FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOUY & ORS v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 347*

MIGRATION – Protection visa application – validity where applicant is national of 2 countries – Minister's discretion to allow visa application – meaning of 'national' – whether requirement of right of entry or 'effective nationality' – effect of 1999 amendments to Migration Act.

MIGRATION – RRT decision – North Korean applicants for protection visa – whether nationals of South Korea – visa applications invalid without Minister's discretionary decision – jurisdiction of Tribunal to consider eligibility criteria – no error in Tribunal's decision to deny jurisdiction – application dismissed.

Border Protection Legislation Amendment Act 1999 (Cth)
Migration Act 1958 (Cth), ss.36, 46, 47, 48A, 65, 91M, 91N, 91P, 91Q, 338, 411

Koe v Minister for Immigration & Multicultural Affairs (1997) 74 FCR 508
Minister for Immigration & Multicultural Affairs v Li (2000) 103 FCR 486
Minister for Immigration & Multicultural & Indigenous Affairs v QAAH of 2004 (2006) 231 CLR 1
Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543
Minister for Immigration & Multicultural & Indigenous Affairs v Walsh (2002) 125 FCR 31
NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 222 CLR 161
Patto v Minister for Immigration & Multicultural Affairs (2000) 106 FCR 119
Plaintiff M61/2010 v Commonwealth of Australia [2010] HCA 41
Rajendran v Minister for Immigration & Multicultural Affairs (1998) 86 FCR 526
Re Minister for Immigration & Multicultural & Indigenous Affairs; ex parte Ame (2005) 222 CLR 439
Saeed v Minister for Immigration & Citizenship [2010] HCA 23
SZGME v Minister for Immigration & Citizenship (2008) 168 FCR 487
SZMWQ v Minister for Immigration & Citizenship (2010) 187 FCR 109)
Tji v Minister for Immigration & Ethnic Affairs (1998) 158 ALR 681

First Applicant:	SZOUY
Second Applicant:	SZOUZ
Third Applicant:	SZOVA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2612 of 2010
Judgment of:	Smith FM
Hearing date:	2 May 2011
Delivered at:	Sydney
Delivered on:	3 June 2011

REPRESENTATION

Counsel for the Applicants:	First Applicant in Person
Counsel for the First Respondents:	Mr S Lloyd SC & Ms A Mitchelmore
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The application is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2612 of 2010

SZOUY
First Applicant

SZOUZ
Second Applicant

SZOVA
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This application raises significant points of construction concerning the operation of Subdivision AK of Part 2 Division 3 of the Migration Act, in its application to protection visa applicants having dual nationality. The subdivision appears to have laid dormant since it was enacted in 1999, at least in relation to judicial consideration. It has recently been given life in several decisions of the Refugee Review Tribunal concerning refugee claimants from North Korea, who fear to return to that country and fear also to claim protection in South Korea.

2. In the present case, the three visa applicants are a mother and her two sons. She claims to have been born in North Korea, to have escaped to

China, and then to have been smuggled into Australia on an aircraft. The Tribunal decided on 27 October 2010 that the applicants' protection visa applications lodged on 30 April 2008 should have been treated as invalid under the provisions of Subdivision AK. The Tribunal made a decision to this effect, and set aside a decision of a delegate made on 11 December 2009. The delegate had treated the visa applications as valid, but refused them on the ground that Australia's protection obligations were excluded by s.36(3) of the Act.

3. Subdivision AK was inserted in amendments to the Migration Act made by the *Border Protection Legislation Amendment Act 1999* (Cth). It was intended, in the then Minister's language, to preclude or deter 'forum shopping' by refugees possibly covered by the Refugees Convention, who preferred to seek protection in Australia rather than avail themselves of potential rights of protection in third countries. Under ss.91P and 91Q, a person to whom Subdivision AK applies, may not make a valid application for a protection visa while he or she remains in the Australian migration zone, unless the Minister has first made a non-compellable personal determination which will allow such an application to be made within seven working days after the Minister's determination. Section 91N(1) applies these provisions to *"a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries"*.

4. The present Tribunal held that the applicants were such persons at the date of their visa applications, by reason of the nationality laws of South Korea. It found that these laws confer South Korean nationality on all people born within the Korean peninsula, even if they have not followed one of several procedures by which South Korean nationality can be recognised for people born in North Korea.

5. The applicants now argue that the reference in s.91N(1) to 'a national' of a particular country is confined to a person with dual nationality, only if he or she also has a right to enter into and reside in that country as at the relevant date, and if that right would enable them to achieve 'effective protection' or 'effective nationality' for the purposes of the Refugees Convention. In particular, they argue that this intent is shown in the language of the introductory section in Subdivision AK, s.91M, which explains Parliament's 'reason for this subdivision'. It provides:

> ***91M Reason for this Subdivision***
>
> *This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.*
>
> *Note: For protection visas, see section 36.*

6. The applicants argue, and it was not contested by the Minister, that the present Tribunal concluded that s.91N(1) was not so confined. In its opinion:

> *The concept of a right to enter and reside plays no part in s.91N(1) – although it does play a part in ss.36(3) and s.91N(2), and it would be relevant to the Minister's discretionary power in s.91Q(1).*
>
> *…*
>
> *…the effect of South Korean law is that all DPRK [North Korean] citizens also have ROK [South Korean] nationality, without pre-conditions. In its view, whether this amounts to the 'unilateral imposition' of its nationality on North Koreans does not assist the Tribunal's assessment.*

The Tribunal therefore declined to examine evidence which raised doubts whether the applicants had 'effective nationality', including an immediate right to enter South Korea on the date of their visa applications, before they had expressed a desire for this, and before a relevant authority of South Korea had addressed their eligibility to enjoy rights attaching to South Korean nationality. According to their claimed histories, the applicants had never resided in South Korea, they had never sought recognition under South Korean nationality laws, and they had no intention of seeking that recognition.

