FEDERAL COURT OF AUSTRALIA

SZMWQ v Minister for Immigration and Citizenship

[2010] FCAFC 97

Citation:	SZMWQ v Minister for Immigration and Citizenship [2010] FCAFC 97
Appeal from:	SZMWQ v Minister for Immigration and Citizenship [2009] FMCA 1197
Parties:	**SZMWQ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1465 of 2009
Judges:	**RARES, BESANKO AND FLICK JJ**
Date of judgment:	6 August 2010
Catchwords:	**MIGRATION – STATUTORY INTERPRETATION** – meaning of the "right to reside" within s 36(3) of the *Migration Act 1958* (Cth) – appellant a citizen of Czech Republic of Roma ethnicity and citizen of European Union – tribunal found appellant, as citizen of European Union, had right to enter and reside in Spain within the meaning of s 36(3) of the Act – whether "right to reside" includes the right to participate in country's system of social welfare or a practical capacity to establish residence **Held**: the right to enter and reside in s 36(3) does not include the right to receive social welfare – not a right to enter and reside comfortably in a country or entitlement to reside for any particular period **MIGRATION – jurisdictional error** – protection visas under s 36(2) of the *Migration Act 1958* (Cth) – whether finding that any period of unemployment that would be suffered by appellant in Spain would be short lived not open to tribunal on the evidence **Held**: tribunal's conclusion open to it on the evidence – no jurisdictional error **ADMINISTRATIVE LAW – procedural fairness** – whether tribunal failed to raise issues with appellant that had been depositive of the review – appellant availed himself of the opportunity to advance materials and made

submissions to support claim

Held: no failure to accord appellant procedural fairness

Held: appeal dismissed.

Legislation:

Acts Interpretation Act 1901 ss 15AB(1) and (2)
Border Protection Legislation Amendment Bill 1999
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)
Convention relating to the Status of Refugees (Geneva, 28 July 1951)
Migration Act 1958 (Cth) ss 36, 91M, 91N
Migration Legislation Amendment Act (No 6) 2001 (Cth)
Protocol relating to the Status of Refugees (New York, 31 January 1967)

Cases cited:

Abebe v Commonwealth [1999] HCA 14; 197 CLR 510 applied
Applicant M185 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 230 cited
Applicant S214 of 2003 v Refugee Review Tribunal [2006] FCA 375; 90 ALD 632 cited
Applicant S214/2003 v Refugee Review Tribunal [2006] FCAFC 166 cited
Darling Casino Ltd v New South Wales Casino Control Authority (1996) 191 CLR 602 cited
F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 discussed
Haneef v Minister for Immigration and Citizenship [2007] FCA 1273; 161 FCR 40 cited
Minister Administering Crown Lands Act v New South Wales Aboriginal Land Council [2009] NSWCA 352; 171 LGERA 56 followed
Minister for Immigration and Citizenship v Haneef [2007] FCAFC 203; 163 FCR 414 cited
Minister for Immigration and Citizenship v JSFD [2010] FCA 569 cited
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; 259 ALR 429 followed
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 84 ALJR 369; 226 ALR 367 applied
Minister for Immigration and Multicultural Affairs v Applicant C [2001] FCA 1332; 116 FCR 154 considered
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 considered
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; 206 CLR 323 applied
Minister for Immigration and Multicultural and Indigenous

Affairs v Al Khafaji (2004) 219 CLR 664 referred to
Minister for Immigration and Multicultural and Indigenous Affairs v VOAO [2005] FCAFC 50 considered
Minister for Immigration and Multicultural Indigenous Affairs v QAAH of 2004 (2006) 231 CLR 1 considered
NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 CLR 161 referred to
NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54; 231 CLR 52 cited
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 60; 150 FCR 522 cited
NBLC v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 272; 149 FCR 151 applied
R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 discussed
R v Murray; Ex parte Commonwealth (1916) 22 CLR 437 cited
Re Bolton; Ex parte Beane (1987) 162 CLR 514 considered
Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen [2001] HCA 10; 177 ALR 473 considered
Re Refugee Review Tribunal; Ex parte HB [2001] HCA 34; 179 ALR 513 considered
Saeed v Minister for Immigration and Citizenship (2010) 267 ALR 204 considered
SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231; 77 ALD 402 considered
SZBEL v Minister for Immigration and Multicultural Indigenous Affairs [2006] HCA 63; 228 CLR 152 applied
SZGGD v Minister for Immigration and Citizenship [2009] FCA 1250 cited
SZJZS v Minister for Immigration and Citizenship [2008] FCA 789; 102 ALD 318 cited
SZLAN v Minister for Immigration and Citizenship [2008] FCA 904; 171 FCR 145 followed
SZMDS v Minister for Immigration and Citizenship [2009] FCA 210; 107 ALD 361 cited
SZMSB v Minister for Immigration and Citizenship [2009] FCA 373; 108 ALD 361 cited
SZMWQ v Minister for Immigration and Citizenship [2009] FMCA 1197; 113 ALD 375 affirmed
SZNKR v Minister for Immigration and Citizenship [2010] FCA 582 cited
SZNTO v Minister for Immigration and Citizenship [2010] FCA 183; 114 ALD 129 cited

	V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018; 114 FCR 408 followed *WAGH v Minister for Immigration and Multicultural Indigenous Affairs* [2003] FCAFC 194; 131 FCR 269 considered
Date of hearing:	26 May 2010
Date of last submissions:	1 June 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	145
Counsel for the Appellant:	Ms R Francois and Ms A D T Rao
Solicitor for the Appellant:	Legal Aid
Counsel for the First Respondent:	Mr G R Kennett
Solicitor for the First Respondent	D L A Phillips Fox

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1465 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMWQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**RARES, BESANKO AND FLICK JJ**
DATE OF ORDER:	**6 AUGUST 2010**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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DATE:	**6 AUGUST 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RARES J

1 At the centre of this appeal from the Federal Magistrates Court is the question of whether Australia has protection obligations in respect of the appellant. He is a citizen of the Czech Republic of Roma ethnicity. Under s 36(3) of the *Migration Act 1958* (Cth) the Parliament has provided that Australia does not have protection obligations to a non-citizen who has not taken all possible steps to avail himself of a right to enter and reside in, whether temporarily or permanently, and whatever the basis of that right, a country apart from Australia including one of which he is a national.

2 The Refugee Review Tribunal found that the appellant had not availed himself, as a citizen of the European Union, of a right to enter and reside in the Kingdom of Spain. He claimed that because he would not be able to have access to welfare were he to enter and reside in Spain, s 36(3) did not relieve Australia of its protection obligations to him. He argued that the lack of the right to welfare meant that there was no right to "reside" within the meaning of s 36(3). The appellant also argued that the tribunal had made other jurisdictional errors, namely making findings that were not open on the evidence and failing to accord him procedural fairness.

THE APPELLANT'S CLAIMS TO THE MINISTER'S DELEGATE

3 The appellant arrived in Australia February 2008. He was then 19 years of age. In March 2008 he lodged an application for a protection visa. He claimed that he feared persecution in the Czech Republic due to his Roma ethnicity that was apparent from his dark skin. The Czech Republic is a member of the European Union. Citizens of the Czech Republic are also citizens of the European Union. In late May 2008 a delegate of the Minister refused to grant the appellant a protection visa.

THE LEGISLATIVE SCHEME

4 Relevantly, the *Migration Act 1958* (Cth) provided in s 36 as follows:

> "36 Protection visas
>
> (1) There is a class of visas to be known as protection visas.
>
> Note: See also Subdivision AL.
>
> (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; or
>
> (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa.
>
> Protection obligations
>
> (3) **Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.**
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> (a) a country will return the non-citizen to another country; and

> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country." (emphasis added)

THE PROCEEDINGS IN THE TRIBUNAL

5 In June 2008 the appellant applied to the tribunal to review the delegate's decision. On 30 September 2008, the tribunal affirmed the delegate's decision, but that decision was set aside by consent by order of the Federal Magistrates Court made on 10 March 2009. The tribunal was reconstituted and the appellant attended two further hearings before it in May 2009, assisted by a migration adviser and an interpreter. (These reasons will refer to the decision of the second tribunal simply as that of the tribunal.)

6 The tribunal found that in general European Union nationals had the right to reside in other European Union member countries as long as they were financially self-supportive or working in that country. It found that although the appellant had the rights of a European Union citizen, the precise contents of those rights varied according to the domestic legislation for each member state, including transitional arrangements that might apply to the Czech Republic following its accession to membership in 2004. Importantly, in considering the appellant's application, the tribunal did not find it necessary to determine whether he had a well founded fear of persecution in his own country. Rather, the tribunal considered that because of his status as a citizen of the European Union, the key issue was whether Australia had protection obligations to him under s 36(3), as qualified by ss 36(4) and (5).

7 The tribunal found that there was at least one member state of the European Union in which the appellant had the right to enter and reside within the meaning of s 36(3), namely Spain. It said that it had focused on the situation in Spain because its legislation and practice were unambiguous in conferring on a person in the appellant's position a currently existing, and legally enforceable, right to enter and reside there. Other European Union states gave European Union citizens a right of residence for up to three months relatively unconditionally, and a further right of residence for more than six months if they were engaged in economic activity or had sufficient resources and sickness insurance to ensure that they did not become a burden on the social services of the host state during their stay. The

tribunal found that under most European Union member State laws, the right of European Union citizens to enter and reside there might be qualified or made conditional and there was a wide variety of domestic legislation in those States, unlike Spain, qualifying the entitlement to stay longer than three months.

