FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXLT & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 799*

MIGRATION – Protection visa – whether jurisdictional error – Israel Law of Return – right of entry to Israel – whether applicants' required to seek right of re-entry – whether failure to seek right of re-entry constitutes failure to take all possible steps – s.36(3) of *Migration Act 1958* – whether all Jews automatically precluded from seeking asylum in Australia and/or whether obliged to express a desire to settle in Israel-– application allowed.

PRACTICE AND PROCEDURE – Order made nunc pro tunc pursuant to Rule 16.05 of the Federal Magistrates Court Rules 2001 setting aside earlier orders and substituting orders by consent quashing first Tribunal decision thereby validating hearing and decision of second Tribunal – whether Court has jurisdiction to undertake judicial review where decision of first Tribunal not quashed and no order made remitting the application – power of Court to make order pursuant to Rule 16.05 with consent of party in whose favour the original order was made requiring amendment.

Migration Act 1958, ss.36, 65, 424A
Federal Magistrates Court Rules 2001, r.16.05

SAAP of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 411
NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 213 ALR 668
SZFKD & Anor v Minister for Immigration & Anor [2006] FMCA 49
Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154
NBGM v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 60
WAGH v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 194
V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018
Savic v Minister for Immigration & Multicultural Affairs [2001] FCA 1787
SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231
NBLC; NBLB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 272

First Applicant:	MZXLT
Second Applicant:	MZXLU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 1064 of 2006
Judgment of:	McInnis FM
Hearing date:	17 April 2007
Delivered at:	Melbourne
Delivered on:	29 May 2007

REPRESENTATION

Pro Bono Counsel for the First and Second Applicants:	Mr J. Gibson
Counsel for the First Respondent:	Mr C. Horan
Solicitors for the First Respondent:	Clayton Utz

ORDERS

(1) It is ordered *nunc pro tunc* pursuant to Rule 16.05 of the *Federal Magistrates Court Rules 2001* that order 1 made by the Court on 6 September 2005 be set aside and in lieu thereof it is ordered:-

(a) The decision of the Refugee Review Tribunal dated 19 August 2005 is quashed.

(b) The Application for review is remitted to the Refugee Review Tribunal differently constituted for reconsideration.

(2) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 18 July 2006.

(3) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(4) The First Respondent pay the Applicants' costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1064 of 2006

MZXLT
First Applicant

MZXLU
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Applicant

REASONS FOR JUDGMENT

1. The Applicants rely upon an Amended Application filed 8 December 2006 seeking judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 18 July 2006.

2. In its decision the Tribunal affirmed a decision of a delegate of the Second Respondent to refuse to grant to the Applicants protection visas.

Background

3. The First Applicant was born in 1971 and is now 35 years of age. The Second Applicant is the daughter of the First Applicant and was born in 1989 and is 18 years old. The First Applicant claims to have been divorced from her husband in 1992. The Second Applicant did not

make any specific claims under the Refugee's Convention and applied for a protection visa as a member of the First Applicant's family unit.

4. The First Applicant is a citizen of Russia and is of Jewish ethnicity.

5. The key issue which was ultimately determinative of the application was a finding by the Tribunal that the Applicants had a right to enter and reside in Israel for the purpose of s.36(3) of the *Migration Act 1958* (the Migration Act) which relevantly provides as follows:

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

6. It is noted that the Tribunal in its decision made the following significant findings:

> *"The Tribunal finds that the applicant has a right to enter and reside in Israel and has not taken all possible steps to avail herself of that right. Furthermore, the Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason in Israel, or of being returned from that country to a country where she has a well-founded fear of being persecuted. Accordingly, Australia does not owe protection obligations to the applicant: s.36 of the Act.*
>
> *As noted above, the applicant daughter lodged an application as a member of the applicant's family unit rather than as a person with her own substantive claims with respect to the Russian Federation. However, to the extent that it might be relevant, the Tribunal finds that the applicant's daughter's position in relation to Israel mirrors that of her mother."*
>
> (Court Book p.497)

7. That extract from the Tribunal's decision indicates that the Tribunal had addressed not only s.36(3) of the Migration Act but also the qualifications of that section, provided in ss.36(4) and 36(5) which relevantly provide as follows:

> *"(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion,*

nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

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

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

subsection (3) does not apply in relation to the first-mentioned country."

8. Despite the fact that the decision in the present case ultimately turned on what might be described as a somewhat narrow issue, it is relevant to set out the background. The background facts in this matter occupied a considerable part of the Tribunal's sixty page decision. The issue which ultimately determined the outcome of the application was dealt with in relatively brief terms.

9. The Applicants arrived in Australia on 1 November 2002 and applied for protection visas on 28 November 2002. The application was supported by a Statement of the First Applicant dated 27 November 2002 (Court Book p.33). In a Statement the First Applicant refers to her Jewish family and difficulties encountered in Russia. She relevantly states:

"I was born in a Jewish family in the atmosphere of respect to the Jewish traditions. I was not as religious as my parents, but the national Jewish holidays became as part of my life. But at the same time, living in a society, I learned that it is a biggest shame being a Jew. I could not get any answers when I asked my parents why.

My classmates always tried to hurt my feelings and even teachers could do so.

My mother's mother never said she was Jewish; she threw away all the documents, stating her nationality."

10. In the Statement the First Applicant claims she was forced to close her business because of a disturbing incident. The incident occurred in

2002 (although in the application it is referred to as 2001) and occurred when the First Applicant was in the process of closing the office towards 6.00pm. She noticed that three men had entered the office, one of them in police uniform and two wearing black leather jackets. In the Statement the First Applicant then describes how she was raped by the men. She specifically stated that the men locked the door and she was then pushed to a table and her mouth wrapped. The lights were shut out and she thought they were going to kill her. She then relevantly states:

> *"They were holding my arms and said: 'Who do you think you are, zhidovskaya suchka, you want to know how we treat those like you?'…"*
>
> (Court Book p.34)

11. The First Applicant then refers to being raped by one man whilst the other two were holding her arms and legs saying "*that we (Jewish) all need to be f..ed and killed, why I am here, not in Israel*" (Court Book p.34).

12. Other graphic details were given of the brutality of the rape.

13. Apart from the Statement in support of the protection visa application, the First Applicant also relied upon a submission dated 14 February 2003 (Court Book p.73). In the submissions the First Applicant's agents relevantly state:

> *"Our client has firstly faced discrimination over many years due to the applicants Jewish ethnicity. The discrimination has most noticeably taken the form of our client being denied access to education purely on the basis of the applicant's ethnicity.*
>
> *Our clients Jewish ethnicity and 'membership of a particular social group' that being Russian women, has lead to our client being subjected to 'serious harm' in the form of being 'gang raped' by a member of the Russian police force and 2 other Anti-Semitic males. The applicant was then threatened with extortion."(sic)*

14. Further details were then given in relation to anti-Semitism in Russia and the lack of effective protection provided by the authorities. The

agent also refers to a number of Country reports and then ultimately concludes:

> *"Our client has been subjected to 'serious harm' in the most horrific manner. The conditions surrounding the way the harm was inflicted in combination with the situation for Jews and women in Russia has meant that the applicant was not even able to seek 'effective protection' from Russian authorities, firstly due to the threat of further recriminations and secondly due to the high likelihood that any reports made would not result in any level of protection being offered to the applicant or any likelihood that 'the agents of persecution' would be brought to justice.*
>
> *Russia has a history of persecuting Jews that stretches back centuries and is entrenched throughout Russia. Though the current administration has made statements condemning Anti-Semitic behavior, these have been superficial and the Jewish population remain incredibly vulnerable to acts of 'serious harm' with almost no prospect of the Russian authorise providing 'effective protection' from these acts of harm."(sic)*
>
> (Court Book p.81)

15. The First Applicant also produced a Divorce Certificate indicating she was divorced on 17 November 2002 (Court Book p.54).