7. I shall below consider the present Tribunal's analysis of the expert evidence which was before it as to the South Korean nationality laws. However, the principal issue of construction is better focused by consideration of the example of a person with dual nationality, in

which the laws of a country of dual nationality clearly do not confer on all of its nationals an enforceable right of entry into and residence in the territory of the country. Some reflection on history will throw up many examples of this. It is enough to recall that these have included the laws of Australia itself, in relation to some residents of its former territory of Papua and New Guinea (see *Minister for Immigration & Multicultural & Indigenous Affairs v Walsh* (2002) 125 FCR 31 at [21], [25]). For these people, Australian citizenship was characterised as *"other than 'real'"*, due to their lack of rights of entry under Australian immigration legislation (see: *Re Minister for Immigration & Multicultural & Indigenous Affairs; ex parte Ame* (2005) 222 CLR 439 at [1], [6], [12], and [22]).

8. For the reasons which follow, I have concluded that the construction contended by the applicants is not correct, and that Subdivision AK, and s.91N(1) in particular, was intended to render invalid a protection visa application when made by a person with dual nationality in the absence of a prior determination by the Minister under s.91Q, even if the local laws of the country of dual nationality did not confer a right of entry and residence which existed as at the date of visa application. The existence or otherwise of a right of entry and residence attaching to the applicants' dual nationality of South Korea at the date of their visa applications was, therefore, not a matter which the Tribunal was bound to be satisfied as to, before it could decide that the visa applications were invalid under s.91P(2). The Tribunal's conclusions that the applicants' visa applications were invalid, and that it had no jurisdiction to examine their eligibility to visas under s.36, were, in my opinion, correct.

The Border Protection Legislation Amendment Act 1999

9. The relevant amendments, including the whole of Subdivision AK and the insertion of subsections 36(3) to (7), were inserted into the Bill for this amending Act during its passage through Parliament. I have extracted them in full in the Schedule to this judgment. They remain in the Migration Act without later amendments.

10. Before the 1999 amendments, the eligibility of a protection visa applicant with dual nationality or a right of entry to a safe third country

was usually governed by the terms of the Refugees Convention without additional qualification in the Migration Act. Issues arising from dual nationality or rights of entry into a third country were addressed by decision-makers, and by the Tribunal on review, in the course of considering whether the visa applicant satisfied the principal criterion for that visa. This was found in s.36(2)(a), which required the Minister to consider in relation to the primary visa applicant whether *"Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"*.

11. The significant definition in Article 1A of the Refugees Convention suggests that it does not cover persons holding dual nationality, if they do not have a well-founded fear of persecution from which protection would not be available from either of their countries of nationality. It relevantly provides:

> *A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...*
>
> > *(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events is unable or, owing to such fear, is unwilling to return to it.*
>
> *In the case of a person who has more than one nationality, the term the "country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.*

12. The effect of s.36(2), and its adoption of the Convention definition of 'refugee', on persons born in East Timor, and eligible for dual Indonesian and Portuguese nationality, was considered by a Full Court in *Koe v Minister for Immigration & Multicultural Affairs* (1997) 74 FCR 508. Their Honours held, applying international law principles including the 1930 *Hague Convention on Certain Questions Relating*

to the Conflict of Nationality Laws, that the conferral of Portuguese nationality by Portuguese law by reference to birth in the former Portuguese colonial territory *"should be recognised for the purpose of applying the Refugees Convention"* (at p.517E). However, they identified an additional issue, which was *"whether the nationality is "effective", which in turn may lead to an inquiry as to the "availability" of protection"* (at p.520C). They concluded:

> *Given the objects of the Convention, it can hardly have been intended that a person who seeks international protection to which, but for a second nationality he or she would clearly be entitled, would, as a consequence of a formal but relevantly ineffective nationality, be denied international protection and, not being a "refugee", could be sent back to the country in which he or she feared, and had a real chance of, being persecuted.*
>
> *In these circumstances, to construe "nationality" where it first appears in the second paragraph of Article 1A(2) of the Refugees Convention as referring to nationality that is effective as a source of protection and which is not merely formal is, in our view, to interpret Article 1A(2) in the manner required by the Vienna Convention as explained in the High Court in Applicant A, that is to say, in accordance with the ordinary meaning of the text but considering also the context and the object and purpose of the Refugees Convention.*
>
> *Effective nationality for this purpose is of course something that must be assessed in the light of all the circumstances of a particular case. The inquiry will thus extend to a range of practical questions, parallel to those posed by the expression "unable" in the first paragraph of Article 1A(2).*
>
> *It follows from the construction we consider to be correct that findings that a person has dual nationalities but lacks a well-founded fear of persecution in one of the countries of nationality will not necessarily preclude a finding that the person is a refugee. (at p.521)*
>
> …
>
> *The error which, in our opinion, the Tribunal made was that it failed to recognise the necessity, in applying the definition of "refugee" in circumstances of dual nationality, of considering the "effectiveness" of his Portuguese nationality as a distinct issue. That is an error of law because it proceeds from an erroneous construction of Article 1A(2) of the Refugees Convention.*