8 The appellant contended that he would not enjoy in Spain the rights to which he was entitled here under Art 1E of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951 as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (**the Convention**). Article 1E provided:

> "This Convention shall not apply to a person who is recognised 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."

9 The appellant had argued before the tribunal that, among other relevant provisions, Art 24 of the Convention required contracting States to accord refugees lawfully staying in their territory the same treatment accorded to nationals in respect of employment conditions and social security. He argued that because he was not a Spanish citizen, he did not have access to the Spanish social welfare system and would not be eligible for benefits were he unable to find work in Spain. He said that this was particularly relevant because of the high unemployment rate in Spain, especially for persons of Roma ethnicity and without skills, such as himself.

10 The tribunal found that s 36(3) did not require that a non-citizen, having a right to enter and reside in another country, should be able to access that country's social welfare system in the same way as a national of the country. It found that the appellant's right to enter and reside in Spain was effective and was not negated by any inability he may have had to avail himself of the Spanish social welfare system.

11 The significant passages of the tribunal's reasoning in this respect were contained in the following:

> "118 … However, while Article 1E of the Convention applies only where the relevant country recognises the person as having "the rights and obligations which are attached to the possession of the nationality of that country", there is no such requirement in s.36(3). In the Tribunal's view, taking also into account the reference to 'temporary' rights in s.36(3), there is no implied

> requirement that a person have such rights. In sum, the Tribunal does not accept that the applicant's right to enter and reside in Spain is negated on this basis.
>
> 119 Second, the applicant and his representative argued that, beyond the period of 3 months, the applicant's rights in Spain would amount to something less than 'residence'. The representative referred to residence as 'the *ability* to establish domicile and establish links with that place', and pointed to practical problems the applicant might face such as unemployment and lack of access to social security benefits, his inability to support himself and (by implication) other problems arising from his lack of language and contacts. The right to reside in the context of s.36(3) clearly refers to the establishment of more than a transitory presence in the place. It might be theoretically possible that an applicant could face such extreme hardship that a right to reside is in effect negated. However, the Tribunal finds it unnecessary to consider this question further. **It considers that the challenges the applicant might face in Spain are far removed from such a hypothetical case, and not such as to negate the existence of his right to reside in that country for the purposes of s.36)(3)**. The challenges that the applicant may face in Spain are, however, relevant to the further question posed by s.36(4), namely whether he has a well-founded fear of Convention-related persecution in Spain. The Tribunal considers that question below (paragraphs 128 ff)." (emphasis added)

12 The tribunal also rejected an argument put by the appellant that the likely difficulties that he would face in Spain made it illusory that he would have real prospects of being assimilated into Spanish society and naturalised. It found that s 36(3) did not require that the person have rights to permanent residency in the third country. The appellant had also argued that because he had no intention of renewing his Czech passport, he would not be able to enter and reside in Spain because he would not have a valid travel document if he wished to remain there beyond three months. The tribunal found that at the date of its decision it would have been possible for the appellant either to travel to Spain on his current passport or apply for a new one in Australia and then travel to Spain on that renewed passport. It found that he had not taken any of those steps. It concluded that he had not taken all possible steps to avail himself of his right to enter and reside in Spain within the meaning of s 36(3).

13 The tribunal accepted that the appellant would face considerable challenges generally in obtaining work in Spain. This was because of his difficulties with the Spanish language, his lack of local knowledge and limited skills set, and the background of a tough Spanish labour market. It considered that the risk of those matters may be off-set by other factors such as the appellant's English language skills, age and past work experience. But it did not accept that the essential and significant reason for any period of unemployment that he would

face in Spain would be his race, membership of any social group, such as unemployed Roma non-citizens, or any other Convention ground such as his not having Spanish nationality.

14 The tribunal then referred to the submission made by the appellant and his adviser:

> "138 … that, faced with possible unemployment, he will be ineligible for social security benefits because he is a non-citizen of Spain and/or because he has not made past insurance contributions. In other words, the lack of income (perhaps together with accommodation and other difficulties) may put him at risk of serious harm, for instance, 'significant economic hardship that threatens [his] capacity to subsist', and 'denial of access to basic services [with a similar impact].' The Tribunal acknowledges the applicant's genuine concern about this, and accepts that his eligibility for social security may rely on his nationality (a Convention ground) and/or his past contributions to any insurance fund. **However, the Tribunal considers that any period of unemployment will be short-lived, given the applicant's age and the nature of his past work, and it is satisfied that there are support groups and social networks in Spain that are available to ensure that he does not suffer harm amounting to persecution**." (emphasis added)

15 The tribunal found that there was no real chance of the appellant experiencing harm amounting to Convention related persecution in Spain. It concluded that on the basis of his circumstances and the laws of the European Union and Spain, the appellant had a right to enter and reside in Spain and that he had not taken all possible steps to avail himself of that right within the meaning of s 36(3) of the Act. The tribunal found that he did not have a well founded fear of persecution in Spain for the purposes of s 36(4) and that there was no real chance that Spain would return him to the Czech Republic, whether or not he had a well founded fear of Convention related persecution there for the purposes of s 36(5). Accordingly, it affirmed the delegate's decision to refuse the appellant a protection visa.

PROCEEDINGS BEFORE THE TRIAL JUDGE

16 The appellant challenged the decision of the tribunal on four bases before the trial judge. These challenges were also renewed on appeal. First, the appellant argued that the tribunal misconstrued s 36(3) of the Act by finding that a person's right to "reside" in another country within the meaning of that section would only be negated in circumstances of extreme hardship. This argument relied on what the tribunal had found in [119] of its decision record. The appellant contended that the tribunal ought to have held that the concept of a right to reside within the meaning of s 36(3) included the right to participate in the

country's system of social security and, as a matter of practical reality, the capacity to establish a residence in the country.

17 The second challenge was related to the first and was interlinked with the construction of s 36(3). He argued that the tribunal had fallen into a jurisdictional error by failing to consider whether the rights granted to the appellant in Spain generally enabled him to establish a residence. The appellant contended that the tribunal's references to the challenges he would face in Spain being "far removed" from "extreme hardship" showed that it had applied an incorrect test that excludes from its consideration other relevant factors. He also argued that the tribunal had taken into account an irrelevant consideration, namely, whether any extreme hardship he would face would be due to a Convention reason.

18 The third challenge was that the tribunal had made a jurisdictional error by making findings not open to it on the evidence. In substance, the appellant contended that there was no evidence to support the conclusion in [138] of the tribunal's decision record that his period of unemployment in Spain would be "short lived" because of his age, past work experience and the availability of support groups and social networks in Spain.

19 The appellant's fourth challenge asserted that the tribunal had made a jurisdictional error by failing to accord him procedural fairness. He asserted that the tribunal had failed to raise with him two issues in relation to the decision under review on which it relied in [138] of its decision record, namely its findings that:

- there were support groups and social networks which could support the appellant in Spain; and

- a young uneducated migrant who did not speak Spanish but who was only experienced in menial labour would be likely to find employment relatively quickly in Spain.

THE TRIAL JUDGE'S DECISION

20 The trial judge refused the appellant's application for constitutional writ relief. He found that the authorities had construed s 36(3) as providing that the right of residence which

it contemplated amounted to no more than a right to remain in a third country, whether temporarily or permanently, free of the fear of persecution, but nothing more. His Honour found that the right to reside referred to in s 36(3) was simply a right to reside in a third country where an applicant for review would not be subject to Convention related persecution and whence he or she would not be *refouled* to a country in respect of which he or she had a well found fear of persecution for Convention reasons. The trial judge found that s 36(3) did not require that the right of residence be of a settled character or at a particular standard of living. He said that the right in s 36(3) simply required the person to have a right to enter and reside in the third country free of the fear of Convention related persecution. On the basis that he had rejected the appellant's construction of s 36(3), the trial judge held that the second ground did not arise.

21 His Honour rejected the third challenge on the basis that the tribunal's conclusions were open to it on the evidence. He noted that the tribunal had evidence of the problematic state of the Spanish economy as a result of the global financial crisis and of significant barriers there against the entry of Roma into the job market. He observed that rather than basing its finding on the evidence dealing generally with economic and social conditions in Spain, the tribunal gave decisive weight to the appellant's age and nature of his past work. He observed that while it may be difficult to agree with the tribunal, its conclusion was open to it and it was not for the Court to engage in merits review. The trial judge also found that the tribunal had evidence before it of significant numbers of Roma associations in Spain. He said that although the tribunal should have referred in its reasons to the evidence on which its findings on this issue were based, it had referred to a document that contained this evidence. He said that a failure to refer to the evidence in support of its actual findings did not amount to a jurisdictional error and, there being evidence to support it, the decision was not invalid.

22 The trial judge rejected the fourth challenge on the basis that it confused the evidence which might be relevant to an issue with the issue itself. He noted that the appellant had claimed that, as a Roma who was an unemployed non-citizen in Spain in his particular circumstances, he feared that he would suffer persecutory harm there consisting of economic hardship and denial of access to basic services. His Honour concluded that the issue before the tribunal was whether the appellant's postulated lack of income, perhaps combined with problems in obtaining accommodation and other difficulties, might put him at risk of harm.

