister" the responsibility for dealing with such claims and to create a codified statutory regime to ensure Australia met its international obligations.

68. In that context, the applicant submitted that what the Parliament had done through the Amending Act was to codify and include in the Act terms on which the Executive is compelled, and directed, to issue a visa. Further, that there was nothing to indicate that Parliament intended that such a "fundamental" change in how Australia met its obligations under ICCPR, CAT and CROC, would not apply to individuals who had, "by chance", had their claims with respect to the Refugees Conventions considered prior to the implementation of the statutory regime to consider claims on complementary protection grounds. Even further, that there was nothing in the Act, nor the extrinsic materials, to suggest that that had been the Parliament's intention.

69. While the Minister did accept that, "at a level of generality" ([35] of the respondent's written submissions), legislation should be construed, where possible, in a manner consistent with Australia's international obligations, that "rule", or principle, had limited application in the

current case. Four bases where put forward by the Minister for that submission.

70. First, that the applicant's construction achieved what the applicant submitted was compliance with Australia's international obligations only as an "incidental aspect of a much broader liberalisation".

71. Second, that in circumstances where the legislation in question is putting into effect Parliament's judgment as to the extent, and manner, in which Australia's international obligations should be implemented in domestic law, then little weight can be afforded to the principle that statutes are to be construed in such a way so as not to be inconsistent with international law (with reference to *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 ALR 380; (2006) 231 CLR 52 at [61] and [69] per Callinan, Heydon and Crennan JJ). Where Parliament is giving specific attention to international obligations and making a conscious, and weighted, decision about how, and the extent, to incorporate international obligations into domestic law, then there is "very little room" for the presumption that Parliament intends to comply with international law and to what extent.

72. Further, the construction advanced by the Minister is not contrary to Australia's international obligations. That is, an applicant (such as the applicant in the current case) who is prevented, by the operation of s.48A of the Act, from having their claims in relation to complementary protection considered through the statutory regime still has available to them the mechanism of Ministerial intervention (pursuant to s.417 and s.48B of the Act).

73. While that "mechanism" does not afford the applicant the same protections as the statutory regime implemented and codified by the Amending Act, there was no evidence that it did not accord with, or was contrary to, Australia's international obligations. Further, the general presumption is that (*Jumbunna Coal Mine v Victorian Coal Miners' Association (No.2)* [1908] HCA 95; (1908) 6 CLR 309 at 363 per O'Connor J):

> *"…every Statute is to be so interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or with established rules of international law"*

74. That is, the Court is to seek compliance with international law in its construction of statutes, not to seek to maximise compliance with international law or the like. It was the latter that the respondent submitted the applicant's construction sought to achieve.

75. Finally, the Minister submitted, citing *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [247] per Kiefel J, that (at [35](c) of the respondent's written submissions):

> *"…if it is not possible to construe a statute comfortably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law."*

Extrinsic Material

76. Both parties referred the Court to extrinsic material. The applicant's position was that, due to the ambiguity in the wording of the Act itself, it was necessary to have regard to extrinsic material (s.15AB(1)(b)(i) of the *Acts Interpretation Act 1901* (Cth)). The Minister's position was that there was no ambiguity, but regard should, and could, be had to the extrinsic material to "…confirm the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act" (s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth)).

77. The extrinsic material was said to be:

1) The Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, circulated by authority of the then Minister for Immigration and Citizenship, the Hon. Chris Bowen MP (the "Explanatory Memorandum").

2) The Second Reading Speech to the *Migration Amendment (Complementary Protection) Bill 2011*, delivered on 24 February 2011 by "Bowen, Chris, MP" (the "Second Reading Speech").

The Applicant's Reliance on Extrinsic Material

78. The applicant relied on the extrinsic material to support his construction. In particular that Parliament had not intended that the "new" s.48A would operate to prevent a class of persons from being able to have their complementary protection claims assessed under the statutory scheme implemented by the Amending Act. The applicant submitted that, had Parliament had such an intention, then there would have been, at the least, an "indication" of that in the extrinsic material. Further, with reference to the Second Reading Speech, the applicant submitted that there was nothing to suggest that it was Parliament's intention to exclude a class of persons, such as the applicant, from accessing the new regime.

79. The Minister's Second Reading Speech was said, by the applicant, to reveal that the intention of the Amending Act was to "…align [Australia's] protection visa process with our existing international obligations and practices" (pg.1356 of the Minister's Second Reading Speech). That is, that the purpose of the Amending Act was to eliminate a "significant administrative hole" in Australia's protection visa obligations. In particular, the Amending Act sought to take away from the Minister the responsibility for meeting Australia's international obligations, noting that (pg.1356 of the Minister's Second Reading Speech):

> *"As things stand, the decision to grant a visa in such cases may only be made by the minister personally. The minister cannot be compelled to exercise this power; there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of the minister's decision."*

The Respondent's Reliance on Extrinsic Materials

80. The respondent submitted that the terms of the Explanatory Memorandum confirmed that the "new" s.48A was not intended to "relax" the bar imposed by earlier iterations of s.48A of the Act ([30]

of the Minister's written submissions). Rather, the purpose of item 16 of the Amending Act was, in the Minister's submission, to expand the scope of s.48A of the Act to prevent a person who has already made a protection visa application, even if that application was based only a claim under the Refugees Convention, from making subsequent applications. In particular that (at [105] of the Explanatory Memorandum):

> *"[t]he effect is that, for the purposes of section 48A, a non-citizen who, while in the migration zone, has made an* ***application for a protection visa*** *(either on Refugees Convention grounds, or complementary protection grounds) where the grant(s) of the visa(s) has or have been refused, may not make a further* ***application for a protection visa*** *while in the migration zone."*
>
> [Emphasis in the original.]

81. The Minister submitted that the absence of any reference to a time period (for example, when the past application for a protection visa was made) and the presence of the word "or" ("…on Refugees Convention grounds, *or* complementary protection grounds" [emphasis added]), meant that the "new" s.48A was intended to ensure that people who had applied for a protection visa under the "old" regime continued to be covered by the "bar" in s.48A, while people who applied under the amended, or "new", regime would also be captured by the "bar" in the future.

