FEDERAL COURT OF AUSTRALIA

NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 37

MIGRATION – appeal – dismissal of application seeking review of a decision of the Refugee Review Tribunal refusing an application for a protection visa – appellant an Indo-Fijian resident of Fiji – neighbouring native Fijians driving appellant out of her home by harassment and assault – claim by appellant that she could not relocate within Fiji – whether unreasonable for appellant to relocate– whether in considering reasonableness of relocation Tribunal failed to ask correct question – whether the Tribunal misapplied the test for relocation – whether such misapplication constitutes jurisdictional error

Migration Act 1958 (Cth) ss 36(2), 91R, 474

Migration Regulations 1994 Sch 2 item 789, Sch 2 item 866

Convention Relating to the Status of Refugees art 1A, art 33
Protocol Relating to the Status of Refugees
UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992)

Akers v Minister for Immigration & Ethnic Affairs (1988) 20 FCR 363 cited
Applicant S454/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1136 cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 cited
Craig v South Australia (1995) 184 CLR 163 considered
Media, Entertainment and Arts Alliance, Re; Ex parte Hoyts Corp Pty Ltd (1994) 119 ALR 206 cited
Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273 cited
Minister for Immigration & Multicultural & Indigenous Affairs v Huynh [2004] FCAFC 256 cited
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32 considered
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 198 ALR 293 cited
Minister for Immigration & Multicultural Affairs v S152/2003 (2004) 205 ALR 587 cited
Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 cited
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323 considered
Minister for Immigration & Multicultural Affairs, Re; Ex parte Applicant S20/2002 (2003) 198 ALR 59 cited
Minister for Immigration & Multicultural Affairs, Re; Ex parte Cohen (2001) 177 ALR 473 cited

Minister for Immigration & Multicultural Affairs; Ex parte applicant S154/2002 [2003] HCA 60 cited
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) [2004] FCAFC 263 cited
NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6 considered
NAGV v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 130 FCR 46 considered
NAWD v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 770 cited
Perampalam v Minister for Immigration & Multicultural Affairs (1999) 84 FCR 274 cited
Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476 applied
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 considered
S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 203 ALR 112 cited
SFGB v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 77 ALD 402 cited
SKFB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 142 cited
The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 cited
Tickner v Bropho (1993) 40 FCR 183 cited

NAIZ v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
NSD 512 of 2004

BRANSON, RD NICHOLSON and NORTH JJ
11 MARCH 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 512 OF 2004**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **NAIZ**
APPELLANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

JUDGES: **BRANSON, RD NICHOLSON and NORTH JJ**
DATE OF ORDER: **11 MARCH 2005**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court be set aside.
3. The matter be remitted to the Refugee Review Tribunal to be determined according to law.
4. The respondent pay the appellant's costs of the appeal and before the Federal Magistrates Court.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 512 of 2004**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NAIZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**BRANSON, RD NICHOLSON AND NORTH JJ**
DATE:	**11 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BRANSON J

INTRODUCTION

1 I have had the advantage of reading in draft the reasons for judgment of RD Nicholson J. I gratefully adopt his Honour's outline of the history of the appellant's application for a protection visa under s 36 of the *Migration Act 1958* (Cth) ('the Act'). I regret that I have reached a different conclusion from his Honour as to the appropriate outcome of this appeal.

2 The appellant has submitted that this appeal raises for consideration two issues of principle. First, what is the breadth and content of the so-called '*internal flight alternative*' under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (together 'the Convention')? Second, does the Refugee Review Tribunal ('the Tribunal') fail to make a decision under the Act within the meaning of s 474 of the Act if, as the appellant contends happened in her case, the Tribunal makes a critical factual finding that was not based on probative evidence?

3 As these reasons for judgment reveal, I have preferred to express the second issue identified by the appellant somewhat differently. I have concluded that the fourth ground of appeal identified in the notice of appeal should be upheld, namely that the learned Federal

Magistrate should have found that the Tribunal misconstrued or misapplied the relocation test. On this basis, in my view, the decision of the Tribunal was affected by jurisdictional error in that it did not ask itself the right questions before determining that the appellant was not entitled to a protection visa.

ELIGIBILITY FOR A PROTECTION VISA

4 Under s 36(2) of the Act a non-citizen in Australia is eligible for a protection visa if he or she is a person to whom Australia has protection obligations under the Convention. Article 1A(2) of the Convention relevantly defines a 'refugee' as 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 ....'*

5 In *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [27] observed:

> *'Section 36(2) is awkwardly drawn. Australia owes obligations under the Convention to the other Contracting States, ... Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals.'*

Their Honours dealt with the awkward way in which subs 36(2) is drawn by proceeding on the basis that the subs 36(2) criterion should be understood as requiring the applicant to be a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Convention. We must proceed on the same basis.

