HIGH COURT OF AUSTRALIA

GUMMOW ACJ
KIRBY, CALLINAN, HEYDON AND CRENNAN JJ

NBGM APPLICANT

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ANOR RESPONDENTS

NBGM v Minister for Immigration and Multicultural Affairs
[2006] HCA 54
15 November 2006
S145/2006

ORDER

1. *Special leave to appeal from the whole of the judgment and orders of the Full Court of the Federal Court of Australia given on 12 May 2006 be granted.*

2. *The appeal be treated as having been instituted and heard instanter and be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

G C Lindsay SC with L J Karp for the applicant (instructed by Legal Aid Commission of New South Wales)

S J Gageler SC with S B Lloyd for the first respondent (instructed by Sparke Helmore)

Submitting appearance for the second respondent.

CATCHWORDS

NBGM v Minister for Immigration and Multicultural Affairs

Immigration – Refugees – Application for permanent protection visa – Statute requiring Minister to be satisfied Australia owes protection obligations to the applicant under the Convention – Applicant previously granted temporary protection visa for a specified period – Whether previous grant of temporary protection visa entitles applicant on application for a new visa to a presumption of being owed protection obligations under the Convention – Construction of *Migration Act* 1958 (Cth), s 36 – Construction of the Convention.

Words and phrases – "refugee", "protection obligations", "cessation".

Migration Act 1958 (Cth), ss 5(1), 36.
Convention relating to the Status of Refugees, Art 1A, Art 1C(5).
Protocol relating to the Status of Refugees.

1 GUMMOW ACJ. I agree generally with the reasons for judgment of Callinan, Heydon and Crennan JJ and in particular with the conclusion that the reasoning in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[1] produces the result that this appeal must fail.

2 This conclusion is reached independently of any view of the construction of sub-ss (3), (4) and (5) of s 36 of the *Migration Act* 1958 (Cth) ("the Act"). The sufficiently decisive consideration is found in the use of the present tense in s 36(2) and the supporting considerations discussed in *QAAH*.

3 Sub-sections (3), (4) and (5) were added by the *Border Protection Legislation Amendment Act* 1999 (Cth)[2]. It would be a curious result if the outcome in the present case was owed only to such recent amendments and would have differed before the making of those amendments.

4 Further, there are various issues of construction of sub-ss (3), (4) and (5) of s 36. Some of these I referred to in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[3]. Others divided the Full Court in the present case. These matters do not require determination for an outcome in the present appeal which favours its dismissal.

5 Special leave to appeal should be granted. The appeal should be taken as instituted and heard instanter and dismissed with costs. However, that would leave to the Full Court the question of costs as reserved by order 3 of its orders made on 12 May 2006.

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1 [2006] HCA 53.

2 Sched 1, Pt 6, Item 65.

3 (2004) 219 CLR 664 at 669 [9], 672-673 [19]-[20].

6 KIRBY J. This is an appeal from orders of the Full Court of the Federal Court of Australia, exceptionally constituted by five judges[4]. The Full Court had been so constituted because of doubts that had arisen in respect of the divided decision of an earlier Full Court in *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs*[5]. By inference, it was hoped that a Full Court of larger numbers would settle clearly the point upon which the Full Court in *QAAH* had divided.

7 In the result, however, the Full Court in the present matter was also divided[6]. The same issues that had led to the divisions in *QAAH* re-emerged and, indeed, were sharpened. Accordingly, when this Court granted special leave to the Minister to appeal in *QAAH*, an order was made returning an application for special leave to appeal on the part of the putative refugee in the present matter, NBGM ("the applicant")[7] to be heard at the time as the appeal in *QAAH*.

8 Argument in the appeal in *QAAH*, and in the application in *NBGM*, was accordingly heard together. Substantially, the issues are common. The outcome in *QAAH* controls the outcome in NBGM's application. In my opinion, that application should succeed. Special leave should be granted. NBGM's appeal should be allowed and a new hearing, before the Refugee Review Tribunal ("the Tribunal"), should be ordered.

Interpretative principles

9 *Recourse to the Convention and Australian law*: In *Plaintiff S157/2002 v The Commonwealth*[8], Gleeson CJ, in stating the first of "established principles …

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4 *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522.

5 (2005) 145 FCR 363 (Wilcox and Madgwick JJ; Lander J dissenting). Two other appeals were heard by the Full Court of the Federal Court and were stood over pending the determination of the appeal in these proceedings. See *NBGM* (2006) 150 FCR 522 at 561 [153].

6 Black CJ, Mansfield and Stone JJ; Marshall and Allsop JJ dissenting.

7 The name of the applicant is anonymised in accordance with s 91X of the *Migration Act* 1958 (Cth).

8 (2003) 211 CLR 476 at 492 [28]-[29]. See also *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142 at 159; *Coleman v Power* (2004) 220 CLR 1 at 27-30 [17]-[24], 91-93 [240]-[242]; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 189 [89].

relevant to the resolution of the question of statutory construction" presented by that case, observed:

> "[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations".

10 This was by no means a new idea. It is orthodox, and the same principle has been stated by this Court, and applied, many times. It was so expressed in *Chu Kheng Lim v Minister for Immigration*[9] and in *Minister for Immigration and Ethnic Affairs v Teoh*[10], where the principle was identified in even wider language[11].

