0907427 [2009] RRTA 1147 (21 December 2009)

DECISION RECORD

RRT CASE NUMBER:	0907427
DIAC REFERENCE(S):	CLF2009/90688 OSF2007/014411
COUNTRY OF REFERENCE:	Iraq
TRIBUNAL MEMBER:	Paul Fisher
DATE:	21 December 2009
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of Iraq, arrived in Australia [in] April 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] June 2009. The delegate decided to refuse to grant the visa [in] August 2009 and notified the applicant of the decision and her review rights by letter dated [in] August 2009.

3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention) and/or under s.36(3) of the Act.

4. The applicant applied to the Tribunal [in] September 2009 for review of the delegate's decision.

5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention.

8. However, s.36(3) provides that 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, unless the person has a well-founded fear of being persecuted in that country for a Convention reason, or has a well-founded fear that the country in question will return the person to another country where he or she will be persecuted for a Convention reason.

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

10. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that

the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].

11. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

12. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

13. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

14. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

15. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

16. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

17. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

18. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

19. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

20. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

21. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

22. The Tribunal has before it the Department's file relating to the applicant.

23. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Background

24. The applicant is a 27 year old Iraqi woman of Assyrian or Chaldean ethnicity and Christian religion. She arrived in Australia [in] April 2009, as the holder of a subclass 300 Prospective Spouse visa sponsored by her fiancé. The fiancé subsequently withdrew his sponsorship, and [in] June 2009 the applicant applied for a protection visa.

25. The visa application indicates that the applicant is an Iraqi citizen seeking protection in Australia so that she does not have to go back to Iraq and Holland, but thereafter only refers to fears of persecution in Iraq.

26. In response to question 41, *why did you leave that country?* the applicant referred to an attached, which reads as follows:

> I fled Iraq with my parents, brother and two sisters, fearing for our lives because of the Islamic extremist terrorist groups. On [date] 2003, we left Iraq and headed towards Syria because my father was a contractor in the [type] club in the Al-Mansour area in Baghdad. My father also owned his own [business] called [name].

> After the fall of Saddam's regime, Ahmad Al-Chalabi and his armed group seized the [type] club and forced my father out by threatening to kill him. A while later, one of the terrorist extremist groups burned down my father's [type] store and also made death threats to my father. These arc the reasons that forced us to leave Iraq.
>
> During the period that I stayed in Syria, I was introduced to an Iraqi named [Mr A]. We fell in love and agreed to get married when the time was right, meaning when we settled into a safe country.
>
> In February 2007, I separated from my family and headed to Holland with some people illegally. After arriving in Holland, I sought refugee status from the Dutch authorities. During my stay, the man I fell in love with was living in Australia so he prepared the papers for me and thus I entered Australia on a prospective marriage visa on [date] 2007.
>
> After my arrival in .Australia I met my fiancé [Mr A] however, two months later I found he had changed dramatically towards me and [in] 2009, [Mr A] surprised me by ending our engagement.
>
> Now I am confused. I cannot go to Holland or to Iraq because; in Holland I lost the privilege of refugee status and in Iraq, especially Baghdad, my life will he in danger and I have nobody there to protect Inc.
>
> I plead to you to compassionately consider my application as my entire family are in Australia except my sister [name] who is in the USA.

27. In response to question 42, *what do you fear may happen to you if you go back to that country*, the applicant replied as follows:

> If I went back to Iraq I will be targeted by those extreme terrorists groups because I am Christian and I have no-one to protect me there.

28. In response to question 43, *who do you think may harm/mistreat you if you go back?* the applicant replied as follows:

> I previously mentioned the Islamic extremist groups.

29. In response to question 44, *why do you think this will happen to you if you go back?* the applicant stated as follows:

> Because I have no one to protect me and I am returning from a foreign country.

30. In response to question 44, *do you think the authorities of that country can and will support you if you go back? If not, why not*', the applicant responded:

> No, I do not think so because the government has failed to keep law and order in Iraq.

31. The visa application was also accompanied by the following:

- A certified copy of the applicant's travel document ("Reisedocument") issued to the applicant by the government of Holland on [date] January 2008 and expressed to be valid until [date] January 2011;

- A number of original letters in the Dutch language dated April 2009, with authorised translations, indicating that the applicant's cost of living allowance paid by her local council under the Work and Social Assistance Act had been terminated following receipt of information that she no longer lived in the municipality.

