FEDERAL COURT OF AUSTRALIA

QAAT v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 968

MIGRATION – protection visa – applicant refused permanent visa following grant of two temporary protections visas – application to review decision of the Refugee Review Tribunal under s 39B *Judiciary Act 1903* (Cth) – whether the Tribunal erred in failing to have regard to the second temporary protection visa when considering application for permanent visa – whether Tribunal erred in its consideration and application of Article 1C(5) of the *Convention relating to the Status of Refugees* – whether the Tribunal erred in failing to consider the inability of the State of Afghanistan to protect applicant from persecution – whether the Tribunal erred in finding that the applicant ceased to be a member of a particular social group for Convention purposes – whether the Tribunal's decision is affected by unreasonableness for failing to take into account the most recent country information

STATUTES

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) ss 65(1), 36(1), 36(2), 36(3), 36(4)

CASES

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 Cited
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 Cited
Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290 Cited
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 Dist
Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 54 Cited
Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 393 Cited
NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6 Foll
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10 Cited
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1373 Foll
QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1448 App
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106 of 2002 v Minister for Immigration and Multicultural Affairs (2003) 198 ALR 59 Cited

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002 (2003) 211 CLR 441; [2003] HCA 1 Cited

SWNB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1606 Cited

OTHER AUTHORITIES

Convention relating to the Status of Refugees, 189 UNTS 150 (Geneva, 28 July 1951) Articles 1A(2), 1C(5), 1

Protocol relating to the Status of Refugees, 606 UNTS 267 (31 January 1967)

QAAT v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
QUD 238 of 2004

KIEFEL J
BRISBANE
15 JULY 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 238 OF 2004**

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

JUDGE: **KIEFEL J**

DATE OF ORDER: **15 JULY 2005**

WHERE MADE: **BRISBANE**

THE COURT ORDERS THAT:

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

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

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QUEENSLAND DISTRICT REGISTRY **QUD 238 OF 2004**

BETWEEN:	**QAAT** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGE:	**KIEFEL J**
DATE:	**15 JULY 2005**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 The applicant is an Afghanistan national of Hazara ethnicity and a Shi'a Moslem. He lived in Jaghoori in the province of Ghanzi in Afghanistan before he came to Australia. The applicant arrived in Australia on 10 November 1999 and on 26 February 2000 lodged an application for a protection visa class XA, sub-class 866 on the grounds that as an Hazara on the list held by the Taliban of persons involved in civil defence groups and possessing a machine gun, he feared persecution from the Taliban who then controlled his district and large areas of Afghanistan. He feared that if he were to return to Afghanistan he would be killed by the Taliban. The visa sought was a permanent visa.

2 On 14 June 2000 the applicant was granted a protection visa class XA, sub-class 785 temporary protection visa on the bases that he had a genuine fear of being persecuted for reasons of religion, ethnicity and imputed political opinions by the Taliban authorities. He was therefore a person to whom Australia had protection obligations under the Refugees Convention (*Convention relating to the Status of Refugees*, 189 UNTS 150 (Geneva on 28 July 1951) and *Protocol relating to the Status of Refugees*, 606 UNTS 267 (31 January 1967)). The visa was valid for three years.

3 The applicant applied again for a permanent visa on 31 July 2000. The application became eligible for consideration in December 2002, it being a requirement that an applicant hold a

temporary protection visa for a period of thirty months. A letter was sent to the applicant at this time but was returned unopened.

4 A further letter was sent on 27 March 2003 to the applicant advising that his application for the permanent visa was being processed. It enquired whether he had any more information relevant to his application or whether there had been a change in the information already provided. The applicant responded by forwarding a statutory declaration dated 30 April 2003. In addition to the claim that it was unsafe for him to return because he was Hazara and Shi'a Moslem, he claimed that he would suffer harassment from his ex-brother-in-law and persecution from people who had worked for the Taliban in the district and were still in power, having changed sides.

