FEDERAL COURT OF AUSTRALIA

NAEN v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 6

MIGRATION - Protection visa - protection obligations under the Refugees Convention as amended by the Refugees Protocol - whether a person has effective protection in another territory - whether Australia owes protection obligations to a person that has effective protection in another territory - whether the effective protection principle applies where an asylum seeker has no connexion with the safe third country and has no desire to go there - Australia owes no protection obligations to a person if they are not prevented by Art 33 from expelling or returning a refugee to the frontiers of another territory

INTERNATIONAL TREATIES - Construction of international treaties

STATUTES

Border Protection Legislation Amendment Act 1999 (Cth) s 36

Migration Act 1958 (Cth) ss 29(1), 30, 31, 36(1) and (2), 65(1)(a) and (b), 500(1)(c), 502(1)(a), 503(1)

Migration Reform Act 1992 (Cth)

Migration Regulations Schedule 2 cl 866.221

CASES

Abdi v Home Secretary [1996] 1 All ER 641 Cited

Al Toubi v Minister for Immigration and Multicultural Affairs [2001] FCA 1381 Cited

Al-Rahal v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 73 Cited

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 Applied

Kola v Minister for Immigration and Multicultural Affairs (2002) 120 FCR 170 Cited

Koowarta v Bjelke-Petersen (1982) 153 CLR 168 Cited

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

Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154 Cited

Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67 Cited

Minister for Immigration and Multicultural Affairs v Sameh [2000] FCA 578 Cited

Minister for Immigration and Multicultural Affairs v Savvin (2000) 98 FCR 168 Cited

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

Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 Approved

NAGV v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 202 ALR 1 Discussed

Odhiambo v Minister for Immigration and Multicultural Affairs (2002) 172 FCR 29 Cited

Plaintiff S157 v Minister for Immigration and Multicultural Affairs (2003) 211 CLR 476 Applied

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

Sivasubramaniam v Minister for Immigration and Multicultural Affairs [2002] FCAFC 98 Cited

SPKB v Minister for Immigration and Multicultural Affairs [2003] FCAFC 296 Cited

V872/00A v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 57 Cited

Victrawl Pty Ltd v Telstra Corporation Ltd (1995) 183 CLR 595 Cited

NAEN v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N390 of 2003

WHITLAM, MOORE, KIEFEL JJ
SYDNEY
13 FEBRUARY 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N390 OF 2003**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NAEN** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**WHITLAM, MOORE, KIEFEL JJ**
DATE OF ORDER:	**13 FEBRUARY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to 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.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N390 OF 2003**

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JUDGES:	**WHITLAM, MOORE, KIEFEL JJ**
DATE:	**13 FEBRUARY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This appeal concerns the criterion specified in the *Migration Act 1958* (Cth) for the grant of a protection visa to a person who comes within the definition of a refugee under the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees, where that person has a right to enter and reside in a third country where that country would not expel or return that person to a country where they might suffer persecution. The issue arises in this case because the appellant, a Russian national, is Jewish and Israel's Law of Return confers upon every Jew the right to enter and remain in Israel. The right is extended by the Law to spouses, regardless of whether they are Jewish. The appellant's husband is of the Russian Orthodox faith. There would be no prospect that they would be returned to Russia from Israel. Nevertheless the appellant and her husband, who have not had any connexion with Israel, do not wish to live there.

2 That issue has been authoritatively determined by a Full Court of this Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543. Justice von Doussa, with whom Moore and Sackville JJ agreed, there held that as a matter of domestic and international law Australia does not owe protection obligations to a person who has *'effective protection'* in another country. In the recent decision of *NAGV v Minister for*

Immigration and Multicultural and Indigenous Affairs (2003) 202 ALR 1 Emmett J held that *Thiyagarajah* was wrongly decided. The other members of the Court, Finn and Conti JJ, while in agreement, did not consider that the Court should depart from the jurisprudence which had developed since *Thiyagarajah* was decided and did not allow the appeal.

3 The appellant invites the Court to follow the reasoning of Emmett J in *NAGV* and to hold to the contrary of *Thiyagarajah*.

THE STATUTORY PROVISIONS

4 The *Migration Act* makes provision for the grant of visas to a non-citizen which would permit them either to travel to and enter or to remain in Australia or both: s 29(1). A visa permitting a person to remain in Australia may be a permanent or a temporary visa: s 30. Section 31 provides that there are to be prescribed classes of visas and the classes provided for in the sections following (ss 32 to 38). Section 36(1) and (2) at the relevant time provided:

> *'(1) There is a class of visas to be known as protection visas.*
> *(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.'*

5 The principal issue on this appeal is the extent of the enquiry which is encapsulated in the words '*a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention …'*.