82. The Minister submitted that there was nothing in the extrinsic material, specifically the Minister's Second Reading Speech, to support the applicant's contention that the "new" s.48A was not intended to exclude persons in the position of the applicant from having their complementary protection claims determined.

83. Indeed, while the construction advanced by the applicant would ensure that individuals in the same class as the applicant would not be excluded from advancing fresh claims under the new regime, individuals who were captured by s.48A(2)(a), (b) and (c), who had only ever had Refugees Convention claims considered previously, would still be barred from having their claims reconsidered. That is, there would be an "inconsistency in treatment" as between different cohorts. Further, that that "surprising reform" would have been made

with some clarity and would have been addressed in the extrinsic material. In the Minister's submission, it was not.

84. Further, the construction propounded by the applicant would allow him, and others like him, to make subsequent applications unconfined to claims for complementary protection. That is, to have a second opportunity to make claims for refugee status. Given that "perverse consequence" of the applicant's construction ([32] of the respondent's written submissions and as referred to above at [51]), the Minister submitted that there would likely be an express statement in the extrinsic material. No such express statement was present in either the Second Reading Speech or the Explanatory Memorandum.

85. Finally, the Minister noted that the applicant had sought to emphasise, and rely on, "broad statements" in the Second Reading Speech about the overall purpose of the legislation. The Minister submitted that while the Second Reading Speech was replete with references to s.36 of the Act, it did not mention s.48A of the Act. That is, the Second Reading Speech was focused on s.36 of the Act and what was sought to be achieved by way of the amendments to that section. In particular, the liberalisation of the Act to include complementary protection provisions. However, s.48A, the focus of current consideration, was not a section that affected that liberalisation. Rather, s.48A made express reservation about the capacity of persons to apply for a protection visa. That is, it qualified the liberalisation that was to be effected by s.36 of the Act and that was the subject of the "broad statements" in the Minister's Second Reading Speech.

Additional Arguments

86. The following additional submissions were made by the parties during the course of the hearing. Given what is set out above at [38] above, it is important to note them prior to setting out consideration in the matter. However, given what is set out below and at "Consideration", their assistance in the disposition of this matter is limited at best.

The "Ethereal Bar" Matter

87. The applicant submitted that the Minister's construction of s.48A misconstrued that provision as creating an "ethereal bar" that exists, and continued to exist, until a person leaves the jurisdiction. The applicant submitted that such a construction was misconstrued as s.48A simply determined whether or not an application for a protection visa was a valid application at the point in time when the application was made. Further, the bar in s.48A did not attach to the person, "designating them persona non-grata", it attached to the application.

88. In oral submissions, the Minister submitted that there was no, nor was there intended to be implied an, "ethereal bar". Section 48A, on the Minister's view (and in agreement with the applicant), applied only so long as it was in force and only in the form that it took from time to time. The Minister made clear that there was no suggestion by him that s.48A (as it was) survived repeal by the Amending Act, nor that an applicant is "forever stamped" by the bar in s.48A regardless of future amendments to the section.

The Distinction Between "Repeal" and "Amend"

89. The applicant posited that the distinction between "repeal" and "amend" (as it appears in the Amending Act) was significant. However, that that significance was diminished given the Minister's acceptance that only the "new" s.48A and s.36 were the relevant sections to the proceedings before the Court.

90. Further, the applicant submitted that the distinction between "repeal" and "amend" was one of substance, and not simply form, as the "repeal" of the "old" s.48A of the Act, as opposed to its amendment, meant that the bar that previously existed in the "old" s.48A, which had applied to the applicant, no longer existed. In that way, there was no continuing bar. Rather, the "new" s.48A inserted by the Amending Act imposed a "new" bar (following the commencement of the Amending Act). It was that bar that the applicant asserted that he was not caught by, given that he had only lodged one application for a protection visa since the commencement of the Amending Act.

91. The Minister submitted that the Court could "put to one side" the difference between an "amendment" and a "repeal" because the Minister agreed with the applicant that, save for one qualification relating to the transitional provision (item 35 of Sch.1 to the Amending Act), the only provisions the Court needed to construe and apply were the "current" versions of s.36 and s.48A of the Act. That is, s.36 and s.48A of the Act as they stand following the commencement of the Amending Act. Further, that the only significance between a repeal and an amendment is that the arguments advanced before the Court in the current case would be, as the applicant submitted, different and therefore, in those circumstances, no further attention was required to be given to the distinction between "repeal" and "amend".

Item 35 of Schedule 1 to the Amending Act

92. It was the applicant's contention that item 35 of Sch.1 to the Amending Act (see [20] above) was not a "commencement" provision, but rather an "application" provision. That is, item 35 provides guidance as to the scope and impact of the Amending Act. In those circumstances, s.48A of the Act, as inserted by the Amending Act, only operates in circumstances where there has been an application for a protection visa "under" the amended provisions.

93. The respondent submitted that item 35 of Sch.1 to the Amending Act was only a "transitional provision" and did not form part of the Act as amended. That is, it simply controlled whether the "new" or "old" version of the Act applied to a particular case. Further, that it would be "strange" if, in the future, regard was required to be had to a transitional provision in order to understand the meaning of s.48A(2) of the Act.

94. The Minister also submitted the following (at [37](b) of written submissions):

> *"If item 35 did somehow exclude the application of new s 48A in the present case, it would do so by way of providing that 'the amendments made by this Schedule' did not apply. The consequence would be that the validity of the Applicant's new visa application would need to be assessed under the old s 48A. That would not assist the Applicant."*

Consideration

I. Law and Policy

95. It must be said that the applicant's arguments before the Court are, in one sense, attractive, if not compelling. That Australia should give domestic expression to its international obligations by way of statutory prescription, rather than executive disposition, would be said by some to be an appealing outcome. (Sections 48B and 417 of the Act, are non-compellable powers: *Applicant NAGM of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 395 at [9] per Sackville, Allsop and Jacobson JJ, *Kolotau v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1145 at [8] per Hely J, *SZAAM v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 917 at [3] per Emmett J.) Even if for no other reason than that the resultant transparency provides the potential to enhance Australia's international reputation and allows the Australian community insight into the workings of the Executive government.