32. [In] August 2009 an officer of the Department contacted an official at the Dutch consulate in Sydney to try to establish the rights of a hypothetical person in the applicant's position. The Dutch official indicated that such people are not entitled to the cost-of-living allowance while they are not living in Holland, but can re-apply for it when they return there, and that there was no reason why payments would not be re-initiated. The official also said that there are two types of asylum visas, granted for three and five years respectively, and that holders are issued with travel documents valid for corresponding periods. As long as the person has a valid travel document, she is entitled to unrestricted travel to Holland, although the three year document cannot be renewed outside Holland. The Travel document remains valid until a new one is issued (either by Holland or another country) or until it expires, whichever occurs first.

33. The application was refused [in] August 2009, without the applicant having been interviewed. The delegate accepted that the applicant is a national of Iraq, but also noted that she had already been granted asylum in Holland, a country against which she had made no protection claims. The delegate therefore concluded that the applicant had effective protection in a third country, at common law and/or pursuant to s.36(3) of the Act.

Review Application

34. [In] September 2009 the Tribunal received an application for review of the delegate's decision nominating the applicant's sister [name] as the authorised recipient. The review application was accompanied by an undated letter from the applicant and her sister [name] requesting more time in order to obtain additional information including the departmental file, in order that they could instruct a solicitor or migration agent. The request referred to an attached FOI application, but no such application was attached.

35. On 24 September 2009, the Tribunal invited the applicant to a hearing scheduled for 23 October 2009.

36. On 8 October 2009 the Tribunal received a copy of the earlier letter, now dated 8 October 2009, a further letter to the same effect, and a formal request for access to the file under FOI.

37. On 9 October 2009 the applicant was informed that the adjournment request had been declined by the Tribunal The Tribunal declined the request because it:

- took the view that on the information before it, the matter turned on the issue of prior protection;
- considered that there was nothing of relevance on the Tribunal or departmental files which had not either been submitted by the applicant in the first place or else fully set out in the decision of the delegate which had been sent to the applicant, and that the applicant should therefore have had ample information in her possession with which to instruct a lawyer or migration agent; and
- in any event, intended to explain the issues of possible concern to the applicant fully at the hearing and then give her the opportunity to respond and, if required, seek additional time in which to do so.

38. In any event, 14 October 2009 a copy of the Tribunal file was made available to the applicant

First Tribunal Hearing

39. The applicant appeared before the Tribunal on 23 October 2009. The Tribunal hearing was conducted with the assistance of an interpreter in the Assyrian and English languages. The applicant's father, brother and brother in law were present and were nominated as witnesses, but the applicant's sister (and authorised representative) was not present. The applicant was assisted by a male friend, [Mr B], evidently a person with no immigration law experience acting in a private capacity However, the applicant made it clear to the Tribunal that she wanted [Mr B] to assist her.

40. The Tribunal explained to the applicant its role, the purpose of the hearing, and the legal framework against which her application had to be assessed. In particular, the Tribunal explained to the applicant that the issue in dispute was whether she had prior protection in Holland for the purposes of s.36(3).

41. This process was interrupted by [Mr B] raising allegations that the adjournment requests had not been communicated to the presiding member, or else they would have been acceded to, repeating the request for an adjournment, and asserting that the matter was extremely complex, and claiming that the applicant had approached a migration agent who had refused to assist her until the whole file was available. [Mr B] asserted that the applicant had been granted refugee status in Holland against her will, that the matters was very complex, and that a highly qualified lawyer was required to explain her case.

42. The Tribunal assured the applicant that the adjournment request had been considered, and attempted to elicit evidence from her.

43. The applicant indicated that she wanted to speak through [Mr B], and in effect refused to give evidence. Unfortunately, [Mr B], who had indicated at the preliminary stage that he did not wish to give evidence, then sought to convey the applicant's claims on her behalf.

44. A standoff ensued, with the Tribunal wanting to hear evidence from the applicant which it considered relevant to the issues, and the applicant refusing to respond.

45. The Tribunal then sought to put potentially adverse information to the applicant pursuant to s.424AA of the act, but this process was disrupted by [Mr B], and ultimately defeated by the interpreter having to leave due to another booking.

