FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMWQ v MINISTER FOR IMMIGRATION & ANOR [2009] FMCA 1197

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – s.36(3) of the *Migration Act 1958* read with s.36(4) and (5) is the statutory embodiment, with some alteration, of the concept of effective protection – s.36(3) is not concerned with a person's standard of living or length of residence in the third country where effective protection is available.

WORDS AND PHRASES – Meaning of "reside" where used in s.36(3) of the *Migration Act 1958*.

Migration Act 1958, ss.36, 425, 430, 474

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Minister for Immigration & Multicultural Affairs v Applicant C (2001) 116 FCR 154
SZLAN v Minister for Immigration & Citizenship (2008) 171 FCR 145
WAGH v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 131 FCR 269
Re Chief Commissioner of State Revenue and Ferrington (2004) 57 ATR 170
R v Jackson (2005) 93 SASR 373
Minister for Immigration & Multicultural & Indigenous Affairs v Thiyagarajah (1997) 80 FCR 543
NBLC v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 149 FCR 151
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 228 CLR 152

Applicant:	SZMWQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1708 of 2009
Judgment of:	Cameron FM

Hearing date:	2 November 2009
Date of Last Submission:	2 November 2009
Delivered at:	Sydney
Delivered on:	8 December 2009

REPRESENTATION

Counsel for the Applicant:	Ms R. Francois with Ms A. Rao
Solicitors for the Applicant:	Legal Aid Commission of New South Wales
Counsel for the First Respondent:	Mr G. Kennett
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1708 of 2009

SZMWQ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(As Corrected)

Introduction

1. The applicant is a citizen of the Czech Republic where, he claims, he and his family were physically and verbally abused because of their Roma ethnicity. He further claims that whilst he has a right to enter and reside in other European Union ("EU") member states, he fears persecution due to widespread discrimination and violence against Roma in Europe.

2. After his arrival in Australia on 5 February 2008, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on 23 May 2008. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental

decision. The applicant was unsuccessful before the Tribunal and applied to this Court for judicial review of the Tribunal's decision.

3. The Tribunal decision the subject of these proceedings is the second such decision relating to the applicant. There was a previous Tribunal decision signed on 10 September 2008 which was quashed by this Court on 6 March 2009.

4. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 5 – 18 of the Tribunal's decision (Court Book ("CB") pages 552 – 565). Relevant factual allegations are summarised below.

Primary Application

7. In his visa application, the applicant made the following claims:

   a) he was born on 28 September 1989 in the Czech Republic and is ethnically a Roma;

   b) he had been verbally and physically abused from the age of six by the public as well as by students and teachers. This mistreatment continued for nine years, causing him stress and depression;

   c) on one occasion, "skinheads" broke all the windows of his home, used abusive anti-Roma terms and threatened to burn him and his family. His father took the family down to the basement and, when they emerged, threatening graffiti had been written on the house;

d) skinheads murdered an uncle in 1997 and his great-great grandparents and others were killed in concentration camps;

e) he left Europe on 31 August 2004 on a Czech passport and lived in New Zealand from September 2004 to February 2008;

f) he travelled to New Zealand to seek recognition as a refugee and applied for refugee status there; and

g) he was unmarried at the time of his Australian protection visa application but married an Australian citizen on 3 August 2008.

Review application

8. On 4 August 2008 the applicant appeared before the Tribunal as first constituted and gave the following additional evidence:

a) his parents were granted protection in New Zealand two or three months after he arrived in Australia. He was excluded from his parents' visa applications because he had come to Australia;

b) the lawyer for his parents contacted him and told him that his parents would not be granted protection visas if he returned to New Zealand. He further stated that the explanation for this was that he had committed driving offences whilst he was on his learners permit;

c) when at school in the Czech Republic his classmates threatened him, he was verbally and physically abused (presumably by other students) and teachers joined in the abuse. On one occasion he was bashed;

d) skinheads constantly persecuted him and his family;

e) he feared that he would be persecuted or killed if he returned to the Czech Republic because his grandfather had been a successful businessman and some people want to destroy Roma who do well;

f) in New Zealand he applied for a student visa but was refused. The decision was appealed twice but without success;

g) his Australian wife is of Czech Roma background. Her parents were given refugee status in Australia;

h) there is nowhere for him to go in Europe as Roma people experience problems throughout Europe; and

i) his wife is in Australia and he wishes to establish a family in Australia.