11 In the context of the Refugees Convention[12], this Court has hitherto accepted that, through s 36, the *Migration Act* 1958 (Cth) ("the Act") has "transpose[d] the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law"[13]. Obviously, the Act did not incorporate the Convention in its totality. But it did so for the purpose of giving meaning to the status of a person (a "refugee"), in respect of whom Australia has protection obligations. To that extent, the Act is the vehicle for fulfilling Australia's obligations as a State party to the Convention and giving its provisions effect in this nation's domestic law. This is why, in countless cases, Australian courts faced with the interpretation of s 36 of the Act have proceeded directly to the

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9 (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

10 (1995) 183 CLR 273.

11 (1995) 183 CLR 273 at 287 per Mason CJ and Deane J: "[T]he fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party … That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law."

12 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150; 1954 ATS 5 (entered into force 22 April 1954), read with the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267; 1973 ATS 37 (entered into force 4 October 1967).

13 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231; cf *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 per Brennan J.

Convention provisions concerning refugee status[14]. Because those provisions appear in a treaty, this Court has consistently interpreted them in accordance with the rules contained in the Vienna Convention on the Law of Treaties[15].

12 In *Applicant A v Minister for Immigration and Ethnic Affairs*[16], a case which dealt with a claim to Australia's protection based on the applicant's alleged refugee status, Gummow J said[17]:

> "It is necessary to begin with the construction of the definition as it appears in the Convention and Protocol. Regard primarily is to be had to the ordinary meaning of the terms used therein, albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results. However, as McHugh J demonstrates by the analysis of the subject in his reasons for judgment, with which I agree, it is important to appreciate the primacy to be given to the text of the treaty."

13 In a footnote to these observations[18], Gummow J made reference to the fact that "[t]hese rules of interpretation are applicable both under customary international law and as it is now stated in the Vienna Convention on the Law of

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14 To do so, as Allsop J did in the Court below, fully conforms to the orthodox approach proposed in the joint reasons at [6], that is, first ascertaining the relevant Australian law; and then construing so much of the Convention as Australian law requires.

15 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 32. See *Applicant A* (1997) 190 CLR 225 at 231 per Brennan CJ, 240 per Dawson J, 252 per McHugh J, 277 per Gummow J and 294 of my own reasons. See also *Morrison v Peacock* (2002) 210 CLR 274 at 279 [16]; *Minister for Immigration v Khawar* (2002) 210 CLR 1 at 16 [45].

16 (1997) 190 CLR 225.

17 (1997) 190 CLR 225 at 277.

18 (1997) 190 CLR 225 at 277 fn 189.

Treaties[19]: see *Thiel v Federal Commissioner of Taxation*[20]". His Honour's reference, in the cited passage, to the reasons of McHugh J, imports a lengthy and oft-cited passage in *Applicant A*[21] containing "interpretative principles" for the ascertainment of the meaning of the term "refugee", as that word is used in the Act. The Act incorporates the concept of "refugee", as defined in the Convention and Protocol (together "the Convention"), both of which Australia has signed and ratified.

14 *Practice of this and other courts*: Countless cases in this Court have proceeded in the foregoing manner. They have addressed immediately the meaning of the composite notion of "refugee" as provided in the Convention. In doing so, they have not bypassed Australian municipal law. That law has uncontested primacy in Australian courts[22]. No one doubts that. But by proceeding directly to the Convention definition, those courts have not questioned that primacy. On the contrary, they have done what Australian law itself requires in defining the persons relevantly entitled (and not entitled) to protection as "refugees" under Australian law.

15 This approach is by no means confined to Australian courts. A similar approach has been taken in the United Kingdom and elsewhere[23]. Indeed, until now, the approach to be taken in cases such as the present has been clear. It has obliged the decision-maker to address immediately the Convention definition of "refugee" and, therefore, to consider the understanding of that expression as it appears in the Convention[24].

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19 But contrast *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

20 (1990) 171 CLR 338 at 348-350, 356-357.

21 (1997) 190 CLR 225 at 251-256.

22 cf *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 414 [136].

23 *T v Secretary of State for the Home Department* [1996] AC 742; *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063; [2005] 4 All ER 580. The same principle is applied throughout the Commonwealth of Nations. For example, the position in India is explained in *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715 at 2720, 2722; 1996 (5) SCC 647; *Peoples' Union for Civil Liberties v Union of India* AIR 2005 FC 2419 at 2426; cf Singh, *Principles of Statutory Interpretation*, 10th ed (1996) at 584-587; cf *R v Chief Immigration Officer; Ex parte Bibi* [1976] 1 WLR 979 at 984.

24 See, eg, *Khawar* (2002) 210 CLR 1 at 15-16 [42]-[43], 37 [111].

16 In the joint reasons in this Court of Callinan, Heydon and Crennan JJ ("the joint reasons"), Allsop J in the Full Court of the Federal Court is taken to task for proceeding to decide this case by reference to the interpretation of the Convention[25]. His Honour is criticised for stating that the Convention provides the framework within which the Act in this respect is to be understood[26]. The joint reasons state that the "Convention does not provide any of the framework for the operation of the Act. The contrary is the case"[27].

17 *Facilitation of international law*: I cannot agree with these criticisms. They fly in the face of long established general principles for the construction of municipal legislation referring to treaty provisions which have been ratified by the nation concerned. They are contrary to the long-standing authority of this Court and of other courts of high authority throughout the common law world. They are inimical to the effective participation of this country in the growing body of international, regional and bilateral treaties which substantially depend, in Australia, on municipal law to bring them into local effect. The new approach is harmful to the consistent development of international law. And that law is of critical importance for the protection of the peace, security, human rights and economic progress of all humanity.