He had identified that harm as significant economic hardship or denial of access to basic services of such severity that the appellant's capacity to subsist would be threatened. The trial judge concluded that these were not issues in themselves, but particular matters or instances on which the appellant had relied in support of his claim to a protection visa. He concluded that the matters complained of in the fourth ground did not have to be notified to the appellant pursuant to s 425 of the Act. Accordingly, his Honour dismissed the application.

FIRST GROUND OF APPEAL

23 The appellant argued that the trial judge's construction of s 36(3) was not correct. He contended that the word "reside" in s 36(3) amounted to more than just the temporary right to eat and sleep in another country but had to extend to the ability to establish an abode there. He argued that the purpose of s 36 was to give municipal effect to Australia's international obligations under the Convention. He contended that the only judicial consideration of the nature of the right to "reside" in s 36(3) was in the concurring judgment of Hill J in *WAGH v Minister for Immigration and Multicultural Indigenous Affairs* (2003) 131 FCR 269 at 283-284 [65]-[66]. There, Hill J noted that it would be unusual, but not impossible, for the word "reside" in s 36(3) to refer to a tourist who may stay overnight, or for time, in a country that was not his or her place of abode, even temporarily. He said that "reside" in its usual dictionary sense meant "to dwell permanently or for a considerable time; have one's abode for a time". He based that observation on the definition in the *Macquarie Dictionary* 3rd ed 1997. Neither Lee J nor Carr J considered this, since each held that the visa there conferred no relevant right within the meaning of s 36(3): *WAGH* 131 FCR at 280 [43] per Lee J, with whom Carr J concurred on this point at 285 [75].

24 The appellant argued that a person granted a protection visa under s 36(2) had conferred upon him or her rights, including a right to work and rights under the *Social Security Act 1991* to the payment of benefits. He contended that where a person was granted a protection visa to reside in Australia that had to enable him or her to have the means of establishing a residence, either through working or the use of social welfare benefits. He contended that the purpose of s 36(3) was to prevent persons from imposing upon Australia if they had another choice of a country in which they could obtain protection from persecution for a Convention reason. This argument was based on extrinsic Parliamentary material, including the Minister's tabling speech and the supplementary explanatory memorandum for

the *Border Protection Legislation Amendment Bill 1999* set out by Graham J in his reasons in *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 151 at 161-162 [54]-[55].

25 The appellant referred the Full Court to a number of authorities dealing with the concept of residing or residence in other statutory contexts. He argued that a person could not meaningfully have a right to "reside" in a third country if he or she had no ancillary rights, such as rights to work and to welfare, that would enable him or her to establish a residence. He contended that a right to enter and reside in another country had to amount to an effective right. He did not assert that such a right entitled the person to live "comfortably" in another country.

GROUND 1 – CONSIDERATION

26 The appellant's argument should be rejected. In *Minister for Immigration and Multicultural Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 16 [36]-[37] Gummow ACJ, Callinan, Heydon and Crennan JJ said:

> "[36] **Section 36, like the Convention itself, is not concerned with permanent residence in Australia or any other asylum country, or indeed entitlements to residence for any particular period at all**. **Its principal concern is with the protection of a person against a threat or threats of certain kinds in another country.** Neither the texts nor the histories of the Act and the Convention require that when the threat passes, protection should be regarded as necessary and continuing.
>
> [37] Whether under s 36(2) Australia has protection obligations depends upon whether a person satisfies the definition of a refugee in Art 1A of the Convention, in the context of other relevant articles, none of which say anything about the period of residence or permanent residence. If they did, they would have to yield in any event to the provisions of the Act which do. There is nothing in s 36(3) of the Act which points to a different conclusion. The words in s 36(3) "whether temporarily or permanently" do no more than make it clear that any obligation of protection may or will not be assumed by Australia at any time, or from time to time, if a person has not taken all possible steps to avail himself or herself of residence in another country." (emphasis added)

27 Earlier, their Honours had noted that Australian courts would endeavour to adopt a construction of the Act and the Regulations, if available, that conformed to the Convention. The Convention must be construed by reference to the principles stated in the *Vienna*

Convention on the Law of Treaties [1974] ATS 2: *QAAH* 231 CLR at 15[34]. They said of subsequent articles in the Convention, including Arts 20-24, (*QAAH* 231 CLR at 19 [48]):

> "Those articles do not purport to define a refugee either for all times or purposes or at all. **Nor do they touch upon how a refugee is to be defined or accorded recognition as such, or to be entitled to continue to avail himself of protection. These matters are expressly and exhaustively the subject of Art 1 of Ch I**. Such consequential rights as flow from recognition as a refugee and give effect to the extent that they do to the Convention, are the subject, in part at least, of the Act under which conditions of residence can be imposed, and of other legislation, including social security and industrial legislation enacted from time to time." (emphasis added)

28 In his dissenting judgment in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 at 672 [19] Gummow J raised the question of whether a "right" of the nature identified in s 36(3) could exist where it was incapable of exercise within a reasonable time. He suggested that there be a link between the "right" and its invariable correlative, a "duty".

29 The right to reside in Spain had a concomitant that Spain would protect persons, with the right to reside in its territory, from persecution for Convention reasons. Because Spain offered such protection to persons who had a right to enter and reside in its territory, s 36(3) provided that Australia did not have protection obligations to the appellant: *WAGH* 131 FCR at 279 [38] per Lee J, 283 [63] per Hill J, 285 [75] per Carr J.

30 Contrary to the appellant's submission, Hill J did not suggest in *WAGH* 131 FCR at 283-284 [63]-[64] that the right to reside referred to in s 36(3) included a right effectively to establish an abode by having sufficient means of support from employment, third parties or access to welfare services. He explained that the essential feature of the right to reside in s 36(3) was that it would be practically likely that the person would obtain effective protection in the other country: *WAGH* 131 FCR at 283 [63], 284 [64]. He identified this as being the difference in his construction of the right in s 36(3) from that of Lee J, whose view was that the other country had to acknowledge that it would (rather than be likely to) accord protection to the person: *WAGH* 131 FCR at 283 [62].

31 Here, on the findings of the tribunal, the appellant had a right to reside in Spain that he could exercise effectively and he would be protected there from the persecution of which he claimed to have a well-founded fear.

32 Essentially, s 36(3) is directed to excluding Australia's obligations to grant protection under the Convention to a person who has a right to enter and reside in another country, but has not taken all possible steps to avail himself or herself of that right. It is not sufficient that, by exercising such a right outside Australia, the person may suffer privation or be exposed to significant difficulties in maintaining a lifestyle, that do not arise for a Convention reason (i.e. a well-founded fear of persecution). Unfortunately, experience has shown that there are many countries in the world without social welfare to which persons flee in an attempt to avoid persecution. If there is a country that will offer a refugee from Convention related persecution the right to enter and reside, where he or she will not suffer the persecution claimed, the mere fact that the country has no social security system at all could not enliven a protection obligation to that person in Australia were he or she to arrive here. It was common ground that ss 36(4) and (5) did not operate to exclude s 36(3) in relation to the appellant if he were to go to Spain.

33 The Full Court has held that the words "all possible steps" should be given their literal and grammatical meaning: *NBLC v Minister for Immigration and Multicultural Indigenous Affairs* (2005) 149 FCR 151 at 152 [2] per Wilcox J, 154 [12] per Bennett J and 165 [63]-[64] per Graham J. They found that the expression should not be construed as meaning the lesser standards of "all steps reasonably practical in the circumstances", "all reasonably available steps" or "all reasonably possible steps". Subsequently, Callinan, Heydon and Crennan JJ had emphasised in *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 that the task of construction of a provision such as s 36(3) involved the Court ascertaining what the Australian law was having regard to what, and how much of an international instrument, Australian law required be implemented. That task involved ascertaining the extent to which Australian law adopted, qualified or modified the instrument by a constitutionally valid enactment. Next, the Court had to construe only so much of the instrument, and any qualifications or modifications of it, as Australian law required: *NBGM* 231 CLR at 71-72 [61].

34 The right to enter and reside in the other country described in s 36(3) is not the same as the right that Australia would grant to the non-citizen were he or she to be given a protection visa under s 36(2). Section 36(3) describes a more qualified right. First, it is merely a right to enter and reside in the other country; it is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee status in the other country.

35 Secondly, the right can be temporary in nature and last for no particular period greater than the time taken to meetthe exigency that gave rise to the non-citizen's well-founded fear of persecution in the country whence he or she had fled. (For example: a government of one country could pursue a vilificatory policy against some of its citizens for a Convention reason. Once the government, or the social conditions which it represented, ceased to be influential, the victims could return to their homes.) History is replete with examples of oppressive regimes losing power and their replacements transforming the society to eliminate the previously existing persecution of minorities for Convention reasons.

36 Thirdly, s 36(3) is satisfied so long as the person's right to enter and reside in another country exists, however it arose or is expressed. This suggests that apart from ss 36(4) and (5), the content or incidents of the right to enter and reside described in s 36(3) is not to be the concern of the Minister or decision-maker. Thus, any such right will not satisfy s 36(3), if the non-citizen would have a well-founded fear that he or she would be persecuted for a Convention reason in the country offering the right to enter and reside (s 36(4)) or he or she could be *refouled* from there to another country where that persecution could occur (s 36(5)).