> *Whether Portugal offers Mr Jong effective protection and whether he can avail himself of Portuguese protection are questions of fact and, therefore, questions for the Tribunal and not for the Court. As in the case of any applicant for a protection visa, they are to be answered having regard to the particular circumstances relating to Mr Jong at the time when the decision is to be made. Relevant matters include whether Portugal is able to offer him in Australia effective protection or the means of obtaining effective protection or whether, on the other hand, if effective protection is available it can be obtained only in Portugal; and, if the latter, whether, as a matter of fact, Mr Jong is reasonably able to travel to Portugal to obtain protection there and whether, if he were to travel there, he would be admitted; and whether, having been admitted he would satisfy the Portuguese authorities that he is indeed a Portuguese national entitled to Portuguese protection. Of particular relevance would be the practical operation, in Mr Jong's case, of Portuguese law and administrative procedures in circumstances in which a person whose Portuguese nationality is said to derive from birth in a former colony travels voluntarily to Portugal or, to take a different case, is sent there unwillingly. One of the ironies of the case is that an Australian tribunal has had to consider the question of Mr Jong's Portuguese nationality, and this Court has now had to do so, in circumstances where the Portuguese authorities have not done so and have indeed, on the evidence before the Tribunal, expressed a reluctance to do so in Australia. (at p.522)*

13. A subsequent decision of the Tribunal relating to an East Timorese refugee claimant was considered by Finkelstein J in *Tji v Minister for Immigration & Ethnic Affairs* (1998) 158 ALR 681. His Honour concluded that the Tribunal had erroneously determined that an applicant, who had never sought Portuguese nationality under its laws, had 'effective nationality' in relation to that country. Finkelstein J considered that this conclusion was not open to the Tribunal, since statements of its ambassador showed that Portuguese nationality was not automatically conferred upon birth within its former colonial territory, but required a declaration by such a person of a wish to become a Portuguese national.

14. A jurisprudence was also developed in the Federal Court in the late 1990s, which held that the test under s.36(2) of the Migration Act, of whether 'Australia has protection obligations', had the effect of excluding eligibility for protection visas from claimants who 'as a

practical matter' could reside in and obtain 'effective protection' in a 'safe' third country, whether by reason of its nationality laws or otherwise. The implicit exclusions of Australia's protection obligations were identified in other provisions of the Refugees Convention, even where the claimant might fall within the definition of 'refugee' in Art.1A. These authorities, including *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 and *Rajendran v Minister for Immigration & Multicultural Affairs* (1998) 86 FCR 526, were explained by French J in *Patto v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 119.

15. Much of this jurisprudence was overruled in 2005 by the High Court in *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 222 CLR 161. The High Court adopted a construction of s.36(2) that:

> *"the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of "refugee" spelled out in Art 1 of the Convention." (see [33], [42], [57]).*

The High Court noted that the *Border Protection Legislation Amendment Act 1999* had amended s.36 to deal with issues of dual nationality and rights of entry to safe third countries, and that the Court was not required to consider the effect of those amendments (see [10], [58], and [60]).

16. When considering the construction of the 1999 amendments, it is useful to appreciate the background provided by the contemporaneous Federal Court jurisprudence on s.36(2) of the Migration Act in relation to visa applicants having dual nationality or a right of entry into a safe third country.

17. The amendments appear to anticipate the High Court's reasoning in *NAGV*, which suggested that policies against 'asylum shopping' required legislative expression in the Migration Act. However, it is not manifest that the 1999 amendments to s.36 attempted to overturn, as distinct from supplement, the then Federal Court jurisprudence on dual nationality and safe third countries. The explanatory material which I shall cite below did not state this, and the Minister's 'tabling speech' suggested that the amendments were thought to be consistent with

"domestic case law". The amendments to s.36 were not clearly inconsistent with the then Federal Court jurisprudence. Indeed, in some respects the amendments raised new complicating issues which had not previously been found in that jurisprudence, for example in relation to the references to "*a right to enter and reside*" and "*all possible steps*" in the new s.36(3) (see cases cited in *SZMWQ v Minister for Immigration & Citizenship* (2010) 187 FCR 109).

18. I therefore do not agree with the present Tribunal member that the 1999 amendments were designed to *"leave no room for the concept of 'effective nationality'"*, in cases where decision-makers and the Tribunal were required under the Migration Act to address the merits of a protection visa application by reference to the criteria found in s.36. Rather, the new provisions of s.36(4) and (5) themselves were reflective of the same concerns which had been identified by the Full Court in *Koe* in relation to s.36(2): that the possession of dual nationality should not disentitle an applicant from a protection visa if he or she might not obtain the effective protection of a third country against persecution for a Convention reason, or against refoulement to another country where the applicant would face persecution for such a reason.

19. Nor do I agree with the reasoning of the present Tribunal member, and the submissions of the Minister to me, which suggested that the amendments were intended to overturn Federal Court jurisprudence in relation to references to nationality in the Refugees Convention and the Migration Act. I accept that new ss.36(6) and 91N(6) provided that for the purposes of the new provisions *"the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country"*. However, the reasoning of the Federal Court had arrived at a not dissimilar outcome, although it tested the relevance of the domestic laws and practices of the country of second nationality against principles of international law in relation to recognition of nationality. Here, too, in my opinion, the effect of the amendments was only to formulate or supplement the existing jurisprudence, perhaps with the hope of easing the path of decision-makers.

20. The very significant new policy innovation in the 1999 amendments was, in my opinion, one of procedure in relation to the determination of applications for protection visas, rather than of fundamental substance in relation to refugee law as adopted by the Migration Act.

