Minister for Immigration & Multicultural Affairs V Applicant C [2001] FCA 1332 (18 September 2001)

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Applicant C [2001] FCA 1332

MIGRATION - protection visas - application for an order of review from decision of Refugee Review Tribunal - where the Refugee Review Tribunal found that the applicant had a right to enter and reside in Syria - meaning of "protection obligations" in s 36(2) of the *Migration Act 1958* (Cth) ("the Act") - consideration of principle that Australia does not owe protection obligations to a person who has effective protection in a third country - whether s 36(3) of the Act is a codification of this principle - meaning of a "right to enter and reside" in a country - whether error of law within s 476(1)(e) of the Act

ADMINISTRATIVE LAW - MIGRATION - no evidence ground of review- application of the no evidence ground of review to a decision based on non-satisfaction that certain criteria have been met - application of the no evidence ground of review to a decision of the Minister for Immigration and Multicultural Affairs (or the Refugee Review Tribunal) not to grant a visa - where the Refugee Review Tribunal had determined that the respondent had a well-founded fear of persecution in Iraq - whether the Refugee Review Tribunal was required by law to grant the respondent a protection visa unless it was established that the respondent had a right to enter and reside in Syria (for the purposes of s 476(4)(a) of the Act) - whether the finding that the respondent could obtain sponsorship to re-enter Syria was a finding of a "particular fact" for the purposes of s 476(4)(b) of the Act.

MIGRATION - whether the Court has power to order that a matter be remitted to the Refugee Review Tribunal as originally constituted - circumstances in which a Court should order that a matter be remitted to the Refugee Review Tribunal as originally constituted - circumstances in which the Court has the power to order that a matter be remitted to the Refugee Review Tribunal to re-consider only some of its previous findings or to assume the existence of a certain state of affairs - circumstances in which the Court should so order

WORDS & PHRASES - "*protection obligations*", "*right to enter and reside*"

Migration Act 1958 (Cth) ss 65, 36(2), 36(3), 476(1)(e), 476(1)(g), 476(4)(a), 476(4)(b), 481(1)(b)

Border Protection Legislation Amendment Act 1999 (Cth) s 65

Acts Interpretation Act 1901 (Cth) s 15AA

Wang v Minister for Immigration and Multicultural Affairs (2000) 179 ALR 1 considered

Wang v Minister for Immigration and Multicultural Affairs [2001] FCA 448 considered

Al-Rahal v Minister for Immigration & Multicultural Affairs [2001] FCA 1141 referred to

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 followed

Rajendran v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526 referred to

Minister for Immigration and Multicultural Affairs v Gnanapiragasam (1998) 88 FCR 1 referred to

Al-Zafiry v Minister for Immigration & Multicultural Affairs [1999] FCA 443 referred to

Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 referred to

Patto v Minister for Immigration & Multicultural Affairs [2000] FCA 1554 approved

Al-Rahal v Minister for Immigration & Multicultural Affairs [2000] FCA 1005 referred to

Jones v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 32 followed

S115/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 540 referred to

Kola v Minister for Immigration & Multicultural Affairs [2001] FCA 630 approved

Bitani v Minister for Immigration & Multicultural Affairs [2001] FCA 631 referred to

W228 v Minister for Immigration & Multicultural Affairs [2001] FCA 860 referred to

V1043/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 910 referred to

V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018 disapproved

Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 distinguished

Television Capricornia Pty Ltd v Australian Broadcasting Tribunal (1986) 13 FCR 511 referred to

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 referred to

Curragh Queensland Mining Limited v Daniel (1992) 34 FCR 212 followed

CA Ford Pty Ltd v Comptroller-General of Customs (1993) 46 FCR 443 referred to

Bowen-James v Delegate of the Director-General of the Department of Health (1992) 27 NSWLR 457 referred to

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 referred to

Mahon v Air New Zealand [1984] AC 808 referred to

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 followed

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 followed

Doan v Minister for Immigration, Local Government and Ethnic Affairs (Olney J, 9 April 1997, unreported) referred to

Chen v Minister for Immigration & Multicultural Affairs [1999] FCA 34 considered

Mohammed Rasel v Minister for Immigration & Multicultural Affairs [2001] FCA 443 referred to

Xiang Sheng Li v Refugee Review Tribunal (1996) 45 ALD 193 referred to

Minister for Immigration & Multicultural Affairs v Al-Miahi [2001] FCA 744 referred to

Minister for Immigration and Ethnic Affairs v Singh (1997) 72 FCR 288 followed

Convention relating to the Status of Refugees as amended by the *Protocol relating to the Status of Refugees* Articles 1A(2), 33(1)

Aronson and Dyer *Judicial Review of Administrative Action* 2nd ed. 2000

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v APPLICANT C

W 97 OF 2001

GRAY, LEE & STONE JJ

18 SEPTEMBER 2001

PERTH

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY W 97 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
	APPELLANT
AND:	APPLICANT C
	RESPONDENT
JUDGES:	GRAY, LEE & STONE JJ
DATE OF ORDER:	18 SEPTEMBER 2001
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. the appeal be dismissed;

2. the cross-appeal be allowed;

3. order 2 of the primary judge made on 12 March 2001 be set aside;

4. the following order be substituted for order 2:

"2. The matter be remitted to the member of the Refugee Review Tribunal who made the decision of 28 August 2000 to be determined according to law";

5. liberty to apply be reserved in case the member of the Refugee Review Tribunal who made the decision of 28 August 2000 should be unavailable;

6. the appellant pay the respondent's costs of the appeal and the cross-appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA
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ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

APPELLANT
AND: APPLICANT C

RESPONDENT
JUDGE: GRAY, LEE AND STONE JJ
DATE: 18 SEPTEMBER 2001
PLACE: PERTH

REASONS FOR JUDGMENT

GRAY J:

1 I have read in draft form the reasons for judgment of Stone J in relation to this appeal. With one reservation, I am in agreement with the orders her Honour proposes and with her reasons for making those orders.

2 My one reservation relates to what her Honour says about the power of the Court pursuant to s 481(1)(b) of the *Migration Act 1958* (Cth) ("the Act") to refer a matter to which a decision relates to the person who made the decision for further consideration, subject to such direction as the Court thinks fit.

3 There are cases in which a tribunal exercising a function under the Act makes a decision involving a number of issues. Some of those issues may be decided in favour of the applicant for a visa. If that applicant is then successful in an application to the Court for judicial review, his or her success will be due to the fact that the tribunal's determination of one or more issues against the applicant has been found to be the result of error falling within one of the grounds of judicial review specified in s 476 of the Act. The tribunal's decision will be set aside on that basis. Because the decision is a single decision, to refuse to grant a visa, it is not possible to exercise the power in s 481(1)(a) to set aside part of a decision. The Court does not review reasons for decision, only decisions. The findings of the Court, however, may leave the tribunal's determination of issues in favour of the applicant untouched.

4 In such cases, there may be injustice in referring the matter to which the decision relates to the tribunal, with a direction that the tribunal be reconstituted. The injustice would arise from the necessity for a reconstituted tribunal to deal with the whole matter again, including the issues previously determined in favour of the applicant. Not only would such a course involve expenditure of public money, and the money of the applicant, in the rehearing of issues that are no longer controversial between the Minister for Immigration and Multicultural Affairs ("the Minister") and the applicant. It would also have the potential to produce different results. A differently constituted tribunal might reach a different conclusion on the issues already decided in favour of the applicant. This would lead to a perception that the system is unfair to applicants. An applicant who succeeds in persuading a tribunal in his or her favour

on an issue the first time, but who loses on that issue the second time, would be inclined to feel that the tribunal was disposed to reject his or her application by one means or another. Public confidence in the integrity of the system for reviewing decisions of delegates of the Minister under the Act would be eroded.

