FEDERAL COURT OF AUSTRALIA

M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 131

MIGRATION – appeal against summary dismissal of application for an injunction to restrain Minister for Immigration & Multicultural & Indigenous Affairs from returning appellant to Iran – unlawful non-citizen in detention – administrative review avenues exhausted – assumed fact that appellant unwilling to return to Iran owing to a well-founded fear of persecution in Iran – assumed fact that appellant's life or liberty would be threatened for 'Convention reasons' if returned to Iran – whether s 198(6) of the *Migration Act 1958* (Cth) authorised the Minister for Immigration & Multicultural & Indigenous Affairs to return appellant to Iran – scope of the duty imposed by s 198(6) of the *Migration Act 1958* (Cth) – meaning of "reasonably practicable" – whether duty imposed by s 198(6) of the *Migration Act 1958* (Cth) constrained by Australia's non-refoulement obligations under the Status of Refugees Convention and the Torture Convention – jurisdiction to review performance of duty pursuant to s 198(6) of the *Migration Act 1958* (Cth).

WORDS AND PHRASES – "reasonably practicable"

Migration Act 1958 (Cth), ss 4, 5(1), 5(9), 29, 48B, 65, 196, 198(6), 417, 474, 476
Judiciary Act 1903 (Cth), s 39B
Federal Court of Australia Act 1976 (Cth), ss 19(1), 23
Administrative Decisions (Judicial Review) Act 1977 (Cth), 3(1), Sch 1, par (da)

Federal Court Rules, O 20 r 2
Migration Regulations 1994 (Cth) , Sch 2, reg 1.06, 785.211, 785.221, 785.222

Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, Arts 1A(2), 33
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 3(1)

F v Minister for Immigration and Multicultural Affairs [2001] FCA 304 referred to
Applicant M38/2002 v Refugee Review Tribunal [2003] FCA 58 considered
Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2000 (2002) 196 ALR 111 considered
Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 197 ALR 241 applied

Ruddock v Vadarlis (2001) 110 FCR 491 considered
Robtelmes v Brenan (1906) 4 CLR 395 referred to
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 considered
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Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574 considered
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T v Home Secretary [1996] AC 742 referred to
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Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 considered
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Opera House Investment Pty Ltd v Devon Buildings Pty Ltd (1936) 55 CLR 110 referred to
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Williams v R (1986) 161 CLR 278 referred to
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Rough v Rix (1982) 49 LGRA 352 referred to
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Sinnappu v Minister of Citizenship and Immigration (1997) 126 FTR 29 considered
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M38/2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 388 of 2003

GOLDBERG, WEINBERG & KENNY JJ
13 JUNE 2003
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V 388 OF 2003**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**M38/2002** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Respondent**
JUDGES:	**GOLDBERG, WEINBERG AND KENNY JJ**
DATE OF ORDER:	**13 JUNE 2003**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The application for leave to appeal be granted (in so far as such leave is necessary).

2. The appeal be dismissed.

3. The appellant pay the respondent's costs of the appeal.

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

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Appellant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
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DATE: **13 JUNE 2003**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 A citizen of Iran, referred to in these reasons as the appellant, arrived in Australia in June 2000. He was detained as an unlawful non-citizen (within the meaning of s 14 of the *Migration Act 1958* (Cth) ("the Act")). He is currently in immigration detention (as defined in s 5(1) of the Act).

2 By an application filed in this Court on 21 March 2003, the appellant sought an injunction restraining the respondent from returning him to Iran. A judge at first instance has summarily dismissed the application under O 20 r 2 of the Federal Court Rules ("the Rules"). The appellant seeks to appeal against the order for summary dismissal and, by notice of motion dated 20 May 2003, seeks orders restraining the respondent from deporting or removing him from Australia until after the determination of the appeal. The motion and the appeal were heard in the afternoon and evening of 28 May 2003.

BACKGROUND

3 Officers of the respondent's department interviewed the appellant on 10 June 2000. He applied for a protection (class XA) visa ("protection visa") on 30 June 2000. On 9 August 2000, a delegate of the respondent refused his application and, on 11 August 2000, he applied

to the Refugee Review Tribunal ("the Tribunal") for review of the delegate's decision.

4 In support of his claim to have a well-founded fear of persecution if he returns to Iran, the appellant relied on his previous involvement with the Mujahideen-e-Khalq Organisation ("MKO"). Suppressed in Iran in 1981, this group supported clandestine resistance to the governing regime in Iran. The appellant claimed that whilst he was living in Iran he had been arrested, detained, questioned and assaulted by the Iranian authorities on a number of occasions, on account of his actual or imputed political opinion. He said that the authorities would punish him if he were to return to Iran because he had converted from Islam to Christianity. According to the appellant, he had been able to leave Iran on an Iranian passport in his name because he had the assistance of a people smuggler.

5 The Tribunal accepted that the appellant had been involved with the MKO, although it found that this involvement did not continue after the MKO was suppressed in Iran in 1981. The Tribunal did not accept that the appellant had been arrested on all the occasions to which he referred. It did not accept that there was a real chance that he would be persecuted by reason of his religion, political opinion, or for any other relevant ground. Accordingly, on 20 September 2000, the Tribunal affirmed the delegate's decision.

6 On 23 March 2001, the Federal Court of Australia dismissed an application for judicial review of the Tribunal's decision: see *F v Minister for Immigration and Multicultural Affairs* [2001] FCA 304. There was no appeal against the Court's decision.

7 In September 2001, the appellant obtained a transcript of the taped interview with the respondent's delegate held on 9 July 2000. The transcript showed that the appellant's references to his arrest at the time of the local council elections in March 1999 had not been interpreted and transcribed. On 26 September 2001, the appellant submitted an application to the respondent under s48B of the Act (to allow him to make another application for a protection visa) and an application under s 417 of the Act (to substitute for the Tribunal's decision a decision more favourable to him). The respondent rejected the s 48B application in late November 2001 and the s 417 application in late March 2002.

8 On 9 April 2002, the appellant made application in the High Court of Australia, out of time, for orders nisi for the respondent and others to show cause why writs of prohibition,

certiorari and mandamus should not issue in respect of the Tribunal's decision of 20 September 2000. He also sought an order prohibiting the respondent from removing the appellant from Australia pending the determination of any application for a protection visa. The High Court remitted the application to this Court and directed, amongst other things, that further proceedings on the remitted application before the Federal Court be governed by the High Court Rules permitting an extension of time.

9 On 10 February 2003, a judge of this Court published his reasons for judgment in which he concluded that the remitted application should be dismissed (without ruling upon the matter of the extension of time). His Honour determined that the Tribunal's failure to consider the untranscribed part of the appellant's interview with the respondent's delegate on 9 July 2000 did not constitute reviewable error, and rejected the contention that the Tribunal fell into reviewable error by failing to have regard to statements also made by the appellant in his interview on 10 June 2000: see *Applicant M38/2002 v Refugee Review Tribunal* [2003] FCA 58. The appellant did not appeal against the order dismissing this application. His Honour ordered that the proceeding be adjourned to a directions hearing on 21 March 2003 for consideration of the appellant's application for injunctive relief.

10 At the directions hearing on 21 March 2003, however, the appellant accepted that his application for injunctive relief should be dealt with in a separate proceeding. The Court dismissed the application remitted from the High Court on 21 March 2003.

THE APPLICATION INITIATING THIS PROCEEDING

11 Also on 21 March 2003, the appellant filed a further application in this Court pursuant to s 39B of the *Judiciary Act 1903* (Cth). This became V 143 of 2003. In this application, the appellant sought permanent and interlocutory injunctions restraining the respondent from returning him to Iran. By way of a statement of claim filed the same day, the appellant alleged that:

> 1. [He] *is a citizen of Iran who is present in Australia and who is unwilling to return to Iran owing to a well-founded fear of persecution in Iran.*
>
> 2. *The Respondent threatens and intends to return* [him] *to Iran.*
>
> 3. *If* [he were] *returned to Iran, his life or liberty would be threatened on account of his religion, membership of a particular social group and political opinion.*

> 4. [His] *return ... to Iran would constitute refoulement ... contrary to Australia's obligations under Article 33 of the Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.*
>
> 5. [His] *return ... to Iran* [would] *constitute refoulement ... contrary to Australia's obligations under Article 3 of the Torture Convention.*
>
> 6. *In the circumstances, the Respondent is neither required nor authorised to return* [him] *to Iran.*

The respondent denied most of these allegations in its defence.