6 These provisions came into effect on 1 September 1994 following the commencement of the *Migration Reform Act 1992* (Cth). Prior to those amendments the *Migration Act* provided for the grant of an entry permit to a person who came within the definition of *'refugee'*, which was defined as having the same meaning as it did in Art 1 of the Refugees Convention. The *Migration Reform Act* repealed those provisions.

7 It was also a criterion prescribed by the Migration Regulations (Schedule 2, cl 866.221) that the Minister be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention at the time of the decision. The grant of a visa is dependent upon the Minister being satisfied that the criteria and requirements for the visa have been met: s 65(1)(a) and (b). Without a visa a person is an unlawful non-

citizen and is liable to be removed from Australia.

8 On 16 December 1999 Part 6 of Schedule 1 to the *Border Protection Legislation Amendment Act 1999* (Cth) commenced. The following provisions were added to s 36:

> *'(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*
>
> *(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.*
>
> *(5) Also, if the non-citizen has a well-founded fear that:*
>
> *(a) a country will return the non-citizen to another country; and*
> *(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;*
>
> *subsection (3) does not apply in relation to the first-mentioned country.'*

9 These provisions may well have relevance to the facts of this case, but they were not in force at the time the applications for protection visas were made, and it is not suggested that they have application.

10 The Minister also referred to certain other sections of the *Migration Act* which were said to militate against the construction placed on s 36(2) in *NAGV*. It is not necessary to set them out. Sections 500(1)(c) and 502(1)(a) refer to decisions to refuse to grant a protection visa, or to cancel a protection visa, relying on Articles 1F, 32 or 33(2) of the Refugees Convention. Section 503(1) provides that a person who has been refused a protection visa or has had such a visa cancelled relying on those Articles is not entitled to enter Australia or be in Australia at any time during the period determined under the regulations.

THE REFUGEES CONVENTION AND PROTOCOL

11 The preamble to the Refugees Convention recites that it is desirable to revise and consolidate previous international agreements *'relating to the status of refugees and to extend*

the scope of and the protection accorded by such instruments by means of a new agreement', amongst other things. The protection of refugees was recognised as depending upon the cooperation of the Contracting States with the United Nations High Commissioner for Refugees.

12 Whilst it is the whole of Art 1 which determines who is a '*refugee*' it is sufficient for present purposes to refer to the definition in Art 1A(2):

> '*(2) As a result of events occurring before 1 January 1951 and 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 it.*
>
> *In the case of a person who has more than one nationality, the term* "the country of his nationality" *shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.'*

13 The Articles which follow refer to refugees generally, refugees *'lawfully staying'* in a territory, and refugees having *'habitual residence'* and certain other descriptions of refugees. Included amongst what a Contracting State is to accord them are the freedom to practise their religion and undertake religious education (Article 4); the same treatment as is given to aliens (Article 7); rights to engage in employment (Articles 17 and 18); rights to property (Articles 13 and 14); access to the Courts (Article 16); and to education (Article 22). Contracting States are also obliged to issue identity papers to any refugee who does not have a valid travel document and to issue documents for the purpose of travel outside its territory (Articles 27 and 28).

14 Article 31 provides that a Contracting State is not to impose penalties on account of refugees' illegal entry and presence whether they come directly from a territory where their life or freedom was threatened. Articles 32 and 33 deal with *'Expulsion'* and *'Prohibition of expulsion or return* (refoulement)'.

Article 32
Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33
*Prohibition of expulsion or return (*refoulement)
*1. 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.*
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The focus of this appeal is upon Art 33.

THE DECISION IN *THIYAGARAJAH*

15 The respondent in *Thiyagarajah* had been afforded refugee status and granted a right of residence in France after his departure from Sri Lanka and prior to his arrival in Australia. He had been issued with travel documents which contained a right of re-entry to France.