46. The hearing was then adjourned to a date to be fixed, and the Tribunal encouraged the applicant to obtain independent, professional advice.

47. On 26 October 2009 the Tribunal invited the applicant to a further hearing scheduled for 13 November 2009.

48. On 12 November 2009 the Tribunal received a response to hearing invitation along with an appointment of authorised recipient form.

49. On 13 November 2009, immediately prior to the hearing, the Tribunal received the following statement on behalf of the applicant (typographical errors included):

> The applicant and her family left iraq in 2003.They are Assyrian Christians from [Town] in bagdad. All her family came to Australia(father mother brother and sister) One sister was given refugee status in usa with her husband.

> The applicant left Syria on [date] 2007. she thought that she was coming to Australia but the people smuggler brought her to Amsterdam And left her there. She turned herself into authorities and told them she wanted to be with her parents in Australia. She was told unless she signed documents she would be sent back to Iraq. There was an interpreter present who was Lebanese. She could not understand him. She did not intend to claim refugee status in Holland After being released she was supported by her family in Australia with payments of about 350 aust dollars per month.
>
> She came to Australia on a prospective spouse visa. A dispute arose because her intended wanted to live in Sydney and she wanted to live in Melbourne with her family. She has a need to be close to her family which has been caused in part by her experiences in iraq.
>
> She attends a local doctor [Dr A] and also [Dr B]. Reports will be sought from both to establish her mental condition. In addition a [priest] in [Melbourne] who knows the family and their experiences will supply a letter describing the dependence of the applicant on her family.
>
> Finally a request has been made for a copy of the dutch refugee file. In the interests of natural justice the applicant requests adjournment of this case until the copy of the dutch file arrives. And the medical and other reports are available.
>
> It is the applicants case that she did not knowingly apply for refugee status in Holland.

Second Tribunal Hearing

50. The applicant again appeared before the Tribunal on 13 November 2009. The applicant's father, and brother in law were also present, as was [Mr B]. [Mr B] made a written apology for his behaviour at the first hearing which the Tribunal accepted, having ascertained that the applicant desired his presence at the hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Assyrian and English languages. The applicant was represented by her lawyer and migration agent.

51. The applicant's representative handed up copies of a prescription dated [in] November 2009 showing that the applicant is on anti-depressant medication, and appointment card showing that she will be seeing a psychiatrist [in] December 2009, and a report by a psychologist, [Mr D], dated [in] October 2009. The report sets out the applicant's background consistent with her claims, reports the distress she exhibited when describing finding herself stranded in Holland and separated from her family, noting that she expressed suicidal ideation during that period, diagnosing her as having developed post-traumatic stress disorder and separation anxiety, and prognosticating that *her mental health would almost certainly deteriorate, and abruptly so, if she were again separated from her parents.*

52. The applicant's representative indicated that additional reports would also be submitted in support of the application, from a priest, a GP and a psychiatrist.

53. The applicant was asked why she felt that she could not return to Holland. She replied that she has no-one there, and that she had not gone there voluntarily in the first place.

54. The applicant was asked whether there was any reason she could not use the Dutch travel document which had been issued to her. She replied that it is not a matter of the travel document; she just wants to stay in Australia.

55. The applicant was asked whether she thought she would be persecuted in Holland for a Convention reason. She replied that she was not scared, but she was emotionally devastated at the prospect of returning there and couldn't stand it. It doesn't matter where she is, as long as she is with her family. She was taken to Holland against her will.

56. The applicant was asked whether she thought that Holland would send you back to a country such as Iraq where she might face persecution. She replied that she did not know, but that anything was possible.

57. The applicant was asked whether she had taken any steps to return to Holland. She replied that she had not done so, because she doesn't want to go back there.

58. The Tribunal referred the applicant to paragraph four of her original statement, at folio 45 of the departmental file, which suggested that she had voluntarily travelled to Holland and sought refugee status there. The applicant disputed this, asserting that the statement had been prepared by a priest, that there was no interpreter used, and that it was incorrect.

59. The applicant was asked to tell the Tribunal what had in fact happened when she arrived in Holland. She replied that she had not known she was going to Holland. She was taken there by a people smuggler, but didn't actually know where she was going. She was taken as far as the airport and told that she would soon see her parents. To her astonishment she found out that she was in Holland She lost her mind at that point. She was told to sign some forms or else she would have been send back, so she did so. She was in a devastated state of mind and did not understand what she was signing.