16. The First Applicant was interviewed on 18 February 2003 by an officer of the First Respondent's Department. Detailed questions were put to the First Applicant and information provided which was set out in detail in the Tribunal decision (Court Book pp.451-457).

17. A further submission dated 19 May 2004 was provided by the First Applicant's agent (Court Book p.258). That statement appears to reiterate earlier submissions made and provided further reference to Country information.

18. A differently constituted Tribunal conducted a hearing on 27 May 2004. A copy of the first Tribunal's decision dated 19 August 2004 appears in the Court Book (pp.280-292). The first Tribunal affirmed the decision not to grant protection visas. The second Tribunal in its decision refers to the first Tribunal's hearing of 27 May 2004 in some detail (Court Book pp.459-464).

19. On 11 January 2005 an application was made to the Federal Magistrates Court seeking review of the first Tribunal's decision. Both parties claim that an order was made by the Federal Magistrates Court quashing the first Tribunal's decision and remitting the matter to be determined by a differently constituted Tribunal and that those orders were made by consent. It was confirmed by Counsel for the First Respondent that the basis of the consent order was a possible breach of s.424A of the Migration Act and/or otherwise non-compliance with the principles set out by the Full Court in *SAAP of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 411.

20. However, a copy of the sealed order which appears in the Court Book revealed that an order was made on 6 September 2005 by consent as follows:

> *"(1) The application be dismissed.*
>
> *(2) The respondent pay the applicant's costs fixed in the sum of $3,800.00."*
>
> (Court Book p.299)

21. I was concerned that there was an apparent inconsistency between the sealed copy of the order and the alleged consent orders which the parties believed had resulted in orders being made that the first Tribunal's decision was quashed and the matter remitted for rehearing. The second Tribunal whose decision is now the subject of the review for this Court, states under the heading "Background" the following:

> *"… The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and on 6 September 2005 the Court set aside the decision and remitted the mater to the Tribunal to be determined according to law. The matter is now before the Tribunal pursuant to the order of the Federal Court."*
>
> (Court Book p.440)

22. It is clear from the order dated 6 September 2005 that unfortunately, as at the date of the hearing of the current application, no order has in fact been made setting aside the first Tribunal's decision and remitting the matter to a differently constituted Tribunal. The reference in the extract set out above to the matter being before the Tribunal "*pursuant to the order of the Federal Court*" presumably is an error and is meant

to refer to the Federal Magistrates Court. There does not appear to be any order in place setting aside the first Tribunal's decision. It should be noted that the parties forwarded further minutes of consent orders dated 26 September 2005, in the first proceedings, as follows:

> *"1. The decision of the Refugee Review Tribunal dated 19 August 2005 is quashed.*
>
> *2. The application for review be remitted to the Refugee Review Tribunal, differently constituted, for reconsideration."*

23. It would seem that the second set of minutes of consent orders sought to correct the error of the first set which had been acted upon by the Court. For reasons which are not readily apparent the Registry refused to refer the second set of consent orders to a Federal Magistrate and an examination of the file reveals that they were not placed on the file and nor were any further orders made.

24. I indicated during the hearing that in the circumstances I should make orders *nunc pro tunc* pursuant to r.16.05 of the *Federal Magistrates Court Rules 2001* (the Rules) setting aside order 1 made by the Court on 6 September 2005 and in lieu thereof making orders of the kind sought in the second consent orders dated 26 September 2005.

25. I was prepared to do this on the basis that orders made by the Court on 6 September 2005 either did not reflect the intention of the Court or that the party in whose favour the order was made, namely the Applicants, consented. I was concerned that if I did not make orders pursuant to r.16.05 of the Rules that there may be some doubt as to whether the second Tribunal had any power at all to further consider the matter and then in turn whether this Court would have any power to undertake judicial review. The intention, with the consent of the parties, was to ensure that the proceedings were regularised. It is clear from the orders dated 6 September 2005 that there would appear to be some inconsistency whereby the Court on the one hand dismissed the application and then in the same orders required the Respondent to pay the Applicants' costs.

26. I was not invited to make orders of a kind which would normally be made namely, the issue of constitutional writs. I am satisfied that it is

sufficient having regard to the consent of the Applicant to make orders of the kind sought by consent by the second set of consent orders which had been presented to Registry.

27. In any event, the decision of the first Tribunal reveals that consideration was given to the claims briefly set out earlier in this judgment and an adverse conclusion reached. The first Tribunal did not consider at all the application of s.36(3) of the Migration Act. Not surprisingly up to that date it did not appear that any submissions were made concerning the First Applicant's right to enter and reside in Israel for the purpose of s.36(3).

28. It was not until a hearing was conducted by the second Tribunal on 11 January 2006 that the question of whether the First Applicant was entitled to migrate to Israel was raised. It is referred to at page 35 of the Tribunal's decision (Court Book p.473). Prior to that the Tribunal recites in considerable detail the history, part of which was set out earlier in this Judgment, including evidence given to the first Tribunal. It then referred to documents provided to the second Tribunal subsequently in anticipation of the further hearing. The first was a Statutory Declaration dated 22 December 2005 which addresses a number of issues which arose out of the earlier decision of the differently constituted Tribunal. A detailed submission was provided by new representatives of the Applicants, namely Victoria Legal Aid, in a letter dated 4 January 2006 (Court Book p.312). Attached to those submissions were a number of country reports.

29. A further pre-hearing submission was provided by the Applicants' advisers dated 6 January 2006 (Court Book p.344). Those submissions refer to "*Women or 'Businesswomen' in Russia*", "*Anti-Semitism in Russia and Effective State Protection*", and "*Relocation*" issues. No reference is made to the question of the Applicants' alleged right to enter and reside in Israel. The Tribunal refers to the submissions in detail. It asked questions of the First Applicant concerning the attack, referred to earlier in September 2002. Specifically it then states:

> *"… The Tribunal put to the applicant that St Petersburg was a large town with a large population of Jews. It asked the applicant why she thought she would have been singled out, identified as a Jew and attacked in the circumstances she had described. The*

applicant referred to crime and anti-Semitism in St Petersburg. She stated that tourists were scared to go there. She suggested that the people must have noticed her and been watching her for some time. The Tribunal asked the applicant why they would watch her particularly when there were many people regularly practising their Jewish faith. The applicant replied that she thought it was because she wore the symbol…"

(Court Book p.472)

30. To understand that reference by the Tribunal it is useful to also set out the following extract which appears earlier in the Tribunal decision:

"The applicant stated that her former husband was not Jewish. When asked how people would know that she was of Jewish ethnicity, she claimed that she always wore the Star of David, that she did not look Russian and that her parents were Jewish. The applicant stated that she had never been ashamed to be Jewish and wore the Star of David with pride. Quite a few of her friends and acquaintances knew that she was Jewish and quite a few other people had said that she had looked Jewish".

(Court Book p.470)

31. It appears that at the hearing the Tribunal analysed in significant detail the claims of the First Applicant. It then specifically states:

'The Tribunal expressed doubt that the situation for Jews in Russia was as grave as that described by the applicant, referring to reports indicating that Jews were able to participate in public life and to reports on religious freedom in Russia. The applicant stated that all the Jewish people she had known in St Petersburg had left for either Israel or the US. She referred to anti-Semitic statements made by the former Minister of Defence. The Tribunal put to the applicant that, in spite of some anti-Semitic statements, it had difficulty accepting that the Russian government persecuted Jews. It referred to positive steps which had been taken to address anti-Semitism. It put to the applicant that, while some violent attacks did occur, it had difficulty accepting that Jewish people in general faced a real chance of persecution. The applicant replied that the official sources differed from reality."