18 We in this Court, at this time, should not be hostile to the provisions of international law. After all, the treaty expressing the applicable obligations of international law has been ratified by this country in accordance with its Constitution and the requisite legal procedures and practices. Moreover, the Australian Parliament has incorporated the relevant definition of "refugee" by reference in a municipal enactment, and the validity of that enactment has not been challenged in these proceedings. Hostility is entirely out of place. Facilitation and implementation constitute the correct legal approach.

The facts, legislation and issues

19 *The facts and legislation*: The facts of NBGM's case are similar to those in *QAAH*. They are substantially set out in the joint reasons[28]. The important fact is that NBGM was granted a temporary protection visa pursuant to the Act on 24 March 2000 by a delegate of the Minister. Accordingly, as at that date, a

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25 Joint reasons at [56]-[65], referring to (2006) 150 FCR 522 at 564 [165] per Allsop J.

26 Joint reasons at [60].

27 Joint reasons at [69].

28 Joint reasons at [38].

conclusion had been arrived at, in accordance with Australia's own legal procedures, that Australia owed the applicant protection obligations under the Convention as a "refugee" (as defined in art 1A(2) of the Convention). In light of the evidence as to his experiences before leaving Afghanistan, as appearing in the record, the acceptance of the applicant's refugee status was scarcely surprising.

20 In accordance with the Convention, and therefore in accordance with the Act, that status could only thereafter be lost (in a case such as the present) by the operation of the cessation provision appearing in art 1C(5) of the Convention.

21 The joint reasons explain that on 16 September 2003, a delegate of the Minister purportedly refused to grant the applicant a permanent protection visa. The delegate refused that visa, finding that NBGM was not a person to whom Australia had protection obligations[29]. NBGM promptly applied to the Tribunal for review of the delegate's decision. On 5 April 2004, the Tribunal affirmed that decision. It refused to grant NBGM a permanent protection visa[30].

22 Pursuant to the *Judiciary Act* 1903 (Cth), NBGM then applied to the Federal Court seeking relief in the nature of a constitutional writ, on the ground of error by the Tribunal in its understanding of its jurisdiction[31]. The primary judge of the Federal Court (Emmett J[32]) refused the relief claimed. On appeal, as has been stated, the Full Court by majority upheld those orders[33].

23 *The applicable issues*: The decisional history of the proceedings in the Federal Court is described in the joint reasons[34]. The same issues emerge in the divided opinions of the judges in *NBGM* as have been identified in *QAAH*[35]. They include:

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29 *NBGM* (2006) 150 FCR 522 at 543 [78].

30 *NBGM* (2006) 150 FCR 522 at 543 [78].

31 *NBGM* (2006) 150 FCR 522 at 543 [79].

32 *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373. In the Full Court, Allsop J noted that the primary judge did not have access to this Court's decision in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 or the decision of the House of Lords in *Hoxha* [2005] 1 WLR 106; [2005] 4 All ER 580.

33 (2006) 150 FCR 522.

34 Joint reasons at [44]-[48].

35 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [14], reasons of Kirby J.

- The proper approach to the relationship between the Act and the Convention for the issues presented in the appeal;

- The propriety and utility of the use of materials produced by, and submitted on behalf of, the United Nations High Commissioner for Refugees ("UNHCR");

- The interrelationship between arts 1A(2) and 1C(5) of the Convention in circumstances where a person has already been recognised as a "refugee" within the Convention definition (as NBGM had been);

- The approach to the establishment of changed circumstances in the country of nationality where this is asserted by the Minister as a ground for cessation of "refugee" status; and

- The availability of relief directed to the Tribunal, in any event, on the basis that it had correctly considered, and rejected, NBGM's arguments in terms of the way they are now propounded in this Court[36].

24 Identical issues were argued in *QAAH*, by reference to the facts in that appeal. There is no need for me, in these reasons, to elaborate the statement of the issues; or to repeat the arguments of the parties or the considerations of authority, legal principle and policy relevant to their disposition in this application.

Conclusion: jurisdictional error is established

25 *Identical resolution of issues*: I would resolve all of the foregoing issues in these proceedings in the same way as I have resolved them in QAAH. In my opinion, the majority in the Full Court in QAAH[37] approached the issues for decision in the correct way. Most especially, they recognised (as the dissenting judges in the Full Court in NBGM also did[38]), that the correct starting point for legal analysis was, in accordance with the Act itself, to understand and apply the accurate meaning of the Convention provisions by which the status of "refugee" is defined for international, as well as municipal law, and hence the

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36 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [50].

37 Wilcox and Madgwick JJ. See *QAAH* (2005) 145 FCR 363 at 386 [88].

38 *NBGM* (2006) 150 FCR 522 at 562 [156] per Allsop J, 530 [26] per Marshall J agreeing.

circumstances in which that status, having been recognised, may cease, by international and municipal law, to apply to the person concerned.

26 For the reasons I gave in *QAAH*, the minority judges in this matter asked the correct questions and came to the correct conclusion in finding jurisdictional error. The majority judges (and the primary judge) by approaching the matter in an incorrect way, and asking incorrect questions, unsurprisingly arrived at erroneous conclusions.

27 *The Tribunal decision issue*: Only one issue has caused me to pause in reaching this conclusion.