37 The supplementary explanatory memorandum for the *Border Protection Legislation Amendment Bill 1999* that introduced ss 36(3)-(7) into the Act explained that their purpose was "… to prevent the misuse of Australia's asylum processes by 'forum shoppers'". It explained that persons who were nationals of more than one country or had 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". Importantly, the explanatory memorandum stated:

> "The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if

without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection."

38 This was elaborated in the Minister's tabling speech as follows:

"The Refugees Convention and Protocol have, from inception, **been intended to provide asylum for refugees with no other country to turn to**.

Increasingly, however, it has been observed that asylum seekers are taking advantage of the convention's arrangements.

Some refugee claimants may be nationals of more than one country, **or have rights of return or entry to another country, where they would be protected against persecution**.

Such people attempt to use the refugee process as a means of obtaining residence in the country of their choice, without taking reasonable steps to avail themselves of protection which might already be available to them elsewhere.

This practice, widely referred to as "forum shopping", represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations....

Domestic case law has generally re-inforced the principle that Australia does not owe protection obligations under the refugees convention, to those who have protection in other countries.

It has also developed the principle that pre-existing avenues for protection should be ruled out before a person's claim to refugee status in Australia is considered." (emphasis added)

39 Extrinsic materials are aids to interpretation: see ss 15AB(1) and (2) of the *Acts Interpretation Act 1901*. But, they are not determinative. The function of the Court is to give effect to the will of the Parliament as expressed in the law: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 at 213-214, [31]-[33] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. These extrinsic materials refer to the person having protection in other countries. These provided some support for the appellant's construction. However, the sense in which the word "protection" was used there is not the sense for which the appellant contended. As ss 36(4) and (5) provide, a person will not have a right to enter and reside in another country that falls within s 36(3), if he or she will not have protection there, or in a country to which he or she may be *refouled* from there, if he or she has a well-founded fear of persecution for a Convention reason in such a country.

40 A significant feature of s 36(3) is that it qualifies, but does not exclude, Australia's protection obligations under the Convention that s 36(2) recognises. The qualification is the requirement that the applicant for a visa under s 36(2) must first have taken all possible steps to avail himself or herself of any right to enter or reside in the other country. Of course, the applicant for a protection visa would not have to engage in a futile exercise. Thus, for example, he or she need not have attempted to exercise the right, if the other country had so qualified his or her posited right to enter and reside in it, that the applicant could not succeed in entering or, if he or she did, in residing there. But, success in the enjoyment of a right focuses attention on the nature of the right.

41 The tribunal found that many people in Spain who enjoyed, in the sense of being entitled to, the right to reside there, were unemployed and did not have access to its social welfare benefits. Section 36(3) is carefully phrased to exclude Australia from owing protection obligations in a limited situation. The section does not use a criterion that the applicant for a protection visa be entitled to enter and reside in another country so as to be treated there as a refugee. Rather, s 36(3) requires the applicant to have taken all possible steps to exercise his or her right to enter and reside in a country in which he or she will be safe from a well-founded fear of persecution for a Convention reason or refoulment to a country where he or she would not be so safe. Thus, the right to reside described in s 36(3) precludes a liability to refoulment (s 36(5)) and includes the protection by the other country of the person from a well-founded fear of persecution for a Convention reason (s 36(4)) but does not require that country to accept the person as a refugee if he or she has some other lawful basis to enter and reside in it. The consequence of that country protecting its citizens generally from persecution for a Convention reason, coupled with the person's right to enter and reside in it, is that Australia will not have its own protection obligations owed to the person.

42 The importance of ss 36(4) and (5) is that they delimit the protection obligations that Australia will assume where a person has not taken all possible steps to avail himself or herself of a right to enter and reside in another country where they will not be at risk of persecution. Unlike the appellant's suggested construction of "reside", ss 36(4) and (5) expressly deal with the basal reason why Australia's protection obligations will arise under the Convention. That is the existence of a well-founded fear of persecution for a Convention

reason in the other country or a country to which the applicant for a visa under s 36(2) may be *refouled*. Those exceptions do not suggest that he or she must be accepted by the other country as a person to whom *it*, as distinct from Australia, owes protection obligations such as those arising under Arts 20-24 on which the appellant relies: cp *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 173 [30]-[32], 180 [58]-[60] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ discussing the Act prior to the insertion of ss 36(3)-(7); see at 168 [10].

43 McHugh and Gummow JJ said in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45] that the Act is not concerned to enact into Australian municipal law various protection obligations of contracting states found in Chapters II, III and IV of the Convention (Ch III being concerned with the rights to have gainful employment and Ch IV, including Arts 20-24, with the right to welfare). They acknowledged that those provisions conferred rights by reference to various stipulated standards, including that the refugee would be accorded the same treatment as nationals of the contracting State. Their Honours said:

> "The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system."

They noted that the scope of the Convention was deliberately confined in the Act: *Khawar* 210 CLR at 17[48].

44 It may be that, had the appellant found himself destitute and starving in Spain, he could have satisfied the tribunal that he had taken all possible steps to avail himself of his right to enter and reside there. That would have raised for consideration whether he had taken all possible steps to avail himself of his right to reside there.

45 The appellant's argument involves a construction of s 36(3) that allows an applicant for a protection visa merely to express a fear that he or she may not be able to establish an abode or home in another country because of an apprehension of adverse economic circumstances of general application or a lack of access to welfare. Here, the appellant said that if he went to Spain, could not find a job and was not otherwise able to find some means

of subsisting there, he would then not be able to exercise effectively his right to enter and reside there.

46 The tribunal found that he had the right to enter and reside in Spain. It evaluated the merits of his claim that he might not be able to reside in Spain by considering the possibility that if he did move to Spain, the appellant might not find work or have access to social security and possibly would face some difficulties in living there.

47 The tribunal did not make a jurisdictional error in the way in which it construed s 36(3). The evaluation of the difficulties of establishing an abode or residence in another State is quintessentially a question of fact for the tribunal. The tribunal found that the appellant had the legally enforceable right, as a European Union citizen, to enter and reside in Spain. And, it found that he had not taken all possible steps to avail himself of that right. Indeed, the appellant had not even attempted to exercise those rights. It was open to the tribunal to find that the appellant had not satisfied it that, having regard to ss 36(2) and (3), Australia owed him protection obligations. The tribunal did not make a jurisdictional error in rejecting this claim.

GROUND 2

48 The second ground of appeal preceded, in effect, on the assumption that the tribunal had misconstrued s 36(3) and that his Honour was in error in failing so to find. The tribunal's reasons in [119] concluded that the challenges the appellant would face in Spain would not amount to extreme hardship. That finding was based on its construction of s 36(3) that a right to reside created more than a right to a transitory presence in the other country.

49 In essence, this ground sought to review the merits of the tribunal's reasoning. As the appellant put in his written submissions, the issue was whether the rights he specified that had to be conferred by the third country would give him the capacity to establish a residence there with all the entitlements of a national. That construction of s 36(3) is erroneous. The appellant accepted in argument that if his construction of the right to reside in s 36(3) were rejected, ground 2 could not succeed.

50 The tribunal did not fail to take into account any relevant consideration nor did it take into account an irrelevant one for the purposes of the correct construction of s 36(3). It follows that this ground must be dismissed.

GROUND 3 – FINDINGS ALLEGEDLY NOT OPEN ON THE EVIDENCE

51 The appellant criticised the tribunal's findings that any period of unemployment would be short lived for him given his age, the nature of his past work and its satisfaction there would be support groups and social networks in Spain available to ensure that he did not suffer harm amounting to persecution. He criticised these findings on the basis that there was no evidence before the tribunal from which it could come to those conclusions. He argued that the only evidence before the tribunal about the job market in Spain was that it was "disastrous for unskilled migrant labour". Accordingly, he contended that there was no evidence that could support the finding that any period of unemployment which he might experience would be "short lived". The appellant argued that this finding amounted to a jurisdictional error within the meaning of *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119-120.

52 The tribunal had evidence before it that the appellant had been sufficiently resourceful to obtain employment here. Although the trial judge commented that other minds have might come to other views on this point, he accepted that the resolution of this issue was a matter for the tribunal. In proceedings for constitutional writ relief, the Court cannot engage in a merits review. In *Minister for Immigration and Citizenship v SZMDS* (2010) 266 ALR 367 at 396 [132], Crennan and Bell JJ held that if probative evidence could give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from the evidence, the decision could not be said, on judicial review, to be illogical, irrational or unreasonable, simply because one conclusion had been preferred to another possible conclusion: see too at 266 ALR at 385 [86] per Heydon J.

53 The trial judge also found that there was evidence before the tribunal of the existence in Spain of support groups and social networks for Roma there. He observed that the tribunal had not expressly referred to the evidence on which its finding was based, as s 430(1) required. But he held that this failure of the tribunal was not a jurisdictional error. The appellant argued that the material, about Romas in Spain having formed associations and

non-governmental organisations (NGOs) to which the trial judge referred, was in general terms. He contended that this general material did not amount to evidence that the associations provided financial or other support to newly arrived immigrant Romas.