21. The procedural intentions were identified and explained in the extrinsic material. As they and the debates in Parliament show, the insertion in the Bill of subsections 36(3) to (7) and Subdivision AK, and the speedy passage of the amendments through the Parliament during November 1999, was a response to a situation of urgency perceived by both major political parties at the time, requiring *"measures aimed at curbing the growing number of people arriving illegally in Australia, often through people smuggling operations"* (see the 'tabling speech' in the Senate Hansard, 25 November 1999 p.10668). The primary concern which was addressed, and the measure adopted, were described in the tabling speech:

> *Under current arrangements the question of whether a person has protection in another country can only be considered as part of the decision-making process for a protection visa application.*
>
> *This increases the time and cost associated with reaching a decision and, for unsuccessful applicants, opens up the right to seek administrative review.*
>
> *For unauthorised arrivals, it extends the period of time that they are detained and adds to the current pressure on our detention centres.*
>
> *For those who have a right of re-entry to a safe third country, it also raises the risk that, by the time the application has been finally determined, and avenues for judicial review have been exhausted, their rights of re-entry will have expired.*
>
> *This has occurred in a number of recent cases, with the result that Australia was found to owe protection obligations to people who had voluntarily forsaken countries of first asylum.*
>
> *The amendments will introduce into the Migration Act a new subdivision which will apply to non-citizens who are dual or multiple nationals, or who have a right to re-enter and reside in a third country.*
>
> *A statutory bar will prevent such non-citizens while onshore from making a valid application for a protection visa if they have been immigration cleared, or, if they have not been immigration cleared, from making a valid application for any visa.*
>
> *The statutory bar will be accompanied by discretionary provisions for ministerial intervention to lift the bar in the public interest.*

> *In conjunction with ministerial guidelines to provide guidance to departmental staff on cases that are to be brought to the minister's attention, this will ensure that Australia meets its protection obligations.*
>
> *This will ensure that where a person may not have protection in a third country, the statutory bar would be lifted to allow them to make an application.*

This explanation confirms the scheme which, in my opinion, is apparent from the terms and context of the amendments themselves.

22. When considering that scheme, it is important to bear in mind that subdivision AK was intended to raise issues of validity of a visa application, which necessarily must be addressed by first instance decision-makers upon receipt of a visa application before they can apply the criteria for the visa sought (see ss.46, 47 & 65 of the Migration Act). As s.47(3) and (4) make clear:

> *(3) To avoid doubt, the Minister is not to consider an application that is not a valid application.*
>
> *(4) To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa.*

23. Moreover, the jurisdictions of the review tribunals are confined to the review of eligibility under a valid visa application, and do not extend to substantive issues of eligibility under visa criteria except in relation to a valid visa application (see ss.338 and 411). As the present Tribunal correctly recognised, in cases where a tribunal forms an opinion that a visa application was invalid, the tribunal has power only to recognise the invalidity of the visa application and of the primary decision which incorrectly found or assumed its validity (see *Minister for Immigration & Multicultural Affairs v Li* (2000) 103 FCR 486 at [80]-[82], and *SZGME v Minister for Immigration & Citizenship* (2008) 168 FCR 487 at [30]).

24. Therefore, decision-makers are required to apply the provisions of Subdivision AK before they can contemplate applying the criteria for protection visas found in s.36, including its new subdivisions. It is therefore necessary to consider how Subdivision AK was intended to operate as a procedural bar, which would preclude issues of 'effective protection' in 'safe' third countries being addressed by reference to the

new criteria inserted into s.36 in some cases, but, presumably, not in all cases. I say 'presumably', since Parliament cannot have intended the new tests of Australia's protection obligations under s.36, found in the same amending legislation, should never be applied.

25. The relevant elements of Subdivision AK in its application to protection visa applicants are:

    i) It is intended to 'apply to' a protection visa applicant who is physically 'in the migration zone' at the time of visa application, whether 'immigration cleared' or not (by the combined effect of s.91P(1) and (2)); **but only if**:

    ii) The applicant falls within one of the classes described in either s.91N(1) or s.91N(2). That is, that he or she *"is a national of 2 or more countries"*, or *"has a right to re-enter and reside in"* any country other than a country of nationality or Australia as described in s.91N(2). The two classes are mutually exclusive, due to the express provision in s.91N(2)(ii).

    iii) Such a visa applicant's application is necessarily not *"a valid application"*, but this bar is *"subject to section 91Q"* (see s.91P). If the bar operates, the visa application necessarily cannot be addressed by reference to the criteria in s.36 and the terms of the Refugees Convention, either by a primary decision-maker or by the Tribunal on review.

    iv) The proviso in relation to s.91Q allows the visa applicant, **before making the visa application**, to obtain a discretionary seven day dispensation from the effect of s.91N, by obtaining a 'written notice' from the Minister under s.91Q(1). The Minister's power is conditioned in the same manner as other similar 'lifting the bar' and 'non-compellable' personal discretions of the Minister under the Migration Act.

    v) However, unlike other such powers, s.91Q(2) provides guidance to the Minister as to the *"matters"* which he *"may consider"*. These include *"information that raises the possibility"*, in effect, that the visa applicant *"might not"* receive protection from his or her country of dual nationality, or from a country to which he or she has a right of entry.

vi) If, but only if, the Minister 'lifts the bar', a protection visa application can be made, and it will then need to be addressed under s.36, including by reference to its new preclusions in s.36(3) in relation to persons with dual nationality or a right of entry and residence in another country.

26. When so analysed, the *prima facie* tension in the amendments appears, but is resolved. As I have noted, that tension arises because, on the one hand, s.36 was amended to introduce a deemed exclusion of Australia's protection obligations to persons with dual nationality or rights of entry to third countries unless they might not receive effective protection, and, on the other hand, the amendments introduce a bar on validity which would prevent the issues of 'effective protection' being addressed by any decision-maker in relation to those classes of protection visa applicants without a non-compellable personal decision of the Minister to lift the bar.

27. In my opinion the key to the resolution of this tension is the tentative language of the suggested consideration for the Minister's determination under s.91Q(2). The references to "*raises the possibility*" and "*might not be able*" point to a scheme which does intend issues of 'effective protection' to be addressed as part of the substantive visa criteria which reflect Australia's obligations under the Refugees Convention, but only in cases where the bar has been lifted by the Minister to allow this to happen.