28 In accordance with the approach that I upheld in *QAAH*, the Tribunal, in *NBGM*, correctly identified the first question that it had to answer as being posed not (as the Minister would assert) as a repeated application of art 1A(2) but the application of art 1C(5) dealing with cessation of refugee status[39]. The Minister now contests that this is the correct approach where questions of cessation arise. However, it is my opinion, for the reasons stated in *QAAH*[40], that the Tribunal was correct in primarily adopting this approach. As I demonstrated in *QAAH*, this opinion is strongly supported by available materials produced by the office of UNHCR, by expert and scholarly opinion and by judicial authority in other countries[41].

29 Can it therefore be said that the Tribunal, to this extent, accurately identified the ambit of its jurisdiction; proceeded to exercise that jurisdiction; and that any error which followed was one made *within* jurisdiction and not one that took it *outside* its jurisdiction, thus requiring judicial intervention for jurisdictional error? In my opinion, this issue presents the only arguable ground in NBGM's application for refusing special leave or for dismissing an appeal.

30 In the end, however, I am convinced on this issue (as on the others) by what Allsop J wrote in his dissent in the Full Court. Relevantly, his Honour said[42]:

> "The flaw in the approach of the Tribunal was its failure to recognise the characteristics of the task before it in assessing whether [art 1]C(5) led to

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39 *NBGM* (2006) 150 FCR 522 at 526 [2].

40 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [65]-[72].

41 Such as *Hoxha* [2005] 1 WLR 1063.

42 *NBGM* (2006) 150 FCR 522 at 575 [215].

> the cessation of the application of the Convention. The Tribunal did not direct itself to, or deal with, the matter exhibiting an appreciation of the need to be satisfied that there had been made out a demonstrably clear and durable change of circumstances to warrant the likely permanent cessation of application of the Convention. This is best revealed by how it treated the killing and beheading of 12 Hazaras by the Taliban in late 2003. The Taliban, it would appear, were still an operating threat in a neighbouring district."

31 Allsop J then quoted, at some length, from the Tribunal's reasons for decision in this case[43]. In those reasons, the Tribunal described the killing and beheading of 12 Hazaras as "isolated examples". As Allsop J remarked, the reasons given by the Tribunal in this respect "exhibit an approach whereby it was for [NBGM] to show that there was a real chance of persecution, rather than it being necessary for the Tribunal to be satisfied that durable change in the relevant circumstances had been revealed with the necessary clarity"[44].

32 From the text and structure of the Convention[45], Allsop J concluded that a clear demonstration of durable change was required to warrant the serious (second) step envisaged by Art 1C(5) of the Convention, permitting a conclusion to be reached that the "refugee" status (that had been acknowledged by the initial grant of protection) was now to be treated as having ceased.

33 In effect, Allsop J's approach to the content of art 1C(5) of the Convention is identical to that accepted by the majority judges in the Full Court in *QAAH*[46]. For the reasons I gave in *QAAH*[47], this approach was correct. It was not inconsistent with the text of the Convention, incorporated in this respect by the provisions of s 36(2) of the Act. On the contrary, the opposite conclusion, now favoured by a majority of this Court, is inconsistent with the language, history and purpose of the Convention. The majority conclusion is also difficult to reconcile with the policy of the Convention that persons accorded refugee status will not be plunged into constant and repeated uncertainty by the grant and later withdrawal of recognition as "refugees", with consequent removal to the country of nationality in potential breach of the basic principle of non-refoulement.

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43 *NBGM* (2006) 150 FCR 522 at 575 [215].

44 *NBGM* (2006) 150 FCR 522 at 576 [216].

45 *NBGM* (2006) 150 FCR 522 at 577 [220].

46 *QAAH* (2005) 145 FCR 363 at 376 [41] per Wilcox J, 392 [110] per Madgwick J.

47 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [110]-[122].

34 To an Australian decision-maker, in the safety of this country, the established fact that 12 persons of the applicant's particular minority racial and religious identity were killed and beheaded in a district of Afghanistan neighbouring his own might seem an unimportant, "isolated incident". But to a person whose experience had already invoked a "well-founded fear" of persecution, occasioning flight to Australia to seek refuge and official acceptance and recognition of refugee status, such an instance might be indicative of more widespread, systematic violent activity apt to occasion a well-founded fear of continuing persecution. It demonstrates, as Marshall and Allsop JJ concluded in the Full Court, why the Tribunal needs to be very sure before deciding that a "change of circumstances" has been established, warranting withdrawal of refugee status and the return of NBGM to his country of nationality.

35 *Conclusion: jurisdictional error shown*: Although, therefore, there are arguments for and against the submission that the Tribunal mistook its jurisdiction, I am ultimately persuaded that it did. NBGM's application for judicial review of the Tribunal's decision should therefore be upheld. His claim should be returned to the Tribunal so that it might, unequivocally, apply the correct standard for cessation of refugee status in accordance with art 1C(5) of the Convention[48]. That standard obliges a clear conviction on the part of the Tribunal that a suggested change of circumstances has occurred that is "substantial, effective and durable"[49].

Orders

36 The application for special leave to appeal should be granted. The appeal should be allowed. The orders of the Full Court of the Federal Court of Australia should be set aside. In place of those orders, this Court should order that the appeal to the Full Court of the Federal Court be allowed; the orders of the primary judge set aside; a writ of *certiorari* should issue to the Refugee Review

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48 As incorporated by the Act, s 36(2). See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [42] where "the adjectival phrase" in the sub-section "to whom Australia has protection obligations under [the Convention]" was held to describe "no more than a person who is a refugee within the meaning of Art 1 of the Convention". The inter-position of the opinion of the Minister cannot inject subjective or personal factors without restoring the discredited doctrine of the majority in *Liversidge v Anderson* [1942] AC 206. On this, see *George v Rockett* (1990) 170 CLR 104 at 112 and *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952 at 1011.