96. However, what is missing in the applicant's approach is that the proceedings before this Court cannot be concerned with what Parliament ought to have done, should have done, or even might have hoped to have done. This Court can only be concerned in these proceedings with what Parliament has actually done (and, in a certain "secondary" sense, what was said to have been intended as expressed in any extrinsic material – see [76] – [85] above).

97. In this light, many aspects of the applicant's submissions, even with the attractive and the powerful manner with which they were delivered, fall away. The applicant's interpretation of the relevant legislation has at its core an argument of his view of compelling policy, rather than the language of the relevant statute as to what Parliament meant. The applicant argues that the relevant legislation says what he asserts because Parliament would have meant to have given proper expression to Australia's international obligations and to seek to maximise that expression in domestic law.

98. It is here that I specifically agree with the Minister's submission that while this Court should approach the construction of the relevant parts of the Act in a way that allows compliance, or comity, with international law, it is not the role of this Court to construe the legislation such as to maximise compliance with Australia's international obligations. It is trite to say that the quality, or extent, of such compliance, where the statutory language is clear, is for Parliament and not this Court.

99. The disposition of the application therefore falls to:

1) Consideration of the statutory context in which s.36 and s.48A of the Act exist and the language of the statute and the impact of the Amending Act.

2) Understanding the importance of the way the applicant initially framed his application to the Court, which was consistent with what his lawyer put to the Minister's department in 2012 but different to the way the case was argued before the Court.

3) Different views of the statutory language.

4) The role of relevant extrinsic material.

II. The Statutory Context and the Language Used

100. Little was said before the Court about the entire relevant statutory regime surrounding the concept of a visa. It is the case that one class of visa is the subject of the application that sits at the heart of s.48A and s.36(2). That is, an "application for a protection visa" (s.48A(2) of the Act).

101. A "visa" is defined in s.5 of the Act as "having the meaning given by s.29" of the Act. This immediately directs attention to Div.3 of the Act, in particular, sub-division A. Section 29 of the Act gives meaning to a visa as permission granted by the Minister to a "non-citizen", relevantly to remain in Australia. In the current context, the applicant is a "non-citizen" (see s.5 of the Act - "a person who is not an Australian citizen") who, by his application of 10 October 2012, applied for

permission from the Minister to remain in Australia. That is, he applied for a visa.

102. The basis of his application (in the sense as ultimately explained before the Court and not the "limited" application stated by his representative in 2012 - see CB 196 and see later at [122] – [132]) is for a particular class of visa. The concept of "classes of visas" is introduced at s.31 of the Act (also in Div.3 of the Act).

103. These are said to be of two "species". The first "prescribed classes of visas" (s.31(1) of the Act) need not trouble us further for the purposes of this judgment. The second are "the classes provided for" by, amongst others, s.36 of the Act (s.31(2) of the Act).

104. In the "logic" presented by the relevant statutory framework, s.36 (noting yet again the focus on the current, and not earlier, version) provides for "a class of visas to be known as protection visas" (s.36(1) of the Act).

105. Sub-section 36(2) of the Act then sets out "a criterion" for this class of visa. That is, a protection visa. These are, relevantly, either the Minister's satisfaction in the context of the Refugees Convention or, separately and dependent on the non-satisfaction in relation to the first, the Minister's satisfaction in the context of complementary protection.

106. In my view, having regard to the language of the Amending Act (see also further below regarding "repeal" and "amend") the insertion of s.36(2)(aa) into the Act did not create a different "species" of protection visas. The distinction between the concepts of "classes of visas" and criteria relevant to separate classes of visa is important.

107. The first, relevant to the current circumstances, derives from s.31 of the Act. The second concept relates to the different criteria set out in s.36(2) of the Act. The applicant's argument essentially here is that the essence of a protection visa, as a statutory concept, is to be derived predominantly from s.36(2) of the Act. His argument is that the change in the criterion for a protection visa, or the bases on which a protection visa may be granted, meant that a new species of visa was created by the Amending Act. That is, because of the change it is a "different" visa.

108. I do not agree with the applicant. His argument, or construction, would have no distinction between the concept of a class of visa and the criteria relevant to a class of visa. That conflation would render s.31 of the Act otiose. [As set out above, s.31 provides that there are to be "prescribed classes of visas" (s.31(1) of the Act) and that, "as well as the prescribed classes, there are the classes provided for by sections…36…" (s.31(2) of the Act).]

109. Further, the language of s.36 of the Act is not directed to the making of an application. As is plain, s.36(1) of the Act creates a class of visa known as the protection visa. That pronouncement is identical in both the pre-amendment and post-amendment (current) version of s.36 of the Act. Notwithstanding the applicant's reliance now on such words as "repeal" and "amend", it remains that Parliament used the same words in both versions (that is, Parliament did not change the wording in the current version). This emphasises the distinction to be drawn between the concept of a class of visa and the criteria, or bases, on which it must be granted.

110. However, even if Parliament had not used the same language, and focussing only on the language used in the current version, the distinction between the concepts is still plain. That is, there is a class of visa, known as a protection visa, the criteria relevant to satisfy the Minister such that the protection visa will be granted remain conceptually separate. That "formal" formulation (of a class of visa), that idea, stands separately on its own. What follows at s.36(2) of the Act are the distinct bases for the grant of a protection visa (with reference, given the use of the words "Minister is satisfied", to the grant of a visa, to s.65 of the Act). The term "a criterion", as referred to at s.36(2) of the Act, can only derive meaning as being a criterion for the grant of a visa.

111. It is with sub-division AA of Div.3 of the Act that the concept of "applications for visas" is introduced into the Act. (Noting, again, our focus on the current, not any pre-amendment, version).

112. Section 45 of the Act provides that "a non-citizen who wants a visa must apply for a visa of a particular class". Two things are of relevant note here. First, the applicant fits the description of a non-citizen.

Second, he has made an application, on 10 October 2012, for a protection visa of a "particular class".

113. That "particular class" of visa is a protection visa seen in light of what is set out above in relation to sub-division A. A large part of this sub-division deals with the elements that contribute, or otherwise, to the validity of the application for the visa.