16 As von Doussa J observed, the appeal in *Thiyagarajah* illustrated the significance of the changes effected by the 1992 amendments. When asylum is claimed a person seeking protection does so by applying for a protection visa. The existence of protection obligations under the Refugees Convention then became the criterion for the grant of such a visa. His Honour said, with respect to such an application (at p 552):

'…In considering that claim the central question for determination must be the criterion for a protection visa prescribed in s36(2) of the Act: is the applicant a non-citizen in Australia to whom Australia has protection

> *obligations under the Refugees Convention? This is a question posed by the domestic law of Australia, but the content of the question must be gauged by reference to the protection obligations owed by Australia under the Refugees Convention as a matter of international law.'*

17 His Honour considered that under the Refugees Convention even if a person was a refugee as defined in Art 1, there remained questions concerning the obligations of Australia as a Contracting State. That most relevant to this appeal was stated by his Honour (at p 556).

> *'…It is whether under the Refugees Convention, Australia is obliged not to deport a non-citizen asylum seeker from Australia to the third country from whence he or she came if that person falls within the definition of 'refugee' in Art 1.'*

18 His Honour turned to what he considered to be the primary obligations imposed on a Contracting State in relation to a refugee, Arts 31, 32 and 33. Article 31 had no application to the circumstances of the case in his Honour's view. There is no suggestion that it is directly relevant to this appeal. Article 32 applies only to refugees *'lawfully'* in a Contracting State's territory. It may not have applied, his Honour observed, because the claim for asylum was made after the expiry of the respondent's entry permit. In the event that it did apply it would oblige Australia to extend due process of law. In any event it is to be read with Art 33 which imposes the principal obligation on a Contracting State.

19 His Honour noted that the prohibition in Art 33 on expulsion or return of a refugee to a place where they would suffer persecution was not just to the country of the refugee's nationality but was expressed to be to 'territories' generally (at p 557). His Honour then considered international practices relating to the return of asylum seekers to third countries where they would have effective protection, recent developments in case law and legislative amendments in the United Kingdom and Canada on that topic. It is not necessary to refer to the discussion in any detail in these reasons. His Honour observed that '*the notion that the Refugees Convention permits a country to whom a claim for asylum is made to remove the asylum seeker to a safe third country'*, whilst considered permissible by the United Nations High Commissioner for Refugees had been criticised by others (at p 561). His Honour said:

> *'… It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee and has accorded that person effective protection, including a right to reside, enter and re-enter that country. The expression 'effective protection' is used in the submissions of the Minister in the present*

> *appeal. In the context of the obligations arising under the Refugees Convention, the expression means protection which will effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee.'* (at p 562).

His Honour concluded that as the respondent had effective protection in France he was not a person to whom Australia owed protection obligations. The additional feature, that the applicant held travel documents entitling him to return to France as a refugee, whilst not essential to that finding at least served to illustrate that his claim for protection was removed from the object and purposes of the Refugees Convention (at p 565).

20 The principle in *Thiyagarajah* has been applied and developed in a number of decisions of this Court: *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549; *Minister for Immigration and Multicultural Affairs v Kandasamy* [2000] FCA 67; *Minister for Immigration and Multicultural Affairs v Sameh* [2000] FCA 578; *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73; *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154; *Al Toubi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1381; *Sivasubramaniam v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 98; *Kola v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 170; *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 172 FCR 29; and *SPKB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 296. The additional matters dealt with by those cases do not arise for consideration in this appeal.

21 The appeal to the High Court, *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 did not concern the issue presently under consideration. The majority judgment did however contain a reference to the Full Court's view of the requirements of Art 33. In relation to issues arising in the Full Court as to Art 1E, their Honours said at (349-350 [15]-[16]):

> *'…The Full Court did not go on to hold, as would appear to follow, that in this respect the Tribunal had erred in law. This course was not taken because of the view of the Full Court that, by reason of the operation of Art 33, Australia did not owe the respondent protection obligations…*
>
> *In the Full Court, von Doussa J correctly emphasised two aspects of the case.*

> *The first was that the effect of ss 36 and 65 of the Act and subclass 866 of Schedule 2 of the Migration Regulations was that the case turned upon the question whether an error of law was involved in the decision of the Tribunal that the respondent, his wife and child were not 'persons to whom Australia has protection obligations under the [Refugees Convention]'. In its applicable form, the legislation obliged the Minister to grant a protection visa if this criterion were met and to refuse the visa if it were not met. The second aspect was that, under the legislation, the inquiry was not confined (as it had been under the earlier legislation [See* Minister for Immigration and Ethnic Affairs v Wu Shan Liang *(1996) 185 CLR 259 at 273-275;* Minister for Immigration, Ethnic and Multicultural Affairs v Guo *(1997) 191 CLR 559 at 563] to the question whether the asylum seeker had the 'status' of a 'refugee'. Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied.'*

NAGV v MINISTER

22 The facts in *NAGV* were in relevant respects identical with those in this case. The Refugee Review Tribunal there determined that Australia did not have protection obligations to the appellants under the Refugees Convention, despite their well-founded fear of persecution in the Russian Federation, because they would probably obtain '*effective protection*' in Israel if they were prepared to go there.