28. In effect, although the Minister is not bound to do so, the legislation suggests that the Minister could apply his 'lifting the bar' discretion under s.91Q(1) by undertaking only a preliminary or provisional assessment of the availability of effective protection in a country of dual nationality or in some other 'available country' (as defined in s.91N(2)). Section 91Q(2) suggests that it might be appropriate for the Minister to allow potentially 'live' issues under s.36(3), (4) and (5) to proceed to a merits determination of those issues by a delegate and the Tribunal, by either assuming the validity of the visa application under s.91P, or by issuing a notice under s.91Q(1). Such live issues might concern the existence of a dual nationality, the existence of a right of entry and residence, or any of the other factual elements raised under s.36 including those of 'effective protection'.

29. This is what appears to have been the approach of the delegate in the present case, when assuming validity of the applicants' visa applications, and then addressing the issues relating to the applicant's possible South Korean nationality and ability to gain effective protection in South Korea under s.36 directly. That approach has an attraction for primary decision-makers, by avoiding a two-stage process of determination and the need to procure a personal decision from the Minister. However, as the present case illustrates, it also can considerably protract an examination of a claimant's refugee status, since the Tribunal will be bound to consider issues of visa application validity first, and regardless of how this was addressed by a delegate. If the Tribunal correctly finds the visa application to be invalid by reason of dual nationality, then the examination of live issues of effective protection potentially raised under s.36 must return to the Minister first to consider under s.91Q on a provisional basis.

30. This understanding of the scheme of the 1999 amendments, is confirmed in the 'tabling speech' which I have extracted above. It suggested that there will be "*ministerial guidelines*" which will "*ensure that Australia meets its protection obligations*" under the Refugees Convention. Those obligations include obligations against refoulement to countries which would not themselves meet the obligations of the Refugees Convention.

31. There is nothing in the material before me, which shows the existence or content of any guidelines actually adopted for the purposes of s.91Q. As has recently been found by the High Court in *Plaintiff M61/2010 v Commonwealth of Australia* [2010] HCA 41, such guidelines may in some circumstances give rise to procedures which are judicially reviewable, if not reviewable on their merits. As the present case illustrates, questions of validity under Subdivision AK are also within the province of judicial review.

The dual nationality construction issue under Subdivision AK

32. I can now explain why I am unable to construe s.91N(1) so that it is confined to dual nationals who can achieve 'effective protection' by reason of rights of entry and residence attaching to their nationality of a potentially 'safe' third country. When doing so, I am hampered by the

absence of any legal representation for the applicants at the hearing before me. The grounds of their application which raise this contention have not been explained by any written or oral submissions. However, two extensive written submissions by a solicitor, Mr Brendan Ferguson, were relied upon by the applicants before the Tribunal, and I have considered his arguments.

33. Mr Ferguson's first submission was dated 3 March 2010 and addressed the issues posed by s.36(3), (4) and (5), upon which the delegate had decided the visa applications. It summarised his primary submission:

> *2. ....*
>
> *a) while North Koreans are theoretically entitled to citizenship under South Korean law, in practice, we submit that this does not amount to a presently existing legally enforceable right to enter and reside in a country apart from Australia, being South Korea, under sub-section 36(3) of the Migration Act 1958 (Cth) (the Migration Act). This is because:*
>
> *i) any right is conditional or contingent upon a North Korean applicant's expression of a desire and intention to settle in South Korea; and*
>
> *ii) by virtue of the protection procedure that North Koreans are required to undergo upon entry to South Korea, any right that a North Korean applicant might possess to enter and reside in South Korea is not a presently existing legally enforceable right.*

34. Mr Ferguson's first submission attached, and relied upon, a 13 page expert report by a Korean human rights lawyer, Mr Hwang. Mr Hwang's 'executive summary' was:

> *Executive Summary*
>
> *4.1 South Korean law provides North Korean nationals (whose father or mother was a North or South Korean national) with a theoretical automatic entitlement to citizenship, provided their North Korean nationality can be established.*
>
> *4.2 However, such South Korean citizenship, of itself, carries little in the way of substantive rights and in particular does not afford an automatic right to enter and reside in South Korea.*

4.3 The only legal avenue for a North Korean escapee to enter South Korea is to apply for 'protection'.

4.4 In order to apply for such protection, a North Korea escapee must desire protection and must express an intention to obtain protection from the government of South Korea. This further requires an implicit denunciation by the applicant of North Korean sovereignty and the North Korean regime's authority.

4.5 Should a North Korean escapee arrive in South Korea, he or she will be detained upon arrival and will be subject to the protection procedure. This procedure will involve joint investigation in detention for a period of up to three months. Provided that the escapee's North Korean nationality is established, the protection procedure will also involve undertaking a further three months assimilation program in quasi-detention conditions.

4.6 North Korean escapees do not obtain a right to enter and reside in South Korea unless or until they have successfully undertaken this prescribed protection procedure.

4.7 A North Korean escapee's right to enter and reside in South Korea is therefore contingent on:

(a) application for protection under the Protection and Settlement Act;

(b) the expression of a desire to obtain protection in South Korea;

(c) denunciation of North Korean sovereignty;

(d) the ability to establish North Korean nationality; and

(e) completion of the prescribed procedure, comprising of:

(i) detention without grounds for a period of up to three months during which a joint investigation will be conducted by Government agencies including the South Korean National Intelligence Service (NIS); and, in most cases

(ii) a further three month social assimilation training program in quasi-detention conditions.