5 Injustice of the kind I have described arose in *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599 (2000) 179 ALR 1. In that case, the Refugee Review Tribunal ("the RRT") had found that Mr Wang, a citizen of the Peoples Republic of China, was a Christian. The RRT had erred in finding that Mr Wang could avoid persecution by practising his religion in a registered church, instead of considering whether the manner in which he was likely to practise his religion would result in persecution of him. The Full Court set aside the decision. All members of the Full Court were of the view that the same member of the RRT should deal with the further consideration of the matter, so that Mr Wang would not lose the benefit of the favourable determination of the issue whether he was a Christian. (See Wilcox J at [11], Gray J at [23] - [25] and Merkel J at [112]). The majority considered it inappropriate that the Court should give a direction that the matter be referred back to the RRT constituted by the member who made the decision, in case there were circumstances, including a view by Mr Wang, that ought to be considered before such a course was ordered. (See Wilcox J at [11] - [12] and Merkel J at [112]). The Full Court reserved liberty to apply.

6 There was a sequel to *Wang*. Mr Wang's solicitors asked the RRT to arrange for the matter to be heard by the same member. The RRT refused to comply with this request. Mr Wang therefore exercised his liberty to apply. The Full Court then made an order that the matter be remitted to the RRT as previously constituted for the application for review. See *Wang v Minister for Immigration and Multicultural Affairs* [2001] FCA 448.

7 A similar situation arises in the present case. The appellant has the benefit of a determination of the RRT in his favour on one issue. That is that he has a well-founded fear of persecution if he should be returned to his country of origin, Iraq. The issue the subject of his application for judicial review has been whether, because of his previous association with Syria and the possibility that he might be able to resume living there, he is not entitled to protection in Australia and therefore does not satisfy the criterion specified in s 36(2) of the Act. In substance, this Full Court is upholding a decision of the learned primary judge that the RRT made an error in the manner in which it dealt with that issue. If the matter were to be returned to the RRT on the basis that the RRT is to be reconstituted for the purpose of further considering the review, the appellant would lose the benefit of the finding in relation to Iraq. He would be at risk that another RRT member would take a different view of the evidence. For that reason, the Court is making an order that the matter be remitted to the member of the RRT who made the decision, to be determined according to law.

8 In case that member of the RRT should be unavailable, it is necessary to reserve liberty to apply. Should that event occur, and the liberty to apply be exercised, I take the view that s 481(1)(b) of the Act contains ample power for the Court to give a direction effectively confining the review to the issue or issues on which the RRT fell into error in making the decision set aside.

9 Stone J points out, correctly, that a determination as to whether Australia owes protection obligations to a person is a determination that must be made in the circumstances that exist at the time of its making. There is a possibility that a change might occur. A person might cease to have a fear of persecution. The regime in the country in which the person fears persecution,

or in a putative safe third country, might change. It is not beyond the capacity of the Court to frame a direction that recognises the possibility of change. For instance, the Court could direct that further consideration is to be given to a review on the basis that, at the date of the earlier decision, the applicant had a well-founded fear of persecution for a convention reason in his or her country of origin. Such a direction would leave room for the RRT to consider changes that may have occurred after that date, or may occur before the RRT makes a further decision.

10 For these reasons, I do not share the doubts that Stone J has expressed about whether s 481(1)(b) of the Act would entitle the Court to direct that the RRT limit its consideration to specified issues. While it might be appropriate to describe the circumstances in which such a direction would be given as "exceptional", I would not like to lay down any rule to this effect. At present, this case does not fall within the category of cases in which it is necessary to consider giving such a direction, because there is no indication that the member of the RRT whose decision is being set aside will be unavailable. If that circumstance were to arise, I should not want the Court's consideration of what direction might be appropriate to be foreclosed by anything said in the reasons for judgment that form the basis for the order that the Court is presently making.

11 Save for what I have said, I agree with what Stone J says.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 18 September 2001

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY W 97 OF 2001
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN: MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

APPELLANT
AND: APPLICANT C

RESPONDENT
JUDGES: GRAY, LEE & STONE JJ
DATE: 18 SEPTEMBER 2001
PLACE: PERTH

REASONS FOR JUDGMENT

LEE J:

12 I have had the advantage of reading the draft reasons of Stone J. I agree that the learned primary judge concluded correctly that the Refugee Review Tribunal ("the Tribunal") based its decision on its interpretation of s 36(3) of the Act and, in particular, on the meaning of the word "right" as used therein. I agree with her Honour that the Tribunal incorrectly interpreted s 36(3). Therefore, the decision of the Tribunal involved an error of law and the ground of review provided by s 476(1)(e) of the Act was attracted. I agree that the appeal should be dismissed with costs, the cross-appeal allowed with costs, and the orders of the learned primary judge varied as proposed by her Honour.

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

Associate:

Dated: 18 September 2001

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY W 97 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

APPELLANT
AND: APPLICANT C

RESPONDENT
JUDGES: GRAY, LEE & STONE JJ
DATE: 18 SEPTEMBER 2001
PLACE: PERTH

REASONS FOR JUDGMENT

STONE J:

PROCEDURAL BACKGROUND

13 The respondent, a citizen of Iraq, arrived in Australia by boat from Indonesia on 20 December 1999. He applied for a protection visa pursuant to the *Migration Act 1958* (Cth) ("the Act") on 7 May 2000. In his application, he claimed to have a well-founded fear of persecution if he were to return to Iraq. A delegate of the appellant ("Minister") refused to grant the respondent a protection visa on 19 July 2000. The Refugee Review Tribunal ("Tribunal") affirmed that decision on 28 August 2000 on the basis that Australia had no obligation to grant the respondent a protection visa because he could obtain effective protection in Syria. On 25 September 2000, the respondent applied to this Court for a review of the Tribunal's decision. On 12 March 2001, a judge of this Court (Carr J) made orders setting aside the Tribunal's decision and remitting the matter to a differently constituted Tribunal for reconsideration according to law. The Minister now appeals from that decision.

PROTECTION OBLIGATIONS

14 The respondent is seeking a protection visa. The circumstances in which Australian law requires a protection visa to be granted are specified in the Act. Section 65 provides that the Minister is to grant a visa "if satisfied" that certain criteria have been met. The section does not allow for Ministerial discretion although there obviously is some leeway for the Minister in reaching the requisite state of satisfaction. The only criterion for the grant of a protection visa that is relevant to this appeal is that in s 36(2) which is that the applicant for the visa must be a non-citizen in Australia to whom Australia has "protection obligations" under the 1951 Geneva *Convention relating to the Status of Refugees* as amended by the 1967 New York *Protocol relating to the Status of Refugees* (compendiously, "the Convention"). The Convention imposes obligations on its signatories in favour of "refugees". Article 1A(2) of the Convention defines a refugee as any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

15 The obligations imposed by the Convention are numerous and are conveniently summarised by Lee J in *Al-Rahal v Minister for Immigration & Multicultural Affairs* [2001] FCA 1141 ("*Al-Rahal*") at [22]:

"As a Contracting State, Australia has undertaken the obligations imposed on Contracting States by the Convention, being obligations not to discriminate against a refugee (Articles 3, 8, 13, 14, 17, 18, 26, 29); to offer to a refugee welfare services available to a national of that State (Articles 20-24); and to provide for recognition of the standing of a refugee within that Contracting State (Articles 27, 28, 34)."

