FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU

[2013] FCAFC 91

Citation:	Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU [2013] FCAFC 91
Appeal from:	SZRHU v Minister for Immigration & Anor [2012] FMCA 1013 SZRBJ v Minister for Immigration & Anor [2012] FMCA 1240
Parties:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP v SZRHU and REFUGEE REVIEW TRIBUNAL** **SZRBJ v MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File numbers:	NSD 2030 of 2012 NSD 2103 of 2012
Judges:	**TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
Date of judgment:	14 August 2013
Catchwords:	**MIGRATION** – whether a 'right to enter and reside in' another country under s 36(3) of the *Migration Act 1958* (Cth) need be a legally enforceable right – whether *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 should be followed – whether the construction of s 36(3) in *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 should be preferred – discussion of the doctrine of effective protection overruled by the High Court of Australia in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161
Legislation:	*Australian Citizenship Act 2007* (Cth) *Australian Constitution* ss 44(i), 51(xix) & (xxvii) *Border Protection Legislation Amendment Act 1999* (Cth) Part 6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* RSC 1985 s 6(1) Explanatory note, *Citizenship Amendment Bill 2010* (NZ)

Federal Court of Australia Act 1976 (Cth) s 20
Immigration Act 2009 (NZ) s 13(1)
Magna Carta Art 42
Migration Act 1958 (Cth) s 36
Supplementary Explanatory Memorandum, *Border Protection Legislation Amendment Act 1999* (Cth)

Treaties:

International Covenant on Civil and Political Rights Art 12(4)
Treaty of Peace and Friendship between India and Nepal 1950

Cases cited:

Air Caledonie v The Commonwealth of Australia (1988) 165 CLR 462
Al-Rahal v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 73
Al-Zafiry v Minister for Immigration and Multicultural Affairs [1999] FCA 443
Applicant C v Minister for Immigration and Multicultural Affairs [2001] FCA 229
Calvin's Case (1608) 2 How St Trials 559, 77 E.R. 377
Chow Hung Ching v The King (1948) 77 CLR 449
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 110 ALR 97
Crandall v State of Nevada, 73 US 35 (1867)
Ex parte De Braic (1971) 124 CLR 162
Fong Yue Ting v United States, 149 US 698 (1893)
Hwang v Commonwealth of Australia [2005] HCA 66, 80 ALJR 125
Judd v McKeon (1926) 38 CLR 380
Kent v Dulles, 357 US 116 (1958)
Kola v Minister for Immigration and Multicultural Affairs [2001] FCA 630
Koroitamana v The Commonwealth of Australia [2006] HCA 28, 227 CLR 31
Lopez v Franklin, 427 F Supp 345(1977)
Mayer v Minister for Immigration and Ethnic Affairs (1984) 55 ALR 587
Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549
Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154
Minister for Immigration and Multicultural Affairs v Ibrahim [2000] HCA 55, 204 CLR 1
Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543
Minister for Immigration and Multicultural and Indigenous Affairs v Walsh [2002] FCAFC 205, 125 FCR 31

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 CLR 161
Nishimura Ekiu v United States, 142 US 651 (1892)
Nolan v Minister of State for Immigration and Ethnic Affairs (1988) 165 CLR 178
O'Keefe v Calwell (1949) 77 CLR 261
Potter v Minahan (1908) 7 CLR 277
R v Director-General of Social Welfare; Ex parte Henry (1975) 133 CLR 369
R v Forbes; Ex parte Kwok Kwan Lee (1971) 124 CLR 168
R v Smithers; Ex parte Benson (1912) 16 CLR 99
Rajendran v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526
Re Patterson; Ex parte Taylor [2001] HCA 51, 207 CLR 391
Re Woolley; Ex parte Applicants M276/2003 [2004] HCA 49, 225 CLR 1
Rowe v Electoral Commissioner [2010] HCA 46, 243 CLR 1
Singh v The Commonwealth [2004] HCA 43, 222 CLR 322
Sue v Hill [1999] HCA 30, 199 CLR 462
SZHWI v Minister for Immigration and Multicultural Affairs [2007] FCA 900; 95 ALD 631
SZMWQ v Minister for Immigration and Citizenship (2010) 187 FCR 109
SZRBJ v Minister for Immigration & Anor [2012] FMCA 1240
SZRHU v Minister for Immigration & Anor [2012] FMCA 1013
United States v Valentine, 288 F Supp 957 (1968)
V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018, 114 FCR 408
V872/00A v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 57
V872/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1019
WAGH v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 269

Blackstone, *Commentaries on the Laws of England* (17th ed, 1830) Book 1
Carasco, Aiken, Galloway and Macklin, *Immigration and Refugee Law* (2007)
Ebbeck, *A Constitutional Concept of Australian Citizenship* (2004) 25 Adel L Rev 137
Hogg, *Constitutional Law of Canada* (5th ed., 2007) vol 2
Holdsworth, *A History of the English Law* (3rd ed., 1944) vol ix
Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens* (1947) 9 Cam L J 330

Morgenstern, *The Right of Asylum* (1949) 26 British Year Book of International Law 327
Rubenstein, *Citizenship and the Constitutional Convention Debates: A Mere Legal Inference* (1997) 25 Fed L Rev 295
Shaw, *International Law* (6th ed, 2008)
Tilmouth, *Citizenship as a Constitutional Concept: Singh v Commonwealth of Australia and Rasul v Bush, President of the United States* (2005) 26 Aust Bar Rev 193
Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law* (1986) 15 Melb Univ Law Rev 662

Date of hearing:	4 March & 21 June 2013
Date of last submissions:	19 July 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	131
Counsel for SZRHU and SZRBJ:	Mr L Karp
Solicitor for SZRHU and SZRBJ:	Parish Patience Immigration Lawyers
Counsel for the Minister:	Mr G Kennett SC and Mr J Smith
Solicitor for the Minister:	Minter Ellison

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP** **Appellant**
AND:	**SZRHU** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE OF ORDER:	**14 AUGUST 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZRBJ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE OF ORDER:	**14 AUGUST 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court of Australia on 22 November 2012 are set aside and in lieu thereof it is ordered that:

    2.1 The decision of the Refugee Review Tribunal is set aside and the matter is remitted to that Tribunal for hearing and determination according to law; and

    2.2 The Minister pay the applicant's costs of the proceedings before that Court.

3. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP** **Appellant**
AND:	**SZRHU** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZRBJ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE:	**14 AUGUST 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

TRACEY J

1 These appeals were argued on 4 March 2013 before a bench comprising Justices Buchanan, Griffiths and myself.

2 In the course of argument it became apparent that there were a number of arguably conflicting Full Court and first instance authorities on the construction and application of s 36(3) of the *Migration Act 1958* (Cth).

3 After the hearing was concluded the Court, as then constituted, gave consideration to whether it might be appropriate to recommend to the Chief Justice that the Court should be reconstituted as a Court of five judges. The parties, through their solicitors, advised that they either did not object to or consented to the Court being reconstituted. It was also agreed that, if two further judges were added to the Court, those judges could rely upon the parties' original written submissions and the transcript of the hearing on 4 March 2013.

4 On 8 May 2013 the Chief Justice gave a direction under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) that the appeal should be determined by a Court of five judges. In accordance with that direction Flick and Robertson JJ joined the bench.

5 As had been agreed their Honours read the parties' written submissions which were filed in advance of the first hearing and the transcript of that hearing.

6 The parties sought and were granted leave to file further written submissions and to present oral argument in support of them. A further hearing took place on 21 June 2013 before the reconstituted bench.

7 I have had the advantage of reading in draft the reasons prepared by Buchanan J. I agree with those reasons and the orders proposed by his Honour.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 14 August 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
Appellant

AND: **SZRHU**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRBJ**
Appellant

AND: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE: **14 AUGUST 2013**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

Introduction

8 These two appeals concern the correct construction and application of s 36(3) of the *Migration Act 1958* (Cth) ("the Act"). In each case, an application for a protection visa was

refused by a delegate of the Minister for Immigration, Multicultural Affairs and Citizenship ("the Minister") and in each case that decision was affirmed by the Refugee Review Tribunal ("the RRT") constituted under the Act. The RRT was constituted by the same member in the two cases which have generated the present appeals.

9 In each case an application was made to the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia) ("the FMCA") for judicial review of the decision of the RRT to refuse a protection visa. In one case (*SZRHU v Minister for Immigration & Anor* [2012] FMCA 1013 ("*SZRHU*")), the application for judicial review was upheld, the decision of the RRT was set aside and the matter was remitted to the RRT for determination according to law. A matter of days later, in the other case (*SZRBJ v Minister for Immigration & Anor* [2012] FMCA 1240 ("*SZRBJ*")), the application for judicial review was dismissed.

10 Section 36(2) of the Act (at the time relevant to the present cases) referred to "protection obligations" owed by Australia under the Refugees Convention. It provided:

> 36(2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> …

11 However, s 36(3) (at the time relevant to consideration by the RRT) provided:

> 36(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.