12 By a notice of motion dated 24 March 2003, the respondent sought an order that the proceeding be dismissed pursuant to O 20 r 2 of the Rules on the ground that it disclosed no reasonable cause of action. (The respondent did not ultimately pursue a subsequent motion, also filed by him, seeking an order pursuant to O 29 r 2 of the Rules.) On the hearing of the motion, it was common ground before the primary judge that the appellant was subject to removal from Australia in accordance with s 198(6) of the Act. The appellant's case was that in discharging the obligation imposed by s 198(6), an officer could not "refoule" (see [37]-[39] below), or act contrary to or inconsistent with Art 33 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (collectively, "the Refugees Convention") and Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention").

13 In supplementary written submissions dated 28 April 2003, the respondent accepted:

> *For the purposes of the motion for summary dismissal, it is appropriate for the Court to assume that allegations of fact pleaded by the applicant will be established by the evidence at the trial.*
>
> *For present purposes, this means that the Court may assume that:*
> *(a) the applicant is unwilling to return to Iran owing to a well-founded fear of persecution in Iran (paragraph 1 of the Statement of Claim); and*
> *(b) if the applicant is returned to Iran, his life or liberty would be threatened for Convention reasons (paragraph 3 of the Statement of Claim).*
>
> *However, in determining the construction of s 198(6), the Court should not necessarily assume the allegations made in paragraph 4 of the Statement of Claim – that is, that the return of the applicant to Iran will constitute refoulement contrary to Australia's obligations under Article 33 of the*

> *Refugees Convention. ... .*

14 In response, counsel for the appellant contended:

> *If the facts pleaded are assumed, as they must be on such an application, ...* [t]*he question of construction ... becomes: 'Does section 198(6) authorize the Minister to* return a refugee *to a place where his life or freedom will be threatened?'*

15 In support of his motion for summary dismissal, the respondent submitted, however, that the question – whether the removal of an unlawful non-citizen from Australia would involve a contravention of Australia's international obligations under the Refugees Convention or the Torture Convention – did not involve a matter that was justiciable in Australian courts. Secondly, he submitted that s 198(6) of the Act (pursuant to which the appellant was to be removed from Australia) did not contain any limitation that prevented the removal of an unlawful non-citizen in circumstances which involved an alleged contravention of an obligation arising under these Conventions, or any other international instrument.

16 By leave of the Court, the appellant filed supplementary written submissions after the hearing of the appeal. In these submissions, the appellant contended that, if "the Minister knowingly returns a person who is in fact a refugee and whose life or freedom will be threatened on Convention grounds if … returned [to his or her place of origin]", then the Minister's act would be beyond power. The appellant submitted that "the only distinction" between this case and a case "where the Minister returns a person who is in fact a refugee and whose life or freedom will be threatened on Convention grounds if the refugee is returned but relies on the findings of the [Tribunal] and believes that the person is not a refugee" is "whether the person has the opportunity to demonstrate the facts in court". The appellant submitted that "[i]f the person demonstrates that they are [sic] a refugee in fact, and face torture, death or imprisonment if returned, a return thereafter would be a return of the first sort". The appellant contended that, since the first case would be beyond power, then, in the second case, it must be open to a claimant for refugee status to establish in court the facts that demonstrate the invalidity of his proposed removal.

17 The respondent answered this supplementary submission in the manner set out at [79] and [82] below.

THE DECISION OF THE PRIMARY JUDGE

18 The primary judge accepted that, for the purposes of the motion, he should assume that the applicant was a refugee, and "all the facts alleged in the Statement of Claim are accurate". His Honour added, at [11]:

> *Further, it was not in dispute that:*
> - *the applicant is a detainee*
> - *the applicant had made a valid application for a protection visa*
> - *the grant of the visa had been refused*
> - *the applicant had not made another application for a substantive visa*
> - *the applicant is subject to removal from Australia in accordance with s 198(6) of the Act.*

His Honour proceeded to deal with the matter on the basis that, although the respondent was proceeding by way of a motion for summary dismissal, the Court should determine finally the construction of s 198(6) of the Act.

19 The primary judge held that the language of s198(6) of the Act did not permit a construction "which incorporates into the subsection a prohibition on removal which would constitute refoulement under Art 33 of the Refugees Convention or Art 3 of the Torture Convention": at [22]. According to his Honour, at [23] and [24], s 198(6) was "unambiguous" and there was "no basis for limiting or qualifying the duty imposed on an officer under s198(6) by an importation of Art 33 of the Refugees Convention and Art 3 of the Torture Convention into the Act". Accordingly, on 15 May 2003, his Honour ordered that the proceeding be dismissed, with costs.

20 On 15 May 2003, the appellant's solicitors wrote to the respondent's solicitor stating that they had been instructed to seek leave to appeal against the judgment given that day and to seek an extension of the respondent's undertaking not to remove the appellant from Australia until the outcome of the appeal was known. On 16 May 2003, the respondent, by his solicitor, informed the appellant's solicitors that the respondent was unwilling to give such an undertaking, although the appellant would not be removed over the following weekend. Also on 16 May 2003, the appellant filed a notice of appeal against the judgment of the judge at first instance and, to the extent necessary, sought leave to appeal from that judgment. The grounds of appeal were stated to be as follows:

> *His Honour erred in law by holding that the language of s198(6) of the Migration Act 1958 (Cth) ('the Act') … is unambiguous.*

> *His Honour erred in law by holding that the language of s 198(6) authorises the return of a refugee 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.*
>
> *His Honour erred in law by holding that the language of s 198(6) of the Act authorises the return of a person to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
>
> *His Honour erred in law by holding that the return of a refugee to a place in circumstances constituting* refoulement *is a bona fide exercise of the power conferred by s 198(6) of the Act to remove a person from Australia.*

As already indicated, this Full Court heard the appeal, together with the notice of motion dated 20 May 2003, in the afternoon and evening of 28 May 2003.

THE PARTIES' SUBMISSIONS ON APPEAL

21 As the primary judge's reasons for judgment make clear, it was common ground at first instance and on appeal that, on the appellant's case, s 198(6) of the Act imposed a duty upon a relevant officer to remove him from Australia "as soon as reasonably practicable". So far as the appellant was concerned, the critical question was whether, in the lawful discharge of this duty, an officer could remove the appellant from Australia by returning him to a place to which he was unwilling to return, owing to what was in fact a well-founded fear of persecution, on Refugees Convention grounds, in that place and where, upon his return, his life or liberty would be threatened for Refugees Convention reasons. As already noted, the respondent submitted, in effect, that, as a matter of law, the question did not arise at all, or alternatively, that it could not arise in this Court.

STATUTORY SCHEME

(a) The duty to remove

22 Section 198 imposes a duty upon "an officer" to remove certain persons from Australia "as soon as reasonably practicable". An officer for the purposes of s 198 is a person falling within one of the classes of persons identified in the definition in s 5(1) of the Act. The term does not include the respondent Minister, although it covers officers of the respondent's department, as well as members of relevant police forces and persons whom the Minister authorises (in writing) to be officers. The precise identity of the officer or officers who are obliged to remove a person from Australia pursuant to s 198 may depend upon the

circumstances of the case.

23 The individuals subject to removal by these officers are "unlawful non-citizens". A "non-citizen" is a person who is not an Australian citizen (s 5(1)). The Act distinguishes between "lawful" and "unlawful" non-citizens. A lawful non-citizen is, relevantly, a non-citizen who holds a visa that is "in effect" (s 13). A visa is a permission granted to a non-citizen by the Minister to enter and remain in Australia (s 29). An unlawful non-citizen is a non-citizen who is not a lawful non-citizen (s 14). That is, s 198 is concerned with the removal from Australia of non-citizens who do not have the Minister's permission to enter or remain in Australia.

24 Subsections 198(1) to 198(9) set out the circumstances in which an officer incurs an obligation to remove an unlawful non-citizen. The word "remove" is defined in s 5(1) to mean "remove from Australia". In particular, s 198(6) (with which the present appeal is concerned) provides:

> *An officer must remove as soon as reasonably practicable an unlawful non-citizen if:*
> *(a) the non-citizen is a detainee; and*
> *(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and*
> *(c) one of the following applies:*
> *(i) the grant of the visa has been refused and the application has been finally determined;*
> *(iii) the visa cannot be granted; and*
> *(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.*

(There is no s 198(6)(c)(ii).)