9. At the hearing the applicant's grandfather and mother-in-law gave evidence which was generally supportive of his case.

10. Following this Court's remittal of the matter, the Tribunal as secondly constituted received a pre-hearing submission from the applicant on 24 April 2009. The submission contained the following information:

a) the applicant's parents and sister were granted refugee status in New Zealand;

b) although a citizen of an EU member state may reside in another EU state, generally the right to stay beyond three months depends on employment and financial capacity. Moreover, because of limited access to social security payments the applicant would not have "equal rights of residence";

c) he fears being unable to work anywhere in Europe due to his Roma ethnicity, his age, his limited skills and his inability to speak any European languages other than Czech;

d) his grandfather and his mother were denied work in the Czech Republic and Poland because they were Roma; and

e) if he returned to Europe, his Australian wife would join him and discrimination would cause them to face unemployment and homelessness.

11. At the Tribunal hearing which took place over two days on 1 May 2009 and 27 May 2009, the applicant made the following additional claims:

a) he left the Czech Republic with his parents and elder sister in 2004;

b) his family applied for refugee status on arrival in New Zealand and he was included in the application. He initially had a student visa and attended college for about five months. He subsequently obtained casual employment;

c) his parents and sister received refugee status in New Zealand some weeks or months after he left for Australia;

d) on arrival in Australia, the applicant was unable to find employment. He assisted his father-in-law as a courier for around four months and his mother-in-law covered his expenses;

e) he had not taken any steps to avail himself of his right to enter and reside in other EU member states;

f) he did not intend to renew his Czech passport when it expired on 30 June 2009;

g) he feared persecution throughout Europe and said he was sure that if he went to any EU country he would be refused work on the basis of his Czech passport and Roma ethnicity;

h) if he did avail himself of the right to enter and reside in Spain (an EU state which, the Tribunal suggested in discussion at the hearing, did not limit EU nationals' stays to three months' duration), his poor prospects of obtaining unemployment, combined with minimal access to basic social or health support, could amount to significant economic hardship and hence persecution. This hardship would be exacerbated if his wife joined him; and

i) the applicant might be at risk of *refoulement* from Spain to the Czech Republic if he failed to find work and accommodation and found himself in "trouble" in Spain.

12. Following the first of the two hearing sessions, the Tribunal received a submission containing the following additional information:

a) if the applicant were to return to the Czech Republic, he would be returning to a life with few relatives, even taking into account his

father's side of the family as they were upset that his father had married a Roma woman;

b) because the applicant had overstayed his New Zealand visa he would not be permitted to board a flight to that country;

c) he had never had a Czech identity card and as he wished to sever links with his country of nationality he did not intend to renew his passport; and

d) he might be at risk of persecution as a Roma and as a member of a particular social group being "unemployed Roma non-citizens" in Spain. He would also be at risk of facing such economic hardship and denial of access to basic services that his capacity to subsist would be threatened.

13. Attached to the submission were the documents from New Zealand relating to the applicant and his family and their residency application.

The Tribunal's decision and reasons

14. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention").

15. Because the applicant was considered an EU national with certain rights in other EU member states, including residency rights, the Tribunal concluded that s.36(3) of the Act applied to him and consequently it did not need to determine whether he faced a real chance of persecution in the Czech Republic. The Tribunal concluded that the issue for determination was whether the applicant had access to effective protection in a third state.

16. Section 36 of the Act relevantly provides:

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

(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) …

Protection obligations

(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.

(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.

17. The Tribunal concluded that, because of his status as an EU citizen, the applicant has a right to enter and reside in Spain but had not taken all possible steps to avail himself of that right. The Tribunal found that this right to enter and reside in Spain was not removed or negated merely because of:

a) the applicant's offences in New Zealand;

b) the fact that the applicant had never visited Spain and was not familiar with its language or culture; or

c) the fact that the rights afforded to non-citizens in Spain are not the same as those given to Spanish citizens.

18. The Tribunal also found that:

a) the practical problems which the applicant might confront in Spain were not so extreme as to negate the existence of the right to enter and reside in Spain;

b) the possibility that a "durable solution" of assimilation and naturalization would be illusory was of no significance because s.36(3) does not require that a person have permanent rights of residency in the third country; and

c) the then-imminent expiry of the applicant's passport did not affect his then-current right to enter and reside in Spain. Moreover, he could apply for a new passport. The applicant's reasons for not seeking a new passport were not relevant to the operation of s.36(3).