49 See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [110]-[122], reasons of Kirby J.

Tribunal quashing its decision. The proceedings should be returned to the Tribunal with an order that it hear and determine the application before it in accordance with law.

37 CALLINAN, HEYDON AND CRENNAN JJ. This application for special leave to appeal was heard at the same time as the appeal in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[50] ("*QAAH*") because it raised similar questions to those for determination in the latter. These reasons should be read with the reasons in that case.

The facts

38 The applicant is a citizen of Afghanistan, a Shi'a Muslim and of Hazara ethnicity. He arrived in Australia in October 1999 without a passport or a visa. He was granted a temporary protection visa on 24 March 2000. A week or so later he applied for a permanent protection visa. On 16 September 2003 a delegate of the first respondent refused that application. The applicant then sought review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed the decision of the first respondent's delegate on 5 April 2004.

The Tribunal's reasoning

39 The Tribunal accepted that at the time when the applicant first applied for a visa he was a person to whom Australia owed obligations of protection under the Convention relating to the Status of Refugees[51], taken with the Protocol relating to the Status of Refugees[52] (together, "the Convention"). The question, the Tribunal said, however, was whether the applicant was, in accordance with Art 1C(5) of the Convention, a person who could continue to refuse to avail himself of the protection of Afghanistan because the circumstances in connexion with which he was recognized by Australia as a refugee had ceased to exist.

40 At the hearing conducted by the Tribunal it was suggested to the applicant that the Taliban, the oppressive extremist movement in Afghanistan, had been removed from power by mid-November 2001, and was no longer a political or other force. It was further suggested that such of the Taliban as were active did not pose a direct threat to the civilian population and that its targets were members of the government, its security forces and international aid workers. The Tribunal put these matters to the applicant in terms, as well as the suggestion that the Taliban was not in any event active in the applicant's region. The

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50 [2006] HCA 53.

51 Done at Geneva on 28 July 1951.

52 Done at New York on 31 January 1967.

applicant sought to reject this last suggestion, referring to some deaths that had occurred in his region not long before.

41 The Tribunal made findings generally in accord with the suggestions that it had made to the applicant, that the Taliban was no longer in a position to massacre people in the manner referred to in the decision of the delegate of 16 September 2003, and that the Taliban was unlikely to re-emerge as a viable political movement in Afghanistan in the reasonably foreseeable future. On the basis of those circumstances, the Tribunal concluded that Art 1C(5) of the Convention applied to the applicant. It also gave consideration to the question whether, assuming that Art 1C(5) of the Convention was not applicable, s 36(3) of the *Migration Act* 1958 (Cth) ("the Act") applied to the applicant. The answer to that question, the Tribunal decided, was the same as the answer to the question that it had first posed, that Australia had ceased to owe obligations of protection to the applicant because of the changed circumstances in Afghanistan.

42 There was apparently a further hearing undertaken by the Tribunal to consider other claims made by the applicant, in substance that because his uncles had been active in a Sepah faction of the Wahdat he would be at risk of the opposing Nasr faction of the Wahdat. The applicant elaborated upon that claim by saying that before the Taliban had taken control of his region the two factions had fought over it. He alleged that unless he were prepared to join one of the factions he would be accused by the other of being against it. It was part of his claim that the government was not in control of the region, that the Pashtun and Tajik people were, and that they would be likely to persecute him because he was a Shi'a Muslim.

43 The Tribunal did not accept any of these claims. It decided that there was not a real chance of persecution of the applicant by any of the people whom he had identified: if there were any discrimination against Hazara people, it fell short of persecution under the Convention. It was the Tribunal's opinion that on the basis of the information available to it the situation of Shi'a Muslims in Afghanistan was generally good. It is for these reasons that the Tribunal affirmed the decision of the delegate.

The Federal Court

44 The applicant then made application for certiorari to quash the Tribunal's decision and for associated relief. This application was heard at first instance by the Federal Court (Emmett J)[53]. After setting out the facts and summarizing the

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53 *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373.

reasons of the Tribunal his Honour turned to a construction of the Convention. He said, correctly in our opinion, this[54]:

> "Articles 33.1, 1A(2) and 1C(5) of the Refugees Convention turn upon the same basic notion; protection is afforded to persons in relevant need, who do not have access to protection, apart from the Refugees Convention. A person is relevantly in need of protection if that person has a well-founded fear of being persecuted, for Convention Reasons, in the country, or countries, in respect of which the person has a right or ability to access. On the other hand, the Refugees Convention is not designed to provide protection to those with no such need. In practical terms, the limited places for, and resources available to, refugees are to be given to those in need and not to those who either can access protection elsewhere or are no longer in need of international protection."

Later his Honour said this[55]:

> "When Article 33.1 speaks in terms of a territory where the life or freedom of a person would be threatened **on account of Convention Reasons**, while the language is not identical, the concept is intended to correspond with the concept that underlies Article 1A(2). That is to say, where a person, owing to well founded fear of being persecuted for Convention Reasons is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, a Contracting State must not expel or return that person to another territory where he or she would have a well founded fear of being persecuted for Convention Reasons namely, his or her life or freedom would be threatened on account of any Convention Reasons.
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> There is a similar relationship between Articles 1A(2) and 1C(5). Thus, the latter refers to the circumstances in conne[x]ion with which a person has been recognised as a refugee. That refers back to the concept that the person has a well founded fear of **being persecuted for Convention Reasons** and is therefore unable, or owing to such fear, unwilling, to avail himself of the protection of his own country. The two provisions should be construed as having some symmetry in their effect.
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54 [2004] FCA 1373 at [34].