4.8 North Korean escapees residing in South Korea continue to be exposed to discrimination.

> *4.9 The fact that South Korean Law does not apply to North Koreans living outside South Korea who have not been recognised as South Korean citizens, or in the territory of North Korea and the fact that North Koreans who have not expressed an intention and desire to defect and to live in South Korea are returned to North Korea demonstrates that the supposed South Korean "citizenship" of all North Koreans contemplated by the Constitution of South Korea is a theoretical construct only.*

35. After the Tribunal received Mr Ferguson's first submission, it obtained an extensive report from another Korean lawyer, Dr Lee. Dr Lee's opinions started with the propositions:

> *"A North Korean is not granted South Korean citizenship. S/he is already a national (citizen) of the Republic of Korea under the law of the Republic of Korea. But s/he has to have his nationality ascertained in order to live effectively as a citizen of the Republic of Korea".*

36. The Tribunal then, for the first time in the consideration of the applicants' protection visa applications, raised the issue whether the applications were invalid under Subdivision AK. This prompted the applicants to present a second submission by Mr Ferguson dated 16 August 2010, supported by a second report of Mr Hwang.

37. Dr Lee's report and the material he presented, like the reports of Mr Hwang, closely examined the avenues by which the dual nationality of a North Korean would achieve practical recognition by the government of South Korea, and whether it could be regarded as providing effective protection for North Koreans against persecution by the North Korean government, in particular by recognition of a right to enter and reside in South Korea. The differing nuances of the opinions of the two experts in these respects were closely examined in Mr Ferguson's second submission to the Tribunal.

38. However, I do not understand that his submission retreated from the premise of his first submission and of Mr Hwang's first report, that South Korean domestic law conferred on every person born in the Korean peninsula a *"theoretical, automatic entitlement to citizenship"*. Rather, his submission was that this citizenship was, in relation to a person born in North Korea who had never entered South Korea, not to

be regarded as giving rise to 'effective nationality' in the sense required in relation to dual nationals under the Refugees Convention as interpreted in *Koe,* and for that reason was not 'nationality' for the purposes of Subdivision AK.

39. Mr Ferguson argued:

> 5. *In our submissions, for reasons including those set out below, subdivision AK of the Migration Act does not operate to invalidate protection visa applications lodged by North Koreans in Australia. In summary, this is because:*
>
> *(a) South Korean law cannot be said to unilaterally impose South Korean nationality upon North Korean nationals;*
>
> *(b) a North Korean national will not be considered a national of South Korea unless they have voluntarily approached a South Korean Embassy, expressed their will to enter and reside in South Korea and successfully completed the protection procedure including up to six months mandatory detention in South Korea;*
>
> *(c) section 91N(1) does not apply to North Korean nationals applying for a protection visa in Australia, unless they have previously entered South Korea and obtained South Korean nationality through the process described in (b) above, because they will not be a national of two or more countries. This approach is consistent that of the US under the NKHRA;*
>
> *(d) if, which is denied, the theoretical nationality that South Korean law purports to confer upon North Korean nationals can be unilaterally imposed on North Korean nationals, that nationality cannot be considered effective nationality as required under subdivision AK;*
>
> *(e) subdivision AK applies only to a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to enter and reside in the third country. The theoretical South Korean nationality which is said to be conferred on North Korean nationals prior to the completion of the steps described at (b) above, does not provide*

North Korean nationals with a right to enter or reside in South Korea, nor does it afford effective protection from persecution; and

(f) *if, which is denied, the theoretical nationality that South Korean law purports to confer upon North Korean nationals can be unilaterally imposed on North Korean nationals, Australia will still owe protection obligations with respect to North Korean nationals on account of the fact that they will have a well-founded fear of persecution amounting to serious harm in both countries of which they are said to have nationality, either:*

(i) *as a result of mandatory detention under the protection procedure in South Korea; or*

(ii) *through the significant risk that South Korean authorities will not recognise an applicant's North Korean nationality and the applicant will ultimately be returned to North Korea.*

40. I do not consider that it is necessary in this judgment to examine more closely the submissions and evidentiary material which was before the Tribunal concerning the legal and practical effects of South Korean nationality laws in relation to North Koreans. It is enough that I agree with the Tribunal's conclusion, that it was common ground between the two experts that the applicants possessed South Korean citizenship or nationality at the time of visa application, in the sense that this citizenship had been directly attributed to them by South Korean law as at the date of their visa applications.

41. As the Tribunal also recognised, it was then debatable whether this 'theoretical' nationality was at that time 'effective nationality' for the purpose of giving them existing rights of effective protection against persecution by North Korea. However, the Tribunal held that it did not need to resolve that debate when addressing the bar imposed by s.91P in relation to visa applicants falling within s.91N(1). It concluded:

- *Both Professor Lee and Mr Hwang commented that North Koreans have, in effect, only 'theoretical' ROK nationality. Mr Hwang goes further, to state that South Korean citizenship is a theoretical construct and political declaration only, and that it has little relevance to 'nationality' or 'citizenship' as normally understood.*

They highlight the obstacles that a North Korean may face in having the South Korean authorities recognise his or her citizenship, for instance, the need for investigations while in detention. Indeed, Professor Lee gives as one example that the South Korean justification for not granting protection (ie. settlement assistance) to all North Koreans – on the grounds that 'they are expatriate North Koreans (chogyo) and not escapees [is] an explanation which is equally at variance with the constitutional principle that all North Koreans are ROK citizens'. In other words, while North Koreans have 'theoretical' or legal ROK nationality, there is tension between this formal position and their actual treatment.

Mr Hwang concludes that this 'theoretical' South Korean citizenship does not confer on the person the right to enter and reside in South Korea (in other words, 'effective nationality'), and cites other purported examples of where North Koreans are not treated identically to other ROK citizens.

In the Tribunal's view, the ROK process of investigating a North Korean's identity and nationality is simply a means of confirming their existing, (concurrent) South Korean nationality. The circumstances of the investigation – such as its length and complexity, and whether it involves detention – do not alter the Tribunal's assessment.