12 There were a number of exceptions to, or qualifications on, the operation of s 36(3) expressed later in s 36. None are directly relevant to the present cases, but I shall mention them again in due course to illustrate the wider context in which s 36(3) must be construed.

13 In *SZRHU*, the FMCA embarked on a detailed discussion of the meaning of s 36(3) of the Act and found that s 36(3) is only engaged when, under the domestic law of a country, it

may be said that a visa applicant has a legally enforceable right to enter and reside in such a country, whether or not as a national of that country. The FMCA stated (at [42]):

> 42. The bottom line of binding opinion in the superior courts, is, in my opinion, that it is necessary for a decision-maker applying s.36(3) to address whether a prospect of entry and residence in a third country by the refugee claimant, whatever its practical degree of likelihood, has an existing foundation under the domestic laws of the third country or administrative action founded upon domestic law, such that the applicant can be said to have had at the time of determination of his Australian visa application a 'legally enforceable right' in relation to the third country.

14 It will be necessary, in due course, to explore the foundation for that finding.

15 In each decision of the RRT, the RRT had found that the visa applicants (each citizens of Nepal) had a presently existing and legally enforceable right to enter and reside in India. That conclusion was disapproved by the FMCA in *SZRHU* but left untouched in *SZRBJ*, although the conclusion of the RRT was based on the same material in each case.

16 The material on which the RRT based its conclusion was country information which included research by the RRT dated 23 February 2007 based on advice provided by the Department of Foreign Affairs and Trade ("DFAT") on 23 October 2006. The country information also included advice from the Nepalese government on 22 July 2011. In each case the advice concerned the meaning and operation of the *Treaty of Peace and Friendship between India and Nepal 1950* ("the Treaty").

17 The Treaty provides:

> Article 1
>
> There shall be everlasting peace and friendship between the Government of India and the Government of Nepal. The two Governments agree mutually to acknowledge and respect the complete sovereignty, territorial integrity and independence of each other.
>
> Article 2
>
> The two Governments hereby undertake to inform each other of any serious friction or misunderstanding with any neighbouring State likely to cause any breach in the friendly relations subsisting between the two Governments.
>
> Article 3
>
> In order to establish and maintain the relations referred to in Article I the two Governments agree to continue diplomatic relations with each other by means of

representatives with such staff as is necessary for the due performance of their functions.

The representatives and such of their staff as may be agreed upon shall enjoy such diplomatic privileges and immunities as are customarily granted by international law on a reciprocal basis : Provided that in no case shall these be less than those granted to persons of a similar status of any other State having diplomatic relations with either Government.

Article 4

The two Governments agree to appoint Consuls-General, Consuls, Vice-Consuls and other consular agents, who shall reside in towns, ports and other places in each other's territory as may be agreed to.

Consuls-General, Consuls, Vice-Consuls and consular agents shall be provided with exequaturs or other valid authorization of their appointment. Such exequatur or authorization is liable to be withdrawn by the country which issued it, if considered necessary. The reasons for the withdrawal shall be indicated wherever possible.

The persons mentioned above shall enjoy on a reciprocal basis all the rights, privileges, exemptions and immunities that are accorded to persons of corresponding status of any other State.

Article 5

The Government of Nepal shall be free to import, from or through the territory of India, arms, ammunition or warlike material and equipment necessary for the security of Nepal. The procedure for giving effect to this arrangement shall be worked out by the two Governments acting in consultation.

Article 6

Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, *in its territory*, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts, relating to such development.

Article 7

The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country *in the territories of the other* the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.

Article 8

So far as matters dealt with herein are concerned, this Treaty cancels all previous Treaties, agreements, and engagements entered into on behalf of India between the British Government and the Government of Nepal.

Article 9

This Treaty shall come into force from the date of signature by both Governments.

Article 10

> This Treaty shall remain in force until it is terminated by either party by giving one year's notice.

(Emphasis added)

18 The advice from DFAT on 23 October 2006 was to the effect that Nepalese citizens do not in practice require a visa to enter India. A Nepalese citizen arriving by air would need to produce, as an identity document, a valid national passport, valid photo identity issued by Indian authorities or an emergency certificate issued by the Embassy of Nepal in Delhi in respect of Nepalese citizens. The advice was that the practice was also for the conditions of the Treaty to be met by India without the passage of domestic legislation. That was based on advice from Dr V D Sharma (Legal Division, Ministry of External Affairs) in India. DFAT was specifically asked for advice on whether "the treaty has been incorporated into India's domestic law". The response directed to that enquiry was as follows:

> **D. Please provide advice on how, if at all, these aspects of the 1950 Treaty have been incorporated into India's domestic law, or how it operates in this respect.**
>
> 8. Dr VD Sharma said that treaties on a specific subject usually had their provisions brought into Indian domestic law through the passage of a bill with the same provisions as the treaty. Sharma said, however, that in the case of more general treaties, such as the 1950 Treaty of Peace and Friendship, the practice was for the conditions of the treaty to be met by India without the passage of the domestic legislation. Sharma characterised the operation of the 1950 Treaty as having been enacted for a long time …

19 In the present appeals, the Minister initially sought to argue that the word "enacted" in that response should be treated as the possible equivalent of confirmation that the Treaty was enforceable as part of the domestic law of India. In my respectful view, the submission was impermissibly speculative. A fair and balanced reading of the response suggests that the provisions of the Treaty operate at a practical level "without the passage of … domestic legislation".

20 The advice from the Nepalese government was extracted as follows:

> **1. Do Nepalese citizens have the legal right to enter and reside in India?**
>
> Yes, with the provisions enshrined in the Treaty of Peace and Friendship signed on 31 July 1950, the Nepalese citizen has the right to enter and reside in India.

> Recently, we have a provision to show any valid ID card to prove the identity so that they can enter into each other's country without any hindrance.
>
> 2. **Are there any circumstances in which a Nepalese citizen may be denied entry to India?**
>
> Generally no. As per the provisions of the treaty between Nepal and India, citizens of both countries can enter into each other's country without visa.
>
> **3. Can Nepalese citizens residing in India be forcibly returned to Nepal? If so, under what circumstances?**
>
> Legally No. For those involved in crimes and other unwanted activities, Governments of either country can extradite each other's nationals as per the provisions of a seperate (sic) Extradition Treaty.

21 It will be necessary to return later to the question of the extent to which this advice reflected the terms of the Treaty itself, rather than the administrative arrangements in each country.

22 As earlier indicated, the RRT concluded that the circumstances and arrangements disclosed by the material before it sufficed to constitute "a presently existing, legally enforceable right to enter and reside in India" and as each visa applicant was a Nepalese citizen entitled to this protection from any feared persecution in Nepal, each application for a visa was rejected.

23 In *SZRHU*, the FMCA concluded that the RRT had wrongly assessed the terms and effect of the Treaty. The FMCA concluded that the existence of a legally enforceable right was a precondition for the application of s 36(3) of the Act and that the Treaty and the associated arrangements were not capable of constituting a legally enforceable right. The decision of the RRT was therefore set aside in that case.

24 In *SZRBJ*, the FMCA dealt with this issue very briefly, saying (at [23]):

> 23. The applicant also submitted that the Indo-Nepal Treaty applied only to business people, at least in practice. It is not apparent that such an assertion was made to the Tribunal. In any event, there was country information before the Tribunal to the effect that the treaty applied in law and in fact to all Nepalese citizens, with the exception of security risks.

25 The challenge to the decision of the RRT in *SZRBJ* was therefore dismissed. Accordingly, there is a direct contradiction between the outcomes in *SZRHU* and *SZRBJ*.

26 In the present appeals, the visa applicants seek to uphold the conclusions of the FMCA in *SZRHU*. The Minister challenges those conclusions and seeks their reversal.

27 I agree with the view expressed by the FMCA in *SZRHU* that the RRT made an error in its assessment of the material before it concerning the legal effect and operation of the Treaty. In my view, it is clear that there was no foundation, from the terms of the material upon which it relied, for the RRT to conclude that either visa applicant had "a presently existing, legally enforceable right (i.e. under India's domestic law) to enter and reside in India". There was no evidence identified by the RRT capable of supporting such a conclusion and such evidence as was identified denied it.

28 However, underlying the resolution of the issues initially raised by the parties is a more fundamental question about the operation of s 36(3) of the Act and the context in which it appears in s 36 as a whole. At the hearing of the appeal, as in the initial written submissions filed for the purpose of the appeal, the parties agreed that it was necessary for the RRT to examine whether the visa applicants had a legally enforceable right to enter and reside in India. That requirement was, they accepted, authoritatively stated in *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 ("*Applicant C*").