(Court Book p.473)

32. It appears that at the stage the Tribunal was advised that the First Applicant had married in Australia and that fact was evidence that her

divorce had been accepted. The fact that the First Applicant is married to an Australian will be referred to further in this judgment.

33. It is then that the Tribunal, apparently for the first time, raises the question of whether the Applicants had a right to enter and reside in Israel. It did so as follows:

> *"The Tribunal referred to the fact that the applicant had said that many other Jews she knew had gone to Israel. It put to the applicant that, under Israel's Law of Return, all Jews had an entitlement to migrate to Israel and that all people who entered Israel on this basis could automatically receive Israeli citizenship. It put to her that the rights under this law were also vested in the children and grandchildren of a Jew. It suggested to her that she might have a legally enforceable right to enter and reside in Israel and referred to the significance of s.36(3) of the Act. In response, the applicant stated that there was a war in Israel. The Tribunal put to the applicant that it would need to consider whether she would face a real chance of persecution for one of the five Convention grounds. The Tribunal asked the applicant whether there was any reason why she thought the law would not apply to her. The applicant stated that she was convinced that she would be persecuted in Russia for reasons of race. She knew that Australia had an obligation to protect people in this situation. The Tribunal provided the applicant's adviser with two weeks to make written submission on this and any other issue."*
>
> (Court Book pp.473-474)

34. Hence, perhaps somewhat surprisingly the key issue which adversely determined the application was not raised until after considerable submissions were made. This led to post hearing submissions made for and on behalf of the First Applicant dated 25 January 2006 (Court Book p.352).

35. In the post hearing submissions the Applicants' advisers specifically address the question of whether the Applicants have a right to enter and reside in Israel.

36. The submissions also dealt with the reason the First Applicant chose to come to Australia and an issue, apparently no longer relevant, as to whether the Applicants had a right to enter and reside in the United

States. It is useful to set out the Tribunal's reference to the post hearing submissions as follows:

> *"It was submitted that the applicant did not have a current right to enter and reside in the US. With regard to Israel, it was submitted that s.36(3) ought to be used sparingly. The purpose of the section was to avoid forum shopping, not to deny protection to as many refugees as possible. It was submitted that, in circumstances such as the present, the provision should not be invoked. The submission drew attention to the fact that the applicant had never been to Israel, that she had no connection with the country other than her ethnicity and that she did not speak or write Hebrew. It was further submitted that, as a recent arrival from Russia, the applicant might suffer serious discrimination in relation to housing, employment and services; that because the applicant's husband was not ethnically Jewish he would be subjected to even more serious discrimination; that the applicant feared that she might be harmed in a terrorist act or some other act of violence; and that the applicant's daughter would suffer discrimination and have to serve in the Israeli army. It was submitted that the spirit of the Israeli Law of Return was to allow Jewish people to move to Israel if they chose to do so and that it was never meant for countries to derogate from their obligations under the Refugees Convention. A country such as Australia should not invoke s.36(3) to deny genuine protection to refugees without regard to the personal circumstances of the applicant. It was submitted that the Tribunal was not bound to refuse protection and that it should adopt a test simular to the test of reasonableness of relocation. It was submitted that it was not reasonable for the applicant to move to Israel. The applicant's adviser stated 'She may not have taken all possible steps to avail herself of a right to enter and reside in Israel but in all the circumstances of the case the Tribunal should not invoke s36(3) of the Migration Act 1958'".*
>
> (Court Book pp.474-475)

37. By letters dated 8 March 2006, 21 April 2006 and 16 June 2006, the Tribunal invited the First Applicant to provide comments in relation to information and, in particular, her right to enter and reside in Israel under the Law of Return (Court Book pp.373-375, 413-414 and 425-427).

38. The Applicants' representative provided comments in response by letters dated 22 March 2006, 4 May 2006 and 30 June 2006 respectively (Court Book pp.405-406, 423 and 429-432).

39. In the response dated 22 March 2006 the Applicants' representative reiterated the matters raised in the post hearing submissions dated 25 January 2005 and further stated:

> *"The applicant fears for her family's safety (herself, her husband and her daughter) if they are forced to move to Israel, because it is a country in conflict and she fears their lives would be in danger living in Israel."*
>
> (Court Book p.405)

40. Further reference was made in the same letter to the First Applicant's concern that she and her family, particularly her daughter, would suffer discrimination on the basis of their status as recent migrants to Israel. Specifically, the letter states:

> *"The applicant is concerned that her family, and particularly her daughter, will suffer discrimination on the basis of their status as recent migrants to Israel. Her concerns are supported by the Paper you have provided from the Immigration and Refugee Board of Ottowa, Canada, which states the following (in part 4):*
>
> > *'Tensions exist between Israelis and olim in younger age groups. According to Cohen, the former 'resent the fact that, while the new immigrants get free rent for a year, they who have given three years of military service must struggle to pay for apartments'…In elementary and high schools, Soviet Jews, referred to as 'Russians' regardless of where in the former Soviet Union they came from, report verbal, and even instances of physical, abuse by their Israeli classmates… The director of IRAC indicates that he is aware of infrequent cases of hostility toward olim schoolchildren by their classmates…A staff attorney with the Association for Civil Rights in Israel…says he has read about one or two cases where hostility has lead to physical attacks on olim children'.*
>
> *The applicant is particularly concerned that her daughter (who is currently in year 11) will soon be of an age where she is obliged to undertake military service. Although women can obtain exemptions if they can satisfy authorities that their conscience*

prevents them from serving in the military, such an exemption is by no means guaranteed."

(Court Book pp.405-406)

41. The letter on behalf of the Applicants dated 4 May 2006 relevantly stated:

"The applicant's husband is an Australian citizen and was born in Australia. All of the applicant's husband's family is in Australia. The applicant's husband will not leave Australia to live in Israel.

The applicant is studying to be a nurse and is currently working as a nurse's assistant for an aged care provider. She is well advanced in establishing a career for herself in Australia,"

(Court Book p.423)

42. By letter dated 16 June 2006 the Tribunal invited that the First Applicant to comment on information concerning the right to enter and reside in Israel (and also the issue of "terrorism in Israel") (Court Book p.425).

43. The Applicants' representatives by way of reply to the Tribunal's request for information forwarded a letter dated 30 June 2006 (Court Book p.429). The letter sets out in detail submissions referring to legal principles, which to a large extent have now been relied upon in submissions made by Counsel for and on behalf of the Applicants in this Court which will be referred to later in this judgment.

Applicants' submissions

44. In support of the argument that there has been jurisdictional error, it was submitted that the Tribunal misunderstood or misconstrued a criteria under s.36 of the Migration Act about which it had to be satisfied for the purpose of s.65. In particular, it was argued the Tribunal asked the wrong question and/or identified the wrong issue and/or misunderstood the terms of s.36(3) of the Migration Act when it found that the primary Applicant had an existing enforceable right to enter and reside in Israel under the Law of Return.

45. It was submitted that despite the exhaustive nature of the Tribunal decision the Tribunal erred in its construction and application of sub-s.36(3) of the Migration Act.

46. It was argued that wording of s.36(3) should be considered in the light of the Article of the Law of Return (Court Book p.480) relevantly set out in the Tribunal decision under the heading "Jewish Law of Return" as follows:

> *"**The Law of Return***
>
> ***In 1950, Israel's Knesset passed a remarkable law, beginning with a few simple words that defined Israel's purpose: "Every Jew has the right to immigrate to this country…"***
>
> *Two thousand years of wandering were officially over. Since the, Jews have been entitled to simply show up and declare themselves to be Israeli citizens, assuming they posed no imminent danger to public health, state security, or the Jewish people as a whole. Essentially, all Jews everywhere are Israeli citizens by right.*
>
> *In 1955, the law was amended slightly to specify that dangerous criminals could also be denied that right.*
>
> *In 1970, Israel took another historic step by granting automatic citizenship not only to Jews, but also to their non-Jewish children, grandchildren, and spouses, and to the non-Jewish spouses of their children and grandchildren. This addition not only ensured that families would not be broken apart, but also promised a safe haven in Israel for non-Jews subject to persecution because of their Jewish roots.*
>
> ***The Law of Return, 5710-1950***
>
> *1. Every Jew has the right to this country as an Oleh.*
>
> *2.*
>
> *a. Aliyah shall be by Oleh's visa.*
>
> *b. An Oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel, unless the Minister for Immigration is satisfied that the applicant --*
>
> *1. is engaged in an activity directed against the Jewish people; or*

2. is likely to endanger public health or the security of the State.