19. The Tribunal found that there is no real chance of the applicant experiencing harm in Spain amounting to Convention-related persecution whether on the grounds of his ethnicity, his nationality or as a member of a particular social group, namely, "unemployed Roma non-citizens" because:

a) his circumstances differ markedly from other Roma or other non-citizens, in part because he is a EU passport holder, an arrival from an English speaking country and is not part of any established, visible community (that is, he did not share a common language or experiences with the Spanish Roma – many of whom live in defined communities and localities);

b) his knowledge of at least some spoken English would assist him in communicating with Spaniards and with members of Spain's large foreign community;

c) he is young, appeared physically fit, and has worked in areas such as painting, gardening, couriering and fixing motors;

d) country information showed that whilst there were individual instances of abuses against Roma in Spain – including physical violence by members of the security forces, private security agents and neo-Nazis gangs – these incidents were not widespread, nor did being Roma in itself establish a real chance of persecutory harm;

e) the Tribunal did not accept that the applicant would attract the interest of law enforcement officials, private security agents or gangs or that he would gravitate to any groups of people potentially vulnerable to such adverse attention;

f) country information showed that EU and Spanish authorities are conscious of the discrimination and violence experienced by Roma in Spain and the efforts that have been made to improve the situation of Roma in Spain constitute an adequate level of protection from Convention-related harm;

g) any possible unemployment in Spain would not be a result of the applicant's membership of any particular social group (such as "unemployed Roma non-citizens" or his nationality as a non-Spaniard) or arise out of the applicant's claimed learning disability. Any period of unemployment would be short-lived given the applicant's age and nature of his past work and it was satisfied of the availability of support groups and social networks that could ensure that the applicant does not suffer harm amounting to persecution; and

h) the presence of the applicant's wife in Spain "did not add to a real chance of the applicant experiencing Convention-related persecution".

20. The Tribunal found that there is no real chance that Spain will return the applicant to the Czech Republic (whether or not he has a well-founded fear of Convention-related persecution there) because:

a) country information indicated that there are very limited circumstances in which EU nationals can be expelled from Spain, examples being serious threats to public order, public health, and public safety;

b) taking into consideration the nature of the applicant's offences in New Zealand, his age when they occurred and his evidence to the Tribunal that he had committed no further offences in Australia, it was not satisfied that the applicant would conduct himself in such a way as to pose a risk, or be perceived to pose a risk, to Spain's public order, public health or public safety; and

c) expulsion of an EU national on economic grounds (such as high unemployment levels) was explicitly ruled out by both EU and Spanish law.

21. The Tribunal noted that country information indicated that the Spanish authorities would regard as "evidently groundless", and therefore refuse to process, any asylum application from the applicant. However, having found that the applicant has a right to enter and reside in Spain and that there is no real chance of this right being curtailed by expulsion, the Tribunal concluded the applicant did not need to apply for asylum in Spain in order to ensure that he would not subsequently be expelled.

22. The Tribunal summarised its conclusions as follows:

> *In sum, the Tribunal finds on the basis of the applicant's circumstances and the laws of the EU and Spain, that the applicant has a right to enter and reside in Spain and that he has not taken all possible steps to avail himself of that right (s.36(3)); that the applicant does not have a well-founded fear of persecution in Spain (s.36(4)); and that there is no real chance that Spain will return him to the Czech Republic (whether or not he has a well-founded fear of Convention-related persecution there) (s.36(5)).* (para.150)

Proceedings in this Court

23. The grounds of the application commencing these proceedings were pleaded as follows:

> *(1) The Refugee Review Tribunal fell into jurisdictional error as its decision involved an error of law.*
>
> *(2) The Refugee Review Tribunal fell into jurisdictional error by failing to take into account relevant considerations and taking into account irrelevant considerations.*

(3) The Refugee Review Tribunal fell into jurisdictional error by making findings that were not open on the evidence before it.

(4) The Refugee Review Tribunal fell into jurisdictional error by failing to accord the Applicant procedural fairness.