114. It must not be forgotten that what the applicant challenges in these proceedings is the efficacy of the decision, made on 10 October 2012, by the departmental officer. The basis for that decision was the application of s.48A of the Act. The relevant language of that section prohibits a non-citizen who has been refused a protection visa from making a further application for a protection visa (noting, of course, the provision of s.48B of the Act).

115. The term "application for a protection visa" is defined in s.48A (see s.48A(2) of the Act). It is said to include: "(aa) an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c)…"

116. Here, again, in my view, the conceptual distinction between a protection visa (as a class of visa), the application for that class of visa, and "a criterion" relevant to that class of visa is maintained.

117. That there is, relevantly, no additional basis (or "mentioned") in relation to this visa does not alter the concept of this particular class of visa. What has changed with the Amending Act is that another element relevant to "a criterion" for this visa has been added, not that the character of the visa itself has changed such that it can be said that, in 2012, the applicant applied for a different species of visa. That character is still directed to providing protection to non-citizens. The Amending Act expanded the statutory scope within which the Minister can consider whether to grant protection in the form of a protection visa.

118. It is important here to focus on the words "a criterion" as they appear both in s.36(2) (as in "a criterion for a protection visa") and reference to s.36(2) in s.48A (as in "a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c)….").

119. The words "a criterion" imply a singular entity. However, when this term is applied as across each of the items in s.36(2) (that is, (a), (aa), (b) or (c)), it is clear that these are separate bases, or grounds, relevant to the consideration and grant of a protection visa.

120. In this context, an important part of s.36(2) of the Act was touched on in the Minister's submissions. What is contained in the parentheses at s.36(2)(aa) ("other than a non-citizen mentioned in paragraph (a)") makes plain that an application for a protection visa must first be assessed as against the Refugees Convention. (That is, the item, or "criterion" in s.36(2)(a) of the Act.) (Since the hearing the Full Federal Court handed down judgment in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 – see in this regard at [67] – [71] per Lander and Gordon JJ.) It follows therefore that the criterion at s.36(2)(aa) (the complementary protection criterion) only requires attention by the Minister, or those charged with making decisions on applications for protection visas (his delegates or the Refugee Review Tribunal), if the non-citizen who has made the application for the protection visa is found not to have met the criterion at s.36(2)(a) of the Act. That is, any applicant who is determined not to be a refugee pursuant to the Refugees Convention.

121. This immediately exposes the difficulty with the ground as pleaded in the application to the Court, and reveals a basis for dismissing the application to the Court. Noting that no application was made to amend the ground, and while submissions proceeded on a different basis (see [52] – [53] above and also [122] – [132] below), the submissions proceeding on a different basis cannot be said to explain the ground as actually asserted.

III. The Applicant's Different Complaints

122. The ground before the Court asserts that "the application [plainly the application lodged on 10 October 2012] was expressly made in reliance only on the grounds in s.36(2)(aa) of the Act (the 'complementary protection grounds')". If that was the case, and it is otherwise said by the applicant to be the case (see below), then the only application for a protection visa made in relation to the Refugees Convention criterion (s.36(2)(a)) was the application made in 2005.

123. In these circumstances, the applicant's relevant statutory construction, as put in submissions to the Court, would have him never to have applied for a protection visa on the Refugees Convention criterion (because, since the commencement of the Amending Act, it is said to be a new, or different, "species" of protection visa). It is therefore difficult, if not impossible, to see how the application made in 2012, only on complementary protection grounds, could ever have been considered and finalised.

124. The consequence of what is asserted in the ground of the application before the Court ignores the plain relationship between the criterion at s.36(2)(a) and the criterion at s.36(2)(aa) of the Act. That is, that the latter only becomes relevant for consideration if there has been an application which included the matter relevant to the former and the application was refused in relation to the former. Otherwise, the words in parenthesis in s.36(2)(aa) of the Act would have no meaning.

125. Therefore, the only way that the application of 2012 could lead to consideration of complementary protection would be if the applicant had also applied for a protection visa which included a criterion in s.36(2)(a) of the Act. At the time of application in 2012 the applicant, given that he expressly said he was not applying in relation to the s.36(2)(a) criterion, would have had to rely on the application he lodged in 2005. That is, to fulfil what is the current statutory requirement that he had applied for, and been refused, a protection visa on the Refugees Convention basis before consideration under the complementary protection criterion. This plainly argues against the applicant's construction that that application was of a different species. At the very least there is an inconsistency in what the applicant said to the Minister's department in 2012 in this regard, and what he now puts to this Court.

126. The relevant material in the Court Book reveals a factual consistency with what is expressly asserted in the ground before the Court, not with what has been submitted to the Court (see CB 193 to CB 195). The application is said to be "for a Complementary Protection Visa under Section 36 (2) (aa)" (CB 193.4). This is emphasised in the applicant's covering letter to the 2012 application, signed by his lawyer ("We

submit that the application now being lodged is **expressly made in reliance only** on s36(2)(aa)" at CB 194.7 [emphasis added]).

127. If the applicant were to now accept the Minister's construction (that is, that an application for a protection visa is an application for a protection visa both before and after the commencement of the Amending Act), then it may be said (if regard is had only to s.36(2)) that his application of 2012 could proceed to consideration of the complementary protection criterion if the Minister were to agree to act pursuant to s.48B of the Act and "lift" the bar. However, in accepting the Minister's construction in this regard, the applicant would go a significant way to conceding the Minister's entire argument. That is, that the application in 2005 was an application for a protection visa recognised under the current version of the Act and, therefore, s.48A now operates to bar him from making an application for a protection visa in 2012.

128. Before the Court, the applicant sought to explain this difficulty in the following way. The applicant would bring an application for a protection visa. While he would, necessarily, have his claims to protection under the Refugees Convention considered (as the Act requires that to be done such that the applicant can be considered on complementary protection grounds), those claims could be dealt with "effectively" given s.50 of the Act, which provides that, in considering further applications, the Minister is "not required to reconsider any information considered in the earlier application.." (s.50(c)) and "…may have regard to, and take to be correct, any decision that the Minister made about or because of that information" (s.50(d)). That is, the applicant says that s.48A was not the only "dam wall" to prevent a flood of applications that would otherwise require reconsideration under the Refugees Convention.