5 On 4 June 2003 the applicant was granted a further temporary protection visa. He had not made any application for it. His current visa was due to expire. The applicant was advised of this by letter dated 6 June 2003. The letter contained the following advice:

> *'I am writing to advise you that your status as a Temporary Protection Visa (TPV) holder has been extended so that you will keep this status until a final decision has been made on the further protection visa application you have lodged. To extend your TPV status, you have been granted a Protection (Class XC) visa (subclass 785)(Temporary Protection) visa). This visa allows you to remain in, but not re-enter Australia until your further application for a protection visa is finally determined.*
>
> *Once the further protection visa application you have lodged has been finally determined, the new TPV you have been granted will cease and your future immigration status in Australia will then depend upon the outcome of the protection visa application you have lodged.*
>
> *Under amendments to the Migration Regulations 1994 which commenced on 1 November 2002, you were deemed to have made an application for this (Protection) (Class XC) visa because you were the holder of a subclass 785 (Temporary Protection) visa granted before 19 September 2001 and you had made an application for a Protection (Class XA) visa.*
>
> …'

6 A document entitled '*Decision on Protection (Class XC) (Subclass 785) Visa Application*' was also produced by the respondent. It was dated 4 June 2003 and was in these terms:

> *'I am satisfied that the persons named in the attached schedule meet the deeming requirements in regulation 2.08F and are applicants for a Protection (Class XC) subclass 785 temporary visa.*

> *I am satisfied that the applicants named in the attached schedule meet the requirements in subsection 36(2) of the Migration Act in Part 785 of Schedule 2 of the Migration Regulations.*
>
> *Accordingly I grant the applicants named in the attached schedule a Protection (Class XC) subclass 785 temporary visa.'*

7 No schedule was produced but it seems to be common ground that the decision relates to the applicant.

8 With respect to the application for a permanent protection visa, by a letter dated 20 August 2003, the delegate invited the applicant to attend an interview with a view to providing any new information relating to his application. The letter advised:

> *'As you may be aware the situation in Afghanistan has changed substantially since you were granted your Temporary Protection visa.*
>
> *It is your responsibility to understand any changes that have occurred in your country and to determine whether those changes affect you.'*

9 The applicant attended that interview on 17 September 2003. On 9 October 2003 the applicant's migration agent provided written submissions. On 16 March 2004 the delegate refused the application for a permanent visa. On 14 April 2004 the applicant applied to the Refugee Review Tribunal ('the Tribunal') for a review of that decision. On 20 October 2004 the Tribunal handed down its decision made on 29 September 2004. It affirmed the decision not to grant a protection visa.

THE LEGISLATION AND CONVENTION

10 Section 65(1) of the *Migration Act 1958* (Cth) ('the Act') provides that after considering a valid application for a visa, the Minister must grant the visa if satisfied that the relevant criteria have been satisfied. The Minister must refuse to grant the visa if not satisfied.

11 Section 36(1) of the Act provides that there is a class of visas to be known as protection visas. Subsection (2) provides a criterion for such a visa. Relevantly it provides:

> *'(2) A criterion for a protection visa is that the applicant for the visa is:*
> *(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees*

Convention as amended by the Refugees Protocol; …'

Subsection (3) provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail themselves of the right to enter and reside in any country apart from Australia including countries of which they are a national. However, subs (4) provides that if they have a well-founded fear of being persecuted in the country, for Convention reasons, subs (3) does not apply.

12 Article 1A(2) of the Refugees Convention defines a refugee as a person who, having a well-founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or particular opinion, is outside the country of his or her nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country. Article 1C(5) however provides that the Refugees Convention shall cease to apply to a person falling under the terms of Article 1A if:

> *'(5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;'*
>
> (referred to in these reasons as 'the cessation clause')

13 I turn then to the provisions relating to the temporary protection visa which was issued to the applicant on 4 June 2003. Regulation 2.08F of the Migration Regulations 1994 ('the Regulations') *'Certain holders of Subclass 785 (Temporary Protection) visas taken to have applied for Protection (Class XC) visas'* provides:

> *'(1) Subregulation (2) applies to a person only if:*
>
> *(a) the person holds a Subclass 785 (Temporary Protection) Visa that was granted before 19 September 2001; and*
> *(b) the person is in Australia but is not in immigration clearance; and*
> *(c) the visa has not been cancelled; and*
> *(d) within 36 months after the date of grant of the visa, the person makes, or has made, an application for a Protection (Class XA) visa; and*
> *(e) the application has not yet been finally determined.*
>
> *(2) The person is taken also to have applied for a Protection (Class XC) visa on the later of:*
>
> *(a) the day when he or she makes, or made, the application mentioned in paragraph (1)(d); and*

(b) 1 November 2002.'