6 In this case the Tribunal took the view that if the appellant relocated within Fiji there would not be a real chance of her suffering serious harm as defined by s 91R of the Act. It thus concluded that she was not entitled to a protection visa.

7 The appellant contended that the breadth and content of the '*internal flight alternative*' was to be identified by reference to the obligation imposed on contracting States by Article 33 of the Convention. Article 33 provides:

'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.'

8 The appellant argued, as I think uncontentiously, that the Convention shows a clear intention to protect persons from being returned by contracting States to places where they face a threat to life or freedom on account of one of the five Convention reasons. On this basis the appellant advanced the following written submission:

'There are cases where a person has a well-founded fear of being persecuted for a Convention reason in some part of their country of nationality but not the whole of it. There may be any number of reasons for why this is so.

In such cases, a person who fears persecution may flee to the nearest safe region which may be a Contracting State under the Refugee Convention. A number of issues will arise in such cases, which involve both the definition of "refugee" and the extent of the duty not to refoule in Article 33(1) of the Convention.

The appellant contends that any construction of the Convention that would permit a Contracting State to refoule a person to a dangerous portion of his or her country of nationality where there is a real chance that he or she will be persecuted for a Convention reason is subversive of the object and purpose of the Convention. Such a construction should not be preferred if another construction is properly available.

It would be erroneous, for example, to conclude that a person is not a "refugee" simply because there is a place in his or her country that is a "safe haven". Nothing in the Convention requires or even supports such a construction. If this were true, a Contracting State concluding that a person is not a "refugee" could consistently with the Convention refoule the person to the portion of the person's country where they do face persecution. The Convention says nothing about returning people who are not "refugees" to persecution for a Convention reason.

...

The appellant contends that inadequate state protection in a portion of the country of nationality (even if there is a safe haven somewhere) is sufficient to meet the second part of the definition of "refugee". If this were not so, and a person was not a refugee simply because a safe haven was available somewhere, it would mean that the Convention would not prohibit a Contracting State from returning such persons even to the dangerous portion of their homeland. This construction is inconsistent with the object of the Convention. It is also unnecessary given that Article 33(1) provides a focused mechanism for Contracting States to return refugees to place [sic] *are safe if*

there is the practical capacity to do so and if it would be reasonable to do so.'

9 As mentioned above, I have concluded that the decision of the Tribunal was affected by jurisdictional error for a reason to which the above submissions do not relate. For this reason, it is unnecessary for me to give detailed consideration to either the foundation or the proper application of the '*internal flight alternative*'. However, it seems to me that a difficulty that the above submissions face is that they pay insufficient regard to the construction of Article 1A(2) now accepted in Australia. As the appellant acknowledged in her submissions, it is now accepted in Australia that '*protection*' in Article 1A(2) refers to the diplomatic or consular protection extended abroad by a country to its nationals (*Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 per Gleeson CJ, Hayne and Heydon JJ at [19]).

10 Where a person is in Australia having fled his or her country of nationality because of a well-founded fear of being persecuted for a Convention reason in one part only of that country, Australia will have a protection obligation in respect of that person only if he or she is outside that country *'owing to well-founded fear of being persecuted'* for a Convention reason. If the putative refugee could reasonably have re-located within the country of nationality, rather than fled that country, he or she will fail the first element of the Convention definition of a refugee. I put to one side the case of a person who is outside the country of his or her nationality because the circumstances inside that country have materially changed since he or she departed the country. This is not such a case.

11 If the putative refugee satisfies the first element of the Convention definition of a refugee but is unwilling to seek diplomatic or consular protection in Australia from his or her country of nationality, the reason for the unwillingness needs to be determined. If the outcome of the putative refugee seeking diplomatic or consular protection would be that he or she would be returned to a part of the country of nationality in which he or she:

(a) would not face persecution for a Convention reason; and
(b) could reasonably be expected to live,

he or she will fail the second element of the Convention definition of a refugee. The unwillingness to avail himself or herself of the protection of the country of nationality would not be owing to a well-founded fear of persecution for a Convention reason.

12 If Australia were to seek to send such a person to a part of his or her country of nationality in which he or she had a well-founded fear of persecution the practical outcome is likely to be that the person would seek diplomatic or consular protection in Australia from his or her own country. However, Australia's conduct would not be subversive of the Convention if the person chose not to seek that protection. The purpose of the Convention is to provide protection to those who cannot reasonably be expected to look to their own States for protection; not to provide additional protection to those who can reasonably be expected to look to their own State.

13 I would therefore reject the appellant's contention that inadequate State protection in a portion of her country of nationality is sufficient to meet the second part of the Convention definition of 'refugee'. As Black CJ observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 (*'Randhawa'*) at 441:

> *'The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.'*

14 In this case the Tribunal was satisfied that if the appellant moved away from her present neighbours she would not be at the same risk of harm as she had been in the past. There was nothing before the Tribunal that even raised the possibility that if the appellant were to return to Fiji she would be required by the Fijian authorities to return to live in proximity with those who were her neighbours before she came to Australia.