55 [2004] FCA 1373 at [36]-[37] and [39]-[40].

> While there is a certain lack of symmetry in the actual language of the three provisions, there is a rationale underlying the basic object and scheme of the Refugees Convention. That rationale is that, so long as the relevant well-founded fear exists, such that a person is unable or unwilling to avail himself or herself of the protection of the country of his or her nationality, he or she will be permitted to remain in the Contracting State. However, if circumstances change, such that it can no longer be said that the person is unable to avail himself or herself of the protection of his or her country of nationality owing to well-founded fear of persecution for Convention Reasons, the Contracting State's obligation of protection comes to an end. That is to say, the obligations to a person that arise under, inter alia, Articles 32.1 and 33.1 continue only for so long as the person is a refugee within the meaning of Article 1A(2).
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> It may be appropriate, when considering the possible application of Art 1C(5), to assess whether a change in circumstances in the country of nationality is such as can properly be characterised as 'substantial, effective and durable'. However, the object of the enquiry is to determine whether the person who has been recognised as a refugee can still claim to have a well-founded fear of being persecuted, for a Convention Reason, in his or her country of nationality such that there is justification for his or her being unable or unwilling to avail himself or herself of the protection of that country." (original emphasis)

45 His Honour then gave consideration to whether under Art 1C(5) relevant changes in circumstances must be "substantial, effective and durable". This language is the same language as used in a paper prepared by the first respondent's department, entitled *Interpreting the Refugees Convention – an Australian Contribution*[56] and elsewhere. The answer to the question was, his Honour said, that the Convention does not actually refer to the need for the change in circumstances to be "substantial, effective and durable". All that it does refer to is "particular circumstances ceasing to exist".

46 His Honour's next step was to consider at some length the evidence which had been before the Tribunal, concluding that[57]:

> "It is not for the Court to second guess the significance attached by the Tribunal to the evidentiary material before it. That, in essence, is what the applicant has asked the Court to do. It was open to the Tribunal, on

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56 Department of Immigration and Multicultural Affairs, Canberra, (2002).

57 [2004] FCA 1373 at [54].

> the material before it, to conclude, as it did, that the applicant did not, as [at] April 2004, have a **well-found** [sic] fear of being persecuted for one of the Convention Reasons if he returns to Afghanistan now or in the reasonably foreseeable future." (original emphasis)

47 Notwithstanding the conclusions which he had already reached, his Honour dealt with an argument advanced by the applicant with respect to the operation given by the Tribunal to s 36(3), (4) and (5) of the Act, as to the first of which it had been submitted that it was directed to a person who had entered Australia to seek protection only in circumstances in which there were other countries in which that person could have sought protection, whether they were countries in which he had been on his journey to Australia or in which he had a right to enter and reside, whether temporarily or permanently. It was part of the applicant's argument with which his Honour dealt that s 36(3) could in effect only have operation if a question of "forum shopping"[58] arose, an expression which had been used in the Explanatory Memorandum of the Bill for the amendments that were made to the Act[59] inserting s 36(3), (4) and (5). Emmett J rejected the argument, holding that recourse to the Memorandum was neither necessary nor desirable in view of the absence of any ambiguity of s 36[60]. As to Art 1C(5) his Honour said that the scheme of the Act which contemplated fresh applications when temporary visas expired, whilst it might not necessarily sit comfortably with the framework of the Convention, was clear: Art 1C(5) was an article that could be invoked by the first respondent as circumstances changed, albeit that in practice a contracting state might seek to apply it sparingly[61]. That, it may be inferred, was the operation which Art 1C(5) had. It could not in argument be used to contradict clear language of the Act.

48 His Honour, in the result, was unable to identify any jurisdictional error on the part of the Tribunal and refused to grant the applicant any of the relief claimed.

The Full Court of the Federal Court

49 The applicant appealed to the Full Court of the Federal Court which was constituted by five judges (Black CJ, Marshall, Mansfield, Stone and

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58 [2004] FCA 1373 at [56].

59 *Border Protection Legislation Amendment Act* 1999 (Cth).

60 [2004] FCA 1373 at [58].

61 [2004] FCA 1373 at [60]-[64].

Allsop JJ)[62]. The appeal was heard after a differently constituted Full Court (Wilcox, Madgwick and Lander JJ) had decided the appeal in *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs*[63].

50 The Full Court in these proceedings was divided in the result, the majority (Black CJ, Mansfield and Stone JJ) disallowing the appeal. The reasoning of the members of the majority differed somewhat.

51 Both Black CJ and Mansfield J were of the opinion that the words in s 36(3) "any country apart from Australia, including countries of which the non-citizen is a national" should be construed according to its ordinary meaning and could not be confined, as the applicant argued, to situations in which an applicant had a right to enter and reside in a "third country"[64]. Black CJ pointed out, correctly, that by s 36 the legislature has laid down the test, as a matter of domestic law, that must be satisfied under s 36(2) of an applicant's entitlement to a visa: that "[t]he circumstances to be established are presently existing circumstances, as to which the past may well illuminate the present; but the question remains in the present."[65]

52 It was his Honour's opinion, as it was of Mansfield J, that the reasons of the Tribunal did disclose that it had properly undertaken the task prescribed by s 36 of the Act and that it had neither misunderstood nor misapplied the law: that even if the Tribunal's processes and reasons were insufficient to enliven Art 1C(5) of the Convention, s 36 was an independent foundation for the Tribunal's decision[66]. Black CJ and Mansfield J were satisfied however that if the Convention fell to be applied in an unqualified way the analysis and meaning of it adopted by Allsop J were correct[67].