14 The Explanatory Statement for Statutory Rules 2002, Number 213 says with respect to this amending regulation:

> *'This amendment seeks to ensure that a person granted a Subclass 785 (Temporary Protection) visa before 19 September 2001 can receive the equivalent protection and benefit arrangements, where they have an unresolved further application for a protection visa, as were provided for persons granted a Subclass 785(Temporary Protection) visa on or after 19 September 2001.*
>
> *Statutory Rule 246 of 2001, which took effect on 19 September 2001, inserted a new 'when visa is in effect' provision which ensured that a Subclass 785 (Temporary Protection) visa would remain in effect beyond the normal 36 month validity period in certain circumstances. These circumstances were where the holder made an application for a Protection (Class XA) visa within the 36 month period from the date of the grant of his or her Subclass 785 (Temporary Protection) visa. In these circumstances, the Subclass 785 (Temporary Protection) visa permitted its holder to remain in Australia until the day on which the Protection (Class XA) visa application was finally determined.*
>
> *The purpose of this amendment is to ensure that persons mentioned in new subregulation 2.08F(1), who are taken to have applied for a Protection (Class XC) visa, will be able to maintain their status as Subclass 785 (Temporary Protection) visa holders while their Protection (Class XA) application is decided. Importantly, this means that they will continue to access benefits, such as work rights, Medicare and Special Benefit payments, while awaiting the final determination of their Protection (Class XA) application.*

15 In relation to a subclass 785 (temporary protection visa) the primary criteria to be satisfied include (reg 785.211) that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

THE TRIBUNAL DECISION

16 At the hearing, the applicant had stated that he needed protection for three reasons: there was no security in Afghanistan after the collapse of the Taliban; warlords and regional fighters had taken their place and the central government was not powerful. Secondly, his sister had married one of the local leading Wahdat commanders whom she had subsequently divorced. Her ex-husband was putting the family under pressure. Finally, people who had worked for the Taliban were still in charge, having changed sides.

17 Following the hearing the applicant's migration agent summarised the applicant's claims:

'• *Mr* [QAAT] *is a Hazara and a Shia from the Jaghoori district of Ghanzi province in Afghanistan;*

- *Following the fall of the Taliban, that area is under the control of the Harakat-e-Islami, a group that cooperated with the Taliban when they were in power (refer UNHCR update on the situation in Ghanzi Province, May 2004):*

> In reference to the July 2003 District Profile on Jaghoori District in Ghanzi province, it is stated that Jaghoori is 100% Hazara but this does not mean that it is therefore not subject to risk of Taliban or ethnically based persecution. The District Profile of July 2003 indicates that Jaghoori District neighbours Northern Zabul Province, where there has been significant recent upsurge of Taliban activity.

- *Mr* [QAAT's] *former brother-in-law is a commander in the Harakat-e-Islami in his local area;*

- *The main problems for civilians in this district are described by UNHCR in the same report:*

> Main concerns of the population: robberies and crimes related to personal enmities; pressure, extortion of crops, food, firewood and illegal taxation by armed elements, by local soldiers and commanders affiliated with Nasr in Maknak village in Malistan district, and in some villages in Nawur, reportedly by the District Administrator; abuses reported to take place mostly during the autumn and winter seasons and caused by the Head of Police, particularly in villages in Jaghouri district.

- *In addition to the general problems faced by Hazara villagers in Jaghori, Mr* [QAAT's] *family faces the additional problem of persecution at the hands of a Harakat commander with a 'personal enmity' towards them caused by Mr* [QAAT's] *sister's refusal to live as his second wife and her family's support for her decision to divorce him; and*

- *The persecution of the family for this reason was sufficiently grave to force Mr* [QAAT's] *brother to also flee Afghanistan.'*

18 The Tribunal had regard to independent country information. It commenced with a reference to the US State Department's advice that during most of 2001 the Taliban controlled approximately 90 per cent of the country but by mid-November 2001 they had been removed from power. The UNHCR had advised, with respect to the Taliban regrouping in the Northern Zabul Province, that the strengthening of the Taliban in this area did not reach the