25 If, in a particular case, the conditions in pars (a) to (d) of s 198(6) are satisfied, then an officer has a duty to remove the unlawful non-citizen from Australia, when it is reasonably practicable to do so (see below). Section 198(6) is, plainly enough, concerned with the removal of detainees who have failed in their visa applications and have no valid visa application on foot.

26 A "detainee" is a person detained in immigration detention (s 5(1)). Sections 189 and 196 provide for the detention of unlawful non-citizens: see *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2000* (2002) 196 ALR 111, at 135-136 per

Black CJ, Sundberg and Weinberg JJ. As soon as reasonably practicable after an officer detains a person under s 189, the person detained must be made aware of s 195 (concerning visa applications by a detainee) and s196 (s 194(a)). In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 ("*Al Masri*"), at 249, the Full Court said:

> *The effect of ss 189 and 196 is that no decision under the Act is required as a precondition to the power and duty to detain an unlawful non-citizen. Detention depends upon the status of the person … .*

27 Section 196(1) of the Act creates an obligation to detain an unlawful non-citizen in immigration detention until he or she is removed from Australia under ss 198 or 199, or granted a visa, or deported under s 200 of the Act. Section 200 provides that the Minister may order the deportation of a non-citizen to whom Div 9 of Pt 2 of the Act applies. Div 9 of Pt 2 deals with the deportation of non-citizens on the ground of criminal conviction and on other grounds. Since they have no application in the present case, the provisions of the Act relating to deportation may be put aside for present purposes. Section 199, which concerns the removal upon request of the family of an unlawful non-citizen who is to be removed from Australia, may also be put aside for present purposes.

(b) The place of the duty in the scheme of the Act

28 Plainly enough, s 198(6) is an integral part of a legislative scheme designed to prevent unlawful non-citizens from entering or remaining in Australia. The Full Court observed in *Al Masri*, at 250:

> *There is no power under the Act to decide against the removal of an unlawful non-citizen and so that where a subsection of s 198 applies to an unlawful non-citizen the removal of that person would occur by force of law.*

Broadly speaking, therefore, the Act contemplates that an unlawful non-citizen must either be granted a visa or removed from Australia.

29 A person must be released from immigration detention if he or she is granted a visa (including a bridging visa pending determination of an application for a substantive visa) or if he or she is in fact an Australian citizen: see ss 191, 196(2) and (3). A visa may be granted to an unlawful non-citizen upon making a valid application (s 46) and upon the Minister being satisfied that he or she meets the statutory criteria for the grant of the visa (s 65).

30 What happens, however, when an unlawful non-citizen has made a valid application for a substantive visa and the Minister is not satisfied that he or she meets the criteria for it? Broadly speaking, s 198(6) of the Act is concerned with this circumstance. Where an unlawful non-citizen in detention has made a valid visa application and –

(1) the visa has been refused and the application has been finally determined (or the visa cannot be granted); and

(2) there is no other valid visa application on foot,

then, by virtue of s 198(6), he or she must be removed from Australia "as soon as reasonably practicable".

31 Subsection 5(9) of the Act provides that, for the purposes of the Act, an application is "finally determined" when either:

> *(a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or*
> *(b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or*http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/index.html - p7 *7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.*

Part 5 provides for the review of decisions by the Migration Review Tribunal. Part 7 provides for the review of decisions by the Refugee Review Tribunal. Both Pts 5 and 7 include provision for the referral of decisions to the Administrative Appeals Tribunal. Plainly enough, the Act contemplates that an application is finally determined when an applicant has exhausted all avenues for administrative review.

32 The importance of s 198 and the associated provisions in Div 7 of Pt 2 in the scheme of the Act is apparent from the Act's long title. This describes the Act as "relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons". The importance of s 198 is confirmed by s 4(1), which states that the object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". The Act itself affirms, in ss 4(2) to (4), that, in order to advance this object, provision is made, amongst other things, for visas and the removal of non-citizens "whose presence in Australia is not permitted by this Act". As French J observed in *Ruddock v Vadarlis* (2001) 110 FCR 491 ("*Ruddock v Vadarlis*"), at 544, the Act:

> *provides a comprehensive regime for preventing unlawful non-citizens from entering into Australia and for their removal from Australia if they do so enter. It confers substantial powers on the Executive in aid of its object.*

33 The Act is an expression of established constitutional and international law principles. Under Australian constitutional law, which is consistent in this respect with international law, the Commonwealth of Australia, like other states, is entitled to determine for itself whether any alien (referred to in the Act as a non-citizen) should be permitted to enter, remain in, and become part of the Australian community: see *Robtelmes v Brenan* (1906) 4 CLR 395, at 400 per Griffith CJ; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ("*Chu Kheng Lim*"), at 29 per Brennan, Deane and Dawson JJ; and *Re Minister for Immigration and Multicultural Affairs; ex parte Te* (2002) 193 ALR 37, at 41 per Gleeson CJ. The Commonwealth Constitution, in ss 51(xix) and (xxvii), confers legislative powers on the Parliament to enable such determinations to be made and to be given effect.

THE REFUGEES CONVENTION

(a) The scope of the Refugees Convention

34 The appellant's case on appeal turns on the relationship between the place of s 198 in the scheme of the Act and Art 33 of the Refugees Convention. Australia acceded to the 1951 Refugees Convention on 22 January 1954 (with effect on 22 April 1954) and to the 1967 Protocol on 19 December 1973 (with effect on that date). Pursuant to Art 1A(2), for the purposes of the Refugees Convention, a refugee is a 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 as a result of such events, is unable, or owing to such fear, is unwilling to return to it.*

The Refugees Convention does not purport to confer a right of asylum on a refugee in a contracting state: see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 ("*Khawar*"), at 583-4 per McHugh and Gummow JJ and *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ("*Applicant A*"), at 273-4 per Gummow J. A refugee within the meaning of Art 1 of the Refugees Convention has no right under international law to insist on being received by a country of refuge: see, e.g., *T v*

Home Secretary [1996] AC 742, at 754 per Lord Mustill.

35 As the title to the Refugees Convention indicates, its principal concern is with the status and civil rights of refugees in the contracting states. Accordingly, Ch II of the Refugees Convention is concerned with the juridical status of refugees and refers, amongst other things, to a refugee's right to "free access to the courts of law" in contracting states (Art 16). Chapter III is concerned with gainful employment and Ch IV, with the welfare of refugees (including rationing, housing, education, public relief, and social security). An examination of Ch III and Ch IV shows that their provisions confer rights by reference to a number of criteria, including "treatment as favourable as possible, and … not less favourable than that accorded to aliens generally in the same circumstances", "the most favourable treatment accorded to nationals of a foreign country in the same circumstances", and "the same treatment as is accorded to nationals".

36 The provisions of Ch V (Arts 25 to 34) are relevant to the appellant's case on appeal. Article 31 provides that, even if refugees entered a contracting state illegally, the contracting state shall not impose penalties on account of their illegal entry or presence. Pursuant to Art 32, a contracting state undertakes not to expel a refugee lawfully in its territory "save on grounds of national security or public order". (When Australia acceded to the Refugees Convention, it did so with some reservations and, relevantly here, it did not accept "the obligations stipulated" in Art 28(1) and Art 32.) Article 33, which is specifically relied upon by the appellant, is the non-refoulement provision. Article 33(1) provides 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.*

(b) The non-refoulement principle

37 Subject to the Refugees Convention, any other binding international instruments, and any limitations or exceptions under general international law, a contracting state is entitled to remove a non-citizen from its territory. (See, e.g., A Achermann and M Gattiker "*Safe Third Countries: European Developments*" (1995) 7(1) International Journal of Refugee Law 19, at 25; *Chu Kheng Lim*, at 29-30 per Brennan, Deane and Dawson JJ; *Ruddock v Vadarlis*, at 495 per Black CJ, 519-521 per Beaumont J and 541 per French J; *V 872/00A v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268 ("*V 872/00A*"), at 273-4 per Hill