23 In the Full Court Emmett J was of the view that s 36 of the *Migration Act* simply identifies the non-citizens to whom the Minister is required to grant protection visas. It and other sections such as s 65 do not require the Minister to take steps that would satisfy Australia's obligations under the Refugees Convention (at [35]). It was, in his Honour's view, the *existence* of protection obligations which was central to s 65 (at [57]). Section 36(2) speaks simply in terms of *'protection obligations* under *the Refugees Convention'* as amended by the Protocol (at [53]). Whilst accepting that the Refugees Convention does not impose an obligation to provide even temporary asylum, nevertheless Australia has some obligations to *all refugees* and some of them can be characterised as *'protection obligations'*. His Honour had earlier listed a number of the Refugees Convention's articles and their subject matter. The protection obligations included at least Arts 31 and 33(at [58] -[60]).

24 His Honour said (at [36] -[37]):

> *'Thus, it will be necessary, in relation to any applicant for a protection visa, to enquire and ascertain whether Australia has protection obligations to that applicant. Once the Minister is satisfied that the applicant is a person to whom Australia has protection obligations, as that term is to be understood*

> *when used in s 36(2) of the Act, that person is entitled to the grant of a protection visa, whether or not the protection obligations imposed on Australia under the Refugees Convention require the grant of asylum or some other benefit falling short of the grant of asylum.*
>
> *Thus, the grant of a protection visa to a non-citizen may well confer on that citizen greater rights than the* "protection obligations" *that Australia has under the Refugees Convention would require Australia to confer on that person. However, that is not to the point. Whatever the content of the* "protection obligations" *that Australia has under the Refugees Convention, if a non-citizen is a person to whom Australia has such protection obligations, the relevant criterion for the grant of a protection visa is satisfied.'*

25 In his Honour's view the Minister's contention, that Australia has protection obligations to a person only where it cannot, consistently with its obligations under international law, expel or return that person to a place where they would have *'effective protection'* could not be accepted:

> *'…That contention as to the construction of s 36(2) involves the implication into the Refugees Convention of an obligation that is certainly not expressed in the Refugees Convention. The Minister's construction means that Art 33 is to be understood as providing that Australia will not expel or return a refugee to the frontiers of any country or territory unless the refugee can enter and reside in that country or territory and will have effective protection there. Thus, so the argument would run, a refugee who has effective protection in a third country, because the refugee can enter and reside in such a place, will not be a person to whom Australia has a protection obligation under the Refugees Convention. But that is not what s 36(2) says.*
>
> *It may be a rule of international law that a country on whose territory a refugee is found will not expel or return that refugee to any country unless the refugee can enter and reside in that country. However, that is not an obligation that Contracting Parties have under the Refugees Convention. Further, having regard to Australia's reservation of Art 32, it is difficult to see how it could be an obligation implied under the Refugees Convention. The obligation of Australia* ***under the Refugees Convention*** *not to return or expel is limited to that arising from Art 33'* (at [39] and [40]).

26 In his Honour's view the Court in *Thiyagarajah* had regard to the wrong question (at [48]). The enquiry under s 36(2) is as to Australia's obligations under the Refugees Convention, and does not concern other obligations which might arise under international law. Section 36(2) does not speak of an obligation under international law to grant asylum nor of an obligation under the Refugees Convention to grant asylum. It speaks simply of *'protection obligations* under *the Refugees Convention'* (at [48] and [53]).

27 Emmett J in *NAGV* also considered it to be of some significance that Australia's protection obligations did not include the obligation in Art 32. His Honour observed that in *Thiyagarajah* von Doussa J's attention was not drawn to the fact that Australia had reserved Art 32. Emmett J went on to hold that: *'The reasoning entails a conclusion that, because Australia is not precluded by international law from expelling or returning an applicant for a protection visa, Australia has* no *protection obligations under the Refugees Convention to that person'*. His Honour considered such a process of reasoning not to be compelling. We should add at this point that it is not plain to us that von Doussa J's reasoning contained the assumption mentioned. In any event, as an addendum to the reasons in *NAGV* later explained, Australia's reservation of Article 32 was in fact withdrawn in a communication to the Secretary-General of the United Nations received on 1 December 1967: the United Nations Treaty Series, *Refugees Convention Relating to the Status of Refugees,* note 15. Emmett J said that that fact did not affect his conclusion about the reasoning in *Thiyagarajah*.