Hazara areas of Jaghoori District and it was unlikely they would do so without open conflict with the Wahdat groups. In February 2004 the UNHCR advised that in some districts of Ghanzi province, the Taliban were active and carrying out activities against persons working with NGO's and also with the government. The Tribunal then had regard to an expert on the Hazaras of Afghanistan, Dr Mousavi, who expressed the opinion that Jaghoori was under the control of the Wahdat party Khalili faction and that its power lies in the hands of two commanders of that faction. Although there was at present little direct confrontation and fighting, the situation remained highly unstable and volatile with respect to powerful local commanders changing their alliances. It advised that these leaders are suspicious of the people of Jaghoori for their betrayal of them and their acceptance of a Taliban incursion into the area, previously these leaders were also linked with crime. On 26 September 2003 the UNHCR field office in Ghanzi provided an update to the Tribunal. The power structure in Ghanzi province showed that there was now a leader who had put into place a structured administration. He had resisted the Taliban and enjoyed the support of the Americans. It went on:

> *'Official Heads of Districts and police have been appointed in most of the 18 districts of the province in year 2003, including Hazara-inhabited and* ruled *districts of … Jaghori … . These districts had been since the fall of* Taliban *ruled by self-appointed warlords. Reports of abuses were collected in this district during year 2002, authorities abusing their power to extort money, crop, land and in a few instances, to kidnap women.'*

19 An official district administrator had been appointed in Jaghoori district at the end of June 2003 by the Central and Provincial government. He was not connected to any party nor any branch of Hezb-e-Wahdat. This appointment had the support of the population. More than sixty policemen were officially working under his command. Although his position was still weak he enjoyed a good reputation.

20 A UNHCR advice of 26 September 2003, also referred to by the Tribunal, was that although the local population stated they had suffered ill treatment of the Talibans under their rule, since the fall of Taliban rule there were no reports of any ill treatment of Jaghoori inhabitants by other ethnic groups.

21 The Tribunal accepted that the applicant was originally recognised as a refugee in 2000 essentially because he would have been persecuted by the Taliban authorities because he is an

Hazara and a Shi'a Moslem and that he would have been forced to fight for the Taliban or be killed if he refused. However the independent evidence, which it had cited and accepted, indicated to it that the Taliban were removed from power by mid-November 2001. It went on:

> *'… The Tribunal accepts that remnants of the Taliban remain active in Afghanistan, but the independent information cited above indicates the Taliban no longer exists as a coherent political movement. While these armed remnants may cause security problems for the Government and for security forces engaged in combating them, it is now three years since the Taliban was removed and the Tribunal does not accept that there is any real chance of the Taliban re-emerging as governing authority in Afghanistan in the reasonably foreseeable future or otherwise be in a position to exercise control in the matter it did at the time the Applicant left Afghanistan.*
>
> *On the basis of all the material before me concerning the circumstances in connexion with which the Applicant was recognised as a refugee, I find that he can no longer continue to refuse to avail himself of the protection of Afghanistan because those circumstances have ceased to exist. Therefore, Article 1C(5) of the Convention applies to the Applicant.'*

22 The Tribunal considered that it followed that s 36(3) of the Act applied.

23 Despite its finding that the cessation clause of the Refugees Convention applied, the Tribunal nevertheless considered it necessary to determine whether the applicant is a person to whom Australia owes protection obligations.

24 The Tribunal accepted that the applicant was once persecuted by the Taliban and that the ex-husband of his sister is harassing his family. However, independent country information accepted by the Tribunal did not support his claim to fear persecution from the Taliban (or former members of the Taliban) now. It did not accept the additional claim that he would be persecuted by reason of his ethnicity or because his family or he did not oppose the Taliban sufficiently. For the same reason it did not accept the applicant's claim that he would face persecution from people who worked with the Taliban in Jaghoori and who are now in power.

25 The applicant's first reason for requiring protection stated at the hearing, namely that *'there is no security in Afghanistan'*, was regarded by the Tribunal as not an unreasonable statement and as a general comment on the situation in that country. It did not however follow that there was persecution or that he had faced persecution.