129. This argument is a diversion. For example, I have some difficulty in accepting that s.50 of the Act would assist in the circumstances of this case such that any such consideration would be done "effectively". Given the passage of time between the two applications (some seven years) much could have changed in the relevant circumstances in the applicant's country of claimed persecution, as much may also have

changed in the applicant's personal circumstances relevant to the question of protection.

130. But, and in any event, even if those latter points were not the case, that still does not explain the inconsistency between what the applicant explained as the basis of his application in 2012 (the subject of the decision now under review) and the construction and intent that he now seeks to give to s.36(2) and s.48A of the Act.

131. The applicant said that, in 2012, he applied for a protection visa only on complementary protection grounds. Plainly, implicit in this is that he did not purport to apply, in 2012, on Refugees Convention grounds. Given the relationship between s.36(2)(a) and (aa) of the Act, to engage s.36(2)(aa) would require prior consideration of the matter in s.36(2)(a). The only time the applicant acted to engage the matter substantively set out in the current version of s.36(2)(a) of the Act was with the application of 2005. If that application was for a different species of visa as the applicant now claims, then why did the applicant not apply for a protection visa on Refugees Convention grounds in 2012, given that it was a necessary precursor to the consideration on complementary grounds. This was not satisfactorily explained. That the "instructing solicitor" was said, in 2012, to be "more conscious" of the effect of s.50 is not supported by what is in the lawyer's letter and does not in any event explain the applicant's actions in light of the clear statutory relationship between s.36(2)(a) and (aa) of the Act.

132. While there may be some appeal in further pursuing the contortions presented by the applicant's positions as at 10 October 2012 and now, for the purposes of this judgment, the applicant's construction, as "amended" by his submissions, does not succeed also for the reasons that follow. Noting again that what must be retained from what is immediately above is that the "current" legislative regime established a priority relationship between s.36(2)(a) and (aa) such that consideration of the latter is dependant on the consideration, and "refusal", of the former and, by necessity, application for the former.

133. I understand the words "a criterion", as they appear in s.48A(2)(aa) of the Act ("…a criterion for which is mentioned…"), to be immediately referrable to the visa, and not necessarily to the form of the application

for a visa. (That is a criterion for the visa which is mentioned in s.36(2) of the Act.)

134. Therefore, and in the context of the scheme of the Act set out above, the definition, for the purposes of s.48A of the Act, of "application for a protection visa", "includes" an application for a visa, a criterion for that visa being mentioned in s.36(2) of the Act. The different criteria (that is, each of "a criterion") are, relevantly, s.36(2)(a) or (aa) of the Act.

135. It is here that the use of the word "or", as it appears at both s.48(2)(aa) and s.36(2) of the Act, is important. The matter mentioned in s.36(2)(a) (as referred to in s.48A(2)(aa) of the Act) is the Minister's satisfaction derived from the Refugees Convention, and which therefore fulfils the "criterion" for the protection visa. This basis for meeting the relevant criterion was not altered by the Amending Act. The language pre-amendment and post-amendment is identical (see also items 12 to 16 of Sch.1 to the Amending Act).

136. The word "or", as it appears at s.36(2) between (a) and (aa) and in the reference to s.36(2)(a), (aa) as it appears in s.48A(2)(aa) of the Act [noting that "or" between s.36(2)(b) and (c) (in s.48A(2) of the Act) means "or" in between each of the subparagraphs], makes it clear that the current version of s.36(2) of the Act has an additional way in which "a criterion" for the protection visa may now be met. That is, with the Minister's satisfaction in relation to complementary protection (only in circumstances where the other criterion at s.36(2)(a) is not successful). The Amending Act has created an additional way in which "a criterion" for a protection visa may be fulfilled. That is, the focus is on the criterion.

137. The amendment was done to expand the ways in which "a criterion" can be fulfilled, not to alter the nature of the character of a protection visa. That character remains to provide protection to those non-citizens in need of Australia's protection and, importantly, not to "refoul" those in need of protection. That the scope of the bases for that obligation has been statutorily expanded does not mean that the nature of the protection visa itself has changed. That is, the protection offered by Australia.

138. Similarly, in my view, the language of s.48A of the Act (as it is now) is clear. A "non-citizen" who has been refused a protection visa "may not make a further application for a protection visa". It is important to note here that the emphasis is not on an application for a protection visa, but on a **further** application for a protection visa. The first part of the section talks not of a non-citizen who had previously applied for a protection visa, but one who has been refused a protection visa.

139. While, plainly the section then proceeds to talk of a person who "has made an application for a protection visa" (s.48A(a)), in my view, that is a reflection of the logical consequence that a person would need to have made an application before being refused. The important point to note here is that the heading of the section "Non-citizen refused a protection visa may not make further application for protection visa" reflects the emphasis that the legislation intended (s.13(2)(d) of the *Acts Interpretation Act 1901* (Cth)). That is, a prior refusal for a protection visa bars a further application for a protection visa being made.

140. In my view, this is reinforced with the language of s.48A(2)(aa) of the Act:

> "***application for a protection visa*** *includes:*
>
> > *(aa) an application for a visa, the criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c)…"*

There is plainly a separation, or distinction, between "a criterion" for a visa and the various methods by which "a criterion" for the visa applied for (the protection visa) may be informed. Again, contrary to the applicant's position, the legislation has not created a separate species of application for a visa by the inclusion of s.36(2)(aa) of the Act. Rather, the application for the visa, as a legislative concept, remains the same. All that has changed is that there is now an additional way of satisfying the relevant "criterion" for the visa.

141. The concept of the "application for a protection visa" therefore remains unchanged by the Amending Act. The applicant in the current case is a "non-citizen" who has already applied for a protection visa. He was found not to have satisfied the relevant criterion at that time, and was refused the protection visa on that basis. The subsequent expansion of

the bases on which "a criterion" for a protection visa may be fulfilled does not alter the fact that the applicant is a person, in the migration zone, who has made a second, or further, application for a protection visa. Such an application, given s.48A of the Act, is not valid. The departmental officer was correct to so find.