16 In addition, his Honour mentioned Articles 32 and 33 as being directly concerned with the protection of a refugee from harm. Article 32 is of no concern here for, as his Honour pointed out, Australia did not accept the obligations contained in it. Article 33(1) is relevant and its terms are as follows:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

17 Section 36(3) of the Act, which commenced on 16 December 2000, makes the question of refoulment directly relevant to the interpretation of s 36(2); see [24] below. In a number of cases decided before the introduction of s 36(3), the Court, in reviewing decisions of the Tribunal refusing to grant protection visas, considered whether it would be a breach of Article 33(1) to return a refugee seeking protection in Australia to a country other than his or her country of origin. In the absence of s 36(3), the relevance of this question to the Minister's task in dealing with an application for a protection visa is not immediately apparent. It could be argued that the Minister is not required, and by virtue of s 65 is not entitled, to introduce the consideration of Australia's protection obligations and whether deporting the applicant would be in breach of those protection obligations as another criterion for the grant of a protection visa; see generally the opinion of Lee J in *Al-Rahal*. On that analysis, the task is to decide if the person is a refugee. If the person is a refugee (assuming always that any other criteria have been met), the Minister must grant the protection visa.

18 This argument raises the question of the correct interpretation of the Act and in particular, the meaning of the term, "protection obligations" used in the section. In *Al-Rahal* at [22], Lee J stated that, generically, all of the obligations referred to in [15] and [16] above could be described as "protection obligations". Those obligations fall into two categories:

(a) those that prohibit the return or refoulment of a refugee to a country where he or she would be exposed to persecution (in some circumstances, this may lead to the refugee being entitled to remain in Australia); and

(b) those that concern the treatment of refugees within Australia, such as non-discrimination and the provision of welfare services.

19 The phrase, "protection obligations" is not defined in the Act or in the Convention. It is used in s 36(2) in connection with the grant of a protection visa that entitles the grantee to remain in Australia. Given that context, the better view is that the term "protection obligations" refers, not to all of the obligations imposed by the Convention, but to those that are specifically concerned with the right of a refugee to remain in Australia. On that interpretation, it is a proper element of the enquiry mandated by s 36(2) to consider whether Article 33(1) would be breached by refoulment to a third country.

20 It has been accepted that Australia does not owe protection to a person who has established residence and acquired effective protection in another country ("third country"). In *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 ("*Thiyagarajah*"), von Doussa J, with whom Moore and Sackville JJ agreed, expressed the principle thus (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. The expression 'effective protection' is used in the submissions of the Minister in the present appeal. In the context of the obligations arising under the [Convention], the expression means protection which will effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee."

21 The principle in *Thiyagarajah* is not restricted to cases where the protection available to the protection visa applicant arises from the grant of refugee status, but may also apply where he or she is entitled to permanent residence in the third country; *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526; *Minister for Immigration and Multicultural Affairs v Gnanapiragasam* (1998) 88 FCR 1. In *Al-Zafiry v Minister for Immigration & Multicultural Affairs* [1999] FCA 443, Emmett J rejected the submission that in referring to "a right to reside, enter and re-enter" in relation to the third country, von Doussa J was intending to refer to a legally enforceable right. His Honour, at [26], interpreted von Doussa J's comments as meaning:

"... 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 to live in a third country where he will not be under any risk of being refouled to his original country, that will suffice."

Emmett J's interpretation was adopted by the Full Court in *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at [42]. In *Patto v Minister for Immigration & Multicultural Affairs* [2000] FCA 1554 ("*Patto*") at [37], French J summarised the position developed in these cases (noting that these propositions are not exhaustive):

"One can draw from these cases broad propositions in relation to the protection obligations assumed by Australia under Article 33 of the Convention in its application to persons who travel to Australia from the country in which they fear persecution by a third country in which they have stopped or stayed for a time:

1. Return of the person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.

2. Return of the person to the third country will not contravene Article 33, whether or not the person has right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

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

22 In judicial pronouncements concerning the concept of "effective protection", there is a common insistence on the necessity to consider the circumstances of each applicant and the practical result of sending that person to the proposed third country. In *Thiyagarajah*, von Doussa J spoke of the person having "a right to reside, enter and re-enter" (see [20] above), whereas Emmett J in *Al- Zafiry* spoke of it being "likely" that the applicant would be given effective protection by being permitted to live in the third country.

23 According to the Act, the Minister must consider whether he or she is "satisfied" that Australia owes protection obligations to the applicant. In reaching that state of satisfaction, the Minister considers the applicant's claims, assesses his or her credibility, considers independent evidence concerning the relevant countries and so on. At the end of this process the Minister must weigh all the evidence and make a decision. In weighing the evidence, different minds may make different choices in the process of reaching the prescribed state of satisfaction. In referring to the "likelihood" of the applicant being given effective protection, I understand Emmett J to be focusing on the realities of administrative decision-making. I agree with the comment of R D Nicholson J in *Al-Rahal v Minister for Immigration & Multicultural Affairs* [2000] FCA 1005 at [29] that the effect of the authorities on this issue:

"...is to abjure any rigid standard based on a check list and to rely on judicial assessment of the practical realities and relevant circumstances in relation to an applicant's position in a third country."

His Honour's decision was affirmed on appeal; see [2001] FCA 1141.

24 It was in the context of the jurisprudence on Article 33(1) that s 65 of the *Border Protection Legislation Amendment Act 1999* (Cth) commenced on 16 December 1999. This legislation, among other things, added five new subsections to the existing s 36. The expanded section is 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."

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 in [20] - [23] above, has been subsumed into s 36(3) or whether the operation of the subsection is more narrow. This issue is discussed below at [63] - [65].

TRIBUNAL'S DECISION

26 The Tribunal found that the applicant was a refugee from Iraq within the meaning of the Convention, that is, that the applicant had a well-founded fear of persecution in Iraq because the authorities would perceive him as politically suspect and opposed to the Iraqi government. The Tribunal, however, upheld the decision of the Minister's delegate that Australia did not owe protection obligations to the applicant because it held he would be able to enter Syria and remain there on an indefinite basis without persecution and without fear of return to Iraq.

27 This finding arose from evidence before the Tribunal concerning the respondent's escape from Iraq. The respondent had gone into hiding during April and May 1999 at a relative's house in Iraq. He later moved to his aunt's house, where he learnt that the Iraqi security forces were continuing to search for him. The respondent's cousins arranged for an invitation from the Iraqi Affairs Office in Damascus (run by groups opposed to the current Iraqi government) to visit Syria for a period of up to three months. Despite a claim by the respondent to the contrary, the Tribunal found that the invitation was genuine. The respondent left Iraq illegally with a driver arranged by his cousins and arrived in Syria on 17 September 1999. He left

Syria about two and a half months later using a false Iraqi passport and came to Australia via Indonesia.

28 The Tribunal considered whether the applicant has effective protection in Syria and directed itself as follows:

"In relation to this, the Tribunal is obliged to consider whether the applicant has taken all possible steps to avail himself of a right to enter and reside in Syria, whether on a temporary or a permanent basis. The Tribunal is further required to consider whether the applicant has a well-founded fear of being persecuted in Syria or of being refouled to Iraq by the Syrian authorities."