26 So far as concerned the harassment from his ex-brother-in-law, this was regarded by the Tribunal as raising a question of nexus with the Refugees Convention. The reasons were advanced by the applicant in connexion with his ex brother-in-law's ('the Commander') pressuring harassment of him and his family. The Commander had demanded the return of a rifle which the applicant has said he had already returned to Wahdat officials. His father had denied any liability and deflected blame to the applicant. His parents could therefore live safely. The applicant also said that this complaint by the Commander was an excuse to renew his threats against the applicant's family because his sister had left him, she had refused to live with his second wife and his family had supported her divorce. The migration agent had suggested to the Tribunal that the applicant's family should be considered as a particular social group for Convention purposes. The Tribunal held that such a claim could not be sustained in the present case since, according to the applicant, his father had apparently convinced the Commander not to trouble him about the rifle and there was therefore no group. In any event the essential and significant reason for the Commander's actions was the anger and humiliation he felt because of his ex-wife's decision not to accept his taking a second wife. The claim for the missing rifle was a pretext for the harassment. These actions were not for a Convention reason.

27 Other grounds dealt with by the Tribunal are not relevant on this appeal.

APPLICATION UNDER SECTION 39B JUDICIARY ACT 1903 (CTH)

28 The grounds of the application are now narrowed to the following issues:

1. The importance of the grant of the second temporary protection visa in applying the cessation clause.
2. The inability of the state of Afghanistan to protect the applicant from persecution.
3. The need to use the most recent country information: unreasonableness.
4. The family as a social group.

Each ground is said to expose a jurisdictional error.

THE CESSATION CLAUSE

29 Section 36 of the Act prescribes that entitlement to a protection visa depends upon the existence of protection obligations owed to the relevant person by Australia under the Refugees Convention: *Minister for Immigration and Multicultural Affairs v Thiyagarajah*

(1997) 80 FCR 543 at 552-553. Regard is then necessary to the whole of Article 1 of the Refugees Convention for that purpose: *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 at [43] (*'NAGV and NAGW of 2002'*).

30 The focus of the applicant's submissions was upon the decision to grant the second temporary protection visa in June 2003. Consideration by the Minister of the relevant criteria for the grant of the visa is a condition precedent to a valid decision under that section: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 441; [2003] HCA 1 at [83]. It follows, it is submitted, that the Minister must be taken to have been satisfied that the criteria for the grant of a temporary protection visa were satisfied. The visa would not otherwise have been granted. The criteria for a subclass 785 visa included that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. It follows that the Minister found that the applicant was such a person, having regard to the circumstances then pertaining in Afghanistan.

31 The applicant then submitted that when the Tribunal came to review the decision refusing the grant of the permanent visa, it ought to have taken as its starting point the decision which had been made on the further temporary visa and what that encompassed. In considering the application of the cessation clause it should not have considered the change in circumstances in Afghanistan since 2000. The starting point for the comparison involved in whether there has been change, is the situation which prevailed in June 2003 when the applicant was found to be a refugee. Regard is then had only to any changes which have occurred since that time. I take the applicant to submit that it would follow that no change could logically be discerned. It may be observed that the approach suggested by the applicant would require a decision-maker to disregard the true facts.

32 In *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1448 *('QAAH')* Dowsett J dealt with a similar argument, which his Honour summarised as follows:

> *'16. The applicant submits that, as s 36 and the regulations prescribing the criteria for a temporary (XC) visa require that Australia owe him protection obligations as a condition precedent to the grant of such a visa, it must be conclusively assumed that the Minister was satisfied as*

to the existence of such status at the time of granting the temporary (XC) visa. He alternatively submits that the Minister may not now deny that such obligations existed at that time. The applicant submits that in either case, it must also be accepted that the circumstances as at March 2003 were sufficient to justify the grant of a protection visa and that he continues to be a person to whom Australia owes protection obligations until those circumstances change in the way contemplated by the cessation clause. It is said that s 36 recognizes that protection obligations continue until the cessation clause is engaged. Thus a protection visa may, and should, be granted upon the basis of a prior determination that the applicant was a refugee and without further enquiry, provided that there has been no change of circumstances sufficient to engage the cessation clause. The effect of the submission must be either that a temporary (XC) visa continues until the cessation clause is engaged, despite the statutory limit on its life, or that there is some obligation to grant a new visa without reference to current circumstances.

17. The applicant then submits that the Tribunal found that circumstances had changed since the grant of the temporary (XA) visa in 2000 but did not consider whether the circumstances which existed in March 2003 (when the temporary (XC) visa was granted), had changed. This is said to involve an error of law going to jurisdiction and is the first ground of review.'