29 In later, supplementary submissions, the Minister argued formally that *Applicant C* was wrongly decided, but accepted that the Court might be reluctant to depart from it as a matter of comity. The position is more complicated than that, in my view, for at least two reasons. First, it does not appear that in this Court the proper construction of s 36(3) has really been regarded as settled. Secondly, there is room to doubt whether the principle stated in *Applicant C* should be affirmed as correct in the present cases in the light of subsequent developments concerning the operation of s 36 as a whole, and s 36(2) in particular. As will be seen, in my view the question of the proper construction of s 36(3) should be revisited, notwithstanding what was said in *Applicant C*.

The enactment of s 36(3)

30 Section 36 of the Act, when s 36(3) was enacted, was as follows:

> 36. Protection visas
>
> (1) There is a class of visas to be known as protection visas.

> (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.
>
> *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.

31 Owing to the terms of s 36(2), as it then appeared in the Act, claims for protection visas turned upon whether Australia owed protection obligations under the Refugees Convention to a person claiming to be a refugee. At the time that s 36(3) was enacted, assessment of that issue in this Court involved consideration of whether a person who claimed to have a well founded fear of persecution in one country, and to be a refugee, might nevertheless have "effective protection" in another country apart from Australia. The development of the notion of effective protection was linked, in a number of cases, with examination of whether the person had a right to reside in, enter and re-enter a third country. That test was expressed by von Doussa J in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 ("*Thiyagarajah*"), which I shall discuss further shortly. A debate then began about whether, by using that test, the Full Court in

Thiyagarajah had intended that the right referred to by von Doussa J be a legally enforceable right and, indeed, whether the existence of any "right" was necessary to a conclusion that a person had "effective protection" in another country. The weight of authority soon was that a practical entitlement falling short of a legally enforceable right would suffice.

32 When s 36(3) was enacted it was initially decided in this Court that s 36(3) referred to a legally enforceable right and not a lesser standard. That construction was quickly contested. That remains the question at the heart of the present appeals and it will be necessary to explore it in some detail.

33 Before I address the development of authority in this Court, and in the High Court, some general points may be made about the terms of s 36(3) and the context in which it was intended to operate when it was enacted. First, it operated subject to the effect of s 36(4), (5) and (6), each of which supplied additional elements to be taken into account in particular circumstances. Notably, s 36(5) expressly contemplated that a non-citizen (i.e. of Australia, the visa applicant) might be returned by another country to a third country (perhaps the country of origin) where the non-citizen would be subject to persecution. The contemplation of such a circumstance is not readily reconciled with the notion that s 36(3) contemplated a "legally enforceable" right to enter and reside in the returning country.

34 Another matter to note is that one circumstance contemplated by s 36(6) was that a visa applicant to whom s 36(3) applied might be a national of more than one country. Such a person may more readily be thought to have a "legally enforceable" right to enter each such country, although (for reasons explained by Flick J in his judgment) even that is not certain. One question (as later discussed) in the present case is whether s 36(3) contemplated only a right of the kind enjoyed by a national of a country or whether it referred also to a "right" of a lesser quality.

35 Another matter to be borne in mind is that the right referred to in s 36(3) is a right to enter and reside "whether temporarily or permanently and however that right arose or is expressed". The phrase "however that right arose or is expressed" suggests a less stringent and broader test than a legally enforceable right arising under domestic law, as does also the notion of temporary residence.

36 In my respectful view, those textual matters give immediate reason to doubt that, when enacted, s 36(3) identified a legally enforceable right, as was initially held in this Court and was subsequently stated in *Applicant C*. The reasons why that construction was adopted require, therefore, close examination.

Cases before the enactment of s 36(3)

37 As already indicated, before the enactment of s 36(3), the phrase "a right to reside, enter and re-enter [a] country" had been used by von Doussa J (with whom Moore and Sackville JJ agreed) in *Thiyagarajah.* The phrase was used in connection with a discussion of the circumstances of a Sri Lankan national who had been granted refugee status and permanent residency by France. His Honour said (at 562):

> It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, *including* a right to reside, enter and re-enter that country.
> (Emphasis added)

38 His Honour also observed (at 565):

> … As a matter of domestic and international law, Australia does not owe protection obligations to the respondent as he is a person who has effective protection in France which has accorded him refugee status. *Moreover*, when his application for a protection visa was determined by the RRT, he had been a resident in France for a long period, he had the right to apply for citizenship in France, and he held travel documents that entitled him to return to France. *These added matters are not essential to the finding* that Australia did not owe him protection obligations, but serve to illustrate that the respondent's claim for protection is far removed from the object and purpose of the Refugees Convention.
> (Emphasis added)

39 In *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526 ("*Rajendran*"), the Court (von Doussa, O'Loughlin and Finn JJ) said (at 529) that the principle of "effective protection" was not confined to persons recognised as refugees by another country but extended:

> … *at least to cases* where the visa applicant is entitled to permanent residence, and, in time, to become a citizen, …

(Emphasis added)

40 Those indications in *Thiyagarajah* and *Rajendran*, that the doctrine of effective protection did not depend necessarily upon a legally enforceable right of entry or residence, were confirmed in later cases.

41 In *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443, Emmett J rejected the proposition that in *Thiyagarajah* von Doussa J was referring to a legally enforceable right. In a passage approved by a Full Court in *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 ("*Al-Sallal*"), Emmett J proposed a test of "practical reality and fact". The Full Court said in *Al-Sallal* (at [42]):

> We agree with and adopt the observation of Emmett J in *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443, the appeal from which was heard by us immediately following the present appeal. His Honour said (at [26]):
>
> > "I consider that all that von Doussa J was saying (and this is consistent with the approach adopted by the Full Court in *Rajendran* and by Weinberg J in *Gnanapiragasam*) is that so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country, that will suffice."

42 The test which lay at the heart of the doctrine of effective protection, therefore, was one concerned with "practical reality and fact". Despite the use in *Thijagarajah* of the phrase "a right to reside, enter and re-enter [a] country", that was quickly seen not to state a condition for "effective protection" but rather to be a description of the factual circumstances of that case. The point is an important one to appreciate in order to understand why s 36(3) was held, when it was enacted, not to represent a codification of the doctrine of effective protection but to be addressed to a different issue, as discussed immediately below.

Cases after the enactment of s 36(3)

43 Section 36(3) was enacted in December 1999. In *Applicant C* at first instance (*Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229), Carr J took the view that s 36(3) introduced a new statutory test which was stricter than the test articulated for the purpose of the doctrine of effective protection (see at [28]). In *Kola v Minister for Immigration and Multicultural Affairs* [2001] FCA 630 ("*Kola*"), Mansfield J

agreed (see at [36]). For the reasons already given, that conclusion must be accepted as correct.

44 Carr J also held that the right to enter and reside in a country referred to in s 36(3) must be a legally enforceable right. His Honour said (at [30]:

> A literal construction of the word "right" in a statute must, in my view, be that it is a legally enforceable right. The extraneous materials to which I have referred above tend to support a literal construction. So does the fact that a literal construction would advance the purposes of the Refugees Convention whereas to construe the word "right" as meaning something less than a legally enforceable right would place much greater obstacles in a refugee's path.

45 In *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 ("*V856/00A*"), Allsop J (as he then was) also dealt directly with the operation of s 36(3). His Honour also rejected the argument that a practical capacity to bring about a lawful entry (the essential condition for the doctrine of effective protection), should be regarded as a right within the meaning of s 36(3). However, Allsop J did not accept that "right" in s 36(3) meant "legally enforceable right". His Honour disagreed with Carr J at first instance in *Applicant C*, who had suggested that the right referred to in s 36(3) was "consonant with Article 1E of the Convention". Allsop J said (at [31]):

> … Carr J in *Applicant C*, at [28] construed s 36(3) as "consonant with Art 1E of the Convention". A right under Art 1E is one (arising from possession of nationality) that is embedded in the law of the country, with correlative obligations on the state in question. In my view, the text of s 36(3) is more relevant and tends to the contrary. The phrase in s 36(3) "howsoever that right arose or is expressed" assists in the recognition that the source and incidents of the right can be diverse. It also assists in the recognition that "right" is intended to be a wide conception. Especially in the light of the above phrase, I see no reason to restrict the meaning of the word "right" to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning a liberty or permission or privilege which does not give rise to any particular duty upon the state in question. Such a liberty, permission or privilege would obtain its effective substance from its grant and thereafter from the lack of any withdrawal of it and from the lack of any existing prohibition or law contrary to its exercise, rather than from the existence within the positive law of the state in question of a correlative duty, justiciable and enforceable in law, to recognise the right.

46 The operation of s 36(3) is clearly not confined to nationals or citizens of a particular country, because the right to enter and reside referred to in s 36(3) is not confined only to a

right arising from citizenship. In my respectful view, that circumstance reveals a flaw in the approach taken by Carr J which was exposed by the analysis offered by Allsop J.