IV. Different Views of the Statutory Language

142. The applicant attacked the Minister's reliance on the words "mentioned" and "includes" as they appear in s.48A of the Act (see [47] – [49] and [54] above). It must be said that I did not see how this description of this aspect of the Minister's submissions as being done for "administrative convenience", and so that bureaucrats could avoid further work, could arise only from this part of the submissions. It either relates to the entire scheme of the applicant's attack, or nothing.

143. In my view this was plainly a colourful submission that the applicant felt he could make, possibly for dramatic effect. Plainly, this Court cannot properly be concerned in these proceedings with the impact on bureaucrats. If the Parliament intended there to be an impact on bureaucrats, then so be it. This then becomes a matter for the Executive arm of government.

144. I agree with the Minister that there is nothing in the relevant language to allow this submission to be properly made. The applicant's attack in this regard therefore could not just relate to this one aspect of the Minister's various submissions. Plainly, if the Court were to accept the Minister's construction of the statute on whatever basis then, in that circumstance, there would be no need for the bureaucrats to consider "additional" protection visa applications.

145. Therefore, if the applicant sought to make this submission for the purpose of highlighting the consequence of accepting the Minister's submissions, or not accepting his construction, then the applicant's attack is wasted. One way or the other, the Court cannot allow any concern for bureaucrats (or otherwise) (or even the Minister's personal workload) to colour its consideration.

146. I should note that the applicant submitted that the Minister's construction of s.48A misconstrued that provision as imposing an "ethereal bar" (set out at [87] above). I did not see this as an accurate description of the Minister's position. I agree with the Minister's submissions in this regard (see [88] above).

147. Some argument ensued between the parties as to the use in s.48A of the words "includes" and "mentioned". Further, whether the appropriate approach to the relevant statutory construction, and given it includes reference to these words, required a "narrow" or "broad" interpretation (see [60] – [63] above).

148. In this debate, I did not see that the applicant's reliance on *SZGME* was of direct assistance to him on this point. I accept the applicant's submission that, in that case, the approach to statutory construction adopted, with respect, by the Full Federal Court was "precise". That is, I respectfully understood the Court to be saying that proper attention must be given to the scheme and language of the relevant parts of the statute.

149. In that case, dealing with an earlier form of s.48A of the Act, the Court emphasised that when regard was had to the nature of the review undertaken by the Refugee Review Tribunal, in that case under Pt.7 of the Act, that to describe the Tribunal's task as making a finding as to whether the applicant was a refugee was not correct. Rather, the task of the Tribunal was to reach, or not reach, the requisite level of satisfaction as to whether Australia had protection obligations towards the applicant (see, in particular, s.414 and s.65 and Pt.7 of the Act – *SZGME* at [18]). In this sense, the Court certainly called for precision in the attention to be paid to the scheme, structure and language of the relevant legislation.

150. The words "narrower" or "broader" in this context are really descriptors of how far the legislative interpretation stays with the language and schema of the statute as opposed to a reading which seeks to encompass matters possibly alluded to, but not specifically mentioned, in the statute.

151. An example is the Minister's suggestion that the word "includes" as it appears in s.48A(2) of the Act, is meant to convey that what follows is

non-exhaustive. The applicant would say that it should be read as if it is exhaustive and that the use of the word "includes" creates ambiguity with the consequences set out earlier in this judgment (see [63] above and see also at [155] – [158] below).

152. I should note that the applicant's reliance on *Buck v Comcare* and *Haneef* did not add to, or further advance, his argument. Rather, I saw these references as another expression of the applicant's point in this regard. The reference to *Buck v Comcare* emphasised the importance of precise construction, not only in terms of public policy but also the safeguarding of an individual's right. In this regard, those rights, said to derive from international treaties to which Australia is a signatory, have domestic expression to the extent, or the shape, given to them by the legislature. This immediately refers to the discussion above about the language of the statute and Parliament's intention.

153. The applicant's reference to *Haneef* seeks to emphasise the importance of common law rights and freedoms. However, that should be understood in light of the "qualification" to be found at [107] of *Haneef* that such an emphasis on statutory construction is "where constructional choices are open". For the reasons set out above in this judgment, I do not agree in the current circumstances that such choices are open to this Court given the language, scheme and structure of the relevant legislation.

154. I ultimately agree with the Minister that close attention must be paid to the language of s.48A(2)(aa) of the Act. The use of the words "mentioned" and "includes" cannot be ignored. After all, they are part of the language actually used in the statute and, importantly, in s.48A of the Act.

155. As the Minister proposes, the words used were not directed to an application for a protection visa as set out, or referred to, in the current, or amended, version of s.36(2) of the Act. Rather, attention is directed to "a criterion" "mentioned" in s.36(2) and all its constituent parts. Noting, again, that each of these parts, relevantly as between (a) and (aa), is expressed in the alternative with the use of the word "or" as it appears between (a) and (aa) of s.36(2) of the Act (and for that matter (b) and (c) of s.36(2)). The point here is that the word "includes" directs attention to, it emphasises, the substance, and the description, of

each of those matters set out individually at s.36(2) of the Act (namely, each constituent part – (a), (aa), (b) and (c)), rather than the mere existence of the actual paragraph itself as an entity. This is an example of where the constituent parts have a life of their own given they are directed to different subjects, as opposed to the description of, or reference to, the entirety of the sub-section as a whole. If some other word had been used, say "means" or "is" (as in "application for a protection visa…" means or is), then such words would have altered the focus.

156. This is an important distinction. The placement of the focus on the substance of what is contained in each paragraph avoids any temporal limitation that may have been created with the use of such words as "means" or "is". That is, what is meant by "an application for a protection visa" (post the commencement of the Amending Act) is that the meaning, or definition, of that term is "inclusive" of a concept (that is, each of the concepts set out there) rather than the creation of some "new" prescriptive list. That is, a concept that in relation to the Refugees Convention criterion had a statutory life before the commencement of the Amending Act and plainly continues to be "included" after.

157. To the extent that the Minister's submissions may also have implied that "includes" was designed to create some non-exhaustive list as meeting the relevant definition, and to the extent that the applicant says this is an explicit consequence of the Minister's submissions, then such a notion must be rejected.