29 The Tribunal discussed the process by which Iraqi citizens are able to enter and reside in Syria. Referring to independent evidence, it found that Iraqis can enter Syria if they are sponsored by a family member, a friend or one of the Iraqi opposition parties operating in Syria. It noted, once in Syria,

"Iraqis are permitted to remain indefinitely without a residence permit. They are able to access free education and health services. They are also able to rent accommodation and engage in business and employment activities. The independent evidence - which includes evidence from UNHCR personnel based in Syria - is that Syria does not deport Iraqis unless they become involved in illegal activities. The evidence further indicates that whilst there have been some changes in the relationship between Syria and Iraq, there is unlikely to [be] an improvement in the relationships such as that Iraqi asylum seekers or dissidents would be returned."

30 The Tribunal was satisfied that:

" The applicant would be able to arrange to re-enter Syria through this Iraqi opposition group that previously sponsored him and;*

* That upon re-entry to Syria, the applicant would be able to reside there on an indefinite basis and would not be at risk of being refouled to Iraq."

THE DECISION OF THE PRIMARY JUDGE

31 The primary judge held that there was no evidence or other material to justify the making of the decision pursuant to s 476(1)(g) and pars 476(4)(a) and (b) of the Act. The relevant provisions in s 476 are as follows:

(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

...

(g) there was no evidence or other material to justify the making of the decision.

...

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

32 His Honour found that there was no evidence before the Tribunal that would justify its finding that the applicant had a right to re-enter and reside in Syria.

33 The primary judge was of the opinion that, in considering whether the respondent had effective protection in Syria, the Tribunal had not applied a "common law test" but s 36(2) as qualified by subs (3), (4) and (5). His Honour stated that this could be seen from the fact that the Tribunal had outlined the provisions of s 36 early in its reasons and then had directed itself in the manner quoted in [28] above. By "common law test" his Honour was referring to the judicially developed doctrine of effective protection; see [20]-[23] above.

34 The primary judge held that, once the Tribunal had found that the applicant had a well-founded fear of persecution if returned to Iraq, the Tribunal was required by law to vary or set aside the decision of the Minister's delegate unless it found that the exception provided by s 36(3) of the Act applied. In other words, for the purpose of s 476(4)(a), the delegate's decision could not be affirmed unless the Tribunal had found that "the applicant had a right to enter and reside in Syria, whether temporarily or permanently, however that right arose or was expressed, and that he had not taken all possible steps to avail himself of that right".

35 His Honour then rejected two submissions made by the Minister concerning the interpretation of s 36(3):

"I reject the [Minister's] submission that the word 'right' in the phrase '...a right to enter and reside in ...' in s 36(3) does not mean a legal right. I reject also the respondent's submission that these sub-sections are a codification of the common law. I acknowledge that they reflect much of the case law on effective protection, some of which I have referred to above as having been cited by the respondent. But, as I see it, s 36(3) is a new statutory hurdle which would-be refugees have, since 16 December 1999, been obliged to jump."

36 A little later in his reasons, his Honour expanded on his view of the meaning of the word "right" in s 36(3). He quoted some comments made by Senator Patterson, Parliamentary Secretary to the Minister, in tabling a supplementary explanatory memorandum relating, *inter alia*, to the new subsections and continued:

"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."

37 He held that there was no evidence that the applicant had a legally enforceable right to enter Syria. The only evidence before the Tribunal was to the effect that if he were able to obtain sponsorship from within Syria, he would then be able to enter Syria and remain there

indefinitely. In particular, there was no evidence to the effect that the applicant had or could obtain the necessary sponsorship. He therefore concluded that, in terms of s 476(4)(a), there was no evidence or other material from which the Tribunal could reasonably be satisfied that the particular matter referred to in [34] above was established. In the alternative, his Honour expressed the view that, in terms of s 476(4)(b):

"it is quite clear that the Tribunal had based its decision on the existence of the particular fact that the applicant had the right to re-enter Syria, and that fact did not exist. Syrian law is a matter of fact. To the extent that there was evidence of that law before the Tribunal, it is quite clear that the right of re-entry is conditioned upon sponsorship from within Syria. The applicant did not have such sponsorship."

GROUNDS OF APPEAL

38 At the hearing the respondent sought leave to amend the amended application for an order of review that had been considered by the primary judge. The respondent's contention is that the primary judge's interpretation of s 36(3) of the Act (see [35]-[36] above), if correct, shows that the Tribunal made an error of law within s 476(1)(e). Although a ground of review in the amended application was that the Tribunal had made an error of law, the primary judge noted that this ground was abandoned at the hearing. In any event, Mr Chaney, who appeared pro bono for the respondent, advised that the particulars attached to the claim do not identify the argument that the respondent wished to make at the hearing of the appeal. Essentially the respondent sought to replace the particulars in the amended application with particulars set out in his Notice of Contention.

39 In *Jones v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 32, the appellant was given leave to argue before the Full Court grounds of appeal that had not been included in the original application for review. R D Nicholson J referred to numerous authorities on this issue and stated at 47:

"The effect of these authorities, as I view them, is that where the new grounds could possibly have been met by calling evidence at the hearing or may have resulted in the case of the respondent being differently conducted at the trial, leave will be refused (the first proposition). However, where all the facts have been established beyond controversy or where the point is one of construction or of law, then it is a question for the Court of Appeal whether it is expedient and in the interests of justice to entertain the point (the second proposition)."

In my opinion the second proposition identified by R D Nicholson J applies here. In any event the Minister did not oppose the request. Leave was therefore given and the hearing proceeded on that basis.

40 The appeal raises three main issues, namely:

(a) the construction of s 36(3) of the Act;

(b) the no evidence ground of review in s 476(1)(g) together with pars 476(4)(a) and (b);

(c) error of law within s 476(1)(e).

CONSTRUCTION OF S ***36(3)***

41 The judicially developed doctrine of effective protection concerns a limitation to Australia's obligations under the Convention to provide protection. It is based on an assessment of the obligations imposed on Australia by the Convention and therefore involves interpretation of the Convention. For this reason it may avoid confusion to refer to the doctrine as the doctrine of effective protection omitting any reference to the common law. As indicated in [33] above, the primary judge found that the Tribunal did not base its decision on this test of effective protection but rather on the application of s 36(2) as qualified by subsections (3), (4) and (5). I agree with the primary judge on this point for the reasons that his Honour gave.

42 The appellant Minister alleges that the primary judge erred in holding that the word "right" in s 36(3) means a "legally enforceable right". Senior counsel for the Minister, Mr Tracey QC, submitted that subss 36(3) to (5):

(a) effect a codification of the pre-existing common law test dealing with effective protection; and

(b) impose a requirement, operating in addition to s 36(2), that must be met before Australia has protection obligations to a non-citizen, namely that he or she must have taken all possible steps to take advantage of any right to enter and reside in a third country.

In his submission the term, "right to enter and reside in" does not mean a legally enforceable right of entry and residence, but rather means the ability or capability legally to enter and reside in the relevant country. The submissions made in support of this interpretation are discussed in detail in [50] below.

Judicial consideration of s 36(3)

43 Since the primary judge's decision there have been a number of other first instance decisions of this Court that have considered the meaning of s 36(3) and have accepted the construction given by the primary judge; *S115/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 540 ("*S115/00A*"); *Kola v Minister for Immigration & Multicultural Affairs* [2001] FCA 630 ("*Kola*"); *Bitani v Minister for Immigration & Multicultural Affairs* [2001] FCA 631; *W228 v Minister for Immigration & Multicultural Affairs* [2001] FCA 860 ("*W228*"); *V1043/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 910.