54 The tribunal set out a passage in its decision record from a United States of America Department of State report on human rights in Spain for 2006 that referred to Spanish government "providing assistance to several NGO's dedicated to improving the condition of Roma". There was evidence before the tribunal to enable it to come to the findings it made concerning support groups and social networks. His Honour's finding has not been shown to be in error.

55 The conclusion of the tribunal was open to it on the evidence and was not one that could not have been arrived at by the tribunal performing its functions according to law. In any event, the tribunal concluded that the appellant had a right to enter and reside in Spain and that he had not taken all possible steps to avail himself of that right. Therefore, this ground cannot constitute a jurisdictional error, even if the appellant's contentions were correct. This ground of appeal fails.

GROUND 4 - ALLEGED FAILURE TO ACCORD PROCEDURAL FAIRNESS

56 The appellant argued that the tribunal had failed to raise with him in the conduct of the review the following issues that had been dispositive of the review (*SZBEL v Minister for Immigration and Multicultural Indigenous Affairs* (2006) 228 CLR 152), namely whether:

- he would face extreme hardship in Spain so that his right to residence was negated;

- there were support groups and social networks in Spain; and

- a young uneducated person in his position who did not speak Spanish with only menial skills would be able to find employment relatively quickly in Spain.

57 Again, for the reasons above, these were not issues that could have been or were dispositive of the review. They depended upon the erroneous construction of s 36(3) advanced by the appellant.

58 In any event, during the course of the hearing before the second tribunal, the appellant's representative identified and addressed these issues as ones that he could have addressed. She made written submissions to the second tribunal on behalf of the appellant between its two hearings. Next, at the second of those hearings, in late May 2009, the appellant's representative argued that the hardships he would face if he went to Spain could negate his right to reside there. The tribunal did not accept that argument. The second tribunal member explained his reasoning process during that hearing to the appellant's representative and how he understood the issues. During that second hearing, the appellant's representative told the member:

> "I would really like to put forward to the tribunal that I think that [the appellant] may have a right, with a valid and current Czech passport, to enter and remain in Spain, but I don't think that that should be considered as equivalent to residence. I think that residence requires more. As I've indicated in these submissions and then the first round of submissions, [the appellant] I think is going to find it virtually impossible to gain employment in Spain, despite his age and physical strength. Given the discrimination against Roma in Spain, he's going to find it very hard to get employment and he will not be eligible for any vocational education or language education."

The appellant's representative then contended that the then tribunal member had "indicated that any problems that [the appellant] would have in relation to employment would not be for a convention reason". The member responded by saying:

> "No, I suggested I would need to consider whether they amounted to persecution and whether they were for one or more of the convention reasons."

59 The appellant was then on notice as to the tribunal's approach and could have made further submissions, had he chosen to do so at that time. The tribunal found in [119] that the hardship that the appellant might face would not have been sufficient to make good his claim. It was for the appellant to put forward a case that satisfied the decision-maker that Australia owed him protection obligations under s 36(2) of the Act. This included satisfying the tribunal that he had taken all possible steps to avail himself of a right to enter and reside in Spain, having regard to his rights as a national of the European Union. The delegate had rejected his application on the basis that being a national of the European Union he had rights

to enter and reside in any European Union member country. The second tribunal refined the enquiry to Spain where the appellant's right to enter and reside was for an indefinite period. That was longer than the three month period generally applicable in the European Union. This was an issue in the review which the appellant had been placed on notice he needed to address and he did so. This ground also fails.

CONCLUSION

60 For these reasons the appeal must be dismissed with costs.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 6 August 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1465 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMWQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**RARES, BESANKO AND FLICK JJ**
DATE:	**6 AUGUST 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BESANKO J:

61 In my opinion this appeal should be dismissed and the appellant should pay the first respondent's costs of the appeal. I agree with the reasons of Flick J and there is nothing I wish to add.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 6 August 2010

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY
GENERAL DIVISION **NSD 1465 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMWQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**RARES, BESANKO AND FLICK JJ**
DATE:	**6 AUGUST 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FLICK J

62 The Appellant is a citizen of the Czech Republic.

63 He arrived in Australia on 5 February 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on 3 March 2008. A delegate of the Minister refused to grant that visa and the now Appellant applied to the Refugee Review Tribunal in June 2008 seeking review.

64 He claimed to fear persecution in the Czech Republic due to his being ethnically a Roma. As a citizen of the Czech Republic, however, he could travel to other European Union member States.

65 On 10 September 2008 the Tribunal affirmed the delegate's decision. But that decision of the Tribunal was set aside by an order of the Federal Magistrates Court on 6 March 2009. A differently constituted Tribunal again reviewed the delegate's decision and on 12 June 2009 that Tribunal again affirmed the delegate's decision. In so concluding, the

Tribunal found that the now Appellant could enter and reside in Spain and that "*the challenges*" he might face there were "*not such as to negate the existence of his right to reside in that country for the purposes of s.36(3)*" of the *Migration Act 1958* (Cth) ("*Migration Act*").

66 An application seeking review of this subsequent decision of the Tribunal was filed in the Federal Magistrates Court on 17 July 2009. That Court dismissed the application on 8 December 2009: *SZMWQ v Minister for Immigration and Citizenship* [2009] FMCA 1197, 113 ALD 375. In doing so the Federal Magistrate concluded (*inter alia*) that "*[t]he cases make it clear that the right of residence contemplated by s.36(3) is really no more than a right to remain in a third country, whether temporarily or permanently, free of the fear of persecution, but nothing more*": [2009] FMCA 1197 at [32]. Rejected was an argument that the term "*reside…encompasses incidental rights and/or the practical capacity to establish a residence*".

67 A *Notice of Appeal* was filed in this Court on 22 December 2009. The *Grounds of Appeal* allege that the Federal Magistrate erred in failing to hold that the Tribunal had committed a jurisdictional error by reason of an error of law in the construction given to s 36(3) of the *Migration Act*; by reason of a failure to take into account relevant considerations and the taking into account of irrelevant considerations; by reason of the making of findings of fact by the Tribunal which "*were not open on the evidence before it*"; and by reason of a denial of procedural fairness.

68 Without doing disservice to the other arguments carefully advanced on appeal, the primary contention of the Appellant was the proposition that the "*right to enter and reside*" in a country referred to in s 36(3) carried with it a right to also have access to that country's unemployment and welfare benefits.

THE TRIBUNAL'S FINDINGS AND REASONING

69 The Tribunal in its reasons for decision given on 12 June 2009 set forth the evidence before it and made findings of fact.

70 Two parts of those reasons assume relevance to the present appeal.

71 Particular reference has been made to paragraph [119] of the Tribunal's decision. It is at that paragraph that the Tribunal made its findings which are central to the arguments now sought to be advanced. To put that paragraph in context, paragraphs [116] to [119] provide as follows (without alteration):

> [116] The Tribunal finds on the material before it, in particular country information discussed at hearing (paragraphs 89-90 above), that the applicant, as an EU citizen, has a right to enter and reside in Spain. This is a currently existing right, and legally enforceable in Spanish and EU courts. The Tribunal recognises that the applicant has never visited Spain and is not familiar with the language or culture, but this does not negate the existence of the rights as referred to in s.36(3).
>
> [117] The Tribunal notes the applicant's evidence that he has prior convictions in New Zealand, 3 for traffic offences (speeding, drunk driving and driving without a licence) and one for disorderly conduct. The applicant and his adviser did not expressly raise this as a potential impediment to his right to enter and reside in Spain. The issue arose rather in the context of his future conduct in Spain (his possible return to unlawful behaviour, if removed from Australia) and his possible expulsion from Spain. The Tribunal is satisfied, having regard to the nature of the offences and the age at which the applicant committed them, as well as the very limited circumstances in which Spanish restricts the rights of EU nationals, that the applicant's offences in New Zealand do not remove his right to enter and reside in that country.
>
> [118] The Tribunal has considered the applicant's submissions during the course of this review that such rights might nonetheless fall short of the meaning of the 'right to enter and reside' as set out in s.36(3). There are several strands to this. First, he and his representative suggested that these rights are not 'equal' to those of others, ie. Spanish citizens. For instance, he would not be eligible for social security benefits if he were unable to find work. It appears that this argument, in essence, seeks to equate s.36(3) with Article 1E of the Convention. There is some suggestion that s.36(3) is "consonant with" Article 1E (*Applicant C v MIMA* [2001] FCA 229 at [28]), and that they are directed to the same concern, although their operation is not co-extensive (*NGBM v MIMIA* [2004] FCA 1373 at [59]; *NGBM v MIMIA* (2006) 150 FCR 522 at [223]). However, while Article 1E of the Convention applies only where the relevant country recognises the person as having "the rights and obligations which are attached to the possession of the nationality of that country", there is no such requirement in s.36(3). In the Tribunal's view, taking also into account the reference to 'temporary' rights in s.36(3), there is no implied requirement that a person have such rights. In sum, the Tribunal does not accept that the applicant's right to enter and reside in Spain is negated on this basis.
>
> [119] Second, the applicant and his representative argued that, beyond the period of 3 months, the applicant's rights in Spain would amount to something less than 'residence'. The representative referred to residence as 'the *ability* to establish domicile and establish links with that place', and pointed to practical problems the applicant might face such as unemployment and lack of access to social security benefits, his inability to support himself and (by implication) other problems arising from his lack of language and contacts. The right to reside in the context of s.36(3) clearly refers to the establishment of more than a transitory presence in the place. It might be theoretically possible that an applicant could face such extreme hardship that a right to reside is in effect negated. However, the Tribunal finds it unnecessary to consider this question further. It considers that the challenges the applicant might face in Spain are far removed from such a hypothetical case, and not such as to negate the existence of his right to reside in that country for the purposes of s.36(3). The challenges that the applicant may face in Spain are, however, relevant to the further question posed by s.36(4), namely whether he has a well-founded fear of Convention-related persecution in Spain. The Tribunal considers that question below (paragraphs 128 ff.)