158. If this were the case then the applicant's argument as to "precision", "narrow" and "broad" interpretation, would be plainly available. The legislation should not be interpreted in such a way as to give license to any infinite number of elements to be imported into the meaning of "application for a protection visa" as set out in s.48A(2) of the Act.

159. However, the view that I have taken of the meaning and use to which "includes" has been put here is devoid of ambiguity and supports the precise, and even "narrow", approach to understanding the meaning of the statute that the applicant says should be used.

160. One of those "parts" of s.36(2) of the Act, namely (a), is in identical terms to a part of "a criterion" as it existed prior to the commencement of the Amending Act. The current version of s.36(2) of the Act and as it is referred to in (the current version of) s.48A, means that an applicant who has made an application for a protection visa at any time, which can be recognised as "an application for a visa, a criterion for which is mentioned in s.36(2)(a)…" (the current version) nonetheless is caught by the description in s.48A(2)(aa) because the "criterion" (its substance) is in identical terms. That is, it is the same criterion. The application, therefore, made by the applicant in 2005 is "an application for a visa, a criterion for which is [still or, even, also] mentioned in paragraph 36(2)(a)…" in its current (post-amendment) form. His application in 2012 is a further application for a protection visa and therefore "barred" by s.48A(1) of the Act.

161. To the extent, also, that the applicant sought to focus attention on the words "repeal" and 'amend" in the Amending Act, such submissions divert attention away from the language of s.48A(2) as it exists post the commencement of the Amending Act. A criterion "mentioned", with its focus on the description of the substance of each of the constituent parts of that criterion, is not limited by a repeal or amendment of s.36(2) as it was. That is because the focus is not necessarily on s.36(2) of the Act per se as it existed, but rather on a criterion characterised by its mention, or as described, in s.36(2) of the Act as it now exists. In the current case, the applicant did make an application for a visa a criterion for which is mentioned in the current version of s.36(2). That he made it prior to the commencement of the Amending Act does not alter the fact that his conduct in the past still meets that descriptor.

V. The Role of Relevant Extrinsic Material

162. Before the Court the applicant submitted that there was, at least, ambiguity in the language of the relevant parts of the statute. He pointed to his own construction and what he said were two constructions proposed by the Minister. Therefore, in these circumstances, he said that recourse to extrinsic material was available, or necessary, to resolve the ambiguity.

163. Two things may be said immediately. First, it does not follow that simply because a number of constructions are proposed, or propounded, that it is the result of any ambiguity. Any such contrary construction may simply be the result of fertile minds, or inventive argument.

164. Second, there is a difference between ambiguity and complexity. Any complexity arising in the current circumstances may not necessarily be due to an ambiguity of language. Rather, it may be due to a particular construction of language designed to cover, or encompass, a number of situations (e.g. applications for protection visas made before and after the commencement of the Amending Act) and to accommodate the various elements constituting the scheme of applying for a visa and, in this case, a particular class of visa, the protection visa.

165. Recourse to extrinsic material may be had to resolve any ambiguity in the statutory language (s.15AB(1)(b)(i) of the *Acts Interpretation Act 1901* (Cth)). However, it may also be of value in confirming the view taken of the meaning of relevant statutory language (s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth)). In this latter regard, the following supports the construction set out above and in support of the Minister's position.

166. The applicant's reliance on extrinsic material is set out at [78] – [79] above. It must be said that, for the large part, the applicant's reliance on the extrinsic material was not dependent on what is to be found there, but rather what the applicant says is not in the extrinsic material. Further, where he did make reference to the material in the Minister's Second Reading Speech, it was to comment on the "liberalisation", or expansion, of s.36, not s.48A of the Act.

167. The applicant's position is that, had Parliament intended to exclude persons such as the applicant from accessing the "new" regime, then, given the importance of such a matter, it would be expected that such an intention would have resulted in some express statement to that effect in either the Second Reading Speech or the Explanatory Memorandum.

168. I prefer the Minister's position with its primary reliance (although not exclusively) on what is actually to be found in those documents. While

also relying on the absence of references (albeit to a smaller degree), nonetheless the Minister did point to some parts of the documents to support his construction of the statute under consideration.

169. The applicant's reference to the Minister's Second Reading Speech (see at [79] above) does not assist his construction. The applicant's construction, in effect, seeks to draw a line between the "old" and "new" versions of the Act. To that extent, there is no argument with his position as a general proposition. For current purposes we are focussed on the legislative version post the Amending Act.

170. However, in drawing that line, the applicant also seeks to draw a line, an impervious line, between actions taken before the commencement of the Amending Act and what is legislatively available after the commencement of the Amending Act (see, in particular, the discussion above on "includes").

171. The Amending Act did not, in my view, seek to "wipe the slate clean" in the sense of denying, or forgiving, what had occurred prior to its commencement. The repeal, or amendment, of an Act does not necessarily, and simply of itself, repeal or amend what has actually been done in the past unless some such intention can be discerned.

172. I agree with the Minister that item 35 of Sch.1 to the Amending Act operated to make clear in the transition from the "old" to the "new" version of the Act that the "new" version of the Act applied to applications made after commencement of the Amending Act and to applications made prior, but not determined. In the absence of anything further, it therefore also means that, amongst other matters, relevantly, complementary protection considerations do not apply "retrospectively" to applications for a protection visa finalised before the commencement of the Amending Act. I cannot see that the language of item 35 confines the operation of s.48A (as amended) to relate only to events post-amendment.

173. In light of my finding above, it is not necessary to proceed to consider the effect of the applicant's construction of item 35, as submitted by the Minister (see [94] above).

174. Further, the applicant's reliance on the Minister's explanation (in the extrinsic material) that one of the reasons for the amendment of the Act was to take the disposition of certain decisions on visa grants away from the Minister acting personally and to place it in a statutorily regulated regime, says nothing about ignoring what has occurred in the past. At most, what is in the Second Reading Speech is an explanation of the reasons for changing, or more precisely expanding, the statutory regime for the future. (Again, noting the discussion above as to the distinction between "a criterion" per se, that is the criteria collectively, and the distinctive and different substance of each criterion.)