33 His Honour rejected the contentions. In his Honour's view (at [21]-[23]) three decisions of the High Court establish that, for the purposes of the Act, refugee status is to be determined having regard to the position at the time at which the determination is made: *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 386-7; 398-9; 405-406; 414 and 431-433 ('*Chan'*); and *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 393 at [29]. This suggested that the Minister was obliged to re-address the question whether the applicant was a person to whom Australia owed protection obligations in considering the application for permanent visa. The majority in *Chan* held that the question for determination is always whether the applicant satisfies the definition of *'refugee'*. It followed, in his Honour's view, that it was not strictly relevant that the applicant had previously received temporary visas. It was not necessary for the Tribunal to decide whether or not the cessation clause had been engaged as a result of the changed circumstances in Afghanistan.

34 Emmett J has also held that when considering the grant of a fresh visa, the only question for the Tribunal was, whether at the time of the Tribunal's decision, the applicant was a person to

whom Australia had protection obligations under the Refugees Convention. On one view, his Honour held, Article 1C(5) had no part to play in that question: *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373 at [63] (*'NBGM'*). His Honour pointed out that the Tribunal was not considering an application for revocation of a visa nor an extension of a temporary visa (at [62]). In *SWNB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1606 Selway J expressed agreement with his Honour.

35 I would respectfully agree with their Honours. In my view the cessation clause has application to the situation where a person has been granted refugee status but the circumstances in connexion with that recognition have ceased to exist. Consideration might be given to implementing the cessation clause in relation to a procedure such as revocation. Where a person applies for a protection visa the question whether they are owed protection obligations is addressed on the determination of each application. If they had previously been found to be a refugee, but the circumstances referred to in the cessation clause had ceased to exist, they would not qualify under Article 1A(2) of the Refugees Convention. They would not be persons who are unable or unwilling, because of their well-founded fear of persecution, to avail themselves of the protection of their own country. I take it that this is the *'symmetry'* which Emmett J identified in *NBGM* between the two provisions (at [37]). It would follow that it is not necessary for a Tribunal to consider whether the cessation clause applies in answering the question under s 36(2) of the Act. In *NAGV and NAGW of 2002* (at [47]) the majority of the High Court said, with respect to whether a decision-maker could determine as a preliminary question in connexion with s 36(2), whether an applicant for a protection visa falls within an exception in Article 1F:

> *'The adoption of the expression "to whom Australia has protection obligations under [the Convention]" removes any ambiguity that it is to s A only that regard is to be had in determining whether a person is a refugee, without going on to consider, or perhaps first considering, whether the Convention does not apply or ceases to apply by reason of one or more of the circumstances described in other sections in Art 1'.*

36 It follows in this case that the Tribunal was not correct in approaching the question of the grant of the visa by considering, in the first place, whether Article 1C(5) applied. It was not necessary to do so. It did however go on to answer the correct enquiry, that under s 36(2) of the Act. In that process it considered the question whether the applicant was a person to

whom protection obligations were owed by Australia. It made its assessment by reference to the current situation in Afghanistan. That approach was clearly correct.

37 The applicant sought to distinguish *QAAH* on the basis that in that case the Minister had not had details of the current situation from the applicant when making the decision on the temporary visa. Here it had been provided in connection with the application for the permanent visa in April 2003.

38 There are a number of factual difficulties if the applicant is contending that the Minister gave full consideration to the matters required by s 36(2) of the Act, including the current situation in Afghanistan. Even if the applicant's material was read, there is nothing to suggest that an update on the situation in that country was considered. It is just as likely that the second temporary visa was regarded as automatically extended whilst the application for a permanent visa of refugees from Afghanistan was determined. This would be consistent with the approach taken in the Explanatory Statement even if it is contrary to the statement in the decision document concerning s 36(2) of the Act.

39 In any event, whatever consideration was given at that point was not relevant to the later decision on the application for the permanent visa. The cessation clause was unnecessary to be considered. Any earlier decision was irrelevant to a determination as to whether the applicant was now a person to whom protection obligations were owed. No question of estoppel arising out of the Minister's decision is, or could be, raised against the Tribunal.