44 In *W228*, French J impliedly rejected the notion that s 36(3) as qualified by ss 36(4) and (5) amounted to a codification of the judicially developed "effective protection" principles and commented (at [40]) that the effect of the subsections,

"is to identify a subset of the circumstances in which the return of a refugee to a third country will not involve a breach of Australia's obligations under Article 33."

45 In *S115/00A* at [8], Finn J also impliedly rejected the codification analysis and stated that the effect of the decision of the primary judge in this matter was:

"(i) where a non-citizen in Australia has a legally enforceable right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself [or herself] of that right unless the conditions prescribed in either s 36(4) or (5) are satisfied, in which case the s 36(3) preclusion will not apply;

(ii) where a non-citizen in Australia does not have a legally enforceable right to enter and reside in a third country, Australia will nonetheless be entitled to refoule that person to that country consistent with Australia's obligations under Article 33 of the Convention, if that person is likely to be given effective protection in that country; and

(iii) if neither s 36(3) or the wider effective protection principle applies to a person, that person is owed protection obligations if he or she is otherwise a 'refugee' within Article 1A [of] the Convention to whom the provisions of the Convention apply or continue to apply: see Article 1C to F; see also s 91ff of the Act.

A consequence of these varying contingencies is that the denial of a protection visa because of a non-citizen's 'connection' with a third country can result from either of two causes - (i) that s 36(3) applies to that person; or (ii) that the person nonetheless has effective protection in that third country."

46 In *Kola* at [36], Mansfield J agreed with the primary judge's interpretation of s 36(3) commenting:

"I do not think that the expression 'effective protection' used and explained in the decisions of the Court concerning Art 33 of the Convention carries the same meaning as the term 'a right to enter and reside in' a third country as used in s 36(3) of the Act."

47 The interpretation of s 36(3) was most recently considered in *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018 ("*V856/00A*"). This case also concerned an Iraqi national who had entered Syria pursuant to a sponsorship arrangement and lived there for a short time before proceeding to Australia and applying for a protection visa. Unlike the respondent in this case, that applicant had travelled in and out of Syria on a number of occasions and had left Syria legally. According to Allsop J, the Tribunal had confirmed the findings of the Minister's delegate that the applicant was able to return to Syria where he would have effective protection from persecution and that, therefore, Australia did not owe him protection obligations. As with the primary judge here, Allsop J found that the Tribunal had based its analysis on subss 36(3) to (5).

48 Allsop J (at [25]) summarised the submissions put to him on behalf of the Minister as follows:

"The respondent...submitted that the context and purpose of the provision as one dealing with 'forum shopping', the width of the words of the subsection ('however that right arose or is expressed') and the intention (it was said), in effect, to codify the previous law on 'effective protection', which previous law (it was said) eschewed any need for rights strictly so-called and emphasised 'practical reality and fact', all assisted in the construction of the word 'right' as meaning practical capacity to bring about a lawful entry; that is, it meant capability or capacity to bring about a permission or right to re-enter and reside in Syria."

49 Allsop J rejected the submission that subss 36(3)-(5) is a codification of the pre-existing law. He was of the view that s 36(3) was not intended to detract from the operation of s 36(2). In particular his Honour rejected the submission concerning the meaning of "right" in s 36(3), stating that the "practical capacity to bring about a lawful permission is in no sense a 'right' to do what the permission allows to be done". His Honour, however, also rejected the view expressed by the primary judge in this case, that "right" means a legally enforceable right. He stated (at [31]) that in the light of the phrase "however that right arose or is expressed" in s 36(3) 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 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 an 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."

Submissions concerning s 36(3)

50 In this appeal, the submissions made to support the Minister's interpretation of s 36(3) were very similar to those put on behalf of the Minister in *V856/00A* (see [48] above). The appellant submitted that interpreting the phrase "a right to enter and reside" as referring to a legally enforceable right would be contrary to the object and purpose of the *Border Protection Legislation Amendment Act 1999* (Cth) which inserted ss 36(3), (4) and (5) into the Act. This purpose was said to be evident from Senator Patterson's tabling speech (Hansard, Senate, 25 November 1999, p10668), which included the following comments:

* *"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."*

* "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."

* "Domestic case law has generally re-enforced 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."

51 The respondent says that the reference to "tough new measures" is a reference to the new Subdiv AK of Div 3 of the Act. These provisions apply to non-citizens with access to protection from third countries and deprive them of the capacity to make a valid application for a visa. It was submitted that the Senator's comments do not assist in the construction of s 36(3). Nevertheless the respondent did submit that the references to "right" in the tabling

speech and its juxtaposition with references to dual or multiple nationality support the proposition that the word "right" refers to a legally enforceable right.

52 The appellant also referred to the following passages in the Supplementary Explanatory Memorandum to the *Border Protection Legislation Amendment Act 1999* (Cth):

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

* "The purpose of the 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."

53 The appellant reminded the Court of s 15AA of the *Acts Interpretation Act 1901* (Cth) which provides that a construction of a provision of an Act which would promote the purpose or object of the Act is to be preferred to a construction that does not. Accordingly, it was submitted, the Court should not construe s 36(3) as referring to a legally enforceable right because to do so would be inconsistent with the purpose of the legislation set out in the Explanatory Memorandum. It was submitted that such a construction would confine the operation of s 36(3) to those who are nationals of a third country. This submission was based on the proposition that even a non-citizen who possesses a visa or other travel document that, on its face, permits him or her to enter and reside in a third country does not have a "legally enforceable right" to entry and residence. In response to this submission, Mr Chaney pointed out that the overall purpose of the provisions concerning protection visas is to ensure that Australia has a legislative system for meeting its protection obligations under the Convention. He suggested that this purpose might be a more appropriate interpretative background.

Conclusions concerning s 36(3)

54 The possibility that a protection visa applicant would be required to take all possible steps to access the protection of a third country raises some difficulties that were the subject of questions put to Senator Patterson concerning the tabling speech referred to above. In the subsequent debate, Senator Bartlett (at 10672) raised the issue of what was required for a person to take "all possible steps" to avail himself or herself of a right to enter:

"I would like to get an interpretation from the government about this phrase 'all possible steps to avail himself or herself of a right to enter and reside in'. I hope it does not mean that they have to apply to enter every other country other than Australia."

55 In response, Senator Patterson said (at 10672-10673),

*"I have been advised that it is not that we expect people to apply to every country that is a signatory to the convention before they can apply here; it is if they have **an existing right to enter a country**. I have been advised that there are some countries that are signatories to the convention where we would not expect them to exercise that right because of the human rights record of that country. However, there are some people who have an existing right to go to a country that would protect them but, when they are advised by our posts to go and apply for a*

visa, they refuse to do so. In that situation we expect them to use that right first before applying to Australia."

[emphasis added]

56 This exchange supports the primary judge's interpretation of s 36(3). If the term "right to enter and reside in" had the meaning pressed by the Minister, namely the practical capacity to bring about a lawful permission to enter and reside legally in the relevant country, then, in order for an applicant to take all possible steps to take advantage of such a right, it would be necessary for the applicant to apply at least to all countries where it could be reasonably expected that the applicant would be granted a visa for entry and temporary or permanent residence.

57 I do not regard the primary judge's interpretation as inconsistent with the meaning of the phrase advanced by Allsop J in *V856/00A* (see [49] above). Allsop J relied on the phrase "however that right arose or is expressed" to expand the meaning from what his Honour describes as "right in the strict sense, having the Hohfeldian 'jural correlative' of duty" to include "the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement" and not imposing "any particular duty upon the state in question". Allsop J also referred to the primary judge's view that, properly construed, s 36(3) is "consonant with Article 1E of the Convention". In relation to this view, Allsop J commented, at [31], that,

"A right under Article 1E is one (arising from the 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 subs 36(3) is more relevant and tends to the contrary."