J and *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73 ("*Al-Rahal*"), at 82-85 per Lee J and *Sale v Haitian Centers Council Inc* 509 US 155 (1993). Regarding limitations and exceptions under general international law, contrast Guy S Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996), at pp 167-171 and James C Hathaway, *The Law of Refugee Status* (1991), at pp 25-27; also A D King, "*Note: Interdiction: The United States' Continuing Violation of International Law*", (1988) 68 Boston University Law Review 773, at 787-792.) Article 33 of the Refugees Convention limits a state's right to remove aliens from its territory. As the appellant further noted, the Torture Convention (which has been ratified by Australia) also prohibits the refoulement of any person who might face torture on return to another state: see Art 3(1). In *Applicant A*, at 274, citing *Robtelmes v Brenan* (1906) 4 CLR 395, at 413, Gummow J observed:

> *The Convention resolves in a limited fashion the tension between humanitarian concerns for the individual and that aspect of state sovereignty which is concerned with exclusion of entry by non-citizens, '*[e]*very society* [possessing] *the undoubted right to determine who shall compose its members'.*

38 Article 33 states the principle of non-refoulement, which applies to persons who are refugees within the meaning of Art 1. Although the definition of "refugee" in Art 1 and the identification of persons subject to the non-refoulement obligation in Art 33 differ, it is clear that the obligation against non-refoulement applies to persons who are determined to be refugees under Art 1: see *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, at 1001 per Lord Goff. Goodwin-Gill (op cit, at 138) says:

> *The travaux préparatoires do not explain the different wording chosen for the formulations respectively of refugee status and* non-refoulement*; but neither do they give any indication that a different standard of proof was intended to be applied in one case, rather than in the other. In practice, the same standard is accepted at both national and international levels, reflecting the sufficiency of serious risk, rather than any more onerous standard of proof, such as the clear probability of persecution.*
>
> *At the international level, no distinction is recognized between refugee status and entitlement to* non-refoulement. [Citations omitted]

We note that whilst the Refugees Convention attributes refugee status to a person who satisfies the definition in Art 1, it is left to each contracting state to implement procedures for determining whether or not a person is a refugee as he or she claims: see below [40]-[42].

39 By virtue of Art 33(1) of the Refugees Convention, a contracting state undertakes an obligation couched in negative terms. It is an obligation not to expel from its territory a person who is determined to be a refugee within Art 1 to the frontiers of a territory in which there is a threat to his or her life or freedom for a Convention reason. If a contracting state removes a person from its territory, there can be no breach on its part of Art 33 if the person is not a refugee (as defined in Art 1) or, if a refugee, the removal does not involve the return to a place where there is a risk to his or her life or freedom on account of his or her race, religion, nationality, membership of a particular social group or political opinion: cf *Al-Rahal*, at 75-76 per Spender J and 97 per Tamberlin J; and *V 872/00A*, at 274 per Hill J and 286 per Tamberlin J.

(c) The manner in which states give effect to the Refugees Convention

40 Whilst all contracting states have a general duty to ensure that their domestic law conforms to their international obligations, states may choose the means by which they accomplish this result. The Refugees Convention does not require that any of its provisions be incorporated into domestic legislation. The Convention does not, moreover, require that a contracting state adopt any particular form of procedure for determining refugee status. Goodwin-Gill (op cit, at 240) has observed:

> *In addition to assuming obligations with regard to the status and treatment of refugees, States ratifying the 1951 Convention and the 1967 Protocol necessarily undertake to implement those instruments in good faith. The choice of means in implementing most of the provisions is left to the States themselves; they may select legislative incorporation, administrative regulation, informal and* ad hoc *procedures, or a combination thereof.*

Further, as Goodwin-Gill notes at 241, "the Convention defines a status to which it attaches consequences, but says nothing about procedures for identifying those who are to benefit".

41 Essentially, it is for each contracting state to decide whether, having regard to its legal system, an initial decision on a claimant's refugee status should be taken by an administrative or judicial body, and the nature and extent of any appeal or review process: see Goodwin-Gill, op cit, at 328-9. As Atle Grahl-Madsen notes (in The Status of Refugees in International Law (1996) vol 1, p 333), under the Refugees Convention:

> [I]*t is left to the Contracting States to determine whether a person comes within the scope of Article 1 of the Convention or not, and that a Contracting State may institute whatever procedure it thinks fit for the purpose of such determination (subject to the provisions of Article 31(2) of the Refugee*

Convention). [Citations omitted]

Article 31(2) provides that only "necessary" restrictions may be applied to the movement of refugees whilst they await regularisation of their status. This provision may be put to one side for present purposes. If they so choose, therefore, states may give effect to some or all of their obligations under the Refugees Convention by the implementation of legislation, or by other means.

42 Bearing in mind that at least some of the obligations assumed by the contracting states under the Refugees Convention relate to their immigration laws, it is plain enough that the Act includes some provisions that are designed to give effect to these obligations: cf *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 ("*Plaintiff S157/2002*"), at 34 per Gleeson CJ. Just as plainly, the Act is not concerned to implement in Australian law all the protection obligations that appear in Chs II, III and IV of the Refugees Convention. As McHugh and Gummow JJ said in *Khawar*, at 584:

> *The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses on the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.*

THE REFUGEES PROVISIONS OF THE ACT

43 The Act, and the regulations made under it, provide for numerous classes and subclasses of visas. Section 36 of the Act provides for a class of visas known as protection visas. It further provides, in s 36(2), that a criterion for a protection visa is that the applicant is 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". Section 36(2) picks up the definition of "refugee" appearing in Art 1A(2) of the Refugees Convention.

44 Further, s504 provides for the making of regulations "not inconsistent with [the] Act". Schedule 2 to the Migration Regulations 1994 ("the regulations") makes provision for the criteria to be satisfied by an applicant for a protection visa. Pursuant to Sch 2 to the regulations, the criteria required to be satisfied by an applicant for a protection visa at the time of the application are that:

> *785.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:*

> *(a) makes specific claims under the Refugees Convention; or*
> *(b) claims to be a member of the same family unit as a person who:*
> *(i) has made specific claims under the Refugees Convention; and*
> *(ii) is an applicant for a Protection (Class XA) visa.*

45 The regulations provide for various classes of visas to be referred to by code (reg 1.06). Protection visas are referred to in the regulations as "Protection (Class XA)" visas. There are two subclasses of such visas, namely "785 (Temporary Protection)" and "866 (Protection)".

46 The criteria required by Sch 2 to the regulations to be satisfied at the time of the decision include:

> *785.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.*
>
> *785.222 In the case of an applicant referred to in paragraph 785.211 (b):*
> *(a) the Minister is satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the Refugees Convention (a* ***claimant****); and*
> *(b) the claimant has been granted a Protection (Class XA) visa.*

47 The critical provision governing the grant or refusal of a visa is s 65(1) of the Act. This provision states:

> *After considering a valid application for a visa, the Minister:*
> *(a) if satisfied that:*
> *(i) the health criteria for it (if any) have been satisfied; and*
> *(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and*
> *(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and*
> *(iv) any amount of visa application charge payable in relation to the application has been paid;*
>
> *is to grant the visa; or*
>
> *(b) if not so satisfied, is to refuse to grant the visa.*

Pursuant to s 496, the Minister may, by writing signed by him, delegate his powers under s 65

to another.

48 Section 65(1)(a) thus requires a decision-maker to grant the relevant visa if satisfied as to the various matters specified in s 65(1)(a). If not so satisfied, s 65(1)(b) requires him or her to refuse the visa. Because s 65(1) of the Act requires the decision-maker to have regard to the criteria that must be satisfied before a visa can be granted, there is a duty, in the case of a person who applies for a protection visa on the basis that he or she is owed protection obligations under the Convention, to consider whether he or she is a "refugee" as defined in Art 1A(2) of the Refugees Convention. That is, the decision-maker has a duty to consider, in each case, whether "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [the visa applicant] is outside the country of his nationality and is unable, or owing to such fear, is unwilling" to avail himself or herself of the protection of that country.