47 Allsop J went on to observe in *V856/00A* that the reference by von Doussa J in *Thiyagarajah* to a "right to reside, enter and re-enter" had not been adopted by the Court as a necessary element of the doctrine of effective protection, even though it was a circumstance actually present in a number of cases which had applied the doctrine of effective protection (see at [33]-[66]). The burden of his Honour's reasoning was to suggest that the doctrine of effective protection did not turn on the necessary existence of a right of entry or residence (although such a right would make the analysis easier), but upon whether as a matter of practical reality and fact a person would be allowed to enter and remain in another country. As will appear from my earlier observations, that analysis accords with my own reading of the relevant cases about the operation of the doctrine of effective protection.

48 Two weeks after the judgment in *V856/00A*, a Full Court delivered judgment in *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73 ("*Al-Rahal*"). The majority consisted of Spender and Tamberlin JJ. The majority confirmed the analysis made by Allsop J in *V856/00A* about the necessary elements of the doctrine of effective protection. Lee J dissented.

49 Lee J said (at [55]):

> … Insofar as the reasons in *Al-Sallal* state that the "effective protection" accorded to a person is assessed as "a matter of practical reality and fact", there was no dissent from the fundamental principle stated by von Doussa J in *Thiyagarajah* in determining the meaning to be given to "protection obligations" in s 36(2). The application of "practical reality and fact" does not alter the relevant questions to be answered, namely, has an obligation to protect the applicant for a protection visa been accepted by a third country and have rights to reside in, leave, and re-enter that country been granted to the applicant by that country. That is, in effect, has a third country undertaken to receive and protect the applicant.

50 However, Spender J said ([3]-[4]):

> 3. It was held in *Thiyagarajah* that it was sufficient to permit a contracting state to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status if it was proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee and had accorded that person effective protection, including a right to reside, enter and re-enter that

country: von Doussa J (with whom Moore and Sackville JJ agreed) at 562.

> 4. I take this to mean that it is *sufficient* for effective protection of a person in the third country if that person has a right to reside, enter and re-enter that country, but that it is not a *necessary* requirement of effective protection that the person have a formal right to reside, enter and re-enter that country.

(Emphasis in original)

51 Tamberlin J said (at [88] and [93]):

> 88. The central question is whether the RRT erred in law in determining that the appellant could enter and remain in Syria. The appellant says that the RRT erred because it did not positively find that the appellant had a *right* to enter or reside in Syria. He contends that the RRT must be satisfied that an applicant has permission to enter and reside in a third country before it could be said that country offered effective protection. It is said that in determining this question the RRT acted on the basis of speculation and conjecture rather than on the material which was before it which did not support a conclusion that the appellant had the *right* to re-enter Syria, with the consequence that the primary judge erred in not so finding.
>
> …
>
> 93. Consistently with the authorities, the relevant question when determining whether refoulement would result in a breach of Art 33 by Australia is whether as a matter of practical reality there is a real chance that the third country will not accept a refugee and would refoule them to a country where their life or freedom would be at risk for a Convention reason. This is a question of fact and degree. It does not require proof of actual permission, or of a right, to enter that country.

(Emphasis in original)

52 The view of the majority is, in my respectful view, consistent with the explanation of the doctrine of effective protection given in the earlier cases. The test proposed by Lee J for the operation of the doctrine was a stricter test which involved the notion of legal rights. That was not the test upon which the doctrine was based.

53 The doctrine of effective protection was controversial in this Court (see for example the judgment of Lee J in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 269 at [22]-[26] and [37]) and was later disapproved by the High Court (see *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 ("*NAGV*"). However, as I will later indicate, the High Court decision in *NAGV* left unaffected the operation or proper construction of s 36(3).

54 Before those important developments are further explored, however, there were further cases in this Court, which dealt both with the construction of s 36(3) and with the doctrine of effective protection, that need attention.

55 The matters which I have mentioned (i.e. distillation of the elements of the notion of effective protection, the enactment of s 36(3) and the emergence of the different approaches taken by Carr J in *Applicant C* at first instance and Allsop J in *V856/00A*) received detailed attention in *Applicant C* on appeal. The leading judgment was written by Stone J (with whom Gray and Lee JJ relevantly agreed).

56 Stone J took the view that the approach taken by Carr J (requiring identification of a legally enforceable right) was not inconsistent with the view expressed by Allsop J in the passage I have set out from *V856/00A*. With respect to her Honour's analysis, and her efforts to reconcile the two approaches, I am not able to reconcile them in my own mind. They proceed from two starkly different premises. One premise (favoured by Carr J) is that s 36(3) referred to a right enshrined in domestic law, enforceable at the instance of an individual against the state in question. The other, opposing premise (favoured by Allsop J who explicitly rejected the first) is that it sufficed to have a "liberty, permission or privilege lawfully given".

57 Stone J traced the line of authority which had developed in this Court to the effect that Australia would not have protection obligations towards a person who might be expected to have effective protection in a third country (see at [20] – [23]), and then identified the following question (at [25]):

> 25 The amendments to s 36, and in particular the introduction of subs (3), raises the question of whether the judicially developed doctrine of effective protection, as outlined at [20]-[23] above, has been subsumed into s 36(3) or whether the operation of the subsection is more narrow. The issue is discussed below at [63]-[65].

58 At [63], her Honour referred to Mansfield J's conclusion in *Kola* that s 36(3) did not change the doctrine of effective protection or the existing operation of s 36(2). Her Honour stated the following conclusion (at [65]):

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

> obligations under the Convention to:
>
> (a) a person who can, as a practical matter, obtain effective protection in a third country; or
> (b) to a person who has not taken all possible steps to avail himself or herself of a legally enforceable right to enter and reside in a third country.

59 The distinction drawn by Stone J in *Applicant C* in [65] accords with the consensus which had developed after the enactment of s 36(3) – that s 36(3) did not represent a codification of the doctrine of effective protection. One important reason is that, as demonstrated by Allsop J in *V856/00A*, the doctrine of effective protection did not depend necessarily on the existence of a right to enter and reside in another country. However, the question remained – what was the nature of the "right" referred to in s 36(3); was it a "legally enforceable" right? Stone J at [65] appeared to accept that it was.

60 Within a short period the second element of the distillation offered at [65] of *Applicant C* was called into question in *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 ("*V872/00A*"). The judgment of the Full Court in *V872/00A* was given on appeal from the judgments of Allsop J in five similar cases, including *V856/00A*. At first instance, in *V872/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1019, Allsop J recorded (at [7]):

> 7 This matter was heard in Adelaide between 25 and 29 June 2001 together with a number of other matters, all involving nationals of Iraq who had been in Syria for various periods of time. Common legal issues arise in the applications. I have set out in *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018 my views on these common legal issues, being the proper construction of subs 36(3) of the Act, the continuing relevance of Article 33 and its consequences for any analysis of whether protection obligations exist for the purposes of subs 36(2) of the Act and the question of relief where there has been error on the part of the Tribunal demonstrated. These reasons should be read in conjunction with my views expressed in *V856/00A, supra*.

61 Although Allsop J had dealt with both the operation of s 36(3) and the doctrine of effective protection, the Full Court judgment in *V872/00A* dealt principally with the latter question and, in particular, applied *Al-Rahal* (see Black CJ at [5]-[7], Hill J at [40] and Tamberlin J at [68] and [77]). Tamberlin J also referred explicitly to s 36(3) and to *Applicant C* (at [71]) and said (at [81]):

> 81 The concept of a right to enter which is *legally enforceable* has inherent difficulties. In order to properly determine whether the right can be legally enforced in the safe third country it would be necessary to examine the law of that country in detail. …
>
> (Emphasis in original)

62 In the present appeals, it was submitted that *V872/00A* is not an authority directly relevant to the construction of s 36(3) but is one limited to a consideration of the doctrine of effective protection. Strictly speaking, that submission must be accepted, but it is significant that there was no criticism of Allsop J's statement of the requirements of s 36(3). In my view, Allsop J's construction of s 36(3) was directly supported by the reservations expressed by Tamberlin J. In my view, therefore, *V872/00A* is a useful contribution to the overall debate, notwithstanding the subsequent disapproval of the doctrine of effective protection. That appears to be a view shared by at least one judge (Hill J) in the case to be discussed next.

63 The question of the operation of s 36(3) arose again in the following year in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 269 ("*WAGH*"). Lee J favoured a strict approach to the circumstances in which Australia might be said not to have protection obligations under the Convention. His Honour said (at [38]):

> 38 The proper construction of the qualification upon the operation of subs 36(2) contained in subs 36(3) is that which meets Australia's obligations under international law, namely, that Australia is to be taken not to have protection obligations under the Convention to a putative refugee where that person has an existing enforceable right, recognized by a third country, to enter and reside in that country and be protected from persecution, thereby obviating the need for that person to seek protection from Australia pursuant to the obligations imposed by the Convention on Australia as a Contracting State.