15 The critical issue for the Tribunal's determination was thus whether it was reasonable to expect the appellant on return to Fiji to live in a new neighbourhood. The second basis on which the appellant argued her appeal related to the Tribunal's approach to this issue.

16 In *Randhawa* Black CJ, with whose reasons for judgment Whitlam J agreed, said at 442-443:

> *'In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further*

analysis the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.

... In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

...

If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'

17 The reasons for decision of the Tribunal include the following passage:

'The Applicant was asked if she could move away from these people who were harassing her. She states that she had moved to a friend's place but they could not look after her as the friend was moving elsewhere. Her daughter in Australia sometimes sent her money. The Applicant asked her daughter to send her the papers so she could come to Australia.

She says that her sons do not want her. One is always drunk and with his friends. The other is married and he has his children to bother about.

It was put to the Applicant that there was information that the security situation had improved in Fiji and that there had been a decrease in communal strife. The Applicant says that it still happens in the villages though not so much in the cities.

The Applicant says that the police do not assist Indians as they are native Fijians themselves.

She states that when she sees a native Fijian she feels pain.

The Applicant's adviser submitted that the native Fijians were trying to drive the Applicant out. He suggest [sic] *it may be unreasonable to expect the Applicant to relocate given her age, lack of education and her mental scars from the earlier harassment. She would have no government protection.'*

18 It seems to me that the statements of the appellant summarised by the Tribunal member in the above passage were intended to convey a concern by the appellant about where she would live if she left her own home and how, without a friend or family member in close proximity, she could *'be looked after'* in the way that, as a 55-year old unemployed widow in Fiji, she needed to be looked after. I conclude from the summarised statements that the appellant said

that she had been living in a friend's home but that home had become unavailable to her because the friend was moving elsewhere. I also conclude that the appellant had intended to convey that neither of her sons would provide her with a home in Fiji.

19 It appears that the appellant's adviser did not stress to the Tribunal by his or her submission that the appellant would experience difficulty in finding a home in which to live in a new Fijian neighbourhood. Nonetheless, the Tribunal recognised that the appellant claimed *'that she could not relocate within Fiji as she would have no one to look after her'*.

20 The Tribunal's conclusion on the issue of whether it would be reasonable for the appellant to relocate in Fiji is recorded in the following paragraph:

> *'I am not satisfied that it would be unreasonable for the Applicant to relocate. I note her difficulties. I also note that her daughter has assisted her in the past and does so here in Australia. I am satisfied that with the assistance of her daughter the Applicant would be able to relocate within Fiji.'*

21 The assistance from the appellant's daughter to which the Tribunal referred must, having regard to the evidence, be understood to be financial assistance. The Tribunal's reasons for decision give no explicit consideration to how, even with some financial assistance from her daughter, the appellant would find a new home in which to live in Fiji and access such support as she might reasonably require to live in that home.

22 I do not accept the appellant's submission that there was no probative evidence on which the Tribunal could conclude that it would not be unreasonable for the appellant to relocate within Fiji. However, the summary way in which the Tribunal dealt with the issue of relocation, including its failure to explore the significance of the appellant's references to having no-one in Fiji *'to look after her'*, causes me to conclude that the Tribunal did not apply the right test when it concluded that it was satisfied that, with the assistance of her daughter, the appellant would be able to relocate within Fiji. The Tribunal did not, as the passage from *Randhawa* set out in [16] above requires, give consideration to the practical realities facing the appellant with respect to accommodation and care should she seek to relocate within Fiji. This is not to say that it was not open to the Tribunal to conclude that the appellant could deal with those practical realities, perhaps with financial help from her daughter. However, the Tribunal was required to give consideration to how, in a practical sense, the appellant could reasonably be

expected to relocate within Fiji.

23 For the above reasons, in my view, the Tribunal's reasons for decision reveal that it misconceived the elements of the test for determining whether the appellant is a person in respect of whom Australia owes protection obligations under the Convention within the meaning of s 36 of the Act. The Tribunal appreciated that it was required to consider the '*internal flight alternative*', and that for that purpose it was required to determine whether it would be unreasonable for the appellant to relocate within Fiji. However, I am satisfied that, because it misconceived the content of the requirement that it not be unreasonable for the appellant to relocate within Fiji, it did not ask itself the right questions before determining that it was not satisfied that the appellant is a person in respect of whom Australia owes protection obligations under the Convention. Consequently, in my view, the decision of the Tribunal is not a decision made by it under the Act in the sense discussed by the High Court in *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 (see also *Craig v South Australia* (1995) 184 CLR 163 at 179). The learned Federal Magistrate, in my view, erred in rejecting the appellant's claim for judicial review of the decision of the Tribunal.