72 The second part of the Tribunal's reasons to which reference is also made is paragraph [138]. That paragraph, together with paragraph [137], provide as follows:

> [137] The applicant contends that there is a real chance that he will be unable to find work – because of the poor job outlook, and exacerbated by his ethnicity and other attributes – and that the Spanish authorities will deny him unemployment and social security benefits because of his nationality (ie as a non-Spanish citizen). The Tribunal appreciates the applicant's concerns. However, it does not consider that his inability to access vocational training amounts to persecution, taking also into account that he has mainly engaged in casual work, such as painting, couriering and fixing motors in New Zealand and Australia. The Tribunal is also not satisfied that the applicant's possible unemployment in Spain will amount to Convention-related persecution. While it is true that he faces considerable challenges, because of language issues, his lack of local knowledge and his limited skill set, all against a backdrop of a tough labour market generally, the risk of these may be offset by other factors, such as his English, his age and his past work. Furthermore, the Tribunal does not accept that the essential and significant reason for any period of unemployment will be the applicant's race, his membership of any particular social group (such as 'unemployed Roma non-citizens') or any other Convention ground (such as his nationality, as a non-Spaniard).
>
> [138] The applicant and [his Advocate] also pointed out that, faced with possible unemployment, he will be ineligible for social security benefits because he is a non-citizen of Spain and/or because he has not made past insurance contributions. In other words, the lack of income (perhaps together with accommodation and other difficulties) may put him at risk of serious harm, for instance, 'significant economic hardship that threatens [his] capacity to subsist', and 'denial of access to basic services [with a similar impact].' The Tribunal acknowledges the applicant's genuine concern about this, and accepts that his eligibility for social security may rely on his nationality (a Convention ground) and/or his past contributions to any insurance fund. However, the Tribunal considers that any period of unemployment will be short-lived, given the applicant's age and the nature of his past work, and it is satisfied that there are support groups and social networks in Spain that are available to ensure that he does not suffer harm amounting to persecution.

SECTION 36

73 It is the first *Ground of Appeal* which seeks to advance the Appellant's primary argument. This *Ground* alleges an error of law in relation to the construction and application to the facts by the Tribunal of s 36(3) of the *Migration Act*.

74 Section 36, in its entirety, provides as follows:

> **36 Protection visas**
>
> (1) There is a class of visas to be known as protection visas.
> Note: See also Subdivision AL.
>
> (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; or
> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
> (i) is mentioned in paragraph (a); and
> (ii) holds a protection visa.

> *Protection obligations*
>
> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> (a) a country will return the non-citizen to another country; and
>
> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country.
>
> *Determining nationality*
>
> (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
>
> (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

75 Section 36(3), (4) and (5) were incorporated by way of amendments effected by the *Border Protection Legislation Amendment Act 1999* (Cth). In *SZLAN v Minister for Immigration and Citizenship* [2008] FCA 904 at [51] to [52], 171 FCR 145 at 158 ("*SZLAN*"), Graham J helpfully set forth extracts from both the *Supplementary Explanatory Memorandum* and the *Tabling Speech* when the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs introduced these amendments. As extracted, the *Supplementary Explanatory Memorandum* stated as follows:

> 3 New subsection 36(3) is an interpretive provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.
>
> …
>
> 5 The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection.

And, as extracted, the *Tabling Speech* stated in part as follows:

> The amendments that I place before the chamber today are part of a package of tough new measures that the Minister for Immigration and Multicultural Affairs announced on the 13th of October 1999.
>
> These measures are aimed at curbing the growing number of people arriving illegally in Australia, often through people smuggling operations.

> The Refugees Convention and Protocol have, from inception, been intended to provide asylum for refugees with no other country to turn to.
> Increasingly, however, it has been observed that asylum seekers are taking advantage of the convention's arrangements.
>
> Some refugee claimants may … have rights of return or entry to another country, where they would be protected against persecution.
>
> Such people attempt to use the refugee process as a means of obtaining residence in the country of their choice, without taking reasonable steps to avail themselves of protection which might already be available to them elsewhere.
>
> This practice, widely referred to as 'forum shopping', represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations.
> …
>
> Domestic case law has generally re-inforced the principle that Australia does not owe protection obligations under the refugees convention, to those who have protection in other countries.
>
> It has also developed the principle that pre-existing avenues for protection should be ruled out before a person's claim to refugee status in Australia is considered.

76 Section 36 is also complemented by s 91M and s 91N which are both part of Subdivision AK, being a subdivision specifically dealing with the area of *Non-citizens with access to protection from third countries*. These sections provide as follows:

> **91M Reason for this Subdivision**
>
> This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.
>
> Note: For protection visas, see section 36.
>
> **91N Non-citizens to whom this Subdivision applies**
>
> (1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.
>
> (2) This Subdivision also applies to a non-citizen at a particular time if, at that time:
>
> (a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:
>
> (i) Australia; or
>
> (ii) a country of which the non-citizen is a national; or
>
> (iii) if the non-citizen has no country of nationality–the country of which the non-citizen is an habitual resident; and
>
> (b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and
>
> (c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.
>
> (3) The Minister may, after considering any advice received from the Office of the United

> Nations High Commissioner for Refugees:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection to persons to whom that country has protection obligations; and
>
> (iii) meets relevant human rights standards for persons to whom that country has protection obligations; or
>
> (b) in writing, revoke a declaration made under paragraph (a).
>
> (4) A declaration made under paragraph (3)(a):
>
> (a) takes effect when it is made by the Minister; and
>
> (b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).
>
> (5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.
>
> *Determining nationality*
>
> (6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
>
> (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

Section 91R thereafter sets forth an explanation of what is meant by "*persecution*".

77 Section 91R is also a provision which has been relevantly amended. As explained by Graham J in *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 272 at [56], 149 FCR 151 at 162 ("*NBLC*"), subsequent to the insertion of s 36(3) to (7) a further amendment was made by the *Migration Legislation Amendment Act (No 6) 2001* (Cth) which commenced on 1 October 2001. That Act inserted a new s 91R. His Honour there also helpfully set forth the following extract from the Minister's *Second Reading Speech* in the House of Representatives on 28 August 2001:

> This bill is aimed at addressing two critical challenges facing Australia's refugee protection arrangements and our ability to effectively contribute to international efforts to protect refugees.
>
> First, the continuing influx of unauthorised arrivals to this country is a tangible indicator of increasingly sophisticated attempts to undermine the integrity of Australia's refugee determination process.
>
> …
>
> The second major challenge lies in the increasingly broad interpretations being given by the courts to Australia's protection obligations under the refugees convention and protocol.
>
> The convention does not define many of the key terms it uses.
>
> In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention.

> These generous interpretations of our obligations encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.
> …
> Our action in legislating on the application of the refugees convention is consistent with the principles recognised in international law that states have the right to define how they will implement their obligations under international treaties.
> …
> The bill will also stop the refugees convention being interpreted so broadly that people who were never envisaged to be refugees manage to obtain refugee protection in Australia.
>
> The government has been concerned for some time that the refugees convention has become so widely interpreted that it is in danger of failing the very people that it was designed to protect.
> …
> *The bill will define the fundamental convention term, "persecution", as an appropriate test of serious harm.*
> …
> *Persecution is a key concept in considering claims for refugee status and it is not defined in either the convention or Australian legislation.*
>
> Our legislation should reinforce the basic principles of persecution under the convention — that for a person to require protection the persecution must be for a convention reason, and the persecution must constitute serious harm. [Graham J's emphases]

78 The manner in which s 36 and s 91R now operate was also addressed by Wilcox J in *NBLC* where His Honour also referred to the *Second Reading Speech* to the 2001 amendment and continued:

> [5] It will be noted that both these passages evince a concern that people are being too readily accepted in Australia as refugees. In that context, it was logical for parliamentary counsel to frame s 91R in such a manner as notionally to amend Art 1A(2) of the *Convention Relating to the Status of Refugees 1951* as done at Geneva on 28 July 1951 as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967 (the Convention), in relation to the application of the Act and regulations to a particular person. Article 1A(2) of the Convention is the gateway through which all applicants for refugee recognition must pass. By raising the threshold of what constitutes 'persecution' within the meaning of Art 1A(2), as applied to that person, the amending legislation was achieving the minister's stated purpose of weeding out unworthy applicants for recognition. However, that purpose has no relevance to s 36(3), a provision that is concerned with people who have already satisfied Art 1A(2), as notionally amended by s 91R, and whose only reason for not being entitled to an Australian visa is that they have a right of residence in another country.