58 To the extent that Allsop J suggests that the primary judge took a strict, Hohfeldian, view of "right" when the latter stated that "A literal construction of the word "right" in a statute must ... be that it is a legally enforceable right", I do not agree. A right may be "enforceable" even though it can be revoked without notice and even without reasons. For example, the Minister has extensive powers, listed in s 116 of the Act, to cancel visas. While that visa is extant, however, the non-citizen has, in my opinion, an enforceable right, namely the right not to be prevented from entering Australia. The non-citizen would be entitled to enforce his or her right of entry against, for example, an officious immigration officer who purported to deny entry despite the non-citizen having a valid visa for entry.

59 Undoubtedly the extent of the Minister's power may, as a practical matter, make the enforceability of the right appear illusory. This reflects the vulnerability of the right but does not, in my view, cast doubt on its existence. The analysis may well be different if, at the time the application for a protection visa is under consideration, the circumstances which permitted the grant of the right no longer exist or the factors warranting its revocation are established. Whether or not there could be said to be a right to enter the relevant country in such a case would depend on all the circumstances of that case. However, as this is not an issue in this proceeding, it is unnecessary to consider the point further.

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".

61 Similarly I do not think that Carr J's reference to s 36(3) being "consonant" with Article 1E indicates that his Honour was adopting the narrow Hohfeldian view of right. To say that the provisions are "consonant" does not mean that the rights referred to in those provisions are identical in nature. The provisions are consonant in that they are both directed to the same purpose, namely limiting the protection obligations of a participating nation so that they do not apply to someone who does not need that protection. Article 1E recognises that the purpose of the Convention does not require a participating nation to give asylum to a person who has the rights referred to in the Article. Section 36(3) takes the matter a step further by recognising that, in the words of the primary judge:

"If it be established that a person has an enforceable right to enter and reside in another country in which he or she would have no well-founded fear of being persecuted for Convention reasons or of being returned to another country in which he or she would have a well-founded fear of persecution for a Convention reason, then there are obviously valid arguments that such a person does not need Australia's protection as a refugee from persecution."

62 In my opinion the primary judge was correct in his interpretation of s 36(3). His interpretation is consistent with the way the provisions are referred to in the parliamentary debates and with the language of the section. Whether or not Senator Patterson's comments (see [50] above) are directly relevant to the section, it is true that it imposes a tough new hurdle that, since 16 December 1999, must be overcome by applicants who fall within the terms of the section. However, as French J has pointed out (see [44] above), the section only identifies a subset of the circumstances in which return of a putative refugee will not involve a breach of Australia's obligations under Article 33 of the Convention.

63 In *Kola,* Mansfield J expressed the opinion that s 36(3) does not purport to change the existing operation of s 36(2) of the Act. His Honour was of the opinion that the doctrine of effective protection is compatible with the effect of s 36(3) as explained above. As his Honour stated (at [37]),

"It has been held in many decisions of the Court that, for the purposes of s 36(2) of the Act, Australia does not have protection obligations to an applicant for a protection visa if that person has 'effective protection' in an intermediate third country. That is because Australia would not be in breach of its obligations under Art 33 of the Convention by refouling the visa applicant to that intermediate third country. That conclusion as to the continued operation of s 36(2) of the Act as it has previously been interpreted, notwithstanding the introduction of s 36(3)-(5) of the Act, is consistent with the recent decision of Finn J in S115/00A v Minister for Immigration and Multicultural Affairs *[2001] FCA 540.*"

64 The circumstances in which one might be "satisfied" that effective protection is available in the absence of a right (in the sense in which I have explained in [23] above) would be rare but not impossible to imagine. For example, if the third country were to give an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, it might be possible to be so satisfied although the person could not be said to have thereby acquired a right. With that possibility in mind, I agree with the position put by Mansfield J in *Kola.*

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.

NO EVIDENCE GROUND OF REVIEW - S ***476(1)(***g***)***

66 Section 476(1)(g) is set out in [31] above. The application of the section is limited by s 476(4) in that this ground of review cannot be made out unless it can be shown that either pars 476(4)(a) or (b) applies.

Application of "no evidence" ground of review where statutory power not exercised

67 It was asserted that the "no evidence" ground of review in s 476(1)(g) applies only where a statutory power has been exercised, that is where there has been a positive decision. Accordingly, the appellant submitted, the section has no application to a decision of the Tribunal to affirm a decision not to grant a protection visa to an applicant because the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Convention. In such a case, the power to grant a protection visa is **not** exercised. If this submission is correct, s 476(1)(g) could have no application to a decision refusing to grant a protection visa.

68 In making this submission the appellant relied on the reasoning of the New South Wales Court of Appeal in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 ("*Azzopardi*"). The case concerned the dismissal of a worker's compensation claim by the Workers' Compensation Commission in relation to an injury to the applicant's knee. On appeal it was submitted that the judge of the Workers' Compensation Commission fell into error of law in that it was not open to him to find that the worker had not suffered an injury to his knee. The resonance that this claim has with the no evidence ground of review in the Act is obvious. Glass JA (with whom Samuels JA agreed) noted that the Court was not permitted under the relevant legislation to correct errors of fact in a finding of the trial judge. In relation to the claim of error of law his Honour made the following observation (at 156):

"To the legally uninitiated there is a spurious validity in a submission that it was not open to the judge to find that the applicant was not injured since there was no evidence to that effect. If a respondent employer can argue a no evidence point, why cannot the applicant worker? The answer is, of course, that alleged insufficiency of evidence to prove a fact always raises a question of law but alleged sufficiency of evidence to the point of conclusiveness cannot, since it assumes that the evidence has been accepted. The party not bearing the onus puts an argument, which assumes ***against himself*** *that the evidence has been accepted, but submits that it is not capable of establishing the fact. The party saddled with the onus on the other hand cannot assume* ***in his favour*** *that the evidence is or ought to be accepted since this trenches upon the liberty of the tribunal of fact to accept or reject any evidence. Finally, the burden of proof to which the applicant is subjected cannot be masked by the use of double negatives. A purported ground of appeal which submits that there was no evidence that or it was not open to find that the applicant was not injured constitutes a futile attempt to convert a question of fact into a question of law by inverting the onus of proof."*

[emphasis in original]

69 The Minister submitted that the "no evidence" provisions of the Act were from the same stable as those in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") and that the historical background to the latter are relevant to the former. As Wilcox J showed in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 at 519-521, the ADJR Act provisions were intended to embody the reasons for the decision of the House of Lords in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. The relevant passage, according to the appellant, is the following comment of Lord Wilberforce at 1047:

"If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge..."

70 It is appropriate to set out the appellant's written submissions on the relevance of this comment to s 476(1)(g) and (4) of the Act:

" The analysis in Tameside *involved two stages. The ultimate question, absent satisfaction of which the Secretary had no power to act, was whether the Council was proposing to act 'unreasonably'. Lord Wilberforce was prepared to assume that the Secretary had asked himself the right question ... The issue was whether there were facts upon which it could be said that the position taken by the Council was such that no reasonable authority could adopt it. Their Lordships were positively satisfied that there were no such facts.*

If the no evidence ground of review in the ADJR Act was intended to give effect to the approach of the House of Lords in Tameside, then s.476(4) of the Migration Act must be read as involving two limbs which are logically related. Accordingly, if the primary 'no evidence' ground has operation only where a statutory power has been exercised, there is nothing in s.476(4) which would extend the grounds to cases where the power was not exercised for want of the relevant satisfaction. It follows that the decision of the Full Court of the Federal Court in Curragh Queensland Mining Limited v Daniel (1992) 34 FCR 212, in applying the equivalent provisions of the ADJR Act to a decision based on non-satisfaction that the discretionary statutory power to confer the Customs benefits should be exercised, expanded Tameside significantly. It did so without discussion as to whether the extension was justified. Having regard to the underlying purpose of the 'no evidence' ground of review, the Court in Curragh erred in expanding the ground of review in the manner it did."