60. Her fiancé and brother were in Australia, so they arranged to bring her here by any means.

61. The applicant was asked whether she understood the purposes of signing the documents She replied that at the beginning she thought she was signing something so she could go to Australia. That's what she told the Dutch authorities she wanted to do. There was an interpreter but due to her condition she couldn't focus. Also she couldn't communicate very effectively with the interpreters. She had two interviews; the first interpreter was Lebanese but the second one was Moroccan. Her first language is Assyrian but she was interviewed in Arabic, and in different dialects. Asked how much she had understood of what was said, the applicant reiterated that she had not been in a balanced state of mind.

Section 424AA Warning

62. The Tribunal then put the following potentially adverse information to the applicant for the purposes of s.424AA of the Act.

- The evidence before it indicated that the applicant had travelled to Australia on a Dutch travel document issued to her on [date] January 2008 and valid until [date] January 2011.
- The applicant claimed to have lost the privilege of refugee status in Holland, a claim which seems to have been based on the fact that her cost-of-living allowance was cut off.
- However, [in] August 2009 an officer of the Department spoke with an official at the Dutch consulate in Sydney to try to establish the rights of a hypothetical person in her position. The Dutch official indicated that people who no longer live in Holland are not entitled to the cost-of-living allowance, but can re-apply for it when they return there, and there is no reason why payments would not be re-initiated. The official also said that there are two types of asylum visas, three and five year visa, with corresponding periods of

validity of travel documents. As long as the person has a valid travel document, she is entitled to unrestricted travel to Holland although the three year document cannot be renewed outside Holland. The Travel document remains valid until a new one is issued or until it expires, whichever occurs first.

63. The Tribunal noted that the above information was relevant because it suggested that the applicant has the right to enter and reside in Holland.

64. The Tribunal indicated to the applicant that as a consequence, and in the absence of any evidence that the applicant faces persecution in Holland, or that Holland would expel her to a country where she may face persecution, this information may lead the Tribunal to conclude that s.36(3) of the Migration Act applied to her, that Australia does not have any protection obligations towards her, and that the Tribunal may therefore affirm the decision under review on this basis.

65. At this point the applicant interjected to claim that in Holland she was being killed emotionally.

66. The applicant was then invited to respond to or comment on the above information, and offered the opportunity to request an adjournment before doing so.

67. After a brief adjournment, the applicant indicated that she would like more time in which to obtain her file from Holland, and also to submit psychiatric evidence. She has applied to obtain her file from the Dutch authorities, but is not sure how long it will take. She will inquire and inform the Tribunal.

68. The applicant observed that perhaps Holland can provide her with physical protection, but that she would still experienced mental anguish.

69. The applicant sought and was granted additional time in which to respond to or comment on the above information and provide additional information. The Tribunal agreed to wait at least four weeks before make a decision.

70. The Tribunal also indicated that it would welcome submissions on whether the claim by the applicant, that she obtained Dutch residence status as a result of mistake, fraud or duress, could justify that status being disregarded by the Tribunal, bearing in mind the language of s.36(3) of the Act and in particular the expression *however that right arose or is expressed.*

Post Hearing

71. At the time of decision, no further submissions had been received from the applicant.

FINDINGS AND REASONS

72. The applicant has claimed to be a national of Iraq, and this is consistent with documentary information she submitted in support of her application for the subclass 300 Prospective Marriage visa granted to her [in] April 2009, and with the Dutch Reisedocument on which she entered Australia. In the absence of any evidence suggesting she is a national of any other country, the Tribunal finds that the applicant is a national of Iraq.

73. The applicant has applied for a protection visa, seeking to invoke Australia's obligations under the Convention.

74. However, a preliminary question arises from the fact, conceded by the applicant, that the applicant has been granted asylum in Holland. Consequently, s.36(3) may operate to relieve Australia of any protection obligations it might otherwise have had towards the applicant.