175. The "significant administrative hole" referred to by the Minister in the Second Reading Speech (at pg.1356) was not filled by denying the past. Rather, the thrust of the Second Reading Speech was to explain, amongst other things, the reasons and mechanisms (e.g. "[t]he bill establishes new criteria for the grant of a protection visa…" see at pg. 1357) for the future.

176. As set out at pg.1358 of the Second Reading Speech:

> *"Moreover, once this bill comes into effect, assessments under the protection obligations determination process for offshore entry persons will* ***also*** *take into account complementary protection."*
>
> [Emphasis added.]

177. That does not give license to the applicant to argue that the intention of the Bill, at least as explained by the Minister in his speech, was to ignore the provisions of s.48A of the Act. Where the Minister talks of "assessment**s** under the protection obligation**s**" [emphasis added] (noting the plural) this refers to applications for a protection visa validly made after the commencement of the Amending Act. It does not serve to validate an application made after that time, by ignoring the fact that a valid application for a protection visa had been made, and refused, under the "old" statutory regime.

178. In any event, the Explanatory Memorandum to the Amending Bill (as it then was), with its specific reference to s.48A of the Act, provides greater insight to what was intended to be wrought by the Amending Act in this regard.

179. Before the Court, the Minister drew attention to the note about item 16 of Sch.1 to the Amending Act dealing with s.48A(2) (see the Explanatory Memorandum: "Notes on Individual Clauses" at pg.16). That is, the definition of "application for a protection visa". In particular, what is noted about the effect of this item on the purpose of s.48A at [105] (of the Explanatory Memorandum at pg.17):

> *"The effect is that, for the purposes of section 48A, a non-citizen who, while in the migration zone, has made an* ***application for a protection visa*** *(either on Refugees Conventions grounds, or complementary protection grounds) where the grant(s) of the visa(s) has or have been refused, may not make a further* ***application for a protection visa*** *while in the migration zone."*
>
> [Emphasis in the original.]

180. Two things, at least, may be said about this "note". That is, in its entirety of the "note" on item 16 in the Explanatory Memorandum ([101] at pg.16 to [105] at pg.17), not just that part extracted above at [179]. First, there is nothing here to suggest that those who have applied for a protection visa once on Refugees Convention grounds are entitled to, or can apply a second time for, a protection visa either on complementary protection grounds or Refugees Convention grounds, or both.

181. Second, and far more importantly, is that the plain language of the extract, and when read in the context of the entire note on item 16, supports the Minister's relevant statutory construction. The note in its entirety records that item 16 repeals the "existing" (now "old") s.48A(2)(aa) and (ab) and substitutes a new paragraph, s.48A(2)(aa). The very paragraph under consideration now.

182. As set out above, there was some discussion before the Court about the import of the words "repeals" and "amend" as used in the Amending Act. The applicant sought to derive some advantage to his argument in relation to his preferred construction by saying that the repeal of a statutory provision, at least, implied some break with the past such that an application for a protection visa on Refugees Convention grounds was not an application for a protection visa of the "species" created by the Amending Act. In my view a "break", or change, in what constituted the basis for the grant of a visa does not, unless some

specific reference is made to the contrary, provide for a denial of what actually occurred in the past.

183. Some explanation is provided as to how these various terms were meant to apply in the Amending Act by the Explanatory Memorandum. I note that (at [103] of the Explanatory Memorandum at pg.16):

> *"However, subsection 48A(2) does not currently mention that an application for a protection visa includes an application for a protection visa on complementary protection grounds. The purpose of the substituted provision is to provide for applicants for a protection visa on the basis of a claim for complementary protection."*

184. With reference to [104] of the Explanatory Memorandum (at pg.16), the "effect" of s.48A(2)(aa), which is described as the "substituted paragraph 48A(2)(aa)", is that an "application for a protection visa includes":

> *"● an application for a visa, a criterion for which is mentioned in new paragraph 36(2)(a) or (b) (**which retains the intention of existing paragraph 48A(2)(aa) and (ab)**); and.."*
>
> [Emphasis added.]

[In context, "existing paragraph" is a reference to the now "old" statutory provision.]

185. Plainly, therefore, the intention of Parliament was not to draw a line with events in the past. The current version of the definition of "application for a protection visa" "retains" that part of the "old" version that related to the Refugees Convention.

186. Therefore, the effect of the "new" s.48A(2)(aa) is to retain that part of the "old" definition that relates to the Refugees Convention and to now "include" a criterion "mentioned" in the new s.36(2)(aa) (the complementary protection claims) (see the second dot point at [104] of the Explanatory Memorandum (at pg.16)).

187. What appears at [105] of the Explanatory Memorandum (at pg.17) must also be read in the context of the explanation that precedes it. This "summary" of the "effect" of the Amending Act for the purposes of s.48A is that a non-citizen who has made an application for a protection

visa, with specific reference to either a Refugees Convention ground, or complementary protection ground, may not make a further application for a protection visa (on any of the grounds otherwise available).

188. There is no temporal limitation as to when the application must have been made to be caught by this provision. The reference to "either ….or" leaves the situation, as with the construction previously set out above, as being that the effect of the "new" provision is that, amongst other things, a non-citizen (such as the applicant) who has applied for a protection visa on Refugees Convention grounds (one of the alternatives now available) cannot make a further application.

189. That the "alternative" (complementary protection) ground was not available to the applicant at the time he made his application for a protection visa does not detract from the fact that this explanation of the effect of the purpose of s.48A was to preclude persons who had already applied for a protection visa on Refugees Convention grounds from making further applications, including on any grounds now available.

Conclusion

190. In summary, I accept the Minister's construction of the relevant legislation. The applicant is a non-citizen caught by the prohibition in s.48A from making a further application for a protection visa while in the migration zone. The officer of the Minister's department was not in error in applying this understanding to the relevant legislation and in deciding that the application made on 10 October 2012 was not valid. The sole ground of the application to the Court, whether as stated or as subsequently argued in submissions, is not made out. Accordingly, I will make an order dismissing the application.

I certify that the preceding one hundred and ninety (190) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Date: 3 April 2013