28 This Court was advised that an application for special leave has been filed in the High Court in *NAGV*.

THE TRIBUNAL'S REASONING

29 The Tribunal found that the appellant had a well-founded fear of persecution in Russia based upon her religion and ethnicity. The appellant and her family had suffered cumulative discrimination and there was a real chance that discrimination amounting to persecution, including acts of violence, would again manifest itself if she returned to Russia. It was not reasonable, the Tribunal considered, to expect her and her family to relocate elsewhere in Russia.

30 The Tribunal then turned to consider Israel's *'Law of Return'* and held that it provided a right of immigration (Aliya) to all Jews. According to information before it these immigrants are issued with Israeli citizenship. It rejected the appellant's claim to have converted to Christianity and her claims that she was not sufficiently religious to be in a position to claim that right and that her husband would be unable to do so. Applying *Thiyagarajah* it held that Australia did not have protection obligations towards the appellant since she and her family were afforded *'effective protection'* in Israel, by being permitted to enter and live there without risk of being returned to their original country. In accordance with Art 33, Australia could return such a person to that third country without considering

whether he or she is a refugee: *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549.

REASONING OF THE PRIMARY JUDGE

31 At the time Sackville J heard this matter the appeal in *NAGV* had not been determined. His Honour referred with approval to the decision of the primary Judge in *NAGV*, Stone J. Her Honour had correctly applied the principles in *Thiyagarajah* and following cases, his Honour considered.

32 The critical point to emerge from *Thiyagarajah,* in his Honour's view, is that the question posed by s 36(2) is not whether an asylum seeker, to the satisfaction of the Minister, has the status of a refugee. It is whether the Minister is satisfied that the applicant is a person to whom Australia presently owes protection obligations. That question is determined by reference to Art 33. If Art 33 does not prevent Australia expelling or returning a refugee to the frontiers of another territory, Australia owes no protection obligations to that person (at [40] and [41]).

33 Before his Honour the appellant argued that an asylum seeker could not be removed to a third country with which they had had no prior connexion. Stone J had determined the question as a matter of fact and considered that the principle of effective protection was not dependent upon whether the asylum seeker had previously been resident in the third country. In his Honour's view (at [52] and [53]) there was nothing in the language or Art 33 to suggest that a Contracting State was limited to removal to a third country with which the asylum seeker had a prior connexion and no obvious reason why it should be read in such a way. The approach taken in *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 suggested that no such connexion was required. The decision in *Abdi v Home Secretary* [1996] 1 All ER 641 also appeared to assume that removal to a safe third country did not infringe the Refugees Convention even if the applicant had no prior connexion with the country.

34 The Tribunal was also clearly aware, in his Honour's view, that any right to Israeli citizenship was dependent upon the appellant and her husband arriving in the country and expressing a desire to settle in Israel. His Honour considered (at [66]) that the Refugee Review Tribunal must have taken the view that the question of effective protection is to be

assessed on the assumption that the appellant would enter and remain in the third country and, as a matter of principle, that must be right. Were it otherwise a refugee could defeat a claim that a third country can provide effective protection.

35 His Honour dismissed the application for review.

THE APPEAL

36 The appeal raises two issues: whether the reasoning of the Full Court in *NAGV* as to the operation to be given to s 36(2) should be adopted; and whether the effective protection principle applies where an asylum seeker has no connexion with the safe third country and does not desire to go there.

37 Each of the judgments in *Thiyagarajah* and *NAGV* accept that the question posed by Australian domestic law, by s 36(2) of the *Migration Act*, is to be answered by reference to the Refugees Convention. They differ as to the extent of the enquiry posed by Art 33. Indeed the reasoning in *NAGV* proceeds upon the basis that there is no enquiry necessary. It is sufficient to recognise that the Convention created protection obligations.

38 On a broader approach Emmett J considered that there were a number of Articles of the Refugees Convention which involved obligations of that kind. We are unable, with respect, to agree. For the most part the Articles to which he referred give rise to obligations concerning the treatment a refugee is to receive where a Contracting State is in the process of considering, or has granted, an application for asylum.