75. While it will usually be convenient to approach an applicant's claims by first considering Article 1 of the Convention pursuant to s.36(2)(a) of the Act, there is no requirement for a decision-maker to be satisfied as to whether or not Australia has "protection obligations" pursuant to s.36(2)(a) before considering the qualification in s.36(3). In an appropriate case, it may be proper for a decision-maker to consider first whether or not Australia is taken not to have protection obligations to an applicant by reason of the operation of s.36(3): *NBGM v MIMIA* (2006) 150 FCR 522 per Black CJ at [20].

76. In determining whether subsection 36(3) of the Act applies to the applicant, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently, and however that right arose or is expressed; whether she has taken all possible steps to avail himself or herself of that right; whether she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

77. On the basis of the evidence before the Tribunal, including the copy of the applicant's current Dutch passport on the departmental file, and information obtained by the Department from the Consulate General of Holland in Australia, the Tribunal finds that the applicant has a legally enforceable right to enter and reside in Holland. The evidence also indicates that the applicant was in receipt of social security benefits in Holland, which are only available while the Beneficiary continues to reside in that country and were terminated when she changed address, but in respect of which the Dutch authorities have expressed the view that there is no reason why they would not be reinstated if and when the applicant re-registers with those authorities This suggests to the Tribunal that the applicant's legally enforceable right to enter and reside in Holland is *a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally*

78. It is apparent from the applicant's claims and submissions that although she may have acquired a legally enforceable right to enter and reside in Holland, it is a right which she did not seek to acquire voluntarily and/or which was acquired without her understanding or informed consent, or even that she was acting under duress as she had no choice but to make the application or be sent back to face persecution. The applicant appears to be arguing that her acquisition of the right to enter and reside in Holland should be held to be vitiated for fraud, mistake or duress.

79. These claims were not advanced in an unequivocal fashion. At various points in her evidence the applicant has claimed that she travelled to Holland and sought asylum there, that she was smuggled there but initially thought she was in Australia, that she understood the process but was too distraught to object, and that she had problems understanding one or perhaps both of the interpreters.

80. The Tribunal does not, however, raise any issue concerning the applicant's credibility. Indeed, it is patent from the manner in which the review application has been conducted, and the delivery of her evidence, that she feels powerless and defers to others who appear to be in

control, as a consequence of which the Tribunal has placed little weight on the inconsistencies in her evidence.

81. The applicant's proposition on one view appears to fly in the face of the philosophical purpose underpinning the Convention, which is to ensure that refugees are afforded protection when and where it is required. For example, Art.1E provides:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

Similarly, Art.2 states that *Every refugee has duties to the country in which he finds himself.*

82. The express words of s.36(3) suggest that the applicant's objections are without substance, providing that the existence of a legally enforceable right to enter and reside in a safe third country relieves Australia of its protection obligations towards the holder of such a right *however that right arose or is expressed*. This implies to the Tribunal that, subject to its enumerated exceptions, s.36(3) is to be applied strictly.

83. To the extent that there is any ambiguity with respect to this phrase, the Tribunal considers that it can be resolved by reference to the Supplementary Explanatory Memorandum to the Border Protection Legislation Amendment Bill 1999 which introduced the provisions in question, and includes the following:

> 1 Australia has comprehensive refugee determination processes in place to fulfil its obligations under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. A significant number of persons seeking asylum in Australia are nationals of more than one country, or have rights of return or entry to another country, where they may reside free from persecution or forced return to the country where they claim they will be persecuted. These persons attempt to use refugee processes as a means of by-passing general immigration requirements to obtain residence in Australia. This practice of seeking protection elsewhere, widely referred to as "forum shopping", represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations. The Government believes that Australia's obligations do not require these persons to be permitted to reside in Australia when they have protection from persecution in another country.
>
> 2 The purpose of these amendments to the Border Protection Legislation Amendment Bill 1999 is to prevent the misuse of Australia's asylum processes by "forum shoppers" These amendments will ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country.

84. This memorandum makes it clear to the Tribunal that the intended application of the new provisions was far reaching. It seems entirely consistent with the stated intention of the legislation to conclude that a person such as the applicant, who has already obtained protection in Holland, is not entitled to obtain it here merely because that is what she would prefer.