STATE PROTECTION

40 This ground is based upon the decision in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (*'Khawar'*). In that case it was alleged that the domestic violence perpetrated against Ms Khawar by her husband and members of his family was tolerated and condoned by the State of Pakistan as an aspect of systematic discrimination against women (see per Gleeson CJ at pp 11-12 [25]-[26]). The majority held that women, or married women, in Pakistan might be considered as a social group. Fear of persecution for Refugees Convention reason may be considered on the basis that the failure of the state to protect is because of a person's membership of a particular social group.

41 Here the applicant has the difficulty that the Tribunal has made findings about the basis for

his claims to fear persecution from the Taliban, or former members of it. It found that an Hazara male would not face persecution in Jaghoori for reasons of his ethnicity or because he and his family had not sufficiently opposed the Taliban. The Tribunal did not accept the applicant's claim that he would face persecution from people who worked for the Taliban and are still in power having changed sides. The Tribunal agreed that whilst there were problems with security in Afghanistan, that did not mean the applicant would face persecution.

42 Absent a finding that the applicant had a real chance of persecution for a Convention reason the question of the state's position with respect to it does not arise. *Khawar* is not applicable in these circumstances.

43 The question whether the applicant belonged to a social group may also be dealt with at this point.

44 The applicant submitted that the Tribunal erred in finding that he ceased to be a member of a social group because his father had deflected blame towards him. This refers to the Commander's demands with respect to the rifle. But in this respect the Tribunal were clearly correct. There was no family group which continued to be subjected to harassment on this account, only the applicant was likely to be.

45 The Tribunal found, as the applicant had suggested, that the real reason for the former brother-in-law's conduct was his anger and humiliation because of his ex-wife's refusal to his taking a second wife. The applicant submits that so long as the Commander is motivated against, and could harm the family as a group, the reason for it is irrelevant.

46 A family may be a social group for the purposes of the Convention: *Chan* at [13] and [15]. To be persecuted within the meaning of the Refugees Convention, the conduct of the Commander towards the family must be for the reason that they are members of the family. As Gummow J pointed out in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 232-233, persecution implies that the persecutor perceives something about, or attributes something to, those they persecute. That cannot be said to be the case here. The family is harassed because the Commander is angry and humiliated about his domestic situation.

UNREASONABLENESS

47 The Tribunal rejected the applicant's claims of fear of persecution on the basis of the country information it accepted. The applicant submits that the most recent country information before the Tribunal from the UNHCR confirmed the applicant's claims. The most recent material should have been relied upon and it was unreasonable not to do so. There were accordingly '*manifest defects in the treatment of the evidence'*: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106 of 2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at 92; [2003] HCA 30 at [150] per Kirby J.

48 The applicant relies upon three sources of information. The first is the January 2003 profile of the Jaghoori district referred to in the UNHCR report of May 2004 and relied upon by the applicant in submissions before the Tribunal, as it noted. Reliance is also placed on the article by Dr Mousavi and the UNHCR report of February 2004.

49 The Tribunal did make findings on the basis of the country information. It accepted that remnants of the Taliban remain active in Afghanistan, but the information showed it was no longer a coherent political movement. Whilst armed remnants of the Taliban might cause security problems for the government, in its view there was no real chance the Taliban could return to exercise power, given three years had elapsed since it had been removed.

50 Other information before the Tribunal, by way of reports at various points in 2003 and through to January 2004, showed the Taliban to be out of power. The focus of the information was upon the groups that had subsequently gained control; the view taken of them by the communities; and whether there was any ill treatment of the community and ethnic groups as a result. There was information that the Taliban had attempted to strengthen in one area, but it was considered unlikely to do so without conflict with groups who had control.

51 The article by Dr Mousavi concerned the social problems which followed the local commanders taking power. Neither it nor the discussion in the UNHCR advice amount to advice as to the likelihood of persecution. The district report left open the question whether there might be. It was contained in a report dated May 2004 but was hardly the last word on the matter. None of these matters stands as a correction or replacement of earlier

information. The weight given to various country information or whether it should be accepted as accurate is a matter for the Tribunal. For the Court to engage in that exercise would amount to merits review which it cannot undertake: *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11].

CONCLUSION

52 The application should be dismissed with costs.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 15 July 2005

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Date of Hearing:	28 April 2005
Date of Judgment:	15 July 2005