CONCLUSION

24 I would allow the appeal, set aside the orders of the Federal Magistrate and remit the matter to the Tribunal to be determined according to law. I would order the respondent to pay the appellant's costs before the Federal Magistrate and of this appeal.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 11 March 2005

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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 512 OF 2004**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NAIZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**BRANSON, RD NICHOLSON and NORTH JJ**
DATE:	**11 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RD NICHOLSON J:

25 This is an appeal from the judgment of a Federal Magistrate (Barnes FM) given on 24 March 2004. Her Honour dismissed an application seeking review of a decision of the Refugee Review Tribunal ('the Tribunal') delivered on 14 January 2003. In that decision the Tribunal refused to grant the appellant a protection visa.

26 The appellant is a Fijian citizen of Indo-Fijian ethnicity. She arrived in Australia from Fiji on 16 August 2001. Her application for a protection visa was lodged on 6 September 2001.

27 In support of the application the appellant claimed to fear persecution in Fiji from her ethnic Fijian neighbours. She said they had harmed her in various ways. These included attacking and robbing her; planting vegetables in her backyard; using her toilet and bathroom; and stealing her jewellery.

28 The appellant's family situation is that her husband died in 1999. She has two sons in Fiji, one married and one unmarried. She has a daughter in Australia. Before her husband died she had no trouble of the sort which she claimed she fears.

TRIBUNAL'S REASONING

29 The Tribunal found as 'probably correct' a submission that the neighbouring native Fijians were trying to drive the appellant out of her home.

30 Before the Tribunal the appellant claimed that she could not relocate within Fiji as she would have no one to look after her. She claimed that her sons did not want her, her friends could not look after her and her daughter was not in Fiji, although she sometimes sent money. The appellant's adviser submitted it may be unreasonable for her to relocate due to her age, lack of education and mental scars from earlier harassment. No questions were put to the appellant by the Tribunal member in relation to these issues.

31 However, the Tribunal was not satisfied that it would be unreasonable for the appellant to relocate within Fiji. It said:

> *'The* [appellant] *claims that she could not relocate within Fiji as she would have no one to look after her. Her sons do not want her, her friends can not look after her and her daughter is in Australia.*
>
> *I am not satisfied that it would be unreasonable for the* [appellant] *to relocate. I note her difficulties. I also note her daughter has assisted her in the past and does so here in Australia. I am satisfied that with the assistance of her daughter the* [appellant] *would be able to relocate to Fiji.'*

32 The Tribunal referred to independent evidence stating that the present law and order situation in Fiji was stable except for some isolated incidents of minor harassment, and that democracy was being restored. It noted that the appellant had stated that things she feared still occurred in the villages though not so much in the cities. The Tribunal was satisfied that if the appellant moved away from her present neighbours she would not be at the same risk of harm as she was in the past.

33 Accordingly, the Tribunal was not satisfied that there was a real chance that the appellant would be subject to serious harm in terms of s 91R of the *Migration Act 1958* (Cth) ('the Act') should she relocate within Fiji. Therefore it found that she did not have a well-founded fear of persecution.

REASONING OF FEDERAL MAGISTRATE

34 Before her Honour two grounds were advanced, focussing upon the finding of the Tribunal

that 'with the assistance of her daughter the [appellant] would be able to relocate within Fiji'. The first ground was that in so concluding the Tribunal had taken into account an irrelevant consideration. Second, it was argued that the Tribunal had denied the appellant procedural fairness because there was no probative evidence upon which the Tribunal could have found that the appellant would receive sufficient funds from her daughter to be able to relocate safely within Fiji. The thrust of the submissions before her Honour was that the Tribunal had misapplied the law in relation to internal protection or relocation because it should have given the appellant an opportunity to raise any impediment to relocation. It then should have considered any evidence that might have resulted. It was submitted that it was necessary for there to be probative evidence to support an assumption that relocation was reasonable and evidence to support the finding that the appellant could relocate with the assistance of her daughter.

35 Her Honour found that the appellant had been given an opportunity to raise any impediment to relocation. Further, she found that the issues of impediment raised by the appellant were dealt with by the Tribunal. Her Honour found the Tribunal had considered the reasonableness of relocation. She said the appellant's complaint in essence was that the Tribunal made factual findings within its domain that were against the appellant on the issue. That, however, did not establish jurisdictional error. Additionally, her Honour held there was material before the Tribunal on which it could conclude that the appellant's daughter would be able to assist her to relocate within Fiji. Her Honour found that the inferences drawn by the Tribunal from the appellant's evidence concerning her daughter and other matters relating to relocation were reasonably open to the Tribunal.