64 Hill J took a different view saying (at [54] and [58]):

> 54 The word "right" tends to suggest, prima facie, a legally enforceable right. However, it was held by a Full Court of this Court in *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 that "right" as used in the subsection did not mean legally enforceable right of entry and re-entry to a safe third country. The ratio of that decision in the narrowest sense is that s 36(3) will operate in a case where not only is there a legal right of entry but also where, absent a legally enforceable right of entry the person is likely to be allowed entry to the third country and is likely, as a matter of practical reality to have effective protection there and not be subject to refoulement contrary to Art 33 of the Convention: see per Black CJ at [5] and per Tamberlin J at [83], where his Honour said that the question is whether there was "any real risk that

> the applicant would *not* be able to secure access to that country so as to attract its protection". In the same case I suggested that s 36(3) would have no operation where the Refugee Review Tribunal (the Tribunal) was not comfortably satisfied that the applicant would practically be granted access, a view which might not be in complete accord with the majority in that case.
>
> …
>
> 58 One reason why a strict construction can not be given to the word "right", so that it is to be read as "legally enforceable right" is that all countries retain as a matter of sovereignty a right to exclude persons from the country. It would be unlikely in many cases that a visa would give a legally enforceable right, although as a matter of practical reality it would be virtually certain that the person in question would be permitted entry.

65 Carr J said (at [71]):

> 71 In my opinion, for the purposes of this appeal, s 36(3) should be viewed as a clear expression of Parliament's intention to put limits on whatever obligations Australia might, having adopted the *Convention Relating to the Status of Refugees 1951* done at Geneva on 28 July 1951 (the Convention), legislatively choose to accept as part of its municipal law.

and (at [74]):

> 74 In my view, *Applicant C* is authority for the proposition that the word "right" in s 36(3) means a legally enforceable right, albeit one that can be revoked - see Stone J at [57] and [58]. I do not see the subsequent Full Court decision of *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 as being inconsistent with *Applicant C*. It would appear that *Applicant C* was not cited to the Court in *V872/00A*.

66 With respect, the last sentence in this extract is clearly incorrect. In *V872/00A*, Tamberlin J recorded at [71] that *Applicant C* was expressly referred to and set out the statements by Stone J at [65] which I extracted earlier.

67 I think it not incorrect to say that at this point the construction of s 36(3) by this Court remained a matter of active debate. The debate was complicated by the influence (both legally and factually) of the doctrine of effective protection and its consequence for the outcome of particular cases.

68 The landscape changed in 2005 with the judgment in *NAGV*. In *NAGV*, the High Court rejected the notion of "effective protection" which had been read into s 36(2), saying (at [27] and [42]]):

> 27 Section 36(2) is awkwardly drawn. Australia owes obligations under the

> Convention to the other Contracting States, as indicated earlier in these reasons. Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals. Beginning with that false but legislatively required step, the appeal turns upon the meaning of the adjectival phrase "to whom Australia has protection obligations under [the Convention]".
>
> …
>
> 42 Having regard to the subject, scope and purpose of the Reform Act, the adjectival phrase in s 26B(2) (repeated in s 36(2)) "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention. That being so and the appellants answering that criterion, there was no superadded derogation from that criterion by reference to what was said to be the operation upon Australia's international obligations of Art 33(1) of the Convention.

69 That conclusion did not touch upon the operation of s 36(3). The High Court said (at [58] and [60]):

> 58 It would have been open to the Parliament to deal with the question of "asylum shopping" by explicit provisions qualifying what otherwise was the operation for statutory purposes of the Convention definition in Art 1. As indicated earlier in these reasons, such a step may have been taken with the changes to s 36 made by the 1999 Act. The primary change is indicated by sub-s (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."
>
> There are qualifications expressed in sub-ss (4) and (5). However, the changes made by the 1999 Act were not achieved years earlier by the quite differently expressed alterations made by the Reform Act.
>
> …
>
> 60 The interpretation of the revised s 36 does not arise on this appeal ...

70 Removal of the notion of effective protection took away an important contextual element in the reasoning in *Applicant C*, which was followed in *WAGH*. It also removed the foundation for the judgment in *Al-Rahal*, which was important for the reasoning in *V872/00A*. However, removal of the doctrine of effective protection does not resolve the question of the proper construction of s 36(3). In particular, it does not offer a reason to prefer a strict view of the term "right" over any other view.

71 No case since *Applicant C*, *V872/00A* and *WAGH* assists to resolve the question of construction which arises in these appeals. In *SZHWI v Minister for Immigration and Multicultural Affairs* [2007] FCA 900; 95 ALD 631, Allsop J referred to the present issue as one "which may require authoritative attention". Although the operation of s 36(3) was considered by a Full Court in *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109, the point which arises for decision in the present appeals did not require direct or decisive attention.

The proper construction of s 36(3)

72 In my view, the question of the proper construction of s 36(3) has not yet been resolved. In particular, in my respectful opinion it is not accurate to describe *Applicant C* as the authoritative statement in this Court about the construction of s 36(3).

73 One important reason is that, although the disapproval of the doctrine of effective protection in *NAGV* did not directly affect the construction of s 36(3), the cases in this Court which considered that question (including *Applicant C*) were obviously influenced by the circumstance that the doctrine of effective protection was at work and, possibly, by the fact that it was controversial. In my respectful view, the disapproval of the doctrine of effective protection necessitates and justifies a fresh look at the question of the construction of s 36(3).

74 In any event, in my view there remains a clear division of opinion about the construction of s 36(3), which is exemplified by the differing approaches taken by Carr J initially and, shortly afterwards, by Allsop J. The conflicting approaches taken by Carr J at first instance in *Applicant C* and by Allsop J in *V856/00A* were not sufficiently (or with respect satisfactorily) resolved in *Applicant C*. Indeed, those two approaches cannot, in my view, be reconciled in the manner suggested in *Applicant C*. The essence of the two different approaches may be seen reflected in the continuing debate in *V872/00A* and *WAGH*.

75 Finally, if *Applicant C* should be understood as endorsing the construction given by Carr J and rejecting the construction suggested by Allsop J (as [65] in *Applicant C* appears to suggest) then, in my respectful view that constitutes an error of sufficient magnitude to justify further attention and correction. In my respectful view, the requirements of comity do not

prevent that in the present case. I prefer not to use stronger language to explain why further attention to the issue is necessary.

76 As I suggested earlier, in *V856/00A* Allsop J exposed a critical error in the approach taken by Carr J in *Applicant C* at first instance, which was to construe s 36(3) as though it referred to a right consonant with nationality or citizenship.

77 It is clear from the terms of s 36(3) of the Act that the "right to enter and reside" in another country which a non-citizen of Australia may have is not necessarily a right associated with citizenship of that other country. Indeed, the commonplace scenario is that of a citizen fleeing his or her own country and seeking refuge in Australia. The question for consideration in such a case is whether there is a third country (i.e. other than Australia or the country of citizenship) where the visa applicant already has a right to enter and reside. If so, by reason of the operation of s 36(3) at least, Australia does not owe that visa applicant protection obligations. In those circumstances, the "right" to which s 36(3) refers cannot be equated to rights which accompany citizenship. Inevitably, the "right" is less certain or secure than that.

78 There does not appear to me to be any other reason either to conclude that the "right" is one which the Parliament intended would be a legally enforceable one, in the sense that it could be vindicated in the courts, and under the domestic law, of the third country. On the contrary, in my view that is an unlikely intention to attribute to the Parliament at the time of the enactment of s 36(3).

79 I find the analysis by Allsop J in *V856/00A* to be compelling. The construction of s 36(3) there proposed by his Honour should, in my respectful view, now be endorsed.

The facts of the present cases

80 The difference between the two possibilities, that s 36(3) refers to a legally enforceable right or to a less strict but nevertheless real entitlement, may be examined by reference to the facts of the two present cases.

81 On the facts found by the RRT, the terms of the Treaty have not been enacted into Indian domestic law in a way which would give rise to individual rights of enforcement of its terms. The reciprocal arrangements and understanding between the sovereign states of India and Nepal are not otherwise matters in respect of which either visa applicant could normally claim an individual right of enforcement, or be regarded as having a legally enforceable right against the government or instrumentalities of India.

82 In those circumstances, the RRT made an error in the way it assessed the application before it, even if the test in *Applicant C* was the correct test to apply. If that was the correct test then each application would need to receive further attention by the RRT.

83 For the reasons already given, the test in *Applicant C* was not the correct test to apply. That circumstance necessitates some consideration of the possible range of outcomes in the RRT, if the correct test is applied, to see if there is a realistic possibility that the outcome before the RRT might be different, so that there is utility in the RRT being required to make a fresh evaluation in each case. In my view, there is utility in a fresh evaluation for the reasons which follow.

84 Flick J has demonstrated in his judgment in the present case why a "right" to enter and remain in a country may, in the case of a non-citizen of that country, arise under a treaty made with that country without any individual right of enforcement arising.