49 The effect of ss 411(1)(c) and 415 of the Act is to require the Refugee Review Tribunal to review a decision refusing to grant a protection visa if a valid application is made for the review of that decision. Section 415(1) of the Act provides:

> *The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.*

In exercising the power conferred by s 415(1) of the Act, the Tribunal is required to apply the law as it stood at the date of the review. Pursuant to s 415(2), upon a review, the Tribunal may affirm the decision, vary the decision, or set aside the decision and substitute a new one. By virtue of s 415(3), if the Tribunal varies or sets aside a decision and substitutes a new one, the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister. Under the Act, the Minister or, in practice, officers of his department, and the Tribunal are required to determine whether, for the purposes of the immigration law of Australia, a person is to be recognised as being a refugee, within the meaning of the Refugees Convention. Further, under Australian law, the role of the courts is strictly supervisory.

IS THE REFUGEES CONVENTION BROUGHT INTO THE ACT OTHER THAN DIRECTLY BY S 36(2)?

(a) Rules for statutory construction

50 The appellant submitted that, in discharging the duty imposed on an officer by s 198(6) of the Act, the officer was constrained by the principle of non-refoulement, set out in Art 33 of the Refugees Convention (and also in Art 3 of the Torture Convention).

51 The appellant accepted, as he must, that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless they have been incorporated into Australian law by statute. As Mason CJ and Deane J observed in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ("*Teoh*"), at 287:

> *This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.* [Citations omitted]

52 As their Honours went on to point out, however, it does not follow from this that Australia's ratification of a treaty is of no significance in Australian law. If there is any ambiguity in the language of a statute and it is "susceptible of a construction which is consistent with the terms of [a relevant] international instrument and the obligations which it imposes on Australia, then that construction should prevail": see *Teoh*, at 287 per Mason CJ and Deane J. This rule for statutory construction is well established: see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, at 363 per O'Connor J; *Polites v Commonwealth of Australia* (1945) 70 CLR 60, at 68-9 per Latham CJ, 77-78 per Dixon J, 80-81 per Williams J; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, at 384-385 per Gummow and Hayne JJ; *Plaintiff S157/2002*, at 34 per Gleeson CJ; and *Al Masri*, at 273.

53 It should be noted, however, that the decision in *Teoh* did not turn on the application of this rule at all: see *Teoh*, at 288 per Mason CJ and Deane J. Rather, in *Teoh*, the Court held that Australia's ratification of the United Nations Convention on the Rights of the Child gave rise to a legitimate expectation, in the absence of statutory or executive indications to

the contrary, that persons making administrative decisions would act conformably with that Convention. Since s 198(6) of the Act does not confer a discretion and, instead, imposes a duty, no such issue arises in this case.

(b) The imperative duty in s 198(6)

54 Unlike the statutory discretion considered in *Teoh*, s 198(6) does not give an officer a choice. He or she is obliged to remove a person from Australia if the conditions set out in the provision are satisfied. If the language of the various provisions of the Act are compared and contrasted, it is apparent that the Act draws a sharp distinction between provisions that confer a power to act, exercisable in the decision-maker's discretion (e.g., ss 48B and 417) and provisions that impose a duty to act, the performance of which is imperative. Considered as a whole, the Act does not leave open the possibility that the word "must" in s 198(6) merely confers a power, rather than a duty, to act, although such a conclusion may be open in other statutory contexts: cf *In re Davis* (1947) 75 CLR 409, at 424 per Dixon J.

55 The conclusion that s 198(6) imposes a duty to act flows from the imperative language of the provision and a consideration of the Act as a whole. This conclusion is, moreover, supported by other decisions of this Court: see *Al Masri*, at 269-270, 272 (concerning s198(1)); *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29 ("*SHFB*"), at [15] and [18] per Selway J; *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52 ("*Daniel*"), at 63 per Whitlam J; *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 ("*NAES*"), at [6]-[7] and [11] per Beaumont J; *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 ("*WAIS*"), at [48] per French J; *Kopiev v Minister for Immigration and Multicultural Affairs* [2000] FCA 1831, at [24] per Sackville J; also in the High Court of Australia, *Re Minister for Immigration and Multicultural Affairs, ex parte SE* (1998) 158 ALR 735 ("*SE*"), at 740 per Hayne J.

(c) The legislative history of s 198(6)

56 The legislative history of s 198(6) of the Act explains and confirms the imperative nature of the duty imposed by the provision. The form of s 198 has its origin in the scheme introduced by the *Migration Amendment Act 1992* (Cth), which at that time formed Div 4B of the Act. The High Court considered the constitutional validity of Div 4B in *Chu Kheng Lim* (supra). The scheme considered in *Chu Kheng Lim* operated only with respect to a class of

non-citizens, falling within the definition of "designated person" in s54J in Div 4B, and colloquially termed "boat people". Section 54L, in Div 4B, provided for the detention of a designated person and his or her release only if given an entry permit or removed from Australia under s 54P. Section 54P(1), which was in much the same terms as the current s 198(1), provided for the removal of a designated person from Australia "as soon as practicable if the designated person asks the Minister, in writing, to be removed". Succeeding subsections made further provision for the removal of designated persons. In particular, s54P(3) provided that an officer must remove a designated person as soon as practicable if:

> *(a) there has been an entry application for the person; and*
> *(b) the application has been refused; and*
> *(c) all appeals against, or reviews of, the refusal (if any) have been finalised.*

57 The *Migration Reform Act 1992* (Cth) effected broader changes to the Act. The Explanatory Memorandum accompanying the Migration Reform Bill 1992 in the House of Representatives stated, at pars 47 and 48, that:

> *In recent years, the increasing frequency of unauthorised boat arrivals at Australia's northern frontier, the need to protect Australia's international fishing zones from being illegally exploited, and the close scrutiny by the Federal Court directed towards relevant sections of the Principal Act, have exposed a need to provide a uniform regime for the detention of persons illegally in Australia and for the recovery of costs associated with such detention and removal.*
>
> *The Principal Act currently provides for a number of ways to deal with persons who have no authority to be in Australia. How the person is dealt with depends on how the person arrived in Australia. ... . As noted above, the Reform Bill will provide generally for one category of 'unlawful non-citizen' which will subsume all other statuses of illegal and unauthorised presence in Australia subject to the designated person exception which will apply only to persons who arrive in particular circumstances before 1 December 1992.*

58 The *Migration Reform Act 1992* provided for a system of mandatory detention for all unlawful non-citizens. It also introduced a new Div 4D, entitled "Removal of unlawful non-citizens". Section 54ZF, in Div 4B, replaced the power to deport illegal entrants (previously in ss 59 and 60) with a power to remove unlawful non-citizens. The Explanatory Memorandum explained, at pars 53 and 54, that:

> *This is essentially a change in terminology, to reflect an appropriate distinction between 'deportation', as the ultimate sanction for non-citizens who commit serious crimes or are a threat to national security, and 'removal' of persons who have no legal entitlement to remain in Australia.*
>
> *Removal from Australia will be by force of law rather than as a result of a decision. A person will become subject to removal as soon as he or she becomes unlawful. If there is any available avenue for applying to remain they will have a limited period to apply for it. Once all available application and merits review entitlements are exhausted the applicant will be removed as soon as practicable.*

59 A new s 54ZF(5), which resembled the present s 198(6), provided:

> *An officer must remove as soon as reasonably practicable an unlawful non-citizen if:*
> *(a) the non-citizen is a detainee; and*
> *(b) the non-citizen made a valid application for a substantive visa; and*
> *(c) one of the following applies:*
> *(i) the application has been refused and finally determined;*
> *(ii) the application cannot be approved;*
> *(iii) the visa cannot be granted; and*
> *(d) the non-citizen has not made another valid application for a substantive visa.*

As the Explanatory Memorandum stated, in par 233, "[t]he section … provides that an unlawful non-citizen in detention must be removed from Australia if the non-citizen has applied for a visa which has been finally refused, cannot be approved or cannot be granted and who has not made a further valid application for a visa". Although the *Migration Reform Act 1992* received assent on 17 December 1992, s 54ZF did not commence until 1 September 1994.

60 The *Migration Legislation Amendment Act 1994* ("the 1994 Act"), in s 56, amended s 54ZF, including s 54ZF(5). The Explanatory Memorandum to the Bill in the House of Representatives stated, in par 125, that:

> *It is not intended that section 54ZF should impact upon the rights that a person has to make an application for refugee status. If a person indicates that he or she is seeking refugee status or is in need of protection, following long standing practice, the person will be treated in accordance with the international obligations that Australia has entered into regarding persons seeking refugee status.*

61 Section 54ZF became s 198 upon the enactment of the 1994 Act by virtue of s 83,

which provided for the re-numbering and re-lettering of the Act.