85. *MZXLT & Anor v MIAC & Anor* [2007] FMCA 799 concerned a Jewish refugee from Russia whose application had been refused by the Tribunal on the basis that a right arising under Israel's Law of Return enabling Jews to claim residency in that country amounted to a right to enter and reside in that country for the purposes of s.36(3). However, the Federal

Magistrates Court held that the right in question was premised on the expressed desire of the person to invoke the Law of Return and that in the absence of a genuine voluntary expression of a desire to invoke that law, the right could not be regarded as an existing right but rather a conditional or contingent right. As there was not only an absence of an expression of a desire to settle in Israel, but rather, a clear positive assertion on the part of the applicant that she did not desire to settle in Israel, it was wrong to interpret the expression of a desire to settle in Israel as being one of a number of "possible steps" which she should have taken in availing herself of a right to enter and reside in Israel. The Court held that there had been an error of law in interpreting the application of s.36(3).

86. In the present case, however, it is not disputed that the right in question, namely the right to enter and reside in Holland, has already been acquired by the applicant.

87. In any event, concepts such as fraud, duress or mistake appear to have limited application to the review of administrative decisions. This issue was considered by the High Court in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 The High Court upheld an appeal by the applicant in that case, accepting her contention that that the non-attendance at the Tribunal hearing resulted from the fraudulent misrepresentation of her representative, Mr Hussain, to the effect that it would not be in her interests to attend the hearing. Mr Hussain also claimed to be a solicitor and migration agent when in fact he was neither. In reaching its decision, however, the court emphasised the narrow scope for the aplication of such principles as fraud in the context of administrative law. The Court made the following observation at [53]:

> The significance of the outcome in this appeal should not be misunderstood. The appeal has turned upon the particular importance of the provisions of Div 4 of Pt 7 of the Act for the conduct by the Tribunal of reviews and the place therein of the ss 425 and 426A. In the Full Court French J correctly emphasised that there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made[66]. The outcome in the present appeal stands apart from and above such considerations.

88. The High Court approving the dissenting judgment of French J in the Full Court (*SZFDE v Minister for Immigration and Citizenship* (2006) 154 FCR 365). In that case, his Honour made the following observations:

> 121 The common law proposition that fraud may vitiate an administrative decision made in the exercise of a statutory power applies as part of the common law of Australia as it does as part of the common law of England It has not been formulated with precision. Its extension to circumstances 'analogous to fraud' covers a range of situations which are not clearly delineated. It appears to cover 'reckless' conduct. As Aronson, Dyer and Groves observed, after referring to the acceptance in *Al-Mehdawi* that decisions of inferior courts and tribunals could be reviewed at the instance of one party for the fraud, perjury, duress or even simply improper behaviour of another party:
>
> *'The principle underlying these cases however is still unclear.'*
>
> It is sufficient to say that a decision made in the purported exercise of statutory powers may be quashed by certiorari where the decision has been induced or affected by fraud or by circumstances analogous to fraud.

> 122 Fraud and 'analogous circumstances' will justify the grant of certiorari if they 'distort' or 'vitiate' the statutory process leading to the impugned decision to such an extent that it can be said that the decision was induced or affected by that fraud or those circumstances. There was support for that approach in *Barrett*. The distortion can occur in more than one way. A decision-maker may be misled by false material dishonestly put before it. Relevant material favourable to a person to be affected by the decision may be deliberately and dishonestly withheld by a third party who would reasonably be expected to disclose it either in the discharge of a statutory duty or by reason of that party's official responsibilities in the administration of the decision making process. In either case the decision-making process can be said to have been distorted by fraud in a way that induced or affected the decision. The English authorities would support an extension of that proposition to a class of case involving the tender of misleading material or the non-disclosure of favourable material even though no dishonesty was involved.
>
> 123 Where a decision-maker acts upon a false impression created as the result of a fraud affecting the conduct of a party before it, then the resulting decision can be said to be induced or affected by the fraud. So a response to an invitation to an oral hearing where the response is in the negative and constitutes a consent to disposition without such a hearing may create the false impression that that consent was voluntarily given when in truth it was obtained by fraud. The proposition that fraud unravels everything in that case applies to the consent upon which the decision-maker acts as well as the decision which results.

89. In the present case, the Tribunal has no jurisdiction to set aside the decision of the Dutch authorities, but is implicitly being asked to apply Australian legal principles to conclude that the decision and the rights which flow from it should be disregarded on the basis that it should be held to have been vitiated for reason of the fraud, mistake or duress outlined in the applicant's evidence. Put another way, the phrase *however that right arose or is expressed* in s.36(3) should not be construed as excluding those rights acquired: without the applicant's knowledge or consent; in circumstances where the applicant was mistaken (for example, as to the identity of the country bestowing the right); or where the applicant, by reason of her fear of persecution, had no meaningful choice but to accept the jurisdiction of the country of asylum.

