FEDERAL COURT OF AUSTRALIA

SVYB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 15

MIGRATION – application for permanent protection visa at expiration of temporary protection visa – application of Article 1C(5) of the Refugees Convention and its interaction with s 36(2)(a) of the *Migration Act 1958* (Cth) – comity – decisions of single Judges of the Federal Court of Australia followed

Migration Act 1958 (Cth) ss 36(2), 36(3)
Migration Regulations 1994 (Cth) Sch 2 subclass 866
Refugees Convention 1951, Article 1C(5)

SWLB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 14 cited
NBGM v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1373 followed
QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1448 followed
SWNB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1606 followed

SVYB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

No S 103 of 2004

FINN J
ADELAIDE
20 JANUARY 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **S 103 OF 2004**

BETWEEN:	**SVYB** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**FINN J**
DATE OF ORDER:	**20 JANUARY 2005**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

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

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SOUTH AUSTRALIA DISTRICT REGISTRY **S 103 OF 2004**

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

JUDGE:	**FINN J**
DATE:	**20 JANUARY 2005**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 This matter was heard together with *SWLB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 14. Save in one minor respect, they raise like issues the principal of which, it is frankly conceded, is inconsistent with a number of first instance decisions of this Court and notably *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373, *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1448 and *SWNB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1606. It is accepted that, as a matter of comity, I will follow these decisions unless I am satisfied they are clearly wrong which I am not.

2 That principal issue can be stated shortly. An applicant for a temporary protection visa satisfies the respondent Minister that he or she is a person to whom Australia owes protection obligations under the Refugees Convention 1951: see s 36(2)(a) of the *Migration Act 1958* (Cth) ("the Act"). In consequence a temporary protection visa is granted. The applicant then applies for a permanent protection visa on the expiration of the temporary visa. For that visa to be granted, the Minister again must be satisfied that, at the time of this decision: see *QAAH*, at [21] ff; the applicant is a person to whom Australia owes protection obligations: see Schedule 2, Subclass 866.22 of the Migration Regulations and s 36(2) of the Act.

3 The Refugees Convention ceases to apply to a person owed protection obligations if that

person can no longer continue to refuse to avail himself of the protection of the country of his nationality "because the circumstances in connection with which he has been recognised as a refugee [i.e. as being owed protection obligations] have ceased to exist": Article 1C(5) of the Refugees Convention ("the Cessation clause").

4 In the three cases to which I have referred above, as also in this matter and in *SWLB*, the interpretation of the Cessation clause and the manner of its interaction with the s 36(2)(a) criterion for a protection visa (i.e. that the applicant is a person "to whom the Minister is satisfied Australia has protection obligations") have been put in controversy in consequence of ameliorating changes in the relevant circumstances of an applicant's country of nationality between the time at which a temporary protection visa was granted and the time of which an application for a permanent protection visa was to be determined.

5 In *NBGM*, Emmett J dealt with this matter at some length. The principles he stated, which I consider to be clearly correct, were conveniently summarised and adopted by Selway J in *SWNB* at [12]. I respectfully adopt what his Honour said there:

> *"1. Where the Tribunal is considering the grant of a fresh visa, including a permanent protection visa, the Tribunal is required to determine at the time of its decision whether the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Article 1C(5) does not necessarily have any role in that decision. I note that Dowsett J reached a similar conclusion in the case of* QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 1448.*
>
> *2. In making that decision, the tribunal may start with a position that the Refugees Convention applied to the applicant as at the date he was granted a temporary protection visa and then ascertain whether the circumstances in connection with which the applicant had been recognised as a refugee had ceased to exist.*
>
> *3. Even if article 1C(5) of the Refugee Convention was applicable, it did not require that there be a 'sustainable, effective and durable' change; merely that there had been a change such that the applicant no longer had a well-founded fear of persecution if he was returned to his country of origin.*
>
> *4. Section 36(3) of the Act should be interpreted in its usual and ordinary meaning. So interpreted, it adds little to the terms of section 36(2) of the Act where the issue involves the return of the applicant to his country of nationality."*

6 Save in one immaterial respect to which I will refer below, the Refugee Review Tribunal ("the Tribunal") in the present manner applied the above principles. Given the view I take of those principles I am satisfied, contrary to the applicant's contention, that the Tribunal committed no jurisdictional error in so acting. I accept that, in this at least, the applicant's case has been designed to preserve its position pending a possible future challenge elsewhere to the correctness of *NBGM*.

7 The Cessation clause issue, if I can so describe it, is not the sole ground advanced in this application. For this reason, it is necessary to refer in a little detail to the factual setting of this matter.

THE FACTUAL SETTING AND THE TRIBUNAL'S DECISION

8 The applicant is from Afghanistan. He is of the Hazara ethnic group; is a Shia Muslim; and comes from the Jaghori district of Ghazni province. He arrived in Australia in November 1999 and shortly thereafter applied for, and was granted, a temporary protection visa.

9 In the decision granting that visa the Minister's delegate found that the applicant's fear of being persecuted related to the Taliban's persecution both of Hazaras (i.e. for reasons of race) and of Shias (i.e. for reasons of religion) and was well-founded.

10 The applicant later applied for a permanent protection visa. By the time that application was determined by the Minister's delegate, the Taliban has been removed from power in Afghanistan. The delegate found that at that time the applicant did not have a well founded fear of persecution by the Taliban or any other group. Review of that decision was sought in the Tribunal.

11 The approach taken by the Tribunal was to consider first whether the circumstances in connection with which the applicant was originally recognised as a refugee had ceased to exist. The Tribunal noted that (i) notwithstanding the Taliban's removal from power remnants of the Taliban were present in Afghanistan but the Taliban no longer existed as a political movement; and (ii) the Department of Foreign Affairs and Trade had advised that the Taliban does not pose a direct threat to the civilian population, its current targets being the Coalition and Government security forces and international aid workers.