36 On the hearing of this appeal the same two issues arose for reargument.

RELEVANT LEGISLATIVE PROVISIONS

37 Under s 36(2) of the Act a non-citizen in Australia is eligible for a protection visa if that person is someone 'to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. The Refugees Convention is the Convention Relating to the Status of Refugees 1951 and the Refugees Protocol is the Protocol Relating to the Status of Refugees 1967. The expression 'Convention' will be used to mean the Convention as amended by the Protocol. Items 785 and 866 in Sch 2 of the Migration Regulations both contain the same criterion.

38 Article 1A(2) of the Convention defines a 'refugee' to be 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.'*

The reasons specified in art 1A(2) are known as Convention reasons. The existence of such reasons threatening the life or freedom of a refugee in a territory to which it is proposed he or she be expelled or returned, gives rise to a protection obligation prohibiting such expulsion or return as a consequence of art 33(1) of the Convention. That article reads:

> *'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.'*

39 In par 91 of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992) it was said:

> *'The fear of being persecuted need not always extend to the* whole *territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.'*

INTERNAL PROTECTION PRINCIPLE

40 The long standing authority with respect to the internal protection principle is the decision of the Full Court in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437. That case concerned a Sikh from the Punjab region of India in relation to whom it was found he could reasonably be expected to relocate to a part of India other than the Punjab. The consequence of this was that the Sikh was found not to have a well-founded fear of being persecuted. Black CJ, with whom Whitlam J agreed, said (at 443):

> *'If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may*

> *be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'*

41 Before that Full Court it had been argued that the internal protection principle had no place in refugee law in that, at least in relation to the part of the country that was the applicant's home, a person would be a refugee within the Convention definition, notwithstanding that he or she might not have the relevant fear in some other part of the country. That is, in considering the application of art 1A(2) of the Convention, the focus should be on the country of the refugee's nationality as a whole.

42 In his reasons, Black CJ rejected this primary argument. The Chief Justice stated at (440 - 441):

> *'Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country.'*

His Honour said the focus of the Convention definition was upon a more general notion of protection by that country rather than the protection that the country might be able to provide in some particular region. This approach received support in Canadian, English and New Zealand decisions to which he referred.

43 On the hearing of this present appeal, counsel for the appellant submitted that the approach which he now urges, and which did not succeed before her Honour, would require a refinement of the construction stated by Black CJ (with the agreement of Whitlam J) in *Randhawa* at 440 – 441. Counsel does not contend – as was contended in *Randhawa* at 440 – that the 'internal protection principle' has no place in refugee law. When the appellant's case thus concedes continued operation for the internal relocation principle, it does so in two respects. The first is to suggest it may be limited to cases where the applicant for refugee status could, before leaving, reasonably have accessed a safe haven. The appellant accepts that this would support a finding that the person did not depart his or her country owing to a well-founded fear of persecution for a Convention reason. This approach is one followed by the UNHCR in its 1992 Handbook at par 91. The second is where Australia is returning an applicant directly into a 'safe haven'.

44 The appellant's contention is that inadequate state protection in a portion of the country of

nationality, even if there is a safe haven somewhere in that country, is sufficient to meet the second part of the definition of 'refugee'. It is submitted that if this were not so and a person was not a refugee simply because a safe haven was available somewhere in that country, it would mean that the Convention would not prohibit a contracting state from returning such person even to the dangerous portion of their homeland. Such construction, it is submitted, would be inconsistent with the object of the Convention. It is said also to be unnecessary given that art 33(1) provides a mechanism for contracting states to return refugees to places that are safe if there is the practical capacity to do so and if it would be reasonable to do so.

45 The significance of the construction as contended for by the appellant is said to be that it discloses that her Honour should have found that the Tribunal erred by failing to appreciate that having a well-founded fear of being persecuted for a Convention reason in a portion of Fiji is sufficient to justify an unwillingness to take steps that could lead to the person's return to that country.

46 In making these submissions the appellant contended that the proposition advanced is not consistent with the decision of this Court in *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 and cases which have followed it. However, the appellant said they were consistent with the dissenting judgment of Emmett J in *NAGV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 130 FCR 46.

47 In *Thiyagarajah* a Full Court (von Doussa J with Moore and Sackville JJ agreeing) held that the standard for the threat of harm under art 33 of the Convention was the same as that applied under art 1A(2), namely, the well-founded fear test. The decision involved also the application of art 1E of the Convention and a finding that Australia did not owe the applicant in that proceeding a protection obligation as he was a person to whom another country owed protection obligations. In *NAGV* Finn, Emmett and Conti JJ all agreed that *Thiyagarajah* was wrongly decided. However, Finn and Conti JJ were of the view that only the High Court could depart from what has been regarded as settled law: at [4] and [92].