90. The authorities suggest, however, that administrative law remedies are available where rights have been denied, or where clear disadvantage has flowed from, for example, the fraud committed on the applicant or the decision-making body. In the present case, the applicant left Iraq, and subsequently Syria, seeking asylum, and that is what she was granted. The only other outcome, whereby the applicant could have refused to make the application, would have resulted in a serious detriment to her, as she would have been returned to Syria or possibly even to Iraq, where she could have faced persecution.

91. Accepting the applicant's contention would also have the perverse effect of imposing a much higher standard on the Dutch authorities, by presumably expecting them to recognize that she had not arrived at her preferred destination and accommodating her desire to be forwarded to - and have her protection claims processed by – Australia. This would impose a far higher and more onerous standard on the Dutch authorities than is required of and practiced by the Australian authorities. If an undocumented arrival in Australia refused to make a claim for protection when offered the opportunity to do so, despite fearing persecution in her country of nationality, and there was no other basis for her to enter and remain in this country, then she would undoubtedly be returned at least to the country of embarkation, and possibly to the country of nationality, particularly if no fear of Convention persecution had been expressed.

92. The Tribunal therefore finds that s.36(3) does apply to the applicant despite the uncertainty surrounding the manner in which she acquired her Dutch residency status.

93. There is no evidence before the Tribunal to suggest that the applicant has taken any steps whatsoever to avail herself of her right to enter and remain in Holland; in fact she has conceded that she has not taken any such steps because she wishes to remain in Australia. The Tribunal finds that she has not taken all possible steps to avail herself of that right.

94. There is no evidence before the Tribunal to suggest that the applicant has a well founded fear of being persecuted in Holland, whether for a Convention or any other reason. She has spoken only of the mental anguish she will experience as a consequence of being separated from her family. While the Tribunal accepts that mental anguish could amount to serious harm for the purposes of s.91R(1)(b), there is no suggestion that this is something which would involve systematic and discriminatory conduct for the purposes of s.91R(1)(c), nor that the essential and significant reason for such harm would be a Convention reason for the purposes of s.91R(1)(a). Consequently, the Tribunal finds that the harm the applicant fears if she returns to Holland does not amount to persecution for the purposes of s.91R.

95. Similarly, there is no evidence before the Tribunal to suggest that the applicant is at risk of refoulement from Holland to Iraq, given that Holland has recognised her to be a refugee and reaffirmed her entitlement to return there.

96. The Tribunal finds that the applicant has a right to enter and reside in Holland and has not taken all possible steps to avail herself of that right. Furthermore, the Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason in Holland, or of being returned from that country to a country where she has a well-founded fear of being persecuted. Accordingly, Australia does not owe protection obligations to the applicant: s.36 of the Act.

97. It is therefore unnecessary to undertake an assessment of the substantive merits of the applicant's claim for refugee status with respect to Iraq.

MINISTERIAL INTERVENTION PURSUANT TO S 417 OF THE ACT

98. The Tribunal notes that the applicant has been accepted as a refugee by Holland.

99. The Tribunal accepts that the applicant was misled by the people smuggler who took her from Syria to Holland, and that she was devastated and experienced emotional hardship upon learning that she had ended up in a different country to the rest of her family. In light of the medical evidence submitted to date, the Tribunal accepts that the applicant's mental health is at risk of deteriorating significantly if she is sent back to Holland

100. The Tribunal also observes that, but for the fact that the applicant has one sibling residing in the United States, she would appear at face value to meet the criteria for a remaining relative visa, were she to be sponsored for such a visa by one of the two parents and five siblings who reside in Australia.

101. In light of the above, it may be appropriate for the Minister to consider intervening in this matter on public interest grounds pursuant to s 417 of the Act, by responding to the applicant's predicament in a compassionate manner and making a more favourable decision than that which the Tribunal is making

102. Any intervention remains, however, a matter entirely at the Minister's discretion.

CONCLUSIONS

103. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

104. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. PRMHSE