71 As can be seen, the appellant's conclusion that the Court in *Curragh Queensland Mining Limited v Daniel* (1992) 34 FCR 212 ("*Curragh*") erred depends on the decision in *Azzopardi* and the proposition developed in [67] above that the "no evidence" ground of review in s 476(1)(g) applies only where a statutory power has been exercised. The status of *Azzopardi* is problematic; see Aronson and Dyer *Judicial Review of Administrative Action* 2nd ed. 2000 at 211-212. In particular, as the learned authors point out, Davies J effectively rejected *Azzopardi* in *CA Ford Pty Ltd v Comptroller-General of Customs* (1993) 46 FCR 443 at 446-447. They also point out that the decision has been said, in *Bowen-James v Delegate of the*

Director-General of the Department of Health (1992) 27 NSWLR 457 at 475, to be consistent with the views of Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. I do not need to resolve this issue here. For reasons that are explained below, I do not accept this ground of review.

72 Despite the problematic status of *Azzopardi*, the argument has a certain initial attraction. The relevant statutory power is found in s 65 of the Act. Relevantly, this section provides that, after considering a valid application for a visa, the Minister, if satisfied that the listed criteria have been met, "is to grant a visa". If not so satisfied the Minister "is to refuse to grant the visa". The appellant would have it that it is only in the grant of a visa that the Minister exercises the statutory power.

73 There are two objections to this submission. First, the argument places too much emphasis on the form of s 65 and too little on its substance. On one reading, the section allows the Minister to refuse to exercise the statutory power if the Minister is not satisfied that criteria have been met. However, unlike the power considered in *Curragh, s* 65 does not allow of any discretion; it covers the field. In other words, the Minister is directed by the section to do one of two things. The Minister **must grant** a visa if satisfied that the criteria have been met or **must refuse to grant** a visa if not so satisfied. The Minister cannot refuse to act.

74 Secondly, the submission ignores the nature of administrative decision-making and the way in which it differs from civil litigation conducted under the common law system of procedure. In *Mahon v Air New Zealand* [1984] AC 808 at 814, the Privy Council commented that in civil litigation where facts are in dispute:

"the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him ... if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation."

75 If the party seeking a remedy is unable to discharge his or her burden of proof, the judge's default position is to refuse to grant the remedy. If a burden of proof were imposed on an applicant or if the exercise of the power were discretionary, the decision-maker could say, "I am not satisfied and therefore I do not have to exercise the power". As the High Court has accepted, however, in administrative decision making the concept of burden of proof is inappropriate; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282-283; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [143]-[146]. Moreover s 65 does not reserve a discretion to the Minister. It directs him to make one of two incompatible findings, namely:

* Australia owes protection obligations to the applicant; or

* Australia does not owe protection obligations to the applicant.

Those findings must be made on the basis of evidence. I do not see any basis for the submission that the decision in *Curragh* should be limited or qualified in so far as it applies to this case.

Section 476(4)(a)

76 The appellant submits that the primary judge erred in concluding that s 476(4)(a) of the Act was applicable to the facts of this case. The Tribunal's finding that the respondent had a well-founded fear of persecution if returned to Iraq has not been challenged. As indicated in [34] above, the primary judge held that once the Tribunal had formed that conclusion, it was bound to set aside the Delegate's decision unless s 36(3) applied. Mr Tracey QC submitted that s 476(4)(a) has no application here as there is no "particular matter to be established".

77 In considering this submission, it is necessary to bear in mind that the criterion for a protection visa in s 36(2) is that the applicant is "a non-citizen in Australia to whom Australia has protection obligations" under the Convention. There are number of necessary elements which go to meeting this criterion and the criteria set out in s 36(3). It is not necessary to attempt to list these exhaustively but they include that:

* the applicant has a subjective fear;

* that which the applicant fears is persecution;

* the persecution the applicant fears is for a Convention reason;

* the applicant's fear is well-founded;

* the applicant does not have a right to enter and reside in a third country; and

* the applicant has not failed to take all possible steps to avail himself or herself of a right to enter and reside in a third country.

78 The Act does not require the decision-maker to address these elements in any particular order. The decision-maker is not required, for example, to decide if the applicant is a refugee before addressing the question of effective protection in a third country. In the absence of such a requirement, there is no basis for asserting that any one of the above elements must be determined before any other. To impose an order on the decision-making process or to find that s 476(4)(a) applies if a certain order is followed is an erroneous application of the section. If it were correct then s 476(4)(a) could apply in relation to any one of the elements that together found a conclusion about Australia's protection obligations to a non-citizen. For this reason, the cases that have concluded that s 476(4)(a) is not available to an applicant for a protection visa cannot be distinguished on the basis that, in this case, the Tribunal accepted that the applicant has a well-founded fear of persecution in Iraq before addressing the question of protection in Syria.

79 It may be, as Olney J commented in *Doan v Minister for Immigration, Local Government and Ethnic Affairs* (Olney J, 9 April 1997, unreported), that the limitation imposed by s 476(4)(a) will rarely be overcome. Whether or not this is so, in my opinion, this is not such a case and the primary judge was in error in concluding that s 476(4)(a) was applicable to the decision of the Tribunal.

Section 476(4)(b)

80 The primary judge's finding on this point is set out at [37] above. The appellant submitted that his Honour erred in holding that the no evidence ground of review was made out in relation to s 476(4)(b) of the Act. To the extent that this challenge was based on the view that the right to enter and reside referred to in s 36(3) is not a legally enforceable right, or that the no evidence ground of review has no application where a visa is refused, I have already rejected the appellant's submissions. In the alternative, however, the appellant submitted that the Tribunal's conclusion that the respondent had effective protection in Syria is not a "particular fact" within the meaning of s 476(4)(b). The same submission was made in relation to the conclusion that the respondent would be able to arrange to re-enter Syria in the future. Consequently, it was submitted, s 476(4)(b) could have no application.

81 An applicant seeking to establish a ground of review based on s 476(1)(g) read with s 476(4)(b) must:

(a) identify a "particular fact" on which the decision being challenged was based;

(b) establish, by admissible evidence, that the particular fact did not exist; and

(c) show that, on the evidence before the decision-maker, it was not open to him or her to find that the particular fact did exist.

82 In *Chen v Minister for Immigration & Multicultural Affairs* [1999] FCA 34 the Full Court stated (at [34]) that:

"The particular fact is to be distinguished from the ultimate fact in issue, or a conclusion based upon a series of particular facts, although one of those particular facts may qualify under s 476(4)(b)..."

83 It is not always easy to distinguish between the statement of a conclusion and a finding of a particular fact. An example of a particular fact is the Tribunal's finding (which was not challenged) that the applicant had been able to enter Syria through genuine sponsorship arranged by his cousin. On the evidence before it, the Tribunal also concluded that Iraqis can enter Syria if they have sponsorship and that, once in Syria, they enjoy effective protection; see [29] above. This latter conclusion is not a particular fact for the purposes of s 476(4)(b). However the finding that the respondent could arrange further sponsorship to re-enter Syria is in a different category.