3."

(Court Book pp.479-480)

47. The relevant words which appear in the Law of Return are as follows:

> *"An Oleh's visa shall be granted to every Jew* ***who has expressed his desire to settle in Israel****…" (emphasis added)*

48. There is no issue raised by the parties that the First Applicant could be regarded as a person who the Minister would be satisfied is engaged in any activity directed against the Jewish people or is likely to endanger public health or the security of the State.

49. The Applicants submitted the following:

> "*23. In view of the wording of s36(3) when seen against the Article of the Law of Return (article 1 at CB 480) stating that the right is* ***premised*** *on the desire of the person to invoke the right and the refusal of the Israeli authorities to consider an application that is not a genuinely voluntary expression of desire to invoke the law it is clear that the right is not an existing right but at best a conditional or contingent right"*

50. In the present case it was submitted that the First Applicant and her daughter have expressed a lack of desire to migrate to Israel and that this has been communicated to the Israeli authorities. In their case, it was submitted the right cannot come into existence unless and until they change their minds and the Israeli authorities were satisfied that they were then expressing a genuine desire to settle in Israel.

51. It was submitted that, *"it is not correct to reason as the Tribunal did by implicitly requiring an Applicant to express a desire to settle in Israel which he or she does not possess (ie. what is a non-genuine desire which would on the country information lead to refusal…) and absent that expression of desire that she be taken not to have taken all possible steps to avail himself or herself of a right to enter and reside in that country."*

52. It was submitted that, "rather, the expression of desire is a condition of the right; absent that there is no right.".

53. The approach taken by the Tribunal, according to the Applicants' submissions, failed to recognise the separate and distinct nature of each of the elements of s.36(3) that need to be satisfied and conflates the taking of all possible steps with the issue 'right'.

54. Reference was made to the Tribunal's reasoning on this crucial issue which I regard as useful to set out in full as follows:

> *"As the Tribunal has put to the applicant, it is of the view that the independent information indicates that every Jew has a right to immigrate to Israel. This right is provided for under the Law of Return and is established in the first section of that law. As is clear from the country information set out above, the rights of a Jew under this law are also vested in a child and grandchild of a Jew and the spouse of a Jew. In the protection visa application, both the applicant and her daughter are described as Jews. The applicant has provided her own Birth Certificate and that of her father, Mr Mikhail Yurievich Svirin. Her father's birth certificate describes his mother, Tatiana Svirina, as a person of Jewish ethnicity. The Tribunal finds that the applicant qualifies under Israel's Law of Return as a person who has the right to go to Israel. The Tribunal considers that the applicant, who also describes herself as a Jew, would have little difficulty satisfying the Israel authorities that, at the very least, she is the granddaughter of a Jew, thus entitling her to the rights of an Oleh.*
>
> *The Tribunal finds that the applicant is therefore a person who has a right to enter Israel under Israeli law. Immigration under the Law of Return results in the receipt of full Israeli citizenship upon arrival in Israel as well as the receipt of benefits provided to new immigrants. As set out above, there are also appeal avenues open to those who wish to avail themselves of their rights under the Law of Return. The Tribunal finds that the applicant has a legally enforceable right to enter and reside in Israel. Once in Israel, she is automatically able to receive Israeli citizenship. In these circumstances, the Tribunal finds that there is no real chance that she would be returned to Russia by Israel. The Tribunal finds that the applicant's right to enter and reside in Israel is a presently existing right which arises as a consequence of her own status as a Jew and the granddaughter of a Jew and the operation of Israeli law. The applicant has not sought to*

argue that she is subject to any disqualification which might affect her exercise of this right (for example, because of conversion to another faith) nor is there any evidence to suggest that she is.

The applicant's submission of 10 May 2006 suggested that she had no right to go to and live in Israel without her daughter and that she must respect her daughter's wishes. The Tribunal sought clarification in this regard from the Israeli Embassy. The Israeli Embassy's advice indicated an ability to obtain an oleh visa in circumstances where the individual expressed a desire to settle in Israel. It did not support the applicant's contention that her own right was affected by her daughter's attitude to settlement in Israel. The adviser's submission of 30 June 2006 and the letter from the Israeli Aliya Centre provide greater clarity as to what in fact occurred when the applicant approached the Aliya Centre in Melbourne. They indicate that the applicant inquired about immigration to Israel for her family. The Aliya Centre indicated that, in those circumstances, it wished to interview other family members and the daughter in particular before proceeding with the case. It did not indicate that the applicant had no right to go and live in Israel without her daughter. It simply indicated that if mother and daughter were seeking to enter Israel both of them would be required to attend the Aliya Centre. The Tribunal finds that the applicant's daughter's attitude to immigration to Israel does not derogate from the right of the applicant herself to enter and reside in Israel.

In finding that the applicant has the requisite right to enter and reside in Israel, the Tribunal has also carefully considered the advice received from the Israeli Embassy on 16 June 2006 and the adviser's submissions in relation to that advice. The Tribunal finds that the applicant has a presently existing right to enter and reside in Israel. The Law of Return accords this right to every Jew. As set out above, the rights under the Law of Return are also applicable to the children and grandchildren of Jews. The Tribunal is satisfied that the applicant has a presently existing legally enforceable right under the Law of Return. All those who meet the requirement of being Jews or having a requisite relationship to a Jewish person have the right to go to Israel. This right is made explicit in the first section of the Law of Return and is also reflected in the commentary on the Law from the Jewish Agency for Israel set out above (Jewish Agency for Israel, The Law of Return). The Law of Return goes on to provide guidance as to how such a person can avail themselves of the right laid down in section 1. It states that Aliyah shall be by

Oleh's visa and that, subject to certain narrow exceptions, an Oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel. This is reflected in the advice from the Israeli Embassy.

Subsection 36(3) of the Act refers to a person who has "not taken all possible steps" to avail himself or herself of the relevant right. It is clear that a person may have a relevant right for the purposes of s.36(3), although they may need to take certain steps to avail themselves of that right. As set out above, Graham J held in NBLC; NBLB v MIMIA that a strict approach should be adopted to the construction of s.36(3). The Tribunal considers that the applicant has a right, as does every Jew under the Law of Return, to immigrate to Israel. As the Tribunal has put to the applicant, large numbers of Jews have migrated to Israel from the former Soviet Union, thus availing themselves of this broadly applicable right. In order to avail herself of such a right, the applicant must take the step of applying to settle in Israel, thus indicating a desire to do so. If she takes this step, the Israeli authorities might wish to confirm that she has the status which gives rise to the right to go to Israel under the Law of Return. Independent information that there is a procedure that involves an investigation by the Israeli Embassy in the applicant's country of origin. However, it is clear from the independent information that this process is not based upon a discretion but merely recognition of the status giving rise to the pre-existing right. The process simply seeks to clarify whether the application conforms with the Law of Return. It may be that the applicant does not wish to undertake these steps or does not consider these steps to be reasonable. However, the Tribunal is nevertheless satisfied that the applicant has a legally enforceable right under the Law of Return, that there are steps which it is possible for her to take to avail herself of that right and that she has failed to take those steps to avail herself of that right.