(d) The scope of the duty in s 198(6)

62 If a statute confers a power to act, it may expressly state the factors a decision-maker is to consider. Alternatively, those factors may appear, by implication, from the subject-matter, scope and purpose of the Act: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39-40 per Mason J. The courts also presume that a discretionary power is not to be exercised capriciously. These considerations are not, however, relevant where, as in the case of s 198(6) of the Act, a statute imposes a duty, since the decision-maker has no choice but to act if circumstances have arisen requiring the performance of the duty.

63 Where a statute imposes a duty, it may provide, as in s 198(6), that the obligation to perform the duty arises only upon the occurrence of certain events or the satisfaction of certain conditions. In s 198(6), the duty to remove a person from Australia can only arise if (1) the person is an unlawful non-citizen and a detainee; (2) he or she has made a valid application for a substantive visa of the kind referred to in s 198(6)(b); (3) the visa has been refused and the person's rights of administrative review in respect of the refusal have ended (or the visa cannot be granted); and (4) he or she has not made another valid application for a substantive visa of the kind referred to in s 198(6)(d).

64 Furthermore, the officer's duty to remove an unlawful non-citizen is not absolute, in the sense that it does not arise as soon as the conditions in pars (a) to (d) are satisfied, but as soon thereafter as is "reasonably practicable" for the officer to remove the non-citizen. This is illustrated by the decision in *Al Masri* (supra). In *Al Masri*, the Full Court held that the power to detain an unlawful non-citizen under s 196(1)(a) was limited to such time as his or her removal from Australia was "reasonably practicable" in the sense that there was a real likelihood of removal in the foreseeable future: see *Al Masri*, at 271-272. The Court observed, at 270:

> [T]he *circumstance that the limitations found by the trial judge could result in a person who has no right to be in Australia, and no visa, being free within this country does point to an intention that such a person should remain in detention until such time, if ever, as removal becomes possible. The force of this consideration is, however, diminished by the circumstance that such a release does not involve the person released having any right to be, much less to remain, in Australia. ... . The consequence of the limitations that, in a*

> *particular case, a person might be released into the community does not mean that that person would have any right at all to remain in Australia. ... . The power and duty to detain would be enlivened again when there was a real likelihood or prospect of removal in the reasonably foreseeable future ... .*

In this passage, the Court implicitly acknowledged that no duty to remove a non-citizen arose when removal was not reasonably practicable.

65 The use in legislation of the expression "reasonably practicable" is not novel, and the authorities that discuss its use are numerous. In the authorities and in the *Shorter Oxford English Dictionary*, the word "practicable" has the meaning "capable of being carried out in action; feasible": see, e.g., *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 ("*Uebergang*") at 305 per Stephen and Mason JJ; also *Adsett v K & L Steelfounders & Engineers Ltd* [1953] 2 All ER 320, at 321 per Singleton LJ; and *Lee v Nursery Furnishings Ltd* [1945] 1 All ER 387, at 389 per Lord Goddard. Whether or not the removal of an unlawful non-citizen is practicable seems to be largely, if not entirely, concerned with whether the removal is possible from the officer's viewpoint. The word "reasonably" in the expression "reasonably practicable" limits or qualifies what would otherwise be an almost absolute obligation: cf *Marshall v Gotham Co Ltd* [1954] AC 360 ("*Marshall v Gotham*"), at 373 per Lord Reid. The removal of a non-citizen may be practicable in the sense that it is feasible, but not "reasonably practicable" as required by s 198(6) of the Act.

66 In the context of s198(6) of the Act, practicability and reasonableness may, on occasion, operate in opposing senses: cf *Uebergang*, at 306 per Stephen and Mason JJ. Whether the removal of a non-citizen is "reasonably practicable", as distinct from merely "practicable", may direct attention to a range of considerations, including factors relating to the unlawful non-citizen facing removal, and the interests of third parties who may be directly affected (such as, for example, the interests of third party states).

67 In *R v Archdall & Roskruge; ex parte Carrigan & Brown* (1928) 41 CLR 128 ("*Archdall*"), at 136, Knox CJ, Isaacs, Gavan Duffy and Powers JJ remarked in a joint judgment that "[r]easonableness is relative, and must be proportioned to the circumstances of the case considered as a whole". Whether the removal of an unlawful citizen will be "reasonably practicable" in a particular case will depend upon all the circumstances, considered by reference to the statutory duty in s 198(6): see *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110, at 117 per Starke J and 122 per Dixon J;

Australian Oil Refining Pty Ltd v Bourne (1980) 28 ALR 529, at 534 per Murphy J; *Williams v R* (1986) 161 CLR 278, at 283-284 per Gibbs CJ; *Marshall v Gotham*, at 370 per Lord Oaksey, 373 per Lord Reid; *Liang Wei Li v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 181 ("*Liang Wei Li*"), at [7] per Merkel J; *Rough v Rix* (1982) 49 LGRA 352, at 358 per Bollen J; *Lansdell v Reid* (1981) 28 SASR 253, at 255 per Walters J. Section 198(6) of the Act leaves it to the officer on whom the duty to remove would otherwise fall to consider whether removal is reasonably practicable in the circumstances of the case. The officer has to weigh these circumstances in order to decide the issue for himself or herself: cf *Archdall*, at 140 per Higgins J.

68 As the decision in *Al Masri* also shows, whether, in a particular case, removal is "reasonably practicable" may depend on whether there is another country that will admit the unlawful non-citizen. If there is no such country, then his or her removal from Australia will not be reasonably practicable. As French J said in *WAIS*, at [58]:

> *The term 'as soon as reasonably practicable' in s 198 is an evaluative term which is to be assessed by reference to all the circumstances of the case. What is reasonable is to be determined, inter alia, by reference to the practical difficulties that may lie in the way of making arrangements for removal which involve the cooperation of other countries whether in respect of the particular applicant or generally in relation to the class of applicants of which he is a part.*

69 Doubtless, there will be other factors that, from time to time, will lead an officer to conclude that, at the time removal is contemplated, removal would not be reasonably practicable in the circumstances of the case. If, for example, the only country willing to receive an unlawful non-citizen were suffering from some severe natural disaster or were in a state of utter civil anarchy, the officer may well be entitled to conclude that his or her removal would not be reasonably practicable until the effects of the disaster had dissipated or some degree of order had been restored. (We interpolate here that this was not the situation under consideration in *SE*: see *SE*, at 739-740.) The physical condition of a person facing removal may also lead an officer to conclude that his or her removal in that condition would not make the removal reasonably practicable: cf *Liang Wei Li*, at [7] per Merkel J (with whom Heerey and Conti JJ agreed).

REFUGEE STATUS, THE OBLIGATION AGAINST NON-REFOULEMENT AND S 198(6)

70 The appellant's contentions on this appeal did not rely on any conception of

reasonable practicability. Rather, the appellant's argument was that, in providing for a detainee's removal from Australia, s 198(6) was ambiguous. This was because s 198(6) required a detainee to be taken out of Australia but said nothing about his or her destination. Because of this ambiguity, s 198(6) was, so the appellant said, susceptible of a construction which was consistent with the obligation against non-refoulement. The appellant submitted that s 198(6) was to be construed as not authorising the removal of a refugee to a place where he faced a real risk of imprisonment or punishment for Convention reasons.

71 For the reasons about to be stated, s 198(6) is not susceptible of this construction. The appellant's submission is misconceived, for by the time an officer is called upon to discharge the duty imposed by s 198(6) of the Act, any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the Act.

72 In considering what the law may require of an officer, on whom the duty to remove under s 198(6) may fall, it is necessary to have regard to the practical context in which the officer must discharge his or her duty. This factor, taken with the scheme of the Act, makes it clear that it is not open to an officer to consider whether an unlawful non-citizen is a "refugee" within the meaning of Art 1A(2) of the Refugees Convention. Nor is it open to an officer to consider whether his or her removal and return to a particular country is conformable with the obligation against non-refoulement in Art 33(1) of the Refugees Convention.