12 The Tribunal considered on the basis of country information that there was no real chance of the Taliban re-emerging as a viable political movement in Afghanistan in the reasonably foreseeable future. It did not accept that there was a real chance of the applicant being persecuted by the elements of the Taliban remaining in Afghanistan because he is a Hazara or a Shia Muslim. It concluded its consideration of the Cessation clause with the finding that:

> *"… because the circumstances in connection with which the Applicant was recognised as a refugee – namely his fear of the Taliban – have ceased to exist, he can no longer continue to refuse to avail himself of the protection of his country of nationality for those reasons. Therefore, Article 1C(5) of the Convention applies to the Applicant."*

13 The Tribunal then considered whether, irrespective of Article 1C(5), s 36(3) of the Act would in any event result in the applicant not being owed protection obligations at the time of its decision in respect of the circumstances in connection with which he was originally recognised as a refugee. Section 36(3) deems Australia not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself of a right to reside in a country in which he did not have a well-founded fear of persecution for a Convention reason. The Tribunal found that the changed circumstances in Afghanistan attracted s 36(3).

14 As Emmett J noted in *NBGM* at [59], it is difficult to see what relevance s 36(3) has in such circumstances. In a case such as the present it merely masks the anterior determination that, because the applicant no longer has a well-founded fear of persecution in Afghanistan in relation to those matters that resulted in his previously being recognised as a refugee, he would not now satisfy the s 36(2) criterion in respect of those matters. That the Tribunal so relied on s 36(3) has no operative vitiating effect on its decision. It was an unnecessary matter to be considered.

15 The Tribunal clearly recognised that, though the applicant could no longer continue to be recognised as a refugee on the basis of the original finding, his present situation may nonetheless have entitled him to a protection visa. The matter was put this way:

> *"… it is still necessary for me to consider for the purposes of Article 1A(2) of the Convention whether, having regard to the situation in Afghanistan as at the date of this decision, the Applicant has a well-founded fear of being persecuted for one of the five reasons set out in the Convention (but for reasons unrelated to the circumstances in connection with which he was originally recognised as a refugee) if he returns to Afghanistan now or in the reasonably foreseeable future."*

16 The claims of persecution made by the applicant evolved over time and with the change of migration agents. At the time of its decision, the Tribunal noted that he claimed to fear being persecuted on the bases of seven profiles all but one of which drew on UNHCR documents identifying persons who may be at risk of violence, harassment or discrimination in Afghanistan and some of which bore "only a tenuous relationship to the Applicant's own circumstances". Nonetheless the Tribunal devoted twenty-two pages of its reasons to the consideration and rejection of these various claims. His principal claim based on political opinion was rejected for reasons of credibility. The Tribunal took the view, which it illustrated, that the applicant was prepared to tailor his evidence to what he perceived to be his advantage without regard for the truth.

17 Claims which were related to race, religion and particular social groups were rejected on the basis of country information or on the absence of contemporary evidence which it could accept to support the claims made.

18 The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason if he returned to Afghanistan in the reasonably foreseeable future. It affirmed the decision not to grant him a protection visa.

THE ADDITIONAL GROUNDS OF "APPEAL"

19 The Cessation clause grounds apart, the Tribunal's decision was challenged in the application on a raft of grounds which, in the submissions ultimately made, were reduced to the following three matters which I will consider in turn.

20 First, it is alleged that the Tribunal incorrectly considered that the applicant's claimed fear of persecution by the Taliban related to the Taliban as a government and not as a non-State body. At page 12 of its Reasons: CB323; the Tribunal referred explicitly to this very matter. In so doing it noted this very criticism had previously been made of it by the applicant's representative – a criticism which it proceeded to refute. This ground is baseless.

21 Secondly, it is alleged (a) that the Tribunal's decision was so unreasonable that no reasonable person properly applying the law could have made it; and (b) the Tribunal's findings were based on no evidence. I note immediately that, confronted with the obvious, the latter of these

was abandoned. It simply cannot fairly be said that there was no evidence for the findings made.

22 The basis of the alleged unreasonableness in the decision was, essentially, that the country information before the Tribunal evidenced a lack of law and order in Afghanistan, as also chaos, violence and discrimination and it disclosed the Taliban's implication in this. Though the violence etc may not have been practised specifically for a Convention reason, when one acknowledges that the Taliban was still there and in circumstances where there was no effective state protection against harm, the Tribunal could not have come to a conclusion that there was no basis for a well-founded fear for a Convention reason into the reasonably foreseeable future.

23 The respondent's counter to this is to accept that while there was no evidence of "a vast amount of violence" in Afghanistan, it is not the evidence that the violence was directed to Hazaras by the Taliban or by anyone else for a Convention reason and that that was acknowledged in the approach of the Tribunal.

24 The country information, in my view, does not lead to the inevitable conclusion that the risks confronting Hazaras and Shias as citizens in Afghanistan were being confronted for Convention reasons. I do not consider that the Tribunal erred in the manner alleged.

25 Thirdly, and this seems in substance to involve a re-packaging of the unreasonableness submission, it is said the Tribunal must have misapplied the well-founded fear test. All I need say of this is that it was open on the evidence for the Tribunal to conclude that there was not a real chance of persecution **for a Convention reason**.

26 I will order that the application be dismissed with costs.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 20 January 2005

Counsel for the Applicant:	Mr PC Charman
Solicitor for the Applicant:	Hamdan Lawyers
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	8 December 2004
Date of Judgment:	20 January 2005