48 The foundation of the defectiveness of the reasoning in *Thiyagarajah* as found by the members of the Full Court in *NAGV* was that it failed to recognise that if a person is a refugee within the meaning of art 1 of the Convention, Australia has protection obligations to that person. The significance of this arises from the fact that s 36 of the Act 'uses the Refugees

Convention as a means for determining the circumstances in which a protection visa is or is not to be granted by the minister to a non-citizen': *NAGV* at [35] per Emmett J. Consequently, the existence of the right to refoule in accordance with art 33 does not mean such protection obligations do not exist: *NAGV* at [1], [61] and [92]. Indeed, art 33 itself is operative where there is a 'refugee' and hence an applicant found to be such: *NAGV* at [41]. In *NAGV* the reasoning therefore rejected a submission by the Minister that the obligations recognised in s 36(2) be limited by obligations under international law: at [39].

49 It has now been authoritatively determined by the High Court in *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6 that *Thiyagarajah* was wrongly decided. The rationale of the joint judgment by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ (with Kirby J separately concurring) is that the reference in s 36(2) to the phrase 'to whom Australia has protection obligations under [the Convention]' describes no more than a person who is a refugee within the meaning of art 1 of the Convention. Therefore, no superadded derogation derives from that criterion by reference to what was said to be the operation upon Australia's international obligations of art 33(1) of the Convention.

50 That being the position, I cannot see any reason to depart from *Randhawa*. In my view *Randhawa* is not relevantly affected by *NAGV and NAGW*.

51 Furthermore, *Randhawa* is a decision of a Full Court which this Full Court should not differ from unless satisfied it is plainly wrong. *Randhawa* is also a decision of over a decade's standing which has been followed and applied in a significant number of decisions of the Court. It is settled law, followed and applied at primary and appellate levels in this Court. It should not be departed from except by the High Court: cf *NAGV* at [4] and [92].

52 I am strengthened in this view by the following added circumstances. It has been held that the relocation principle in *Randhawa* is not inconsistent with *S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 203 ALR 112; *SKFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 142 at [10]-[13] per Branson, Finn and Finkelstein JJ; *NAWD v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 770 at [11]-[15] per Bennett JJ. The *Randhawa* principle has also been considered not to be inconsistent with *Minister for Immigration & Multicultural*

Affairs v S152/2003 (2004) 205 ALR 587; *NAWD* and *Applicant S454/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1136 at [53] per Gyles J. See in particular *S152/2003* at [19], [26], [28] and at [29].

53 For these reasons I do not consider the first line of argument in the appeal can succeed.

ABSENCE OF PROBATIVE EVIDENCE

54 The appellant also contends that there is a complete absence of probative evidence to support a finding which was, on the reasoning of the Tribunal, essential to the state of satisfaction that it reached: *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALD 402. The finding in issue is that relating to the assistance which may have been available from the appellant's daughter in respect of relocation within Fiji. It is said there was no foundation for the conclusion that the daughter would provide assistance of the kind required in the future. In particular, it is said that the evidence of the appellant that her daughter in Australia sometimes sent her money prior to her leaving Fiji was no such foundation.

55 In *Randhawa*, it was urged that the decision-maker's duty was not discharged by asking whether, in a general way, it was reasonable in the circumstances for an applicant to relocate to another part of a country. Rather a series of specific matters needed to be addressed, including the area, city or region to which it was contemplated that an applicant could relocate and also what counsel described as a general life style adjustment that would need to be made by a person were he or she to relocate within the country of nationality. Black CJ (at 442) said this was an important further question:

> *'... because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country would remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person.'*

56 He said further that 'in the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered'.

57 It is therefore submitted by the appellant that the Court should more readily infer the Tribunal asked itself the wrong test as a result of the following factors. The first is that the Tribunal

did not consider whether it was positively satisfied that it was reasonable for the appellant to relocate. It is said that, rather, the Tribunal set itself a lower bar, finding only that it was not satisfied it was unreasonable for the appellant to relocate. Second, the Tribunal failed to address all of the reasons advanced by the appellant as to why the Tribunal should conclude it was not reasonable to expect her to relocate. In particular, her age, lack of education and mental scars were not referred to, although they should have been addressed even on the *Randhawa* test. Third, the Tribunal took into account an irrelevant consideration in asking not whether it was reasonable to expect the appellant to relocate but whether it was reasonable to expect her daughter to effectively fund that relocation: see *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119-120.

58 The respondent submits that for there to be jurisdictional error the Tribunal would have had to ask itself the wrong question, which was not the case because it addressed the issue of relocation. Additionally, the respondent contends the Tribunal dealt with 'the range of realities' in a manner which satisfied the requirements laid down by the Full Court in *Randhawa* at 442. This latter submission is put with reliance on the proposition that the Tribunal was not under any duty to inquire further. These submissions raise the issue whether the Tribunal failed to properly apply itself to considering the issue of the reasonableness of the appellant's relocation and, if so, whether that gives rise to jurisdictional error. This latter question entails consideration of whether the Tribunal 'simply did not examine at all various aspects of the evidence' and so 'did not deal with an essential aspect of the appellant's case': *Perampalam v Minister for Immigration & Multicultural Affairs* (1999) 84 FCR 274 at 284 per Burchett and Lee JJ and at 290 per Moore J.

