FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Multicultural and Indigenous Affairs v MZWLH

[2006] FCAFC 173

Corrigendum

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v MZWLH AND REFUGEE REVIEW TRIBUNAL
VID 1240 OF 2005

TAMBERLIN, WEINBERG & ALLSOP JJ
30 NOVEMBER 2006 (CORRIGENDUM 16 JANUARY 2007)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1240 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Appellant**
AND:	**MZWLH** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**30 NOVEMBER 2006 (Corrigendum 16 January 2007)**
PLACE:	**SYDNEY**

CORRIGENDUM

1 On the coversheet the words "*of 2004*" be added after "*QAAH"* in the first case citation.

2 On the coversheet the words "*QAAH v*" be inserted prior to the words "*Minister for* …" in the second case citation.

3 On the coversheet the words "*QAAH of 2004*" be deleted from the third case citation.

4 Line two in paragraph 6 on page 2 the words "*of 2004"* be deleted.

5 Line two in paragraph 8 on page 3 the words "*of 2004"* be added after the words " *v QAAH"*.

I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 16 January 2007

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Multicultural and Indigenous Affairs v MZWLH

[2006] FCAFC 173

Migration Act 1958 (Cth) s 36

Minister for Immigration and Multicultural Affairs v QAAH [2006] HCA 53
Minister for Immigration and Multicultural and Indigenous Affairs (2005) 145 FCR 363
NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54 *QAAH of 2004*
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 522

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v MZWLH AND REFUGEE REVIEW TRIBUNAL
VID 1240 OF 2005

TAMBERLIN, WEINBERG & ALLSOP JJ
30 NOVEMBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1240 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Appellant**
AND:	**MZWLH** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE OF ORDER:	**30 NOVEMBER 2006**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1240 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Appellant**
AND:	**MZWLH** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**30 NOVEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

TAMBERLIN J

6 I agree, for the reasons given by Allsop J that the appeal should be allowed, with costs.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberin.

Associate:

Dated: 30 November 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1240 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Appellant**
AND:	**MZWLH** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**30 NOVEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

WEINBERG J

7 I agree, for the reasons given by Allsop J that the appeal should be allowed, with costs.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg.

Associate:

Dated: 30 November 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1240 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Appellant**
AND:	**MZWLH** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**30 NOVEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ALLSOP J

8 This is an appeal by the Minister from orders made by a Federal Magistrate which set aside the decision of the Refugee Review Tribunal (the Tribunal) that had affirmed the decision of a delegate of the Minister.

9 The first respondent is a national of Afghanistan who arrived in Australia on 3 September 1999. On 23 October 1999, he lodged an application for a protection visa with the Department. On 27 January 2000, he was granted a sub-class 785 (temporary protection) visa that was valid for 3 years. On 2 February 2005, the first respondent made a further application to the Department for a protection visa (Class XA). The first respondent claimed that he would face persecution at the hands of the Taliban if he were to return to Afghanistan because of his ethnicity and his support for the former communist regime, including his association with the friend of political leaders who were fighting against the Taliban. He also claimed that he made negative comments about Pakistan and that those comments may have

been reported to the Taliban. Also, he claimed that because he had lived overseas he may be seen as anti-muslim. In a decision dated 5 September 2003 a delegate of the Minister refused to grant the first respondent a protection visa. On 14 October 2003 the first respondent lodged an application for review of the delegate's decision with the Tribunal. On February 2004 the Tribunal invited the first respondent to attend a hearing. On 17 March 2004, the first respondent lodged written submissions in support of his claims. On 19 March 2004, the first respondent attended a Tribunal hearing and gave oral evidence. On 7 April and 14 April 2004, the first respondent's adviser submitted letters and translations in support of the first respondent's application. On 16 April 2004, the Tribunal decided to affirm the delegate's decision.

10 The Tribunal dealt with the matter accepting that the first respondent was a citizen of Afghanistan who had been previously been found by a delegate of the appellant Minister to be a person to whom Australia owed protection obligations under the Refugees Convention. This recognition of the first respondent's position was made at the time of the granting of the temporary protection visa. The Tribunal stated that the first question that it needed to address was whether, in accordance with Article 1C(5) of the Convention, the first respondent could not continue to refuse to avail himself of the protection of his country of nationality because of the circumstances in connection with which he was recognised as a refugee had ceased to exist. After recounting the first respondent's original claims that had been accepted, the Tribunal found that the Taliban were no longer in a position to pose a threat to the first respondent. It concluded that his circumstances had relevantly changed and that article 1C(5) applied to the first respondent. The Tribunal then embarked on an alternative course of reasoning in relation to the matter. In this alternative course of reasoning, it posed itself the question as to whether the first respondent had a well founded fear of persecution for a relevant Convention related reason under article 1A(2) of the Convention. According to the Tribunal, the relevance of this argument was brought about by the application of s 36(3) and (4) of the *Migration Act 1958* (Cth) (the Act).

11 The area of debate necessary to be dealt with that is thrown up by the above facts is the application of the Full Court decisions in *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363 and *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522. At the time the

Federal Magistrate dealt with the matter only *QAAH* had been handed down. Therefore, in accordance with the dictates of that decision, the Federal Magistrate found that the Tribunal did not properly address, amongst other issues, what he referred to as the durability question and the question as to the full circumstances of the respondents position.

12 Time has overtaken that approach. In *NBGM*, a majority of the Full Court in this Court stated the following (see [25] in the reasons of Black CJ, agreed in by Mansfield J and Stone J):

> *"The members of the Full Court have reached differing conclusions both as to the outcome of the appeal and as to the reasons for the outcome. As a majority would dismiss the appeal, that will be the order of the Court. Given the practical importance of the case, I think it appropriate to observe that whilst there are two lines of reasoning leading to the majority conclusion that the appeal should be dismissed, there is a common conclusion about the task to be performed by the decision-maker on an application for a permanent protection visa where the relevant circumstances are said to have changed since the appellant was granted a temporary protection visa. The majority would agree that s 36 mandates that the decision-maker must be satisfied that, at the time the decision is made, the applicant for a permanent protection visa then has a well-founded fear of persecution for a Convention reason. The circumstance that a previous decision-maker was satisfied that the applicant had such a fear when a temporary protection visa was granted is not sufficient to establish what s 36 requires."*

13 Further, the High Court has now delivered judgment in the appeals in *Minister for Immigration and Multicultural Affairs v QAAH* [2006] HCA 53 and *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 in which a majority of the High Court made clear that the correct approach was to apply Article 1A(2) as the Full Court agreed in [25] of *NBGM* though for different reasons.

14 From this it is clear that the alternative approach of the Tribunal in assessing whether the first respondent had a well-founded fear of persecution for the purposes of Article 1A(2) of the Convention was correct.

15 The first respondent to the appeal sought to uphold the decision of the Federal Magistrate by an argument, strongly pressed, to the effect that the decision in *NBGM* in the Full Court did not contain a relevant *ratio*. The decisions of the High Court in *QAAH* and NBGM now make the arguments irrelevant.

16 Mr Gibson on behalf of the Respondent submitted that this Court should not follow the Full Court in *NGBM* and should adopt the approach which Marshall J and I, for the reasons that I gave, adopted. That course is now impossible in the light of the High Court decisions.

17 There being no other ground argued, the appeal should be allowed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 30 November 2006

Counsel for the Appellant:	Mr G Johnson
Solicitor for the Appellant:	Clayton Utz
Counsel for the Respondent:	Mr J A Gibson
Solicitor for the Respondent:	Victoria Legal Aid
Date of Hearing:	19 May 2006
Date of Judgment:	30 November 2006