Error of law – s.36(3)

24. The applicant particularised his allegation that the Tribunal had erred in law as follows:

> *The Refugee Review Tribunal gave to the concept of* "a right to enter and reside in" *another country in subsection 36(3) Migration Act 1958 ("the Act") a meaning unavailable under the Act, namely that a person's right to* "reside" *in another country within the meaning of subsection 36(3) would only be* "negated" *in circumstances of* "extreme hardship" *(at [119]).*
>
> *The Refugee Review Tribunal ought to have held that the concept of a right to reside in subsection 36(3) of the Act included:*
>
> *(a) the right to participate in that Country's system of social security; and/or*
>
> *(b) as a matter of practical reality, the capacity to establish a residence in that country.*

25. At the outset it should be observed that the Tribunal did not express the view that a person's right to reside in another country within the meaning of s.36(3) would only be "negated" in circumstances of "extreme hardship". What it said was:

> *It might be theoretically possible that an applicant could face such extreme hardship that a right to reside is in effect negated. However, the Tribunal finds it unnecessary to consider this question further. It considers that the challenges the applicant might face in Spain are far removed from such a hypothetical case, and not such as to negate the existence of his right to reside in that country for the purposes of s.36(3).* (para.119)

Although the Tribunal did consider the difficulties which the applicant might confront were he to relocate to Spain, it did so in the context of s.36(4) and whether such circumstances might amount to Convention-related persecution. It did not consider these matters in the context of

s.36(3) and whether the applicant's right to reside in Spain might have been negated thereby.

26. The effect of s.36(3) is that if an applicant fails to demonstrate that he or she has taken all reasonable steps to exercise such legally enforceable entry and residency rights as he or she may have in another country, Australia is taken not to have protection obligations to that person: *Minister for Immigration & Multicultural Affairs v Applicant C* (2001) 116 FCR 154; *SZLAN v Minister for Immigration & Citizenship* (2008) 171 FCR 145 at 159 [58]. Given that the applicant had not sought to travel to and take up residence in Spain, s.36(3) required the Tribunal to determine whether such rights as the applicant had to go to Spain and remain there for a period amounted to a "right to enter and reside" there.

27. The applicant observed that "reside" and "residence" are not terms defined by the Act and that the full scope of what "reside" means in s.36(3) has not yet been judicially considered. He advanced a case that the right to "reside" referred to in s.36(3) encompasses incidental rights and/or the practical capacity necessary to establish a residence. This argument involved two elements. The first was that the meaning of "reside" or "residence" involved something akin to settling in a location. The second was that this right of residence was coupled with, and underpinned, by a right to receive the social security benefits enjoyed by the citizens of the third country.

28. As to the first of these elements, the applicant submitted that "reside" should be understood to import concepts of "abode" and "connection". He referred to *WAGH v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 269 where Hill J observed:

> *"Reside" in its usual dictionary sense means "to dwell permanently or for a considerable time; have one's abode for a time" (see* The Macquarie Dictionary *(3rd ed)). It would be an unusual, although not impossible, use of the word to refer to a tourist. A tourist may stay overnight, or for a time in a country, but that country would not be his or her place of abode, even temporarily.* (at 283-284 [65])

It was submitted that a residence could not be temporary but required something of a settled character: *Re Chief Commissioner of State*

Revenue and Ferrington (2004) 57 ATR 170 at 178 [30]; *R v Jackson* (2005) 93 SASR 373 at 378ff [12]ff.

29. The applicant further submitted that, in context, "reside" was ambiguous and that to better understand its proper meaning it was appropriate to refer to the supplementary explanatory memorandum to the *Border Protection Legislation Amendment Bill 1999*, which introduced ss.36(3)-(7) into the Act. Relevantly, paragraphs 3,4 and 5 of that memorandum state:

> *New subsection 36(3) is an interpretative provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.*
>
> *Proposed subsection 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted, or of being returned to another country in which he or she has a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular social group or political opinion (new subsections 36(4) and 36(5)).*
>
> *The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection.*

30. The applicant submitted that "protection", where referred to in the supplementary explanatory memorandum, assumed a particular level of protection and that "residence" must be considered in that context. His case was that a right to reside assumed the ability to acquire a residence which in turn implied a right to subsist. He submitted that a theoretical right to "reside" in another country, with no rights to access the welfare benefits available to citizens of that country and no consideration given to his capacity to establish a residence, is not what s.36(3) means by a right to reside in another country.