85 In the present cases, on the face of the information before the RRT, each of the visa applicants had a practical opportunity to enter India subject to proof of identity. That practical opportunity arose in conjunction with the observance, by the Indian government, of the terms of the Treaty between India and Nepal.

86 A right of entry of that kind appears to be a possibility described by Stone J in *Applicant C* at [60]:

> 60 It should also be recognised that a right of entry such as I have postulated may arise other than by grant of a visa. A country's entry requirements may be met by proof of identity and citizenship of a nominated country being provided at the border, for example by production of a valid passport, without the necessity for a visa. This would explain the use in s 36(3) of the phrase, "however that right arose or is expressed".

87 In my respectful view, it is instructive that Stone J should have provided such an example of a circumstance which might fall within the operation of s 36(3) because it does not meet the description of a legally enforceable right able to be individually enforced against a state. A country's entry requirements are inherently incapable of being fitted to that mould. In my respectful view, that also shows the underlying fallacy of the strict approach taken by Carr J which was apparently endorsed in *Applicant C*.

88 However, on the facts found by the RRT no right of entry appears to arise from the terms of the Treaty itself. There is certainly no legally enforceable right arising from the terms of the Treaty, but neither does the Treaty refer in terms to any entitlement of entry which would satisfy the test expressed in *V856/00A*. The rights given by the Treaty which appear to satisfy that test are the rights arising from the mutual covenants in Article 6 and Article 7. Article 7 articulates a right of residence, but it assumes that a citizen of one country is in the territory of the other. The arrangements at the border, whereby entry from one country to another is permitted generally upon satisfactory proof of identity, appear to be the result of administrative arrangements, rather than arising directly from the terms of the Treaty. In other words, the Treaty itself does not appear to give rights of entry. If the administrative arrangements for entry (even though they appear intended to facilitate the operation of the Treaty) do not satisfy the test in *V856/00A*, then the composite test in s 36(3) will not be satisfied either. That is a question which should not be decided in the present appeals. The possibility adverted to by Stone J in *Applicant C* at [60] is one which requires evaluation applying the proper test. That evaluation should be made by the RRT which will, if it chooses to do so, be in a position to seek further information relevant to the correct test to be applied.

Conclusion

89 In my respectful view, s 36(3) does not refer to, or presuppose, a legally enforceable right under domestic law. On the contrary, s 36(3) refers to an entitlement of the quality referred to by Allsop J in *V856/00A*. In my respectful view, the construction of s 36(3) offered by Allsop J should not have been rejected in *Applicant C* and in light of the history I have recounted it was an error to do so. Equally, in my respectful opinion, the majority judgment in *WAGH* perpetuated the same error. The construction of s 36(3) offered by Allsop J in *V856/00A* should now be endorsed.

90 The RRT in each of the present cases was in error to conclude that the terms of the Treaty represented or reflected a legally enforceable right to enter and reside in India. The RRT failed to apply the correct test to the evaluation of that question. In each case, the RRT should deal again with the applications before it using the correct test. It should pay regard to the actual terms of the Treaty and should also evaluate whether, in combination with the terms of the Treaty, the administrative arrangements for entry by Nepalese citizens at the Indian border (or any other arrangements with respect to entry identified by it) satisfy the test.

91 The Minister's appeal in *SZRHU* should therefore be formally dismissed, although not for the reasons given by the FMCA. The appeal in *SZRBJ* should be allowed and that matter remitted also to the RRT. The Minister should pay the visa applicant's costs in the FMCA. In the circumstances of these two cases, I would make no order as to the costs of the present appeals.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 14 August 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
Appellant

AND: **SZRHU**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRBJ**
Appellant

AND: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE: **14 AUGUST 2013**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

FLICK J:

92 In issue is the correct interpretation of the statutory phrase "*right to enter and reside*" as employed in s 36(3) of the *Migration Act 1958* (Cth) ("*Migration Act*"). That sub-section, in its entirety, provides as follows:

> Australia is taken not to have protection obligations in respect of 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.

Section 36(3), together with s 36(4), (5), (6) and (7), were inserted by way of amendment by Part 6 of the *Border Protection Legislation Amendment Act 1999* (Cth). That Part was headed "*Amendments to prevent forum shopping*".

93 The opportunity has been taken to read the reasons for decision of Buchanan J. Concurrence is expressed with his Honour's reasons for concluding that the "*right*" referred to in s 36(3) is not to be confined to a legally enforceable right. Concurrence is also expressed with the conclusion of Allsop J (as his Honour then was) in *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018 at [31], 114 FCR 408 at 419 that there is "*no reason to restrict the meaning of the word 'right' to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning the notion of liberty or permission or privilege which does not give rise to any particular duty upon the state in question*". Such was also the conclusion of Buchanan J.

94 Given the conclusion reached by the other members of this Court, it is unnecessary to form a concluded view as to whether the terms of the 1950 *Treaty of Peace and Friendship* between India and Nepal – as they have been interpreted and applied – are sufficiently certain as to confer a "*right to enter and reside*" for the purposes of s 36(3). Had it been necessary to form a conclusion, and contrary to the opinion of Buchanan J, it would most probably have been concluded that there would have been such a right conferred by that *Treaty*.

THE LEGISLATIVE BACKGROUND TO THE 1999 AMENDMENTS

95 The evolution of the judicial consideration as to the terms of s 36 has been helpfully set forth by Buchanan J. Gratitude is expressed to his Honour for that exposition.

96 In addition to his Honour's analysis of that provision, however, it is also considered useful to set forth the legislative explanation provided in respect to the 1999 amendments. The meaning to be ascribed to s 36(3), in particular, is informed in part by that explanation.

97 The *Supplementary Explanatory Memorandum* of the *Border Protection Legislation Amendment Act 1999* (Cth) which sought to explain the purpose of those amendments thus provided in part as follows:

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

The objective of these provisions as a tool to be employed in "*curbing*" the number of persons arriving in Australia illegally was explained in a *Tabling Speech* incorporated into Hansard which also provided in part as follows:

> The amendments that I place before the chamber today are part of a package of tough new measures that the Minister for Immigration and Multicultural Affairs announced on the 13th of October 1999.
>
> These measures are aimed at curbing the growing number of people arriving illegally in Australia, often through people smuggling operations.
>
> The Refugees Convention and Protocol have, from inception, been intended to provide asylum for refugees with no other country to turn to.
>
> Increasingly, however, it has been observed that asylum seekers are taking advantage of the convention's arrangements.
>
> Some refugee claimants may be nationals of more than one country, or have rights of return or entry to another country, where they would be protected against persecution.
>
> Such people attempt to use the refugee process as a means of obtaining residence in the country of their choice, without taking reasonable steps to avail themselves of protection which might already be available to them elsewhere.
>
> This practice, widely referred to as "forum shopping", represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations.

> …
>
> Domestic case law has generally re-inforced the principle that Australia does not owe protection obligations under the refugees convention, to those who have protection in other countries.
>
> It has also developed the principle that pre-existing avenues for protection should be ruled out before a person's claim to refugee status in Australia is considered.

Notwithstanding the legislative objective sought to be achieved by the introduction of the 1999 amendments, a phrase of central relevance to those amendments – "*a right to enter and reside*" – was regrettably not further addressed.

98 As is implicit in the reasoning of Buchanan J, the meaning and content of the term "*right*" is to be informed – at least in part – by the manner in which s 36 had been interpreted prior to its amendment.

99 Further to the reasoning provided by his Honour, it is also separately considered that the meaning and content of the phrase "*a right to enter and reside*" is to be informed – again in part – by reference to the identification of those persons who have long exercised a right to enter and reside in a Sovereign State and by reference to those persons who have been permitted to enter and reside in a Sovereign State. Although it remains uncertain whether, in 1999, the legislature consciously had in mind the long recognised right of persons to enter and reside in a Sovereign State, the terms of s 36(3) should be construed in a manner consistent with that long-established right, if at all possible.

100 The Court – sitting as a bench of five Judges – has the opportunity (subject to accepted constraints) to consider afresh the terms of s 36(3) and should not shun the opportunity to construe s 36(3) in a manner consistent with the manner in which that phrase (or a comparable phrase) has long been interpreted and applied by courts and legislatures of both this country and a number of overseas jurisdictions.

THE RIGHT TO ENTER & RESIDE – THE RIGHTS OF A CITIZEN

101 The phrase, "*a right to enter and reside*" or a like phrase, is frequently employed in decisions of both Australian and overseas superior courts and in legislation both in Australia and overseas.

102 Notwithstanding the frequency with which that precise phrase or a like phrase has been used, the origin of the phrase was not a question initially pursued with any vigour by either Senior Counsel for the Minister or by Counsel for the SZRHU and SZRBJ. Nor was there any great attention given by Counsel to the identification of those persons who have long been recognised as having "*a right to enter and reside*".