73 First, the task of determining whether a person is a refugee is a difficult and complex one. As Gaudron J said in *Re Minister for Immigration and Multicultural Affairs, ex parte Miah* (2001) 206 CLR 57, at 76, the Convention definition of "refugee":

> *looks both to the position of the individual and to the conditions which pertain in the country of his or her nationality. More precisely, the question whether a person has a well-founded fear of persecution is one that has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts relating to conditions in the country of his or her nationality.* [Citation omitted]

Issues of this kind are not appropriately resolved by an officer on whom the duty to remove under s 198(6) falls. It is partly on account of the complexity of the issues arising when a person claims refugee status that the Act provides for a specialised administrative regime for

the determination of claims for refugee status.

74 Administrative decisions have such force and effect as are given to them by the law under which they are made: see *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117 ("*Bhardwaj*"), at 127 per Gaudron and Gummow JJ. As already noted, the Act picks up the definition of "refugee" in Art 1A(2) by incorporating it in the criteria for the grant of a protection visa. As Gummow J said in *Applicant A*, at 274-5:

> [A]*s will be apparent from the above outline of the applicable provisions of the Act, Australia, like the United States, the United Kingdom, Canada and New Zealand, applies the definition of 'refugee' from the Convention and the Protocol as a criterion in its municipal law for the admission of those seeking asylum within its territory.* [Citations omitted]

Under the Act, a decision to grant a protection visa may be made by the Minister (or his or her delegate) or by the Refugee Review Tribunal (whose decision is taken to be that of the Minister). By virtue of the Act, the effect of a decision to grant a protection visa is that the recipients (and, in the circumstances set out in the Act, their family members) have permission to enter and remain in Australia for the period set out in the visa. The Act does not give this effect to a decision of any other person.

75 In making a decision to grant a protection visa, the Minister personally (or his delegate) or the Refugee Review Tribunal are acting under legislation that gives effect in domestic law to some of Australia's obligations at international law, including under Art 33(1) of the Refugees Convention. As Goodwin-Gill (op cit, at 325) notes:

> *For asylum seekers generally, the very existence of procedures for the determination of status can guarantee both* non-refoulement *and treatment in accordance with the relevant international instruments.*

76 This is consistent with the approach taken by courts elsewhere. In *Sinnappu v Minister of Citizenship and Immigration* (1997) 126 FTR 29, the Federal Court of Canada considered the rights of an unsuccessful refugee claimant under the Canadian *Immigration Act 1985*. The Canadian legislation, like the Australian Act, provided certain limited rights to persons who are refugees within the meaning of the Refugees Convention. These rights included a qualified right to remain in Canada and a qualified prohibition against removal to a country where a refugee's life or freedom would be endangered. The applicants in *Sinnappu* were citizens of Sri Lanka who unsuccessfully claimed refugee status. They subsequently failed on an application for judicial review challenging the constitutional

validity of removal orders requiring their deportation to Sri Lanka. At [53], McGillis J said:

> *In* Ahani v Canada [1995] 3 F.C. 669 *(T.D.); affd (1996),* 37 C.R.R (2d) 181 *(F.C.A.), I noted at page 687 that, in recognition of Canada's obligations in respect of refugees, Parliament had provided in the Act certain limited rights to Convention refugees ... . Neither of those statutory rights apply to an unsuccessful refugee claimant. Indeed, an analysis of the rights accorded to an unsuccessful refugee claimant must start from the fundamental premise that such a person has no right to remain in Canada, and has no right not to be deported from Canada.*

His Honour ultimately dismissed the judicial review application in *Sinnappu*, holding, amongst other things, that the legislative scheme did not violate s 7 of the Canadian *Charter of Rights and Freedoms* (guaranteeing "the right to life, liberty and security").

77 In an earlier case, *Said v Canada (Minister of Employment and Immigration)* (1992) 91 DLR (4th) 400, the Federal Court of Canada held that the deportation of an unsuccessful refugee claimant to his country of origin was not cruel or unusual punishment within s 12 of the Canadian *Charter of Rights and Freedoms.* At 407-408, Jerome ACJ said:

> *Finally, it is submitted that the respondent, by removing the applicant from Canada, is subjecting him to cruel and unusual treatment or punishment contrary to s. 12 of the Charter. With respect, this argument reflects a misperception of immigration proceedings, which are civil in nature and bear no relationship to criminal proceedings. The jurisprudence has clearly established that the purpose of deportation is not to impose penal sanctions against an individual but rather, to remove from Canada, an undesirable person. The deportation of a refugee claimant to his or her country of origin, where that individual has been determined not to be a Convention refugee, cannot, in my view, be considered as cruel or unusual punishment.*

78 In discharging his or her duty under s 198(6) of the Act, an officer proceeds on the basis required by the provision, namely, that the detainee is an unlawful non-citizen who is not entitled to a protection visa, because any application for such a visa has failed, and there is no current application on foot: cf *SE*, at 740. In consequence, so far as the question of refugee status can arise under Australian law, it has been determined adversely to the detainee.

79 We reject the appellant's submission that it is relevant to consider whether an officer could effectively remove an unlawful non-citizen by "knowingly" returning him or her to a country where he or she would face persecution on Refugees Convention grounds. As the respondent said in response to the appellant's supplementary written submissions:

> *Putting to one side situations in which the non-citizen raises subsequent developments to the Tribunal's decision or fresh evidence which was not presented to the Tribunal, the removal of the non-citizen will therefore never involve the 'knowing' return of person to a country where his life or freedom is threatened on Convention grounds. Where the non-citizen seeks to rely on subsequent developments or fresh evidence, he or she may request the Minister to exercise his discretion under s.48B to allow a further application for a protection visa to be made.*

80 The Act accommodates the possibility that there may have been some relevant change in the circumstances of the detainee vis à vis his country of origin in the time elapsing between the refusal of a visa, including a protection visa, and the time for his removal, by the provisions in ss 48B and 417 of the Act. In permitting the Minister to substitute a decision more favourable to a refugee claimant than the decision of the Tribunal, s 417 also allows the Minister to grant a visa upon humanitarian grounds, or to cure error on the Tribunal's part. The Act entrusts the discretionary powers referred to in ss 48B and 417 to the Minister personally, and stipulates that the Minister is under no duty to consider whether to exercise them (ss 48B(6) and 417(7)). In this context, it would be contrary to the evident scheme of the Act to construe s 198(6) as enabling an officer to consider a detainee's claim for refugee status or whether his or her return to a country of origin would constitute a breach of an obligation against non-refoulement, arising under Art 33(1) of the Refugees Convention or elsewhere under international law.

81 The appellant's application for a protection visa was refused, first, by the respondent's delegate and, on review, by the Refugee Review Tribunal. The appellant failed in his applications to the Minister invoking ss 48B and 417. He has twice failed to establish reviewable error in this Court. As a matter of legal analysis (the only analysis with which this Court is concerned) the question that the appellant invited the Court to consider (namely, whether s 198(6) authorised the Minister to return a refugee to a place where his life or freedom will be threatened) does not arise, and the Court cannot embark on a consideration of it. The facts, which the parties invited the primary judge to assume on the motion for summary judgment, were not relevant to the duty imposed by s 198(6) of the Act. These facts were, moreover, contrary to the findings of fact made by the decision-makers to whom the Act entrusted such responsibilities.

82 We note that, in his supplementary written submissions (referred to above), the

appellant submitted that:

> *The Court should be hesitant to assume that the discretion* [in s 417] *is sufficient safeguard to catch errors of the* [Refugee Review Tribunal]. *The Minster's refusal to undertake not to return the Appellant pending the decision in the appeal demonstrates that the Minister seriously believes that he is entitled to return refugees to persecution or death, despite the provisions of the Convention.*

In response, the respondent submitted that:

> *Whether or not the discretionary power conferred by s.417 of the* Migration Act *is 'a sufficient safeguard to catch errors of the RRT' (or is even intended to be such a safeguard) is not a relevant consideration for this Court's construction of s.198. In any event, while there may be limited scope for judicial review of a decision to exercise or not to exercise the power conferred by s.417, the Minister remains politically accountable for any decision made in relation to a request for the exercise of that power.*

83 The appellant's supplementary submissions here (and as mentioned above) are misconceived. First, as the respondent in effect contended in answering submissions, there is no proper basis for the inference that the appellant invites the Court to draw. Secondly, as already stated, the Act establishes a specialised administrative regime for determining matters of refugee status. It is not open to the Court to substitute its own decisions on these matters for the decisions made by those to whom the Act entrusts responsibility. It is, of course, open to the Court to ensure that decisions made under the Act are made according to law. The Court discharges this supervisory responsibility when it engages in the judicial review of the administrative decisions taken under the Act. The Court has no jurisdiction to make its own independent inquiry into the factual basis of any claim for refugee status.