84 There are a number of judicial comments to the effect that a "prediction as to the future" or "a conclusion as to future possibilities" is not a particular fact; *Mohammed Rasel v Minister for Immigration & Multicultural Affairs* [2001] FCA 443 at [20]-[22]; *Xiang Sheng Li v Refugee Review Tribunal* (1996) 45 ALD 193 at 204. The Tribunal's conclusion that the respondent would be able to remain in Syria on an indefinite basis and would have effective protection there is such a prediction and, on the basis of the above authorities, is not a particular fact. However, in my opinion, the statement that the respondent could arrange further sponsorship for re-entry to Syria is not a prediction as to the future but a statement about a present right or capability of the respondent. As such it is a finding of a particular fact. Moreover, it is a finding that is critical to the Tribunal's decision in the sense referred to in *Curragh* and *Minister for Immigration & Multicultural Affairs v Al-Miahi* [2001] FCA 744. It

is clear that the Tribunal would have concluded that Australia does owe protection obligations to the respondent if it had not found that the respondent could arrange further sponsorship for re-entry to Syria.

85 The respondent claims that there was no evidence for this finding of fact. The primary judge agreed and followed the approach taken by French J in *Patto*. *Patto* concerned an Iraqi applicant for a protection visa who, after escaping from Iraq, had lived for some years in Greece before coming to Australia. The Tribunal had refused the application because, it said, he could obtain effective protection by returning to Greece; it was satisfied that he had a right of return. French J found that there was no evidence to support the Tribunal's finding that the applicant had such a right of return. His Honour commented at [38]:

"While it may be that Patto could have remained in Greece indefinitely, his departure in Australia and prospective re-entry as a deportee from this country are circumstances which place in the realm of sheer speculation what the attitude of the Greek government might be to his re-entry. This difficulty also confronts the Tribunal's fall-back finding that even in the absence of a legal right he would, as a matter of "practical reality" be afforded effective protection in Greece."

86 In this case, the Tribunal's finding on the point was expressed as follows:

"The Tribunal is satisfied that the applicant was able to enter Syria through genuine sponsorship arranged by his cousin ... As the applicant was previously sponsored by an opposition group and was thus successfully able to obtain security clearance to enter Syria, the Tribunal is satisfied [supported by the independent evidence] that the applicant would be able to go through the process again."

87 Having found that the applicant had obtained sponsorship once, the Tribunal then asserted that the applicant would be able to do so again. It did not refer to any evidence to support that finding. The applicant, however, referred to certain evidence in support of his claim that he could not obtain sponsorship. The Tribunal did not reject that evidence or address the issues raised by it namely:

* the position of a person seeking **re-entry** as opposed to initial entry;

* the fact that the applicant had left Syria illegally;

* the fact that the applicant had no access to those who had previously sponsored his entry to Syria.

The applicant has accordingly pointed to evidence of the non-existence of the particular fact. I agree with the primary judge that the comments of French J in *Patto* are applicable here. Moreover the applicant's own evidence is sufficient to meet the requirement of positive evidence to show that the relevant fact does not exist; *Curragh* at 224.

ERROR OF LAW - Section ***476(1)(***e***)***

88 The views I have expressed as to the correct interpretation of s 36(3) indicate that the decision of the Tribunal involved an error of law. The Tribunal based its conclusion on the proposition that the respondent had the capacity to obtain re-entry to Syria by arranging

sponsorship for entry rather than on the proposition that the respondent had a legally enforceable right to re-enter Syria. Independent of the no evidence ground that I have found to be made out under s 476(1)(g) and s 476(4)(b), this constitutes an error of law, being a failure to interpret the law correctly.

89 The Tribunal's decision was not justified on any basis other than by a purported application of s 36(3). The Tribunal did not address the question of whether the applicant could, as a practical matter, obtain effective protection in Syria, relying instead on the respondent's failure to take certain steps within the meaning of s 36(3) (see [41] above and the decision of the primary judge; [2001] FCA 229 at [21]-[23]). Accordingly, the Tribunal's error affected its decision; I would have dismissed the appeal on this basis had the primary judge's decision not been justified on the basis of s 476(1)(g).

CONCLUSION AND ORDERS

90 The orders made by the learned primary judge are:

"1. The Refugee Review Tribunal's decision of 28 August 2000, affirming the decision not to grant the applicant a protection visa, is set aside;

2. The matter is remitted to the Refugee Review Tribunal, differently constituted, for reconsideration according to law;

3. The respondent pay the applicant's costs of the application.

91 At the hearing of this appeal, the respondent was given leave to cross-appeal against order 2. Pursuant to that leave the respondent seeks the following order in lieu of order 2:

"The matter be remitted to the Refugee Review Tribunal as previously constituted for the Respondent's application for review for reconsideration in accordance with the reasons of the Full Court.

In the event that the Refugee Review Tribunal as previously constituted is not available or is otherwise unable to reconsider the matter, then the matter be remitted to the Refugee Review Tribunal differently constituted for reconsideration limited to the issue of whether Australia has protection obligations to the Respondent by reason of any right which the Respondent may have to enter and reside in Syria."

92 Two issues arise in relation to these orders, the direction that the matter be remitted to the Tribunal as previously constituted and that the issues to be considered by the Tribunal be limited. In relation to the second issue, the respondent has submitted that as the only aspect of the Tribunal's reasons that has been challenged is its finding in relation to effective protection in Syria, there is no reason in logic why the issue of the respondent's status in Iraq should be revisited.

93 This submission overlooks the fact that the determination to be made by Tribunal is whether Australia owes protection obligations to the respondent. This determination is to be made as at the date the application is assessed; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288; *Thiyagarajah* at [28]. Section 481(1)(b) of the Act provides that on an application for review of a decision such as this, the Court may make an order,

"referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit".

94 While I have doubts that this provision would entitle the Court to direct that the Tribunal limit its consideration to specified issues, it is not necessary for me to decide the point in this case. Such an order, were it permissible, would be a matter for the discretion of the Court and, in my opinion, should only be made in exceptional circumstances. I do not believe that this case falls into that category and, in the exercise of my discretion I would decline to limit the Tribunal's consideration to a particular issue or issues.

95 In relation to the first issue, I accept that the Court has power to order that this matter be determined on remittal to the Tribunal by the member whose decision is under review; *Wang v Minister for Immigration & Multicultural Affairs* [2001] FCA 448. I see the force in the submission that this is a desirable course and am prepared to make such an order. It may, however, be that the member who made the decision is not available and, if that is the case, the parties should have liberty to apply on that issue.

96 As the respondent has been successful on this appeal the usual order as to costs should apply.

97 I would therefore order that:

1. the appeal be dismissed;

2. the cross-appeal be allowed;

3. order 2 of the primary judge made on 12 March 2001 be set aside;

4. the following order be substituted for order 2:

"2. The matter be remitted to the member of the Refugee Review Tribunal who made the decision of 28 August 2000 to be determined according to law";

5. liberty to apply be reserved in case the member of the Refugee Review Tribunal who made the decision of 28 August 2000 should be unavailable;

6. the appellant pay the respondent's costs of the appeal and the cross-appeal.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:

Dated: 18 September 2001

Pro Bono Counsel for the Applicant:	J A Chaney
Counsel for the Respondent:	R Tracey QC, and P Macliver
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	31 May 2001
Date of Judgment:	18 September 2001