59 The respondent contends that the Tribunal's ultimate finding that it was reasonable for the appellant to relocate was based on three facts. The first was that her daughter had provided monetary assistance to her in Fiji. The second was that the daughter had assisted the appellant when she was in Australia (although the respondent accepted this could not speak to the issue of how the appellant would cope in Fiji without her daughter). The third was the finding that the appellant only had to move away from her neighbours, being the particular group of ethnic Fijians who were proximate to her.

60 In reply, the appellant disavows any reliance on the argument that the Tribunal was under any

duty to inquire further. Rather the appellant contends that the fact questions concerning the relocation were not asked by the Tribunal enables the Court to infer the Tribunal misunderstood the law.

61 The ground of appeal relying on absence of probative evidence alleges jurisdictional error 'whether described in terms of irrationality or denial of procedural fairness'. A further ground alleges misconstruction or misapplication of any relocation test but does not specify in what way either of those matters would give rise to jurisdictional error.

62 The present proceeding is not a case where the appellant alleges she was prevented by the Tribunal from presenting her case as she wished or from saying everything she wanted to say: *Minister for Immigration & Multicultural Affairs; Ex parte applicant S154/2002* [2003] HCA 60 at [30]. There is no complaint by her in terms that she received insufficient assistance or encouragement from the Tribunal. Rather the appellant's case is that as a consequence of absence of sufficient evidence or failure of the Tribunal to ask the correct questions applying itself to the realities of relocation, jurisdictional error has occurred.

63 In my view, it is the case that the Tribunal was in error of law in that it did not apply itself to the realities of the appellant's relocation. The error arose from non-compliance by the Tribunal with the method of approach laid down by the Full Court in *Randhawa*. By not considering how in fact the appellant could relocate and in particular what assistance she would require and whether it was reasonable for her to relocate, the Tribunal failed to satisfy the requirements set in *Randhawa* for assessment of the practical realities of the appellant's relocation.

64 However, for the appeal to succeed it is necessary for the appellant to establish the existence of error of law going it its jurisdiction. An error of law does not necessarily equate to jurisdictional error: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356. In the absence of jurisdictional error, the decision of the Tribunal will be a privative clause decision protected by s 474 of the Act. It is necessary therefore to examine each of the bases suggested by the appellant as giving rise to jurisdictional error.

65 Jurisdictional error will arise in the circumstances referred to by the High Court in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82], citing *Craig v*

South Australia (1995) 184 CLR 163 at 179. It is not contended here that the Tribunal identified a wrong issue or relied on irrelevant material. The case advanced by the appellant makes it appropriate to consider whether the Tribunal asked itself a wrong question or ignored relevant material when it did not examine the reasonableness of relocation in the manner prescribed in *Randhawa*. (*Craig* also recognises jurisdictional error as arising 'at least in some circumstances' where there is 'an erroneous finding or … a mistaken conclusion' but, whatever the scope of those words, they were not pressed by the appellant).

66 Some further guidance is available from decisions of the High Court on the circumstances in which factual error may constitute jurisdictional error. In *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* [2004] HCA 32 at [38] Gummow and Hayne JJ (with whom Gleeson CJ agreed) said:

> *'38. The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 *(2003) 198 ALR 59 at 67[37], 71 [52], 98 [173]; 73 ALD 1 at 9, 13, 40; 77 ALJR 1165 at 1172 [37], 1175 [52], 1194 [173]; cf at ALR 62 [9]; ALD 4; ALJR 1168 [9]). If the decision did display these defects, it will be no answer that the determination was reached in good faith. To say that a decision-maker must have acted in good faith is to state a necessary but insufficient requirement for the attainment of satisfaction as a criterion of jurisdiction under s 65 of the Act. However, inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.'*

The issues arose in an appeal from a decision of this Court finding that a decision of a tribunal (relevantly that there was no evidence before the tribunal upon which it could have been satisfied that the applicant for a protection visa could have been suffering from post-traumatic stress disorder) was misconceived. The respondent here submits that in the passage quoted and particularly as a consequence of the final sentence in that passage, the High Court has confined the no evidence ground to jurisdictional facts. To resolve the present appeal it is not necessary to accept that view. In any event, it is not a conclusion to which the sentence read in its context gives rise on a matter of such significance.

67 Guidance may also be obtained by reference to *S154* where Gummow and Heydon JJ, with

whom Gleeson CJ agreed, said at [58] 'the Tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which the applicant chooses not to embark on'. The circumstances of *S154* were that the prosecutrix in that proceeding made a claim that she had been raped, adding that she could not speak of it in detail. The Tribunal member did seek further evidence concerning the claim, which was later repeated. The primary argument of the prosecutrix was that the Tribunal had denied her natural justice, a contention rejected by the majority (Gleeson CJ, Gummow, Heydon, and Callinan JJ, Kirby J dissenting).