For the reasons given above, the Tribunal must determine only whether the applicant has South Korean nationality, and it is not permitted to make an assessment of the effectiveness of that nationality, in the sense discussed in Jong Kim Koe. Professor Lee's and Mr Hwang's observations and concerns – that a North Korean must still establish a means of entering South Korea, that South Korean law does not apply to North Koreans outside its territory and other instances where North Koreans receive different treatment from other ROK nationals – even if correct, do not go to the issue of the applicant's nationality under South Korean law.

- *Professor Lee and Mr Hwang expressed different views on whether South Korea can be said to unilaterally impose its nationality on North Koreans. Professor Lee confirms that South Korean law confers ROK nationality on all DPRK citizens, the issue before the Tribunal. Mr Hwang appears to address a different issue, in the context of 'effective nationality', namely whether the ROK nationality law can be characterised as 'imposing' South Korean citizenship or settlement assistance on DPRK nationals, in the sense of*

> *forcing them to take steps to activate these. The Tribunal is satisfied that the effect of South Korean law is that all DPRK citizens also have ROK nationality, without pre-conditions. In its view, whether this amounts to the 'unilateral imposition' of its nationality on North Koreans does not assist the Tribunal's assessment.*

42. Essentially, therefore, the Tribunal's opinion that the visa applications were invalid was based upon a construction of the concept of 'nationality' in s.91N(1), which rejected Mr Ferguson's arguments that it required a conclusion that the applicants' South Korean nationality conferred by law was also immediately 'effective' in affording them protection under the Refugees Convention.

43. Since I have concluded that the Tribunal was correct in this respect, I also do not need to examine whether the evidence established an immediate right of entry and residence, nor the prospect of other 'real' protections, which could allow the 'theoretical' South Korean nationality held by the applicants to be characterised as 'effective protection' or 'effective nationality'. For the reasons which follow, I find no error in the construction of Subdivision AK adopted by the Tribunal, nor in its application of that construction to the evidence before it.

44. I accordingly must uphold its opinion that the applicants' visa applications were invalid, and that the Tribunal had no jurisdiction to consider whether they satisfied the criteria for a protection visa under s.36, including those which address questions of 'effective protection'.

The Tribunal's construction of Subdivision AK was correct

45. The foundation of Mr Ferguson's submissions on construction was a submission as to the implications of the opening 'purposes' section, s.91M, which I extracted at the start of this judgment. He submitted to the Tribunal:

> 14. *Subdivision AK was inserted into the Migration Act by the* Border Protection Legislation Amendment Act (1999) *(Cth) (the* ***BPLAA****), enacted on 16 December 1999. The Supplementary Explanatory Memorandum to the* Border Protection Legislation Amendment Bill 1999 *states at paragraph [2] that:*

> *The purpose of these amendments…is to prevent the misuse of Australia's asylum processes by "forum shoppers"…(ensuring) that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that country.*

15. *Section 91M expressly incorporates that purpose into subdivision AK. In WAGH v Minister for Immigration & Multicultural & Indigenous Affairs, Lee J described section 91M as "a statement of policy made by Parliament to assist construction of the subdivision". His Honour cited the provision, adding his own emphasis to illustrate that the subdivision would only operate to exclude from protection "a non-citizen* ***who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country****" (emphasis added by Lee J). It is clear from the wording of section 91M, that for the purposes of subdivision AK, "nationality" must be effective in that it must allow a non-citizen to "avail himself or herself of protection" from persecution by providing a right to enter or reside in the relevant third country. A theoretical nationality affords no present right to enter or reside and is clearly not such a "nationality".*

16. *To construe section 91M in any other way would be to strip the section of any utility. Furthermore, the application of sections 91N(1) and 91P(2), without the qualification of section 91M, would lead to the return of dual nationals to either one of their countries of origin, even in circumstances where they have a well-founded fear of persecution amounting to serious harm in both countries. Australia would therefore be in breach of its most significant obligation under the Convention – that of non-refoulement imposed by Article 33(1) – on a regular basis. This was clearly not Parliament's intention in enacting the BPLAA, nor is it consistent with basic principles of Australian migration law. Ryszard Piorowicz explains the concept succinctly in the Australian Law Journal:*

    > *The requirement that nationality be effective is crucial for ensuring that real protection is accorded to those at risk of persecution: there is no point in a country denying an application for asylum on the ground that the applicant has a right to enter and remain in another country, if in reality the second country is not prepared to let the person in.*

46. However, I am not persuaded by these arguments, for the following reasons:

i) I accept that s.91M is an aid to construction of the succeeding sections of the Subdivision. However, it is not expressed to perform a definitional role, in particular, to qualify the references to 'national' in s.91N(1) and (6). These sections contain no express nor implicit qualification to that term, but appear to invite only an investigation of the local laws of nationality, i.e. citizenship, regardless of what other rights might attach to citizenship, regardless of how the citizenship can be recognised as a practical matter, and regardless of whether it confers nationality which is 'effective' under the Refugees Convention.

ii) I do not accept that the reference in s.91M to *"can avail himself or herself of protection from a third country"* carries any implicit qualification to the references to 'national' in s.91N(1). I agree that s.91M suggests an assumption by Parliament that Subdivision AK allows the Minister to give effect to Australia's international obligations under the Refugees Convention. This is an assumption which the High Court has found in other provisions of the Migration Act bearing on refugee status determinations (see *Plaintiff M61/2010 v Commonwealth of Australia* [2010] HCA 41 at [27]). However, in my opinion, the scheme of the 1999 amendments which I have analysed above is capable of being applied for this purpose without confining the word 'nationality', even though issues of 'effective protection' may only be addressed if the Minister lifts the bar under s.91Q.

iii) The Act is to be construed with the appreciation that Parliament has authority to determine the procedures by which Australia will implement its obligations under the Refugees Convention in its domestic law, and to determine the manner in which *"a right of entry and of permanent settlement should be afforded to any individual or group of individuals"* (cf. *Minister for Immigration & Multicultural & Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [2] and [34]).