The Tribunal accepts the advice from the Israeli Embassy that it is not eh case that all Jews everywhere in the world are citizens of Israel. However, the question is no whether the applicant is at present a citizen of Israel but rather whether she has an existing legally enforceable right as a Jew to enter and reside in Israel. The Tribunal is satisfied that the applicant does have an existing legally enforceable right and has not taken steps available to her to avail herself of that right. Were she to avail herself of her right to enter and reside in Israel, she would automatically become an Israeli citizen on her arrival and thus be protected from refoulement to Russia."(sic) (Court Book pp.490-492)

55. It is noted the Tribunal then refers to the possibility of harm as a result of a terrorist act in Israel and then otherwise considers submissions made by the Applicants' adviser in relation to a "reasonable" principle, similar to that which applies in relation to internal relocation and that it should apply in relation to s.36(3).

56. Before considering the Applicants' submissions any further, it is again useful to set out in some detail the Tribunal's reference to relevant law and its finding arising out of that law as follows:

> *"It has been suggested by the applicant's adviser that a "reasonableness" principle, similar to that which applies in relation to internal relocation, should be applied in relation to s.36(3). However, the law in this regard is unambiguous. In NBLC v MIMIA; NBLB v MIMIA, the Full Federal Court dismissed the argument that 'possible steps' should be construed as 'reasonably available steps' or 'reasonably practicable steps' or reasonable possible steps' Graham J stated:*
>
> > *62 In dealing with this issue the primary judge said, in my view correctly, 'section 36(3) directs attention at taking steps to avail oneself or a right to enter and reside in a country. [It] is not directed to the consequences of entering and residing in a country'.*
> >
> > *63. The relevant right in respect of which a non-citizen must take all possible steps to avail himself is the bare right, if it exists, to enter and reside in a country, not a right to enter and reside comfortably in a country.*
> >
> > *64. I am disinclined to the view that 'all possible steps' should be construed as 'all steps reasonably practicable in the circumstances', 'all reasonably available steps' or 'all reasonably possible steps'. Indeed, I would conclude, given the object underlying the Act, that 'all possible steps' means what it says and should not, in the context, be read down in any way…*
> >
> > *66. If (say) a human variant of avian bird flu broke out in South Korea with the consequence that all possibilities of travelling to that country by sea or air were closed off one could well understand that inaction by a non-citizen in Australia may equate to having taken all possible steps to avail himself of a right to enter and reside and reside in that country, but that is not the case here. Here there was no evidence of any steps*

> *being taken by either of the Appellants to avail themselves of their respective rights to enter and reside in South Korea.*

Expressing his agreement with Graham J, Wilcox J made the following observations (at [2]):

> *The words 'all possible steps' in a s 36(3) of the Migration Act 1948 (Cth) ('the Act') ought to be interpreted as meaning exactly what they say. Especially having regard to the context in which s36(3) was enacted, as evidenced by the extrinsic materials, it is not possible to conclude that Parliament intended the words to require decision-makers to take into account the consequences to the person of entering or residing in the relevant third country, except as specifically provided in subss (4) and (5) of s 36. If the appellants' argument in relation to s 36(3) were correct, subss (4) and (5) would be otiose. Given that subs (4) commences with the word 'However', and subs (5) with 'Also', those subsections can hardly be regarded as insertions for more abundant caution.*

The Tribunal must in this case consider the application of s.36(4) and s.36(5) to the applicant's circumstances. While it may be that the applicant and applicant daughter have never been to Israel, that they have no connection with Israel other than ethnicity and that they do not speak or write Hebrew, the application of s.36(3) is not dependent on a finding by the Tribunal that it is 'reasonable' for the applicant and her family to move to Israel. Subsection 36(3) of the Act is qualified by s.36(4) and s.36(5) and it is these qualifications, not an additional 'reasonableness' qualification, that the Tribunal must consider. Submissions have referred to factors such as the applicant's husband's reluctance to live in Israel, the applicant's progression in Australia in terms of a future career and the applicant daughter's schooling in Australia. However, the Tribunal finds that such factors are not relevant to the question of whether the applicant has a right to enter and reside in Israel, and whether s.36(4) or s.36(5) is applicable in this case.

The Tribunal finds that the applicant has a right to enter and reside in Israel and has not taken all possible steps to avail herself of that right. Furthermore, the Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason in Israel, or of being returned from that country to a country where has a well-founded fear of being

persecuted. Accordingly, Australia does not owe protection obligations to the applicant: s.36 of the

As noted above, the applicant daughter lodged an application as a member of the applicant's family unit rather than as a person with her own substantive claims with respect to the Russian Federation. However, to the extent that it might be relevant, the Tribunal finds that the applicant's daughter's position in relation to Israel mirrors that of her mother."

(Court Book pp.496-497)

57. It was submitted on behalf of the Applicant that when the Tribunal stated that "in order to avail herself of such a right, the applicant must take the step of applying to settle in Israel, thus indicating a desire to do so" it had overlooked the fact the existence of the right is predicated upon the genuine willingness of the First Applicant to migrate to Israel and that the right does not come into existence until the Israeli authorities are satisfied of this requirement.

58. It was argued that in the present case given the expressed unwillingness of the First Applicant and her family to settle in Israel, a right to enter and reside in Israel never came into existence so cannot be described as one in relation to which she failed to take all possible steps to avail herself. The process, it was submitted, "is not simply an administrative or mechanistic one, as the Tribunal would have it, involving the taking of certain steps leading to approval."

59. During the course of submissions reliance was placed upon the decision of the High Court in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 668 (*NAGV*). Although it was conceded that that decision dealt with s.36(2) and predated the introduction of s.36(3) it was argued that the views expressed by the High Court in that decision are relevant to the extent that it may lead to a conclusion that the Law of Return cannot "sensibly operate to relieve contracting states of protection obligations towards Jewish people as in the case of Australia's obligations under s36(2)." It was argued then "if by analogy a right to enter and reside requires for its existence an expression of implicitly a genuine desire to settle in Israel which is not present then no right has come into existence." It was argued the judgments in *NAGV* provide intellectual

support for the Applicant's position and negate the proposition that not to adopt the Tribunal's approach is to somehow subvert the purposes of both the Migration Act and the Convention.

60. Thought not dealing with s.36(3) reference was made, however, to the joint judgment of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ in *NAGV* who stated the following:

> *"30. Acceptance of the Minister's submissions respecting the significance of the access of the appellants to Israel would have significant and curious consequences for the operation of the Convention, given the events in Europe which preceded its adoption. In NAEN v Minister for Immigration and Multicultural and Indigenous Affairs[34], Sackville J referred to the enactment by Israel of the Law of Return in 1950, before the adoption of the Convention in 1951; his Honour said it would be "an exquisite irony" if from the very commencement of the Convention it had not obliged Contracting States to afford protection to Jewish refugees because they might have gone to Israel instead."*

61. It was noted that Kirby J who was in agreement with the orders of the majority stated in *NAGV* the following:

> *"96. In part, the Convention sought to repair, and prevent recurrences of, the injustices suffered by Jewish refugees during that time. Notoriously, many of them were shipped from pillar to post, searching often fruitlessly for a place of refuge[117]. The Law of Return in Israel is, itself, also in part a response to that historical period[118]. It would be astonishing if the Law of Return could now be used to force a person to migrate to Israel. Article 2(b) of the Law of Return states that an "oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel" (emphasis added). Given that the Law of Return aimed to facilitate the provision of a place for Jews to "finally have a place to be free from persecution"[119], it would be surprising if it now had the effect that all Jews fleeing persecution anywhere were obliged to go there, even if doing so was contrary to their "desire"[120].*
>
> …
>
> *98. It would require the clearest language of the Convention to have such a discriminatory operation. Far from being clear, the Convention, in its terms, does not withdraw its*

> *protection from applicants, otherwise "refugees", who happen to be of Jewish religion or ethnicity or any other religion or ethnicity that might somewhere fall within some other country's unilateral enactment of return rights. Jews, however defined, are protected by the Convention like everyone else. The enactment of the Law of Return by the State of Israel does not deprive them of that protection which derives from the international law expressed in the Convention. As far as I am concerned, any ambiguity that might exist in the Convention (or the Act) must be construed to prevent such an unjust operation."*

62. Those references by the High Court, it was submitted, give a strong indication of how the Court may interpret s.36(3) as it applies to Jewish refugees in the context of the terms of the Law of Return.