103 To attempt to construe the phrase simply by reference to the notion of what constitutes a "*right*" and in disregard of the manner in which the phrase has long been employed, it is respectfully considered, has the very real potential to divert attention into too narrow a field of analysis. It is also a process of analysis which places too little significance upon other phrases employed in s 36(3):

- "*…however that right arose or is expressed*"; and
- "*…including countries of which the non-citizen is a national*".

Both of those phrases emphasise the width of the inquiry required when seeking to identify the source of the "*right*" and the fact that the inquiry is not restricted to identifying any "*right*" which may be uniquely possessed by a "*national*".

104 Any attempt to construe the phrase "*a right to enter and reside*" exclusively by reference to the term "*right*" or by reference exclusively to the terms of the *Migration Act* and in a manner divorced from any attempt to identify the circumstances in which persons have a right to enter and reside in a particular country is to divorce the phrase from the international context in which persons seek to enter and reside or remain in many different countries on a daily basis.

105 The international recognition of a right of an individual to enter a country of which they are a citizen is addressed in part by Article 12(4) of the *International Covenant on Civil and Political Rights* which provides that:

> No one shall be arbitrarily deprived of the right to enter his own country.

That Article mirrors in part the long-established common law position described by Blackstone in his *Commentaries on the Laws of England* as follows:

> A natural and regular consequence of this personal liberty, is, that every Englishman may

> claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by sentence of the law … [N]o power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal : Book 1, Ch 1 at 137 (17th ed, 1830).

Long before Blackstone was writing, Article 42 of the *Magna Carta* provided:

> In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.

106 If judicial consideration of the phrase is initially confined to decisions of the High Court of Australia, the same conclusion has also long been recognised. Thus, in *Potter v Minahan* (1908) 7 CLR 277, O'Connor J accepted that a British subject not only owed "*allegiance to the British Empire*" but was also entitled to "*entry and residence in any part of the King's Dominions*…". His Honour there expressed this entitlement as follows:

> … Speaking generally, every person born within the British Dominions is a British subject and owes allegiance to the British Empire and obedience to its laws. Correlatively he is entitled to the benefit and protection of those laws, and is entitled, among other things, to entry and residence in any part of the King's Dominions except in so far as that right has been modified or abolished by positive law. But the British Empire is subdivided into many communities, some of them endowed by Imperial Statute with wide powers of self government, including the power to make laws which, when duly passed and assented to by the Crown, will operate to exclude from their territories British subjects of other communities of the Empire. To this extent the British subject's right to enter freely into any part of the King's Dominions may be modified by Statute law. The right is founded on the obligations of national allegiance. International law recognizes for purposes of allegiance only sovereign nationalities—not sub-divisions of a nation—and in questions between the British Empire and other nations Australian nationality cannot be recognized. But in questions between the Australian community and its members it would seem to follow that the principle which regulates rights as between the British Empire and its subjects must be applied in determining the relations of the Australian community to its members. A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary. It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication. In the Act under consideration the legislature has plainly enacted, and in doing so is within its constitutional powers, that all immigrants into Australia shall be subject to certain conditions and restrictions. If a person, once a member of the Australian community, seeks to re-enter Australia under circumstances which constitute him an immigrant, the law must be held to restrict his re-entry as it does that of any other immigrant. … : (1908) 7 CLR at 304-306.

Comparatively more recently, in *Air Caledonie v The Commonwealth of Australia* (1988) 165 CLR 462 at 469, Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ referred to the "*right of an Australian citizen to enter the country*" and the fact that that right was "*not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive*…". A little later, their Honours referred to the case of "*the ordinary Australian citizen*" and the fact that "*such a citizen had, under the law, the right to re-enter the country, without need of any Executive fiat or 'clearance', for so long as he retained his citizenship*…": (1988) 165 CLR at 470.

107 There is an obvious transition in language from the terms of "*allegiance*" as used by O'Connor J in *Potter* to the language of "*citizen*" as used by the Court in *Air Caledonie*. The doctrine of "*allegiance*" has "*its roots in the feudal idea of a personal duty of fealty to the lord from whom land is held*": Holdsworth, *A History of the English Law*, vol ix at 72 (3rd ed., 1944). The transition from this doctrine to one whereby a person became either "*subjects of the king*" or "*aliens*" was, however, traced in part by McHugh J in *Re Patterson; Ex parte Taylor* [2001] HCA 51 at [113] - [117], 207 CLR 391 at 428-430.

108 It is unnecessary for present purposes, however, to do more than refer to the entitlement of those who owed "*allegiance*" to a particular country to enter and reside in that country. It is unnecessary, for example, to identify those who owed "*allegiance*" or the extent of any duty of diplomatic protection which may be owed by a country to a person within its borders: Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens* (1947) 9 Cam L J 330. Nor is it necessary to pursue questions which may arise where a person may owe competing "*allegiances*": e.g., *Calvin's Case* (1608) 2 How St Trials 559, 77 E.R. 377. See also: Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law* (1986) 15 Melb Univ Law Rev 662 at 663-664; Ebbeck, *A Constitutional Concept of Australian Citizenship* (2004) 25 Adel L Rev 137.

109 A comparable right has similarly long been recognised in the United States of America. Thus, for example, in *Crandall v State of Nevada*, 73 US 35 (1867) the Supreme Court referred to the right of the government to call upon its citizens, and continued:

> … But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection,

> to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the Courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

Cited with approval: *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108 per Griffith CJ. Speaking in 1958, the Supreme Court again referred to the "*right to travel [being] a part of the 'liberty' of which the citizen cannot be deprived without the due process of the law under the Fifth Amendment*": *Kent v Dulles,* 357 US 116 at 125 (1958). Much more recently, the United States District Court for the District of Puerto Rico said that "*[t]he only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied reentry*": *United States v Valentine,* 288 F Supp 957 at 980 (1968). A little later, another United States District Court characterised "*one important right of citizenship as 'the right to live in the United States for as long as one sees fit'*" : *Lopez v Franklin,* 427 F Supp 345 at 349 (1977).

110 If attention is shifted from judicial consideration of those who have a right to enter and reside in a particular country, and if attention is shifted to legislative recognition of such a right, it is noted that in Canada the right to enter is enshrined in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* RSC 1985 ("*Charter*"). Section 6(1) of that *Charter* provides as follows:

> Every citizen of Canada has the right to enter, remain in and leave Canada.

Even before the enactment of the *Charter* in 1982, the right of Canadian citizens was guaranteed by prior legislation: Hogg, *Constitutional Law of Canada* vol 2 at para 46.1 (5th ed., 2007). The Canadian right of a citizen has been described as an "*unqualified right to enter, remain in, and leave Canada*": Carasco, Aiken, Galloway and Macklin, *Immigration and Refugee Law* at 110 (2007).

111 Similarly, in New Zealand, s 13(1) of the *Immigration Act 2009* (NZ) provides as follows:

> For the purposes of this Act, every New Zealand citizen has, by virtue of his or her citizenship, the right to enter and be in New Zealand at any time.

The *Explanatory note* to the *Citizenship Amendment Bill* (NZ) introduced in 2010 referred to the fact that "*[o]nly New Zealand citizens have an unfettered right to enter, live, and work in New Zealand…*".

112 These decisions and these legislative provisions recognise the existence of a right to enter and remain in a country. Whether that right is expressed to be one possessed by a "*citizen*" or by a person who owes "*allegiance*" and whether that right is expressed as a "*right to enter and reside*" or a "*right of free access to … seaports*" or a "*right to enter [and] remain*" matters not.

113 Within Australia, the right is presently expressed in terms of the right of a "*citizen*". But the concept of "*citizenship*" itself is a "*statutory notion*": *Koroitamana v The Commonwealth of Australia* [2006] HCA 28 at [55], 227 CLR 31 at 47 per Kirby J. "*The term 'citizenship'*", it has thus been said, "*has a number of diverse meanings, and an exhaustive definition is difficult – maybe impossible – to formulate*": *Hwang v Commonwealth of Australia* [2005] HCA 66 at [12], 80 ALJR 125 at 129 per McHugh J. These difficulties, too, may presently be left to one side. Whoever may be a "*citizen*", it may nevertheless be readily accepted – as the High Court accepted in *Air Caledonie* – that a "*citizen*" has the "*right … to enter the country*…".

114 It is perhaps curious that the existence of such a fundamental right is not confirmed in Australia by either (for example) the *Migration Act* or the *Australian Citizenship Act 2007* (Cth) ("*Citizenship Act")*. The approach of both the New Zealand and Canadian legislatures stands in contrast.