53 It is unnecessary to refer any further to the reasons of Mansfield J because they were generally in accord with those of the Chief Justice.

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62 *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522.

63 (2005) 145 FCR 363.

64 (2006) 150 FCR 522 at 528 [12] per Black CJ, 536 [54] per Mansfield J.

65 (2006) 150 FCR 522 at 529 [18].

66 (2006) 150 FCR 522 at 530 [22] per Black CJ, 534 [42] per Mansfield J.

67 (2006) 150 FCR 522 at 530 [23] per Black CJ, 534 [41] per Mansfield J.

54 The other member of the majority, Stone J, referred to a number of other provisions of the Act and Regulations, including some of those to which we referred in *QAAH* and which are concerned with statutory temporal limitations on visas.

55 Her Honour, correctly, pointed out that the Convention does not apply directly and in an unqualified way in Australia, and that the fundamental question was the proper construction of the Act. She then discussed[68] a number of authorities of this Court[69] in which the construction of international and other instruments had been considered, concluding that it was difficult to discern any material difference between the principles governing the interpretation of international treaties and domestic legislation.

56 As to the argument advanced by the applicant that Art 1C(5) would be otiose on the construction given to it by the primary judge, her Honour said that on the occurrence of events, that is, relevant changes of circumstances, predicated by it and not inconsistently with it, the cancellation provisions of the Act will apply notwithstanding that an applicant may hold a visa for a period which is still not expired[70]. Her Honour then went on to say that she agreed with the interpretation of the Convention and the statutory scheme prescribed by the Act and Regulations adopted by the primary judge: she was not prepared to, and did not, regard herself as bound, sitting as a member of the Full Court, to apply the reasoning and decision of the majority in *QAAH*, preferring the reasoning of the primary judge there, Dowsett J, which was in substance the same as that of Emmett J, at first instance in this case.

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68 (2006) 150 FCR 522 at 549-554 [107]-[123].

69 *Simsek v Macphee* (1982) 148 CLR 636; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; *Morrison v Peacock* (2002) 210 CLR 274; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273; *Coleman v Power* (2004) 220 CLR 1; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161.

70 (2006) 150 FCR 522 at 558-559 [141]-[142].

57 Allsop J (in dissent) embarked first upon a detailed consideration of the use which might be made of extrinsic materials in aid of the interpretation of the Convention[71]. As to the proper interpretation of the Act and Regulations, he said that in understanding their operation it was "of central importance to appreciate the content and intended operation of the Convention"[72]. His Honour then set himself the task of construing Arts 1A(2) and 1C(5), citing and adopting[73] the approach and words of Lord Brown of Eaton-under-Heywood in *R (Hoxha) v Special Adjudicator* ("*Hoxha*")[74]:

> "The whole scheme of the Convention points irresistibly towards a two-stage rather than composite approach to 1A(2) and 1C(5). Stage 1, the formal determination of an asylum-seeker's refugee status, dictates whether a 1A(2) applicant ... is to be recognised as a refugee. 1C(5), a cessation clause, simply has no application at that stage, indeed no application at any stage unless and until it is invoked by the State *against* the refugee in order to deprive him of the refugee status previously accorded to him." (original emphasis)

58 His Honour took as supporting the position, which he ultimately adopted, the United Nations High Commission for Refugees 1979 Handbook ("the Handbook"), and Lord Brown's references to and uses of it[75].

59 Allsop J then said this[76]:

> "The cessation of the Convention, and the cessation of the obligations of the host state to afford the person the benefits and protections provided for by the Convention (through its domestic law) can be seen to be a matter of great seriousness, and likely finality. The circumstances which have given rise to the recognition of the person as a refugee may raise matters of life and death. Section C(5) can be seen to operate to the disadvantage of someone who has been recognised as a

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71 (2006) 150 FCR 522 at 562-564 [156]-[163].

72 (2006) 150 FCR 522 at 564 [165].

73 (2006) 150 FCR 522 at 565 [168].

74 [2005] 1 WLR 1063 at 1082 [60]; [2005] 4 All ER 580 at 600-601.

75 (2006) 150 FCR 522 at 565-567 [169]-[173].

76 (2006) 150 FCR 522 at 566 [171], 567 [174], 568 [181].

refugee, in a way which can be seen to be final and irrevocable: 'he can no longer ... continue to refuse' the protection of his country of nationality.

...

As Lord Brown set out at [65] in *Hoxha*, the two stage approach to the operation of ss A(2) and C(5) contemplates the possibility of cessation. It does not contemplate, within its terms, multiple determinations of the application of s A(2). Domestic law could, of course, provide for recognition of application of s A(2) to lapse and for such recognition to be reapplied for. It might provide for yearly, monthly, weekly or even daily reassessments in which, on each occasion, the applicant would be required to make out afresh his or her claims for protection. The Convention does not contemplate that. It contemplates recognition as a refugee (with the engagement thereupon of the Convention) and cessation of the application of the Convention thus recognised, in circumstances provided for in s C, one of those being s C(5).

...