63. It was submitted that "the right of a Jewish person to an immigrant visa to Israel, which is clearly contingent upon expressing a desire to settle in Israel, is **not** an existing legally enforceable right (unless that contingency or condition is met)."

64. Accordingly, it was argued the Tribunal's decision contains a misinterpretation of the law and a fundamental jurisdictional error.

65. During the course of submissions reference was made to the Tribunal decision where it made a request of the Israeli Embassy in Canberra on 19 May 2006 seeking information. The letter and response are relevantly set out in the Tribunal's decision as follows:

> *"On 19 May 2006, the Tribunal put the following request to the Israeli Embassy in Canberra:*
>
> > *A member of the Tribunal is urgently seeking information on the operation of the Law of Return in relation to a person (Person A) and that person's seventeen-year-old daughter. Both describe themselves as Jewish. The grandmother of Person A is described as Jewish in the birth certificate of Person A's father. The Tribunal is investigating whether Person A and/or Person A's daughter have the right to enter and reside in Israel under the Law of Return.*
> >
> > *The RRT would be grateful if you would respond in writing to the following questions.*

1. *Is the willingness of Person A's daughter to relocate to Israel a matter that would be investigated by the Israeli authorities if the family sought to obtain entry to Israel under the Law of Return?*

2. *If Person A's daughter indicated an unwillingness to go to Israel, would this affect Person A's right under Israeli law to enter and reside in Israel?*

The Tribunal received a response from the Israeli Embassy on 16 June 2006 which provided information approved by their legal department. The information was as follows:

> *In accordance with article 2B to Israel's law of return (1950) and immigrant visa (oleh) shall be granted to every Jew who has express his desire to settle in Israel. There are a number of exceptions to that rule whereby such a request may be rejected.*
>
> *Thus, in accordance with this law, an individual is only entitled to this visa upon expressing a desire to settle in Israel. An individual has not made such an expression is therefore not entitled to receive the visa. Furthermore, only after arriving in Israel with the abovementioned visa, would the individual be able to become an Israeli citizen.*
>
> *It is certainly not the case that all Jews, everywhere in the world, are the citizens of the State of Israel.*

On 16 June 2006, the Tribunal forwarded this information to the applicant. It put to the applicant that the Tribunal was one of the view that this response did not support her claim that her own right to enter and reside in Israel would be affected by her daughter's attitude to relocation to Israel. It put to her that, according to Israeli law, it appeared that she and her daughter had the right to enter and reside in Israel. It expressed doubt that they had taken all possible steps to avail themselves of a right to enter and reside in Israel in accordance with Australian law. The Tribunal put to the applicant that her daughter's personal unwillingness to go to Israel did not necessarily mean that s.36(3) of the Act did not apply. The Tribunal also put to the applicant independent information about terrorism in Israel.

The applicant's adviser responded by letter dated 30 June 2006. The adviser's submission emphasised that the right to enter and reside must be an existing legally enforceable right. It referred to SZKFD v MIMIA [2006] FMCA 49 where Smith FM

distinguished between an existing legally enforceable right and 'some lesser expectation of a discretionary permission to enter for residence'. It was submitted that the advice from the Israeli Embassy made it clear that the entitlement to an immigrant visa (oleh) was contingent upon the individual expressing a desire to settle in Israel. Both the applicant and applicant daughter, so it was submitted, were disqualified from the visa because they did not meet this contingency. Reference was made to previous reasons given by the applicant and applicant daughter for not wanting to settle in Israel.

According to the submission, the applicant attended the Israel Aliyah Centre in South Caulfield in May or June 0f 2005. She inquired about the requirements for immigration to Israel for her family and wa told that, in order for her family's case to be considered, the Aliyah Centre would need to interview her daughter. The submission reiterated that the applicants did not want to settle in Israel and stated that the applicant was concerned in particular about exposing her daughter to military service. The applicant's husband was also adamant that he would not move to Israel. The applicant would not consider moving to Israel without her daughter and husband." (sic)

(Court Book pp.477-478)

66. During the course of submissions, after an exchange between Counsel and the Court, Counsel agreed that as a matter of logic if the First Respondent's contentions are correct in relation to the application s.36(3) then all Jews who are seeking asylum status or seeking to be refugees would be met with the argument concerning Israel's Law of Return. It would mean that regardless of the country from which asylum has been sought, Jews would be required to return to Israel, or at least would be met with the argument that s.36(3) applies.

67. When referring to the Tribunal's statement of "in order to avail herself of such a right the applicant must take the steps of applying to settle in Israel, thus indicating a desire to do so" it was argued that to use a colloquial expression that "put the cart before the horse". It was submitted it is necessary to establish the nature and existence of the right and whether it is a presently existing right. It was submitted that for the right to arise it is conditional upon the expression of desire and essentially it is a right to enter by virtue of a visa. The taking of "all possible steps" it was argued arises after the expression of interest.

The expression of interest as I understood the submission could not be regarded as one of the steps contemplated pursuant to s.36(3) of the Migration Act.

68. It was argued that the real mischief to be avoided by the introduction of s.36(3) was to overcome dealing with the question of taking all possible steps. This would apply to people who may have resided in another country and had a right to re-enter but simply decided to select another country, namely Australia. That right of re-entry is to be distinguished from the Law of Return, which refers of course to an ancient right of Jewish people to return to Israel.

69. As I understood it Counsel conceded there is no authority directly on point in relation to the taking of all possible steps contemplated by s.36(3) save for the extracts from the decision of the High Court in *NAGV* which it was conceded applied to s.36(2) of the Migration Act.

70. It was argued that the right under consideration in relation to the Law of Return has to be an existing legally enforceable right (see *SZFKD & Anor v Minister for Immigration & Anor* [2006] FMCA 49).

71. Reference was made to *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 and, in particular, the following paragraphs:

> *"57. I do not regard the primary judge's interpretation as inconsistent with the meaning of the phrase advanced by Allsop J in V856/00A (see [49] above). Allsop J relied on the phrase "however that right arose or is expressed" to expand the meaning from what his Honour describes as "right in the strict sense, having the Hohfeldian `jural correlative' of duty" to include "the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement" and not imposing "any particular duty upon the state in question". Allsop J also referred to the primary judge's view that, properly construed, s 36(3) is "consonant with Article 1E of the Convention". In relation to this view, Allsop J commented that (at 419 [31]):*
>
> > *"A right under Article 1E is one (arising from the possession of nationality) that is embedded in the law of the country, with correlative obligations on the state in*

question. In my view, the text of subs 36(3) is more relevant and tends to the contrary."

58. To the extent that Allsop J suggests that the primary judge took a strict, Hohfeldian, view of "right" when the latter stated that "A literal construction of the word `right' in a statute must ... be that it is a legally enforceable right", I do not agree. A right may be "enforceable" even though it can be revoked without notice and even without reasons. For example, the Minister has extensive powers, listed in s 116 of the Act, to cancel visas. While that visa is extant, however, the non-citizen has, in my opinion, an enforceable right, namely the right not to be prevented from entering Australia. The non-citizen would be entitled to enforce his or her right of entry against, for example, an officious immigration officer who purported to deny entry despite the non-citizen having a valid visa for entry.