Bennet J, the third member of the Full Court in *NBLC*, there also noted the manner in which the qualifications effected by s 36(3) and (4) now operate as follows:

> [17] It can be seen that the subject of the section is the person, the applicant. It is not the case that the applicant simply needs to establish a well-founded fear in his or her country of nationality. The "gateway", to adopt the language of Wilcox J, is a composite test that precedes the application of s 36(2). As the primary judge put it at [38], s 36(3) is a qualification of s 36(2) and (4) is a qualification to that qualification.

See also: *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 60 at [16], 150 FCR 522 at 528 to 529 per Black CJ; at [55] per Mansfield J. Special leave to appeal from this decision was granted but the appeal was dismissed: *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54, 231 CLR 52.

A RIGHT TO ENTER AND RESIDE?

79 The first *Ground of Appeal* seeking to contend that there had been an error of law in respect to the construction and application of s 36(3) – and, in particular, in paragraph [119] of the Tribunal's reasons – was expressed in the *Notice of Appeal* as follows:

> Cameron FM erred in failing to hold that the Refugee Review Tribunal committed a jurisdictional error in so far as it as its [sic] decision involved an error of law.
>
> *Particulars*
>
> The Refugee Review Tribunal gave to the concept of "*a right to enter and reside in*" another country in subsection 36(3) *Migration Act 1958* (the "Act") a meaning unavailable under the Act, namely that a person's right to "*reside*" in another country within the meaning of subsection 36(3) would only be "*negated*" in circumstances of "*extreme hardship*" (at [119]).
>
> The Refugee Review Tribunal ought to have held that the concept of a right to reside in subsection 36(3) of the Act included:
> (a) the right to participate in that Country's system of social security; and/or
> (b) as a matter of practical reality, the capacity to establish a residence in that country.

The same argument was advanced before the Federal Magistrate and was rejected: [2009] FMCA 1197 at [24] to [39]. The "*hardship*" which it is said would be faced by the Appellant was said to be attributable (at least in part) to his inability to obtain employment or to access welfare benefits should he remain in Spain for longer than 6 months.

80 The range of errors that may constitute jurisdictional error is quite broad. In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, 206 CLR 323 McHugh, Gummow and Hayne JJ identified some of the parameters of errors that may go to jurisdiction as follows:

> [82] It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the Tribunal)
>
> > "… falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional

> error which will invalidate any order or decision of the tribunal which reflects it".
>
> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law. [footnotes omitted]

Not all errors as to the correct construction and application of a statutory provision will necessarily constitute "*jurisdictional error*": *Minister Administering Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 352 at [9], 171 LGERA 56 at 62 per Hodgson JA.

81 But an error as to the correct construction and application of s 36(3) of the *Migration Act* in the present proceeding, it is considered, could constitute jurisdictional error. Section 36(3) operates as an important qualification of both the manner in which the Act operates in respect to those seeking Australia's protection as refugees and as an important aspect of the obligations Australia has assumed internationally. For the Refugee Review Tribunal to wrongly exclude an applicant from refugee status by reason of a misconstruction of s 36(3) would be a failure on the part of the Tribunal to in fact do the task entrusted to it by the Legislature. Such an error could operate at the outset of a consideration of an applicant's claims so as to exclude from further consideration the merits of those claims by reason of a mistaken conclusion that the applicant could "*enter and reside*" in a third country.

82 Although an error in the construction of s 36(3) may thus be accepted as a jurisdictional error, it is considered that the first *Ground of Appeal* is to be rejected for either of two reasons, namely:

- the Tribunal whose decision was under review did not make any finding either that the right to reside would only be "*negated*" if an applicant for refugee status was exposed to "*extreme hardship*" or that the present Appellant would face "*extreme hardship*"; and/or

- s 36(3), properly construed, simply addresses the right to "*enter and reside*" in a third country and does not incorporate any requirement to necessarily examine such matters as a person's ability to obtain employment or to access welfare benefits upon taking up residence.

83 The former reason is a sufficient reason to reject the first *Ground of Appeal*.

84 Irrespective of what may be the correct construction of s 36(3), the simple fact is that in the present case the Tribunal did not conclude that "*a person's right to 'reside' in another country within the meaning of subsection 36(3) would only be 'negated' in circumstances of 'extreme hardship'*". The conclusion in fact reached by the Tribunal was that:

> …[i]t might be theoretically possible that an applicant could face such extreme hardship that a right to reside is in effect negated.

Indeed, the Tribunal found it unnecessary to consider this "*theoretical*" possibility or such a "*hypothetical*" case. Its conclusion was simply that the difficulties confronting the now Appellant were "*not such as to negate the existence of his right to reside*" in Spain. That was a finding of fact open to it on the evidence and a finding of fact not dependent upon the construction of s 36(3) now urged on behalf of the Appellant before this Court.

85 The first *Ground of Appeal*, with respect, misstates the conclusion and findings reached by the Tribunal. Taking the argument as advanced on behalf of the Appellant at its highest, the present Appellant did not factually fall within the construction advanced on his behalf.

86 In rejecting a like argument, the Federal Magistrate also correctly noted that the Tribunal at paragraph [119] did not "*express the view that a person's right to reside in another country within the meaning of s.36(3) would only be 'negated' in circumstances of 'extreme hardship'*": [2009] FMCA 1197 at [25]. After setting out part of paragraph [119] of the Tribunal's reasons, the Federal Magistrate went on to observe that "*[a]lthough the Tribunal did consider the difficulties which the applicant might confront were he to relocate to Spain, it did so in the context of s.36(4) and whether such circumstances might amount to Convention-related persecution. It did not consider these matters in the context of s.36(3) and*

whether the applicant's right to reside in Spain might have been negated thereby": [2009] FMCA 1197 at [25].

87 Although the reasoning of the Federal Magistrate may not completely set forth the manner in which the Tribunal discharged its functions, no appellable error is discernible in the Federal Magistrate's conclusion.

88 Separate from any consideration of the findings and conclusions in fact expressed by the Tribunal, however, is the rejection of the primary argument advanced on behalf of the Appellant that s 36(3) and the use of the term "*reside*" carries with it a practical opportunity for a person to obtain employment and to participate in a country's welfare benefits.

89 The source of the Appellant's argument that such matters are incorporated within the ambit of s 36(3) was primarily to be found within Article 1E of the *Convention Relating to the Status of Refugees* ("*the Convention*"). That Article is found within Chapter I of the Convention which is directed to the "*definition of the term 'refugee'*". Article 1E provides as follows:

> 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.

Chapters III and IV of the Convention thereafter deal with "*Gainful Employment*" and "*Welfare*" respectively. Within Chapter IV, Article 24 provides that the "*Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect to*" the matters thereafter mentioned.

90 Counsel on behalf of the Appellant accepted that the rights and obligations of a claimant for refugee status are to be found in Australia's domestic law and not in the terms of the Convention. But, where there is ambiguity in the terms of the statutory language employed by the Australian parliamentary draftsman, recourse it was said could be made to the terms of the Convention as an aid in the resolution of that ambiguity.

91 It may presently be accepted that the correct construction of s 36 is not without its difficulties. Despite the apparent simplicity of the statutory phrase in s 36(3), namely the

"*right to enter and reside*", there is continuing uncertainty as to what either the words themselves mean or what the phrase as a whole means.

92 The term "*enter*" is defined by s 5 as including "*re-enter*". The terms "*right*" and "*reside*" are not defined. Nor is there a definition of the phrase "*right to enter and reside*".

93 It should also be noted that the same statutory phrase is also to be found elsewhere in the *Migration Act* – namely, in s 91D(2)(b). Section 91M, it may also be noted, refers to a "*right to re-enter and reside*".

94 The term "*reside*" is also employed in ss 42 ("*reside indefinitely*"), 189 and 197AB.

95 An initial potential source of ambiguity is whether s 36(3) refers to only a single right, namely a right to enter and reside, or whether it refers to two separate rights, namely a right to enter and a separate right to reside. In *SZLAN* at 162, Graham J concluded that s 36(3) referred to a single right of entry and residence. That conclusion, His Honour reasoned, was supported by the reference to a single right later in s 36(3).

96 That conclusion, it is respectfully considered, is clearly correct. The phrase "*right to enter and reside*" is a composite phrase which should be construed as a whole. Section 36(3) refers to a single "*right*". A "*right*" to enter another country is not sufficient for the purposes of s 36(3); nor is a "*right*" to reside sufficient. As noted by Graham J in *SZLAN*, s 36(3) refers to "*that right*", namely "*the right to enter and reside*". Construed as a composite whole, the phrase itself assists in giving content to that which will operate as a "*qualification*" upon the "*criterion for a protection visa*" to which s 36(2) refers. Construed as a composite whole, the phrase largely removes any necessity to even consider whether a visa issued to a tourist or for limited business purposes would fall within the phrase.

97 Attempts to construe the individual terms within the phrase, it is respectfully considered, have the potential to mislead and to divert attention away from the object and purpose sought to be achieved by s 36 as a whole. Such attempts also have the potential to divert attention into questionable analogies as to what the phrase "*right to enter*" or the term "*reside*" may mean in other areas of the law. It nevertheless remains instructive to consider

each of the individual statutory terms used by the Parliamentary draftsman as a potential aid to construing the phrase as a composite whole.

98 Subject to that reservation, various words of phrases within s 36 have over time received the attention of a number of Full Courts of this Court and of various Judges of the Court. Such views as have been expressed have obviously been directed to the terms of the legislation then in force.