115 Nor is this fundamental right of a citizen recognised – either expressly or implicitly – in Australia in the *Constitution*. Indeed, the term "*citizen*" is used only twice in the *Constitution* – both references being in s 44(i). Commonwealth legislative power in respect to the ability of the Australian community to regulate who may enter this country is nevertheless to be found in s 51(xix) and (xxvii) of the *Constitution* which provide as follows:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

…

(xix) naturalization and aliens;

…

(xxvii) immigration and emigration;

…

In that context, the term "*alien*" has become synonymous with "*non-citizen*": *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53, 110 ALR 97 at 135 per Gaudron J; *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49 at [15], 225 CLR 1 at 11 per Gleeson CJ. At the time of federation there were, apparently, perceived difficulties in agreeing upon a definition of the term: Rubenstein, *Citizenship and the Constitutional Convention Debates: A Mere Legal Inference* (1997) 25 Fed L Rev 295; Tilmouth, *Citizenship as a Constitutional Concept: Singh v Commonwealth of Australia and Rasul v Bush, President of the United States* (2005) 26 Aust Bar Rev 193 at 197. The *Constitution*, according to McHugh J, "*eschews any reference to 'citizenship'*": *Singh v The Commonwealth* [2004] HCA 43 at [101], 222 CLR 322 at 366. It is not a concept which has been found to be "*constitutionally necessary*": *Chu Kheng Lim* (1992) 176 CLR 1 at 54 per Gaudron J. See also: *Koroitamana* [2006] HCA 28 at [55]-[56], 227 CLR 31 at 47-48 per Kirby J. In addition to the observations of O'Connor J in *Potter* and of Griffith CJ in *Ex parte Benson*, however, there nevertheless remain passing references by Judges of the High Court over the years to the rights and duties of "*citizens*". Thus, for example, in *Judd v McKeon* (1926) 38 CLR 380 at 385 Isaacs J referred to the right to "*demand of a citizen his services as soldier or juror or voter*". More recently, in *Sue v Hill* [1999] HCA 30 at [48], 199 CLR 462 at 487, Gleeson CJ, Gummow and Hayne JJ referred to the "*rights and privileges of a subject or citizen*" but did not go on to further identify those "*rights and privileges*". See also: *Rowe v Electoral Commissioner* [2010] HCA 46 at [121], 243 CLR 1 at 48 per Gummow and Bell JJ, at [347] per Crennan J.

116 Whatever the difficulties in defining "*citizenship*" – or who is a "*non-citizen*" – and whatever may be the uncertainty as to the rights which attach to a person being a "*citizen*", it is sufficient for present purposes to recognise in Australia and in many overseas jurisdictions

the existence of a long established and widely recognised "*right*" of persons to enter and reside in a particular country.

117 To this very day, the existence of a "*right to enter and reside*" possessed by a citizen is not to be found necessarily in any constitutional or statutory source. The existence of such a right is to be found in an acknowledgment on the part of a Sovereign State that a particular person or a class of persons may cross its borders and remain. Such a right may be found possibly in legislation or even in a treaty or agreement between Sovereign nations. Such a right may not be *"legally enforceable"*. A treaty, it may be accepted, "*has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty*": *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478 per Dixon J. So much is "[*a*]*ccepted doctrine*": *Mayer v Minister for Immigration and Ethnic Affairs* (1984) 55 ALR 587 at 589 per Davies J. See also: Shaw, *International Law* at 258 (6th ed, 2008). The existence of a "*right to enter and reside*" may nevertheless be distilled from the acceptance or permission granted by a Sovereign State that such a person or class of persons may enter. The "*right*" may not be enforceable at the suit of an individual – but it nevertheless remains a "*right*" which may be enjoyed by a person or class of persons.

THE RIGHTS RETAINED BY A SOVEREIGN STATE

118 Common to these jurisdictions is the notion that a Sovereign State has both duties and obligations it owes to particular categories of persons and the right of certain persons to enter and reside in a particular country.

119 These dual aspects of the right have long been recognised as an incident of statehood.

120 Even those persons – be they described as "*nationals*" or "*citizens*" – who have been recognised as having a "*right of entry*" may, accordingly, have that right abrogated or qualified. The right of entry is most commonly abrogated or qualified by an exercise of legislative power. The Commonwealth Legislature may thus legislate so as to restrict the right of an Australian citizen to enter Australia: *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* [2002] FCAFC 205, 125 FCR 31.

121 Legislative power, self-evidently, extends beyond a legislative competence to control the entry of citizens or nationals. The ambit of the power conferred by s 51(xxvii) of the *Constitution* thus authorises the imposition of statutory conditions upon entry of immigrants: *O'Keefe v Calwell* (1949) 77 CLR 261 at 276-277 per Latham CJ. Conditions may thus be imposed requiring an immigrant to obtain an entry permit and upon expiration of that permit for him to become a prohibited immigrant: *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168; *Ex parte De Braic* (1971) 124 CLR 162 at 164 per Barwick CJ (with whom McTiernan and Owen JJ agreed). And the ambit of the power conferred by s 51(xxvii) extends beyond the actual act of entry: *R v Director-General of Social Welfare; Ex parte Henry* (1975) 133 CLR 369 at 376 per Stephen J.

122 Separate from any recognition of the right of "*nationals*" or "*citizens*" to enter and remain within the country of their citizenship and the legislative competence of a Sovereign State to place restrictions upon those who may enter and remain within its borders is the right of a Sovereign State to say who may enter.

123 Common to all jurisdictions is the notion that it remains within the power of a Sovereign State to determine who may cross and remain within its borders. Again, this is a right which may be found in sources other than legislation.

124 In Australia, Gummow J in *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, 204 CLR 1 briefly addressed as follows the right of a Sovereign State to admit persons to cross its borders:

> [137] … it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national. The proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of this Court. However, from that proposition, two principles of customary international law have followed. One is that a State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State; and the other is that, because no State is entitled to exercise corporeal control over its nationals on the territory of another State, such individuals are safe from further persecution unless the asylum State is prepared to surrender them …

As recognised in an article cited by Gummow J (Morgenstern, *The Right of Asylum* (1949) 26 British Year Book of International Law 327 at 327), it is "*an undisputed rule of international law … that a state is free to admit anyone it chooses to admit*".

125 Similarly, in the United States it "*is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe*": *Nishimura Ekiu v United States,* 142 US 651 at 659 (1892). See also: *Fong Yue Ting v United States,* 149 US 698 at 705 (1893).

126 Separate from the right of a citizen or national to enter and reside within the country of citizenship, is the ability of a non-citizen or an "*alien*" to enter a Sovereign territory where the State has granted its permission to do so. Both a citizen or national of a country, and others whom a Sovereign State has acknowledged may cross its borders, it is concluded, have a "*right to enter and reside*" for the purposes of s 36(3). Such a right may not necessarily be *"legally enforceable"*. Such a conclusion is assisted by the statutory expression in s 36(3), namely "*however that right arose or is expressed*". It is also assisted by the recognition in s 36(3) that the ambit of rights envisaged are not expressed exhaustively but inclusive of a right to enter and reside in a country "*of which the non-citizen is a national*".

CONCLUSIONS

127 The correct meaning and application of the phrase "*right to enter and reside*" as employed in s 36(3) of the *Migration Act*, it is considered, is not to be found exclusively within the text of Commonwealth legislation, including – in particular – the *Migration Act* or the *Citizenship Act*. Nor is it to be found necessarily in international conventions or treaties. The phrase is to be construed against the historical and long exercised rights of Sovereign States to admit persons and to exclude persons from its borders. Such a right is based on broad notions of liberty and allegiance, and not on strict concepts of individual enforceability.

128 Had it been necessary, it would have been concluded that the recognition of both India and Nepal in Articles 6 and 7 of the 1950 *Treaty of Peace and Friendship* as to the manner in which the nationals of each country are to be treated is sufficient to satisfy the requirements of s 36(3). To confine the application of those provisions to those nationals "*in the territory of the other*" – and to exclude from the application of those provisions those nationals who may wish to enter the territory of the other – would be contrary to both the

recognition of "*neighbourly friendship between India and Nepal*" and contrary to the advice provided by the Nepalese government as to the legal right of Nepalese citizens to enter India.

129 Excluded from the ambit of such a "*right*" would be the practical ability of an individual to cross a border without permission or possibly illegally. It could not readily be contemplated that the Australian Legislature, while seeking to "*curb*" the rights of asylum seekers, foist upon them the role of some ancient mariner – cursed to travel the seas with some uncertain hope of being able to secure entry at some unknown port. But where a Sovereign State has recognised the ability of a person or persons of a particular description, s 36(3) provides that such persons should disembark at that foreign port and not Australia.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 14 August 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
Appellant

AND: **SZRHU**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRBJ**
Appellant

AND: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE: **14 AUGUST 2013**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

ROBERTSON J

130 I agree with Buchanan J.

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

Associate:

Dated: 14 August 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2030 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
Appellant

AND: **SZRHU**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2103 of 2012**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRBJ**
Appellant

AND: **MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TRACEY, BUCHANAN, FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE: **14 AUGUST 2013**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

GRIFFITHS J

131 I have had the benefit of reading in draft form Buchanan J's reasons for judgment. I agree with those reasons and the orders proposed by his Honour.

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

Associate:

Dated: 14 August 2013