…

63. In Kola, Mansfield J expressed the opinion that s 36(3) does not purport to change the existing operation of s 36(2) of the Act. His Honour was of the opinion that the doctrine of effective protection is compatible with the effect of s 36(3) as explained above. As his Honour stated (at [37]):

> *"It has been held in many decisions of the Court that, for the purposes of s 36(2) of the Act, Australia does not have protection obligations to an applicant for a protection visa if that person has `effective protection' in an intermediate third country. That is because Australia would not be in breach of its obligations under Art 33 of the Convention by refouling the visa applicant to that intermediate third country. That conclusion as to the continued operation of s 36(2) of the Act as it has previously been interpreted, notwithstanding the introduction of s 36(3)-(5) of the Act, is consistent with the recent decision of Finn J in S115/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 540."*

64. The circumstances in which one might be "satisfied" that effective protection is available in the absence of a right (in the sense in which I have explained at [23] above) would be rare but not impossible to imagine. For example, if the third country were to give an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, it might be possible to be so satisfied although

the person could not be said to have thereby acquired a right. With that possibility in mind, I agree with the position put by Mansfield J in Kola.

65. The combination of the amendments to s 36 and the doctrine of effective protection leads to this position. Australia does not owe protection obligations under the Convention to:

(a) a person who can, as a practical matter, obtain effective protection in a third country; or

(b) to a person who has not taken all possible steps to avail himself or herself of a legally enforceable right to enter and reside in a third country."

72. It was submitted that the right to enter Israel must mean a legally enforceable right to enter and reside.

73. As I understand the submissions from the Applicants, this is not a case where some technical interpretation of the law is required by the Tribunal of a kind which may simply have resulted in an error of fact.

74. During the course of submissions it was emphasised that the right in the present case does not come into existence until the Israeli authorities are satisfied that the requirements set under the Law of Return have been met. Accordingly, it was submitted one does not look at taking all possible steps until one is satisfied about the right and the existence of previously legally enforceable right for the purpose of s.36(3) of the Migration Act. It was argued that based upon what was before the Tribunal it is clear that Israel would only want people who seek to return and genuinely wish to settle as Jews in Israel. It would not be interested in people who are disingenuous or who pretended to have a desire to return to Israel rather than having a genuine wish to do so.

First Respondent's submissions

75. The First Respondent submitted that s.36(2) provides that a criterion for the grant of a protection visa is that the Applicant is a non-citizen in Australia to whom the First Respondent is satisfied Australia has protection obligations under the Refugee's Convention. It was submitted that s.36(3) relevantly provides that Australia "is taken not to

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

76. It was argued that where it applies in relation to a person, s.36(3) of the Migration Act operates as an "automatic disqualification" of that person from being granted a protection visa. Reference was made to *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 60 (*NBGM*) at [10].

77. It was also noted that the effect of s.36(3) was considered in *NBGM* in the following manner:

> *"In cases where a Convention obligatio might otherwise exist, the operation of s 36(3) is such that Australia is, in effect, deemed not to have protection obligations."*([11] per Black CJ)
>
> *"The criterion of Australian having 'protection obligations' to the applicant, which is established by s 36(2), is statutorily negated in the circumstances in which s 36(3) applies. When that statutory negation takes effect, it is only undone by the operation of either s 36(4) or s 36(5). That is, the applicant will only be able to make good the criterion in 36(2) by making out the exception in s 36(4) or (5)."* ([18] per Black CJ)
>
> *"Section 36(2) specifies a criterion for the grant of a protection visa and s 36(3) and its qualifiers then prescribe as a matter of domestic law certain circumstances in which that criterion will not be satisfied."* ([56] per Mansfield J)
>
> *"No doubt sub-s 36(3), as qualified by subs-ss 36(4) and (5), was intended to narrow the operation of the Convention by limiting the availability of protection in Australia by reference to rights that the applicant has in relation to other countries."* ([210] per Allsop J, with whom Marshall J agreed).

78. Reference was also made to the decision of the Federal Court in *WAGH v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 194 at [71] per Carr J who stated:

> *"In my opinion, for the purposes of this appeal, s 36(3) should be viewed as a clear expression of Parliament's intention to put limits on whatever obligations Australia might, having adopted*

the Convention, legislatively choose to accept as part of its municipal law."

79. It was argued that ss.36(4) and (5) "provide the mechanism by which Australia's international obligations under the Refugees Convention are to be met" (see *NBGM* at [57] per Black CJ).

80. In the present case the Tribunal accepted the right to enter and reside as a legally enforceable right which must be shown to exist by acceptable evidence. The Tribunal made express findings that the Applicant had a legally enforceable right to enter and reside in Israel and that the Applicant had not taken all possible steps to avail herself of that right to enter and reside. It was argued that the finding by the Tribunal that the Applicant had a right to enter and reside in Israel for the purpose of s.36(3). The finding was based on the Law of Return together with independent country information about the application of that Law. It was argued the Tribunal took into account though did not accept a submission by the Applicant that the right to enter and reside in Israel was "contingent" on the expression of desire to settle in Israel (Court Book p.478.5).

81. It was submitted that the question of whether the Applicant had an existing legally enforceable right to enter and reside in Israel within the meaning of s.36(3) was a question of fact for the Tribunal. Reference was made to the decision of Allsop J in *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018 (*V856/00A)* at [27] where the Court noted it was "unnecessary to explore the nature of the fact-finding involved in the ascertaining of such a right under foreign law as a general matter". It was submitted the construction and characterisation of the effect of the Law of Return was a question of fact. Generally a question of this kind is a question of fact. Reference was made to a decision of Manfield J in *Savic v Minister for Immigration & Multicultural Affairs* [2001] FCA 1787 where the Court relevantly stated:

> *"14 The first step in the applicant's contention is not in issue. It is that the content of foreign law is a question of fact about which evidence is receivable: see e.g. Bank of Valetta PLC v National Crime Authority [1999] FCA 791 at [72 - 73] per Hely J. In that case, Hely J agreed with the remarks of Powell J in Scruples Imports Pty Ltd v Crabtree & Evelyn*

Pty Ltd (1983) 1 IPR 315 at 325 as to the respective roles of the fact finder and of expert evidence in deciding, as a matter of fact, the content and meaning of foreign laws. Hely J in that case considered the terms of the relevant foreign legislation to decide as a fact what it meant where expert evidence on that topic was conflicting. Powell J said:

> *'... the task of identifying what is the relevant law and of expounding what, in general terms, is its meaning and effect, is, primarily, the task of the expert witness: ... if, in a case in which the relevant law is reduced to writing, which writing becomes part of the evidence, the expert witness fails to demonstrate how the law has been interpreted and applied, or essays an exposition which provides no assistance as to its interpretation (see, for example, Williams v Usher (1955) 94 CLR 450 at 453-4 or which produces results which might be regarded as bizarre, the court is free to interpret the law for itself according to the rules of statutory construction normally applied in this court: ... when expert witnesses have given conflicting views on the question, the court must resolve the question for itself, if need be by undertaking a like exercise.'"*

82. In the present case it was submitted that the construction and effect of the Law of Return does not directly arise for consideration by the Court in these proceedings. Any alleged error by the Tribunal in the construction or characterisation of the Law of Return would not constitute an error of law.

83. Reference was made to the decision of the Full Court of the Federal Court in *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 where the Court states at [20] the following:

> *"20 … if there is sufficient evidence or other information before the Tribunal on which it could reach the conclusion it did then it is for the Tribunal to determine what weight it gives to that evidence. Indeed, unless the relevant fact can be identified as a `jurisdictional fact', there is no error of law, let alone a jurisdictional error, in the Tribunal making a wrong finding of fact: Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 35-36. It is for the Tribunal to determine the merit of the claim. The line between merit review and jurisdictional error may not be a `bright line',*

> *but it is nevertheless an essential one: Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272."*

84. It was submitted that the Applicants' contentions of the right to enter and reside in Israel is not existent unless the Applicants express a desire to settle in Israel essentially addresses a question of fact which was one for the determination of the Tribunal and not the Court.