31. The applicant submitted that the legislative purpose of s.36(3) was that the third country it contemplates would offer an applicant the quality of protection offered by the Convention and that this would include

access to welfare. It was submitted that art.24(1)(b) of the Convention was relevant in this connection. Relevantly, it provides:

> *1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:*
>
> *(a) …*
>
> *(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:*
>
> *(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;*
>
> *(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.*

32. The embellishments on the meaning of "reside" which the applicant propounds are not supported by authority. The cases make it clear that the right of residence contemplated by s.36(3) is really no more than a right to remain in a third country, whether temporarily or permanently, free of the fear of persecution, but nothing more.

33. For instance, when considering what "reside" means, the passage from Hill J's judgment in *WAGH* which the applicant cited should not be considered in isolation. In *WAGH's case* each of the protection visa applicants held a visa issued by the United States of America permitting them to enter the United States "for the purposes of business and tourism" and to stay for a period of up to six months with a capacity to seek an extension of a further six months. The issue before the Full Court of the Federal Court was whether that visa gave a right to enter and reside in the United States in the sense contemplated by

s.36(3). Quoted in full, the paragraph of Hill J's judgment which contains the passage relied upon by the applicant states:

> *The fact that the residence of which the section speaks may be temporary is clear from the face of the section. Whether a visa to enter for tourist purposes is a visa which authorises both entry and (temporary) residence is a difficult question. "Reside" in its usual dictionary sense means "to dwell permanently or for a considerable time; have one's abode for a time" (see* The Macquarie Dictionary *(3rd ed)). It would be an unusual, although not impossible, use of the word to refer to a tourist. A tourist may stay overnight, or for a time in a country, but that country would not be his or her place of abode, even temporarily. The present is not a case where the appellant carried on any business, or indeed was employed by some other person in that person's business. If she were then it would be possible to argue that residence was necessary for business purposes.* (at 283-284 [65])

34. As Debelle J observed in *R v Jackson*, the concept of "residence" is capable of various shades of meaning and is neither a legal nor a technical term. In the statutory context, a place could be a person's residence even if the occupation was for only a short period of time, much depending on the statutory context and the intent and purpose of the legislation (at 380-381 [23]). In this case, the relevant statutory context is provided by s.36(3). It is concerned with the protection from persecution which the residence in a third country affords, not with the period of residence necessary to secure such protection as may be required. In this connection, it should not be forgotten that s.36(3) does not stand alone but is to be read with s.36(4) and s.36(5) as the statutory embodiment, with some alteration, of the concept of effective protection.

35. The doctrine of effective protection was considered in *Minister for Immigration & Multicultural & Indigenous Affairs v Thiyagarajah* (1997) 80 FCR 543:

> *It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is*

> *proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including a right to reside, enter and re-enter that country. The expression "effective protection" is used in the submissions of the Minister in the present appeal. In the context of the obligations arising under the Refugees Convention, the expression means protection which will effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee.* (at 562 per von Doussa J, Moore and Sackville JJ agreeing)

Article 33 of the Convention prevents a state which is party to the Convention from expelling or returning a refugee to the frontiers of territories where his or her life or freedom would be threatened for a Convention reason.

36. Referring to the principles applicable to such considerations prior to the introduction of subss.(3), (4) and (5) of s.36, Stone J said in *Applicant C's case* at 161 [21]:

> *The principle in* Thiyagarajah *is not restricted to cases where the protection available to the protection visa applicant arises from the grant of refugee status, but may also apply where he or she is entitled to permanent residence in the third country …*
>
> … *In* Patto v Minister for Immigration and Multicultural Affairs *(2000) 106 FCR 119 at 131 [37], French J summarised the position developed in these cases (noting that these propositions are not exhaustive):*
>
> > *"One can draw from these cases broad propositions in relation to the protection obligations assumed by Australia under Art 33 of the Convention in its application to persons who travel to Australia from the country in which they fear persecution by a third country in which they have stopped or stayed for a time:*
> >
> > *1. Return of the person to the third country will not contravene Art 33 where the person has a right of residence in that country and is not subject to Convention harms therein.*
> >
> > *2. Return of the person to the third country will not contravene Art 33, whether or not the person has right of residence in that country, if that country is a party to*

the Convention and can be expected to honour its obligations thereunder.