The text and purposes of the Convention, reinforced by the views of jurists (based, in part, on international jurisprudence), the Handbook viewed as the work of jurists, and the unanimous view of the House of Lords all point to the same way of viewing the Convention. Once the host State recognises the application of s A(2) that the applicant is a refugee, the protection provided for by the Convention is engaged and is only lost by an application of a cessation clause, here s C(5). Nothing in *Mayer*[77] or *Simsek*[78] is to the contrary of this."

60 Having said that, his Honour acknowledged that "[t]he context of domestic law in Australia is, however, somewhat different"[79]. One difference is that Australian law holds that the proceedings before the Tribunal were inquisitorial and its function is simply to decide whether a claim is made out. His Honour next referred[80] to s 36 of the Act, having first said that the content

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77 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

78 *Simsek v Macphee* (1982) 148 CLR 636.

79 (2006) 150 FCR 522 at 569 [182].

80 (2006) 150 FCR 522 at 569-570 [186].

and intended operation of the Convention was the framework against which the Act and delegated legislation under the Act may be read[81].

61 It is appropriate to point out at this stage that to approach the matter in that way was to invert the steps which an Australian court should take in situations in which international instruments have been referred to in, or adopted wholly or in part by, enactments. The first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument. The subsequent step is the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires. The first step is not, contrary to his Honour's express holding[82], to derive an understanding of the proper interpretation and operation of the Convention.

62 Notwithstanding the repeated references in the Act and Regulations to the respective durations of various visas and a non-citizen's obligation to apply for a visa, his Honour stated this view[83]:

> "Thus, read together, s 36(2) and the Regulations place Art 1 (as a whole) at the centre of the granting of both temporary and permanent protection visas. Importantly, the Regulations themselves, in terms, require the decision-maker to assess, by reference to the Convention (properly interpreted), whether Australia has protection obligations at the time of the decision. Thus, both the Act and the Regulations require the assessment of the relevant question (the existence of protection obligations at the time of decision) to be undertaken according to the Convention and its operation based on its proper interpretation."

63 Allsop J added this[84]:

> "The visa being applied for had its limitations, but the recognition of the applicant as a refugee was not in terms of the Act or Regulations an interim, provisional, interlocutory or temporally limited recognition.

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81 (2006) 150 FCR 522 at 564 [164]-[165].

82 (2006) 150 FCR 522 at 570 [188].

83 (2006) 150 FCR 522 at 571 [196].

84 (2006) 150 FCR 522 at 571 [197]-[198], 575 [212].

> Through the Minister's decision, the applicant was recognised by Australia as a refugee. There is nothing in the Act or Regulations to the effect that that recognition lapsed or ceased to be relevant at any particular point in time, or, perhaps more importantly, that the recognition had a more limited effect or consequence than contemplated by the Convention. The legislative regime provided for the further application for a permanent visa. It is important to ascertain whether this regime is to be seen as intended to operate differently to the operation of the Convention and, in particular, Art 1 as a whole. There was a need, or opportunity, to apply for a different and longer protection visa (five years – reg 866.511). The temporary protection visa would expire in the context of that further application.
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> The whole of Art 1 was at the centre of both applications (for a temporary protection visa and a permanent protection visa) as providing the content for the phrase 'a person to whom Australia has protection obligations under the Refugees Convention'. At the time of the determination of his application for a permanent protection visa, the [applicant] had been recognised as a refugee. He was not a claimant seeking recognition of the application of s A(2). He had that recognition. No provision of the Act or Regulations stated that that recognition ceased to have relevance to the operation of the Convention and to the question whether Australia had protection obligations to him under the Convention (though indirectly as obligations under international law as a host state) and under the Act and Regulations.
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> ...
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> Thus, unless and until the Convention ceases to apply by operation of s C(5), s 36(3) does not operate in respect of the [applicant] because s 36(4) makes it inapplicable, there being an existing recognition of the matters with which s 36(4) is concerned."

64 With respect to the reasons of the Tribunal, his Honour was of the opinion that they did not "disclose a direction to itself as to the clarity with which it must be satisfied of the change of circumstances"[85]. Further, he said, the reasons exhibited an approach "whereby it was for the applicant to show that there was a real chance of persecution, rather than it being necessary for the Tribunal to be satisfied that durable change in the relevant circumstances had been revealed with the necessary clarity"[86].

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85 (2006) 150 FCR 522 at 576 [216].

86 (2006) 150 FCR 522 at 576 [216].

65 Accordingly it followed, his Honour concluded, that the primary judge had erred in deciding that the Tribunal's reasoning and approach were correct. With this view, general reasoning and conclusion, Marshall J agreed[87].

Disposition of the application by this Court

66 The applicant made application for special leave to appeal to this Court.

67 It is unnecessary to repeat what we have said in *QAAH*, as our reasoning there applies to this application, and produces the result that if special leave were granted the appeal would fail.

68 It is desirable to say something further, however, about the proper approach to the construction of the Act and the Convention. Section 36 of the Act must be considered in context. The context is provided by other provisions of it. Some of those provisions, particularly the ones which we emphasized in *QAAH*, make it clear that a grant for a protection visa offers no promise or obligation to continue to afford protection or grant residence, whether permanent or otherwise, in the event that circumstances change.

69 The Convention does not provide any of the framework for the operation of the Act. The contrary is the case. That does not mean that the Convention in and to the extent of its application to Australia should be narrowly construed. It simply means that Australian law is determinative, and it is that which should be clearly ascertained before attention is turned to the Convention.

70 This application for special leave should be granted but the appeal should be dismissed with costs leaving the Full Court to determine the question of costs reserved in order 3 of the orders of 12 May 2006.

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87 (2006) 150 FCR 522 at 530 [26].