39 Article 33 might give rise to an obligation to protect, which is to say not to return or expel a refugee to the frontiers of a territory where they would face persecution for a Convention reason. Further enquiry is however necessary to determine whether Australia is unable to return an asylum seeker to another country in a particular case. *NAGV* denies the need for such an enquiry.

40 The effect of *NAGV's* approach to Art 33 is that the criteria of s 36(2) will be met in any case where a person is a refugee to whom Art 33 applies. Emmett J conceded that the construction adopted in *NAGV* might have the effect of granting protection visas to non-citizens to whom Australia was not required to provide protection under the Refugees

Convention (at [37]). This would not, in our respectful view, be consistent with the aim of s 36(2), which is to give effect to Australia's obligations under the Convention: *Plaintiff S157 v Minister for Immigration and Multicultural Affairs* (2003) 211 CLR 476 at 491-492 [27].

41 Further, that approach to s36(2) does not recognise the different statutory regime effected by the 1994 amendments to the *Migration Act*. *NAGV* did not refer to the observations of the High Court in the appeal in *Thiyagarajah*. It was there confirmed that a person may be a refugee but not be a person to whom protection obligations are owed, when regard is had to Art 33.

42 It was an important aspect of the reasoning in *NAGV* that Art 33 is not expressed to refer to considerations of effective protection in third countries. It does however contain reference to *'territories'* generally, as von Doussa J observed. It may be that it was written with the prospect of safe third countries in mind. It is not necessary to determine whether that was the case. International law now gives such a meaning to Art 33. Emmett J observed that *Thiyagarajah* imports those standards into an interpretation of Art 33. In our view it was correct in doing so.

43 International treaties are not drawn with the precision of a domestic statute and often in general terms: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J) and at 255-256 (McHugh J). As McHugh J there observed this is sometimes the price paid for multinational political comity. As a result no technical common law approach is appropriate to their interpretation.

44 Article 31 of the Vienna Convention on the Law of Treaties has been described as the *'leading general rule of interpretation of treaties'*: McHugh J in *Applicant A* at 252, referring to *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265. The terms of that Convention would not render it applicable to the Refugees Convention and Protocol. Article 4 of the Vienna Convention provides that it applies to treaties which are concluded by States after its entry into force. The Vienna Convention came into force after the Refugees Convention and Protocol, as Katz J pointed out in *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168 at 187. It has however been held to constitute *'an authoritative statement of customary international law"*: *Victrawl Pty Ltd v Telstra*

Corporation Ltd (1995) 183 CLR 595 at 622. Katz J considered that it was for that reason that the Vienna Convention has been referred to on occasions by Australian Courts as if it were applicable in construing the Convention: and see *Applicant A* at 255 and 277, fn (189).

45 Article 31 cl3 of the Vienna Convention provides:

> *'3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.'*

46 It would seem to us that the course undertaken in *Thiyagarajah* was to give effect to par (b) in particular.

47 The Minister also submitted that the decision in *NAGV* would cut across provisions such as ss 500(1), 502(1) and 503(1) etc. There is substance to the contention. If, under s 36(2), all persons who are refugees are entitled to a grant of a protection visa, that would be so notwithstanding that they come within the exceptions permitting expulsion under Arts 32 and 33(2). The sections assume that reliance can be placed on those Articles to refuse the grant of or to allow the cancellation of a protection visa.

48 In relation to the issue whether a person can be returned to a country with which they have had no prior connexion, Art 33 does not contain such a condition and we can detect no error in Sackville J's approach to the question. The Tribunal found as a fact that the appellant had access to effective protection in Israel. That she may not desire at present to go there is not a matter relevant to Australia's obligations under Art 33.

CONCLUSION

49 The critical points in *Thiyagarajah* were those summarised by Sackville J in this case. The question posed by s 36(2) is determined by reference to the operation of Art 33. If Art 33 does not prevent Australia from expelling or returning a refugee to the frontiers of another territory, Australia does not owe protection obligations to that person. In our view that was a correct approach and one permitted by the rules of construction of treaties. So

understood Art 33 is not to be taken as prohibiting return to a country unless the refugee has a prior connexion with it.

50 The appeal will be dismissed with costs.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Whitlam, Moore and Kiefel.

Associate:

Dated: 13 February 2004

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Date of Hearing:	4 November 2003
Date of Judgment:	13 February 2004