3. *Return of the person to a third country will not contravene Art 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."*

37. Her Honour further held that the subsequently enacted s.36(3) did not purport to change the existing operation of s.36(2) or the concept of "effective protection". In particular, her Honour held, Grey J agreeing:

> *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.* (at 172 [65])

38. As a result, and contrary to the applicant's submissions, where "protection" is referred to in the supplementary explanatory memorandum to the Bill which introduced subss.(3), (4) and (5) of s.36, it should not be understood to be referring to Convention protection but to "effective protection". Importantly, "effective protection" need not be protection pursuant to the Convention but need only be (effective) protection against threats to an applicant's life or freedom for a Convention reason. This means that rights to social security benefits or the like need not form part of the protection available in the third country. Put another way, the right of residence contemplated by s.36(3) is not concerned with an applicant's standard of living in a third country but with an applicant's ability, by remaining in a third country, to avoid the persecution which he or she fears: *NBLC v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 149 FCR 151 per Graham J at 165 [62]-[63].

39. The right to reside referred to in s.36(3) is therefore simply the right to reside in a third country where the applicant will not be subject to Convention-related persecution and from which he or she will not be *refouled* to the country in respect of which he or she has a well-founded fear of persecution for a Convention reason. It does not imply residence of a settled character or a particular standard of living, simply freedom from the fear of Convention-related persecution.

Failing to take into account relevant considerations/taking into account irrelevant considerations

40. The second allegation made in the application was particularised as follows:

> *(a) The Tribunal concluded that the challenges the Applicant would face in Spain were "far removed" from "extreme hardship" (at [119]) and thus improperly excluded further consideration of the application of subsection 36(3) of the Act.*
>
> *(b) In so far as the Tribunal may have based its conclusion in 2(a) on its factual findings in relation to whether the Applicant would face a real chance of persecution in Spain, the Tribunal took into account an irrelevant consideration being only whether any extreme hardship faced by the Applicant would be due to a Convention reason.*

41. The applicant's second allegation depended on the Court accepting his construction of the meaning of "reside" where that word is used in s.36(3) of the Act. Based on his submission that the residency right referred to in s.36(3) included the right to participate in the third country's system of social security and the capacity to establish a settled residence in that country, the applicant submitted that the Tribunal improperly excluded from its consideration the inability of the applicant to obtain welfare benefits in Spain and his capacity generally to establish a home. As the Court has not accepted the applicant's submissions on what "reside" means in s.36(3), the second ground of the application lacks the necessary foundation and thus discloses no jurisdictional error on the part of the Tribunal.

Findings not open on the evidence

42. The applicant alleges in the third ground of the application that the Tribunal erred by making findings that were not open on the evidence. This allegation was particularised as follows:

> *The Refugee Review Tribunal found that the applicant's period of employment in Spain would be "short lived" because of his age, past work experience and the availability of "support groups and social networks" in Spain (at [138]).*
>
> *It was not open to the Refugee Review Tribunal to make this finding as there was no evidence before the Tribunal that:*
>
> *(a) young uneducated migrant non-citizens who do not speak Spanish and who are only experienced in menial labour are likely to find employment relatively quickly in Spain; and/or*
>
> *(b) there were support groups and social networks in Spain which could support unemployed migrant non-citizens such as the Applicant.*

43. Although repetitious, it is useful to set out verbatim the relevant finding of the Tribunal:

> *… any period of unemployment would be short-lived, given the applicant's age and the nature of his past work, and it is satisfied that there are support groups and social networks in Spain that are available to ensure that he does not suffer harm amounting to persecution.* (para.138)

44. As to the submission that there was no evidence that any period of unemployment which might be suffered by the applicant would be short-lived, it is sufficient to observe that the Tribunal based this conclusion on the applicant's age and the nature of his past work and that there was evidence on both of these matters. For this reason, the Tribunal's conclusion was open to it for the reasons it expressed. Undoubtedly, the Tribunal had evidence of the parlous state of the Spanish economy as a result of the global financial crisis and of there being significant barriers against the entry of Roma into the Spanish job market. However, rather than basing its finding on this evidence dealing generally with economic and social conditions in Spain, the Tribunal gave decisive weight to the applicant's age and the nature of his past work. It is difficult to agree with the Tribunal but this

conclusion was open to it and the Court's views on the matter are irrelevant.

45. The allegation that there was no evidence of any "support groups or social networks in Spain" which would assist the applicant also fails on the facts. There was evidence before the Tribunal that Roma civil society in Spain was "quantitatively rich, with tens of associations in each [Autonomous Community]" (CB 811-813). That evidence is found in a document entitled "The Situation of Roma in Spain", a report to which the Tribunal referred at p.23 of its decision. It must be concluded that the Tribunal read and absorbed the discussion reproduced at CB 811-813 even if it made no specific reference to it in its reasons. To comply fully with its obligations under s.430(1) of the Act, the Tribunal should have referred to the evidence on which its finding on this aspect of the matter was based. However, such a failure does not amount to jurisdictional error and, as there was evidence to support it, the finding itself is not legally erroneous.