85. Reference was made to the Law of Return set out earlier in this judgment, and it was argued that the right conferred under that Law is capable of being described as an existing right to enter and reside, even if entry and residence is contingent on unilateral action taken by the holder of the right.

86. Emphasis was placed upon the words in s.36(3) which provide for the right to enter and reside "howsoever that right arose or is expressed".

87. Reference was made to the decision of Allsop J in *V856/00A* where the Court stated that the "right" referred to in s.36(3) is intended to be "a wide conception" and "the source and incidents of the right can be diverse" (see [31]). Particular reference was made to the decision of Allsop J in *V856/00A* where it was claimed the Court found that an "inchoate" right may be sufficient to attract s.36(3). Allsop J stated:

> *"… A practical capacity to bring about a lawful permission is in no sense a "right" to do what the permission allows to be done. It might be otherwise if it could be shown that a statute or piece of positive law of the country in question granted a permission on satisfaction of certain preconditions. It may be that in those circumstances, perhaps by reference to, and with the benefit of an understanding of, that country's system of law, the person had a right, albeit inchoate…"*

88. It was argued that the matters raised are questions of fact for the Tribunal.

89. It was further argued that in any event *"the expression of a desire to settle, in the form of making an application to settle in Israel, is a 'possible step' which the applicant can take to avail herself of the right to enter and reside in Israel under the Law of Return."* It was argued that it was not open to the Applicant to "side step the application of

s.36(3) by refusing to take available steps to enable her to enter and reside in Israel".

90. It was argued that the country information before the Tribunal indicated that subject to proof of identity and Jewish background, an application to immigrate under the Law of Return would only be refused where the Applicant fell into one of the disqualifying categories listed in s.2(b) of the Law of Return.

91. The reference to "all possible steps" in s.36(3) it was submitted should not be read down and, in particular, does not mean all reasonably possible or reasonably available steps (see *NBLC; NBLB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 272 (*NBLC*) at [61]-[65] nor is it relevant to consider the consequences to the Applicant of moving to Israel except as specifically provided by sub-s.36(4) and (5) see *NBLC* at [2] per Wilcox J.

92. It was argued that the High Court decision in *NAGV* is of no assistance to the resolution of the questions presented in this case as the Court in that instance was concerned with the construction of s.36(2) and the meaning of "protection obligations under the Refugees Convention".

93. It was noted, however that the Court in that instance acknowledged it was open to the Parliament to enact specific provisions which qualified the operation of the Convention for the purpose of the domestic law in Australia. Reference was made to the decision of the Court where Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ stated the following:

> *"It would have been open to the Parliament to deal with the question of "asylum shopping" by explicit provisions qualifying what otherwise was the operation for statutory purposes of the Convention definition in Art 1. As indicated earlier in these reasons, such a step may have been taken with the changes to s 36 made by the 1999 Act…"*

94. Reliance was also placed upon a decision of Kirby J, where His Honour relevantly stated in *NAGV* the following:

> *"Although the foregoing and other later amendments[106] to the Act do not control the interpretation of s 36(2) in the present case, they do demonstrate that legislative techniques are available*

which might have been used by the Parliament to limit the scope of the "protection obligations" owed by Australia…"

95. It was argued that as the present case is concerned with the construction and application of s.36(3) of the Migration Act, it is a matter of Australian Domestic Law. The questions raised by s.36(3) have no implications it was argued for the operation of the Refugee Convention as a matter of international law. Sections 36(4) and (5), having regard to the earlier authorities, simply provide a mechanism by which the Parliament has chosen to meet the international obligations under the Refugees Convention.

Reasoning

96. In my view the First Respondent's submissions in relation to the issue before the Court are misconceived.

97. I do not accept that the opportunity to express a desire to live and reside in Israel can be regarded as a possible step to be taken, having formed a genuine desire to in fact live and reside in Israel.

98. I accept the submissions made for and on behalf of the Applicants that where a person such as the First Applicant, a Jew, seeks asylum from Russia clearly expresses a desire not live and reside in Israel then the process which may permit that person to avail herself of the Law of Return has not been enlivened. It is clearly not enlivened save for those persons who generally express a desire to settle in Israel. Although s.2(b) of the Law of Return does not import the word "genuine" it is clear that expressing a desire to settle in Israel would need to be a genuine desire before triggering the benefits which clearly flow to Jews around the world of an opportunity to return to Israel.

99. In the present case, I am satisfied that s.36(3) does not apply. The absence of an expression of a desire to settle in Israel in my view means that the Tribunal erred when it then drew the significant conclusion that in this instance the First Applicant had a right to enter and reside in Israel and had not taken all possible steps to avail herself of that right. One can only avail oneself of a right to enter and reside in Israel if one initially reaches a conclusion, that one wishes to express a desire to settle in Israel.

100. In the present case not only was there an absence of an expression of a desire to settle in Israel, but rather for reasons which are apparent from the history set out in detail earlier in this Judgment, a clear positive assertion on the part of the First Applicant that she did not desire to settle in Israel. Having expressed the desire not to settle in Israel and that evidence, not having been challenged by any evidence before the Tribunal, it is my concluded view that the Tribunal has erred by then imposing upon the First Applicant an interpretation of s.36(3) which would otherwise seek to impose an automatic obligation upon all Jews to express a desire to live in Israel.

101. I accept, as submitted by the Applicants, that there is an implicit requirement that the First Applicant should express a desire to settle in Israel whether or not she possesses that desire.

102. I further accept that the proper interpretation of s.36(3), when considered in the light of the Article of the Law of Return, deals with a right which is premised on the desire of the person to invoke the Law of Return. In the absence of a genuine voluntarily expression of a desire to invoke that law, I accept that the right cannot be regarded as an existing right but rather a conditional or contingent right as submitted by the Applicants.

103. I take some comfort at expressing this conclusion from the decision of the Court in *NAGV*. In the present case adopting the words of the majority in that case it would seem that if the First Respondent's submissions are correct that Australia can avoid affording protection to Jewish refugees simply because they might be able to express a desire to settle in Israel instead.

104. I do not regard sub-ss.36(4) and (5) as providing a complete mechanism by which Parliament has chosen to meet its international obligations under the Refugees Convention. Those subsections relate to very narrow circumstances whereby an Applicant, having been required to express a desire to settle in Israel could otherwise be excluded from the impact of s.36(3) as a result of establishing a well founded fear of persecution in Israel. Those provisions provide a very narrow opportunity to avoid the consequence of s.36(3) and do not in any way, in my view, detract from the fundamental right to seek asylum

by a Jew fleeing another country who for good reason has chosen not to express a desire to settle in Israel.

105. Simply because an asylum seeker is a Jew does not mean that he or she is bound to express a desire to settle in Israel.

106. I cannot see in any of the authorities referred to by Counsel any legal obligation to do so, as in my view if that were the legal requirement of s.36(3), then all Jews would automatically be precluded from seeking asylum in Australia and would be obliged to express a desire to settle in Israel to the extent that the Tribunal has inferred that the expression of a desire to settle in Israel is one step which could properly form part of "all possible steps" required by s.36(3) and in my view that is sufficient to constitute an error of law.

107. It is not simply an error of fact in interpreting foreign law but rather an error of law in interpreting the application of s.36(3) and an error in the manner in which the Tribunal has interpreted the expression of a desire to settle in Israel as being one of a number of "possible steps" which the First Applicant should have taken in availing herself of a right to enter and reside in Israel.

108. It follows for the reasons given that in my view that the decision of the Tribunal should be set aside and the matter remitted to a differently constituted Tribunal.

I certify that the preceding one hundred and eight (108) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 29 May 2007