iv) There is some infelicity of language in the phrase *"because of nationality or some other right to re-enter and reside in the third country"* in s.91M. On first reading, the word 'other' might appear to assume that 'nationality' necessarily includes a 'right to re-enter and reside'. However, on reflection, I consider that the draftsperson intended the clause to be read as *"nationality or some right to re-enter and reside in a third country otherwise arising"*. That is, that it makes no assumption that the status or right of nationality for the purposes of Subdivision AK is anything more than that, and in particular does not assume that citizenship of a country always carries a right of entry. As I have pointed out above, such an assumption would be clearly incorrect as a general proposition, including in the history of Australian law itself.

v) As I have pointed out, the two separate classes of visa applicants caught by the bar under s.91P are defined in s.91N(1) and (2) in terms which cannot overlap, notwithstanding that frequently 'nationality' is accompanied by a right of entry and residence. This confirms the reading of s.91M which I have suggested above.

vi) On that reading of s.91M, there is nothing in it nor in the other sections of Subdivision AK which supports a qualified reading of the reference to 'national' in s.91N(1). There is nothing pointing to a special meaning for that word, which encompasses the existence of rights giving 'effective protection' and not just a right to nationality or citizenship.

vii) Nor, in my opinion, is there anything in the extrinsic material which suggests or confirms the effect of s.91M and the interpretation of s.91N(1) which were submitted by Mr Ferguson. I have above discussed the background and scheme of the amending legislation and its extrinsic material, and I consider that they tend to confirm the interpretation adopted by the Tribunal.

47. I have therefore concluded that the interpretation adopted by the Tribunal is the correct interpretation, applying the recognised

principles of statutory construction, including the recent reminder that *"when it is said the legislative 'intention' is to be ascertained, 'what is involved is the 'intention* ***manifested****' by the legislation'. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning."* (see *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23 at [31]-[33], citations omitted, emphasis repeated).

48. In my opinion, taking into account the language of the section considered in its statutory context, the reference to 'a national' in s.91N(1) carries no meaning other than that ordinarily given to that word, i.e. an existing status of citizenship, no more and no less. In particular, it does not carry an implicit qualification which confines it to a species of nationality which carries a right of entry and residence or which includes attributes which would allow it to be characterised as 'effective nationality' for the purposes of the Refugees Convention.

Conclusion

49. The present application to the Court, with another similar matter, was set down for hearing before me as a 'test case', at which the applicants intended to present their arguments by counsel. Other cases were said to be waiting on the outcome. However, the applicant in the other matter discontinued on the day before the hearing, and the solicitor and counsel for the present applicants withdrew.

50. I have endeavoured, with the assistance of counsel for the Minister, to consider their possible arguments in support of the grounds of the application formulated by their previous legal representative:

> *1. The Second Respondent (the Tribunal) misconstrued and misapplied section 91N of the Migration Act.*
>
> ***Particulars***
>
> *(a) Error in construing that provision as not requiring consideration whether such "nationality" as was conferred by the law of the Republic of Korea on the applicant was effective to give her an immediate right to enter and reside in that country.*

> (b) *Error finding that section 91N of the Migration Act was not to be construed in the light of section 91M of that Act.*

51. Essentially, as I understand them, these grounds raise only the construction point which I have addressed above, and contend that it was incorrectly decided by the Tribunal. For the reasons given above I find no error in the Tribunal's opinion.

52. The grounds do not, as I understand them, challenge whether the Tribunal's opinion that the applicants had, at the date of their visa applications, the right or status of nationality under South Korean law. My short opinion, is that the Tribunal's factual conclusion in this respect was both open to it on the expert evidence and supporting material which was before it, and was correct on the same evidence which is now before me.

53. The application seeks only writs of certiorari and mandamus directed at the Tribunal, in effect, to require it to exercise a jurisdiction to address the issues of 'effective protection' under s.36 of the Migration Act upon which the delegate had decided the visa applications. However, for the reasons above they have not established this entitlement, because I agree with the Tribunal that its jurisdiction allowed it only to recognise the invalidity of the visa application.

54. I have considered whether I should make a declaration as to the invalidity of the visa application or as to the absence of substantive jurisdiction in the Tribunal to address s.36 issues. However, such a remedy was not sought by the applicants nor the Minister, and I do not consider that it is necessary to make any declaration.

55. The outcome of the Tribunal's decision, as confirmed by this judgment, is that the applicants have not yet made valid applications for protection visas. They are therefore not precluded from doing this afresh, by reason of the bar in s.48A. However, they remain precluded by the absence of any determination by the Minister under s.91Q. They should now take urgent advice on whether, and how, to apply for that determination.

56. I shall hear further submissions in relation to the costs of the proceedings.

SCHEDULE

Amendments to the Migration Act inserted by Schedule 1 to the *Border Protection Legislation Amendment Act*, 1999 no.160.

Part 6—Amendments to prevent forum shopping

65 At the end of section 36

Add:

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.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

66 Paragraph 46(1)(d)

After "91K (temporary safe haven visa),", insert "91P (non-citizens with access to protection from third countries),".

67 After Subdivision AJ of Division 3 of Part 2

Insert:

Subdivision AK—Non-citizens with access to protection from third countries

91M Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should

seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

91N Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

Determining nationality

(6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

91P Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

(1) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a visa; and

(c) the non-citizen is in the migration zone and has not been immigration cleared at that time;

neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

91Q Minister may determine that section 91P does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

68 At the end of section 198

Add:

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

69 Paragraph 475(2)(e)

After "91L,", insert "91Q,".

70 Application of amendments

The amendments made by this Part apply to applications, or purported applications, for a visa made after the commencement of this item.

I certify that the preceding fifty-six (56) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate:

Date: 3 June 2011