68 Assistance is also available from decisions of other Full Courts of this Court. In *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 198 ALR 293 at 299, the Full Court (Gray, Cooper and Selway JJ) accepted that an obligation to afford natural justice does not normally imply a duty upon the decision-maker to make inquiries, citing *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd* (1994) 119 ALR 206 at 213-214. However the Court added that that 'does not mean that there may not be a duty to inquire in relation to a particular issue under a particular statute', a statement the respondent submits, wrongly in my view, is contrary to *SGLB*. In *Djalic v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 206 ALR 488, the Full Court (Tamberlin, Sackville and Stone JJ) stated at [83] in the context where no complaint was made that the Minister had denied procedural fairness, that the appellant there 'had an opportunity to provide more detailed information if he wished, but he did not avail himself of that opportunity'. In *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263 the Full Court (Black CJ, French and Selway JJ) recognised that an error of fact in the course of a decision is likely to be a jurisdictional error where the fact is a jurisdictional fact, citing *Re Minister for Immigration & Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at 481, at [35] per McHugh J and *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 71, at [54]. The Full Court therefore found the circumstances in which a factual error will amount to or evidence jurisdictional error 'are likely to be quite limited'. In *Minister for Immigration & Multicultural & Indigenous Affairs v Huynh* [2004] FCAFC 256, the Full Court (Kiefel and Bennett JJ) referred at [81] to the three instances where additional information was required to be considered for a decision under the relevant statute, referred to by McHugh J in *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 321. Additionally reference was made to an instance of material known to be readily available (*Tickner v*

Bropho (1993) 40 FCR 183) in relation to improper exercise of power and misapprehension of material facts: *Akers v Minister for Immigration & Ethnic Affairs* (1988) 20 FCR 363.

69 None of these authorities can be said to support a finding of jurisdictional error in the way the Tribunal approached the issue of the reasonableness of the appellant's relocation. This is because, in the first place, the Tribunal asked itself the right question; the particulars of the reasonableness did not go to the formulation of that question. In my view this is not a case in which the Tribunal asked itself the wrong question. The reasons of the Tribunal disclose that the member asked himself whether it would be 'unreasonable' for the appellant to relocate and went on to conclude she 'would be able to relocate within Fiji'. The way it went about answering the question it posed to itself was in error but that does not carry with it the proposition that the Tribunal asked itself the wrong question in the first place. To characterise what the Tribunal did as a failure to ask the jurisdictionally important question is to permit this Court to impermissibly review the merits of the way the Tribunal went about answering the correct jurisdictional question.

70 Second, the Tribunal did not ignore relevant material. The shorthand reference by the Tribunal to noting the appellant's difficulties is to be read in the context of the particularisation of these in the Tribunal's description of 'claims and evidence'. Third, this is not a no evidence case. The three circumstances identified in the respondent's contentions demonstrate that other evidence was present. Those factors provided some foundation for the Tribunal's conclusion and prevent its reasoning from being considered to be irrational or illogical. Fourth, the contention that the Tribunal misunderstood the law cannot be accepted when the Tribunal's reasons are considered as a whole. Fifth, there is no allegation that the appellant was inhibited in any way in bringing forward to the Tribunal any further evidence concerning her relocation. The result is that in the context of the authorities raised in the course of argument of this appeal there is no appropriate basis to safely conclude that the Tribunal's error of law in failing to properly examine the reasonableness of the appellant's relocation constituted jurisdictional error even though it went about its task in a manner which was non-compliant with *Randhawa*.

71 It is not satisfying that an error of law that has occurred in the performance of the function of a Tribunal cannot be corrected because it is not of the character of a jurisdictional error. That, however, is the effect of the legislation governing the appellate jurisdiction applicable

to this appeal.

CONCLUSION

72 For these reasons I consider the appeal must be dismissed.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice RD Nicholson.

Associate:

Dated: 11 March 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 512 OF 2004**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **NAIZ**
APPELLANT

AND: **MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS**
RESPONDENT

JUDGES: **BRANSON, RD NICHOLSON AND NORTH JJ**

DATE: **11 MARCH 2005**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

NORTH J

73 I agree with Branson J that this appeal should be allowed for the reasons given by her Honour in pars [22] and [23] of her judgment. As this conclusion is sufficient to dispose of the appeal I do not address the alternative argument submitted to the Court on the scope of the internal flight alternative.

I certify that the preceding one (1) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 11 March 2005

Counsel for the Applicant:	S Lloyd with T Jowett
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Counsel for the Respondent:	GT Johnson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	11 November 2004
Date of Judgment:	11 March 2005