THE COURT'S SUPERVISORY JURISDICTION

84 In the ordinary case, the performance of a public duty is subject to the supervisory jurisdiction of the court. In an appropriate case, it may fall to a court possessing relevant jurisdiction to decide whether the duty has been performed as the governing statute requires. In determining this question, the court may consider whether the person who must discharge the obligation has misconceived the obligation in some way; whether the conditions upon which due performance depend have been satisfied; or whether there has been a constructive failure to perform the duty for some salient reason. The failure to perform a public duty, such as that under s198 of the Act, as the law requires, will typically attract relief by way of

mandamus. As Rich, Dixon and McTiernan JJ said in *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, at 242:

> *A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law* de novo*, at any rate if a sufficient demand or request to do so has been made upon him.*

85 Relief by way of mandamus may be appropriate where there has been a failure to perform the duty imposed by s 198, whether because the officer has misconceived his duty, or because there has been a failure to comply with a condition essential to its performance, or because there has been no performance at all: see *NAES*, at [11] per Beaumont J; *Daniel*, at 63 per Whitlam J; *SHFB*, at [18] per Selway J. In some circumstances, where, for example, a breach of statute may be imminent, injunctive relief may also be available.

86 Section 19(1) of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") provides that the Court has "such original jurisdiction as is vested in it by laws made by the Parliament". Section 39B of the *Judiciary Act 1903* (Cth) confers jurisdiction on the Federal Court in the following terms:

> *(1) Subject to subsections (1B) and (1C), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ or mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.*
>
> *(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*
> *(a) in which the Commonwealth is seeking an injunction or a declaration; or*
> *(b) arising under the Constitution, or involving its interpretation; or*
> *(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.*

The powers of the Federal Court, in aid of its jurisdiction, include those conferred by s 23 of the Federal Court Act, which provides:

> *The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.*

87 The jurisdiction, which the Court might otherwise have under s 39B of the *Judiciary Act 1903*, is affected by the Act. Section 476(1) of the Act states that the Federal Court does not have any jurisdiction in relation to "a primary decision", "[d]espite any other law". Section 476(6) states that, in s 476, "primary decision" means:

> *a privative clause decision:*
> *(a) that is reviewable, or has been reviewed, under Part 5 or 7 or section 500; or*
> *(b) that would have been so reviewable if an application for such review had been made within a specified period.*

As it happens, acting or failing to act under s 198 are not matters that are reviewable under Parts 5 or 7 or s 500 of the Act. Section 476(1) does not, therefore, operate to deprive the Federal Court of the jurisdiction it would otherwise have under s 39B of the *Judiciary Act 1903*.

88 Removing or refusing to remove an unlawful non-citizen under s 198(6) of the Act does, however, constitute a "privative clause decision" for the purposes of the Act. Section 474(2) provides that, in s 474:

> ***privative clause decision*** *means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act ... (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).*

There is no reference to s 198 in s 474(4) or (5). Section 474(3)(g) provides that a reference in s 474 to a "decision" includes a reference to "doing or refusing to do any … act or thing". Removing or refusing to remove an unlawful non-citizen under s 198(6) is, by virtue of s 474(3)(g), a "decision" and, as such, a "privative clause decision" within the meaning of s 474(2). According to s 474(1), a privative clause decision:

> *(a) is final and conclusive; and*
> *(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
> *(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.*

89 We note too that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") does not enable review under its provisions of privative clause decisions (within the meaning of s 474 of the Act): see par (da) in Sch 1 to the ADJR Act.

Section 3(1) of the ADJR Act contains a definition of "decision to which this Act applies", which identifies decisions of an administrative character made, proposed to be made or required to be made under certain enactments, but excluding decisions included in any of the classes of decision set out in Sch 1. Paragraph (da) of Sch 1 specifies:

> *... a privative clause decision within the meaning of subsection 474(2) of the* Migration Act 1958 ... .

90 To what extent does s 474 of the Act preclude this Court from exercising a supervisory role in connection with the duty imposed by s 198 of the Act? In connection with its own supervisory role, the High Court held, in *Plaintiff S157/2002*, that s 474 of the Act is to be construed conformably with s 75(v) of the Constitution (conferring on that Court jurisdiction where, amongst other things, a writ of mandamus is sought), with the consequence that the expression "decision[s] … made … under [the] Act" in s 474(2) is to be read "so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act": *Plaintiff S157/2002*, at 45 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. As the authors of the joint judgment added, at 45-6:

> *Indeed so much is required as a matter of general principle. This court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in s 474(2) as 'a decision ... made under this Act' and is, thus, not a 'privative clause decision' as defined in s 474(2) and (3) of the Act.* [Citations omitted]

Where jurisdictional error is established, then, in the High Court, the constitutional writs of mandamus and prohibition (and, for the reasons stated in *S157/2002* at 47, certiorari) may issue.

91 So far as the High Court is concerned too, s 75(v) of the Constitution also confers jurisdiction in matters in which "an injunction is sought against an officer of the Commonwealth". Again, as the authors of the joint judgment noted in *S157/2002*, at 47:

> *Given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus. In any event, injunctive relief would clearly be available for fraud, bribery,*

> *dishonesty or other improper purpose. The* Hickman *requirement that a decision be made bona fide presumably has the consequence that s 474 permits review in all such cases. If it does not, there must, to that extent, be a real question as to the constitutional validity of s 474.* [Citations omitted]

92 Accordingly, where a person facing removal under s198(6) of the Act seeks to impugn a failure or constructive failure on an officer's part to discharge the duty imposed by s 198(6), it seems that it would be open to him or her to seek relief by way of mandamus and, in an appropriate case, injunction in the High Court.

93 What is the position in the Federal Court? Because of the construction given to s 474 of the Act in *S157/2002*, it would be open to a person facing removal under s 198(6) who sought to impugn the failure or constructive failure on an officer's part to discharge his or her duty to seek relief by way of mandamus in the Federal Court, pursuant to s39B of the *Judiciary Act 1903*. In *S157/2002*, at 49-40, their joint judgment, Gaudron, McHugh, Gummow, Kirby and Hayne JJ stated:

> *The construction given in these reasons to the term 'privative clause decision' in s 474 is significant, in particular for the operation of s 483A of the Act, and ss 39B and 44 of the Judiciary Act. The limitation, by the adaptation of the term 'privative clause decision', of the jurisdiction otherwise enjoyed by the Federal Court ... and the limitation upon the power of this court under s 44 of the Judiciary Act, will be controlled by the construction given to s 474.*
>
> *Decisions which are not protected by s 474, such as that in this case, where jurisdictional error is relied upon, will not be within the terms of the jurisdictional limitations just described; jurisdiction otherwise conferred upon federal courts by the laws specified in s476(1) in respect of such decisions will remain, to be given full effect in accordance with the terms of that conferral.*

Since jurisdictional error must be shown before relief by way of mandamus can be granted, s 474 of the Act would not preclude the grant of mandamus in the Federal Court, on the application of a person facing removal under s 198(6) who established a proper basis for it.

94 If, however, injunctive relief is available on wider grounds than relief by way of mandamus (or prohibition) then, in some circumstances, it may be that injunctive relief is available in the High Court, although it is not available in the Federal Court. This is because s 474 cannot validly operate to diminish the conferral of power by s 75(v) of the Constitution, although it can operate to diminish the conferral of power by s 39B of the *Judiciary Act 1903*.

A case may arise in which, pursuant to s 75(v) of the Constitution, the High Court could grant injunctive relief to a person facing removal under s198(6) of the Act, although this Court could not do so because of the effect of s474 on s39B: compare *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, at 614-615 per Gaudron J. This matter need not, however, be considered further, since the appellant has failed on this appeal to establish any tenable basis for this Court to grant the injunctive relief that he seeks.

DISPOSITION OF THE APPEAL

95 If it were necessary to do so, we would give leave to appeal from the orders of the primary judge and, for the reasons stated, dismiss the appeal.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 13 June 2003

Counsel for the Appellant: Mr J W K Burnside QC, with Mr K Farouque

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Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 28 May 2003

Date of Judgment: 13 June 2003