46. For these reasons, the third ground pleaded in the application does not disclose jurisdictional error on the Tribunal's part.

Breach of s.425 of the Act

47. In the fourth ground of the application the applicant alleged that the Tribunal failed to accord him procedural fairness. This allegation was particularised as follows:

> *The Tribunal failed to inform the Applicant that the following issues arose in relation to the decision under review (at [138]):*
>
> *(a) The Tribunal's belief that there were support groups and social networks which could support the Applicant in Spain; and/or*
>
> *(b) The Tribunal's belief that young uneducated migrant* [sic] *who do not speak Spanish and who are only experienced in menial labour were likely to be able to find employment relatively quickly in Spain.*

48. Section 425(1) provides:

> ***425 Tribunal must invite applicant to appear***

> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

In *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 it was held that, by virtue of s.425, a review applicant before the Tribunal is entitled to be aware of the issues which may be dispositive of his or her review. Section 425(1) describes these as "the issues arising in relation to the decision under review".

49. The applicant's submissions are to the effect that the two questions – whether or not there were support groups or social networks which could support him in Spain and whether his particular personal attributes might affect his access to employment – were issues potentially dispositive of his application and which s.425 of the Act required be brought to his attention. He submitted that the Tribunal failed to do this and that its conclusions on these two questions, as set out in the above particulars, were both critical to its findings and "highly surprising" given the known evidence. The applicant submitted that by failing to raise these matters with him, the Tribunal denied him procedural fairness and the opportunity to adduce further evidence.

50. The applicant's submissions confuse the evidence which may be relevant to an issue with the issue itself. To understand the allegation, the entirety of para.138 of the Tribunal's decision needs to be set out:

> *The applicant and Ms Biok also pointed out that, faced with possible unemployment, he will be ineligible for social security benefits because he is a non-citizen of Spain and/or because he has not made past insurance contributions.* ***In other words, the lack of income (perhaps together with accommodation and other difficulties) may put him at risk of serious harm, for instance, 'significant economic hardship that threatens [his] capacity to subsist', and 'denial of access to basic services [with a similar impact].'*** *The Tribunal acknowledges the applicant's genuine concern about this, and accepts that his eligibility for social security may rely on his nationality (a Convention ground) and/or his past contributions to any insurance fund. However, the Tribunal considers that any period of unemployment will be short-lived, given the applicant's age and the nature of his past work, and it is satisfied that there are support groups and social*

> *networks in Spain that are available to ensure that he does not suffer harm amounting to persecution.* (emphasis added)

51. This passage must, in turn, be read with para.129 of the Tribunal's decision:

> *The applicant claims that he has a well-founded fear of Convention-related persecution in all EU countries, including, relevantly for this decision, Spain. He claims to fear persecution on the grounds of his ethnicity, as a Roma, and, according to the latest submission, as a member of a particular social group 'unemployed Roma non-citizens'. …* ***The applicant also claimed that, as a Roma and as an 'unemployed Roma non-citizen', and also taking into account his particular circumstances, he fears economic hardship and denial of access to basic services, amounting to persecutory harm.*** (emphasis added)

52. When these paragraphs are considered, it can be seen that the issue was whether lack of income, perhaps combined with accommodation and other difficulties, might put the applicant at risk of harm. This harm was identified as significant economic hardship or denial of access to basic services so serious that the applicant's capacity to subsist would be threatened. However, far from being issues themselves, the particular matters the applicant relies on in respect of this ground of the application – lack of support groups, probable unemployment and denial of access to basic services – are no more than evidence relevant to what was, in fact, the issue.

53. As a result, the particularised matters did not have to be notified to the applicant pursuant to s.425. Moreover, it is apparent that the applicant was aware of the real issue because it was raised by him and his legal adviser at the Tribunal hearing, as recorded at para.138 of the Tribunal's decision quoted above.

Conclusion

54. Jurisdictional error on the part of the Tribunal has not been demonstrated.

55. Consequently, the application will be dismissed.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 8 December 2009

CORRECTIONS

1. Page 2 of "Cover sheet and Orders" – Counsel for the applicant amended to include "with Ms A. Rao"