99 Views have thus been expressed as to whether the term "*right*" refers to an "*existing legally enforceable right*" (*WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194 at [32], 131 FCR 269 ("*WAGH*") at 278 per Lee J; *SZLAN v Minister for Immigration and Citizenship* [2008] FCA 904 at [68], 171 FCR 145 at 162 per Graham J) or a practical ability to enter and reside in a country and obtain protection (*Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332 at [20] to [21], 116 FCR 154 at 161 ("*Applicant C*") per Stone J (Gray and Lee JJ agreeing); *WAGH* at [54] per Hill J). The phrase in s 36(3), "*however that right arose or is expressed*", has been relied upon by Allsop J in *V856/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 1018, 114 FCR 408 as indicating that "*the source and incidents of the right can be diverse*". His Honour continued:

> [31] … It also assists in the recognition that "right" is intended to be a wide conception. Especially in the light of the above phrase, I see no reason to restrict the meaning of the word "right" to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning a liberty or permission or privilege which does not give rise to any particular duty upon the state in question. Such a liberty, permission or privilege would obtain its effective substance from its grant and thereafter from the lack of any withdrawal of it and from the lack of any existing prohibition or law contrary to its exercise, rather than from the existence within the positive law of the state in question of a correlative duty, justiciable and enforceable in law, to recognise the right. It may be that in many cases if the right is to survive outside, and divorced from residence in, the country in question it may well be a right in the strict sense, but I do not think that that conclusion follows as a matter of statutory construction.

100 The source of any such "*right*" has also received attention. It need not be one conferred by the grant of a visa. Thus Stone J in *Applicant C* further observed:

> [60] It should also be recognised that a right of entry such as I have postulated may arise other than by grant of a visa. A country's entry requirements may be met by proof of identity and citizenship of a nominated country being provided at the border, for example by production of a valid passport, without the necessity for a visa. This would explain the use in s 36(3) of the

phrase, "however that right arose or is expressed".

101 Perhaps of more immediate relevance to the present appeal are the views previously expressed as to what is meant to be conveyed by the term "*reside*". Implicit in the judgment of Lee J in *WAGH* is that it refers to an ability to "*reside*" in a third country for so long as is necessary to secure the protection that the country may offer. Hill J there further observed:

> [62] With respect to Lee J, s 36(3) does not require that it be shown that the third country acknowledge that it would accord the person protection from persecution if returned to the country of residence or nationality. There is nothing in the section which suggests the need for a prior recognition by the third country. If such prior acknowledgment or recognition is to be required then it would be necessary to add substantially to the words used in s 36(2). Accordingly I do not accept that s 36(3) requires that the Minister show that the applicant have an existing right to enter and reside and receive protection equivalent to that to be provided to that person by a Contracting State under the Convention.
>
> [63] In my view the question to be determined by the Tribunal is whether the appellant was a person who had what may be described as a right that was practically likely to be exercised, albeit not legally enforceable, to enter and reside even if only temporarily in the United States and in circumstances where it was practically likely that she would obtain effective protection there. It is not necessary that the Tribunal decide whether the "right" in that sense carries with it the right to receive protection in the third country.
>
> [64] I agree with Lee J, naturally, that not any visa, no matter how restrictive, would activate s 36(3) and thus result in the person not being a person to whom Australia owed protection obligations. The right, to which s 36(3) refers, is not merely a right to enter. It must be a right to enter and reside. A transit visa, for example, would, or could, be a right to enter, but clearly is not a right to enter and reside.
>
> [65] The fact that the residence of which the section speaks may be temporary is clear from the face of the section. Whether a visa to enter for tourist purposes is a visa which authorises both entry and (temporary) residence is a difficult question. "Reside" in its usual dictionary sense means "to dwell permanently or for a considerable time; have one's abode for a time" (see *The Macquarie Dictionary* (3rd ed, 1997)). It would be an unusual, although not impossible, use of the word to refer to a tourist. A tourist may stay overnight, or for a time in a country, but that country would not be his or her place of abode, even temporarily. The present is not a case where the appellant carried on any business, or indeed was employed by some other person in that person's business. If she were then it would be possible to argue that residence was necessary for business purposes.

102 Subsequently, in *NBLC* a Full Court again had the occasion to consider s 36(3). The principle question there under consideration was the meaning of the phrase "*all possible steps*" in s 36(3). In the course of resolving that question, Graham J concluded:

> [61] The appellants' submitted that "possible steps" should be construed as "reasonably available steps" or "reasonably practicable steps" or "reasonably possible steps" and that in this regard the Tribunal misconstrued s 36(3).
>
> [62] In dealing with this issue the primary judge said, in my view correctly, "Section 36(3) directs attention at taking steps *to avail oneself of a right to enter and reside in a country.* [It] is not directed to the consequences of entering and residing in a country" (emphasis in

> original).
>
> [63] The relevant right in respect of which a non-citizen must take all possible steps to avail himself is the bare right, if it exists, to enter and reside in a country, not a right to enter and reside comfortably in a country.

Wilcox J had earlier similarly observed:

> [2] … The words 'all possible steps' in s 36(3) of the *Migration Act 1958* (Cth) (the Act) ought to be interpreted as meaning exactly what they say. Especially having regard to the context in which s 36(3) was enacted, as evidenced by the extrinsic materials, it is not possible to conclude that Parliament intended the words to require decision-makers to take into account the consequences to the person of entering or residing in the relevant third country, except as specifically provided in subss (4) and (5) of s 36. If the appellants' argument in relation to s 36(3) were correct, subss (4) and (5) would be otiose. Given that subs (4) commences with the word 'However', and subs (5) with 'Also', those subsections can hardly be regarded as insertions for more abundant caution.

Bennett J (at [12]) also expressed concurrence with the conclusion of Graham J as to the meaning of the phrase "*all possible steps*".

103 But no decision supports the construction of s 36(3) now advanced on behalf of the Appellant. The reasons for decision, for example of Hill J in *WAGH* at [64] cannot be construed as any endorsement of the proposition that the reference to residence carries with it any right to participate in (for example) welfare benefits.

104 Nor is such an interpretation of s 36(3) supported by the words in fact used. Indeed, the only "*right*" to which reference is made in that sub-section is a "*right to enter and reside*". There is no reason why any further right, including any right to receive welfare benefits, should be implied. To imply such rights would be, it is respectfully concluded, contrary to the conclusion of the Full Court in *NBLC*. Graham J there concluded that the right referred to was a bare right to enter and reside, "*not a right to enter and reside comfortably in a country*": [2005] FCAFC 272 at [63]. And, as was concluded by Wilcox J, there was no requirement to "*take into account the consequences to the person of entering or residing in the relevant third country*": [2005] FCAFC 272 at [2].

105 Nor does recourse to the Convention provide any reason to reach any different conclusion.

106 Article 1E, a provision upon which particular reliance was placed by the Appellant, is a provision which expressly identifies those persons to whom the Convention does not apply,

namely those persons who have taken up residence in another country and who have been recognised by that country as "*having the rights and obligations which are attached to the possession of the nationality of that country*". A person who has received such recognition from another country is not a person who is a "*refugee*" as defined by the Convention. Quite simply, such a person cannot voluntarily leave the place in which he has taken up such residence and seek to then enter another country of his choosing.

107 However that clause of Article 1 may be construed, the "*criterion for a protection visa*" under Australian law is to be found within s 36(2). Once that sub-section identifies those who may apply for such a visa, s 36(3) thereafter operates as a separate qualification upon those who may apply and s 36(4) again thereafter operates as a further qualification. Concurrence is expressed with the view of Allsop J in *V856/00A*, supra, that "*the text of s 36(3) is more relevant*" than the terms of Article 1E when construing the term "*right*": [2001] FCA 1018 at [31], 114 FCR at 419.

108 Left unanswered by the Appellant was why the construction of s 36(3) being advanced only picked up the right to obtain welfare benefits and not the other benefits referred to in Chapter IV of the Convention.

109 The argument advanced on behalf of the Appellant that the "*right to enter and reside*" necessarily incorporates as a matter of law a right or an ability to obtain employment and a right to participate in a country's welfare benefits is thus rejected.

110 Left open for future resolution is a question as to whether a person who has a "*right to enter and reside*" in another country may so confront economic or physical circumstances that he may not truly be said to have such a "*right*". The right is a "*right to enter and reside*"; it is perhaps different to a "*right to enter and subsist*". Regulation 5 to the Revised 1956 Regulations for Inmates for the United States Penitentiary for Alcatraz, California, it will be recalled provided:

> PRIVILEGES. You are entitled to food, clothing, shelter and medical attention. Anything else that you get is a privilege. You earn your privileges by conducting yourself properly. 'Good Standing' is a term applied to inmates who have a good conduct record and a good work record and who are not undergoing disciplinary restrictions.

It would be desirable to conclude that a "*right to enter and reside*" means a little more than the basic entitlements extended to inmates of Alcatraz over half a century ago. A right to enter a country and to have access to basic shelter and food may not be as desirable as a claimant may hope for, but it may perhaps remain a "*right to enter and reside*". Examples are regrettably not infrequent where those fleeing persecution are housed by another country in tents or make-shift accommodation and have no ability to obtain employment and where their ability to move freely throughout a country may be seriously circumscribed. But their ability "*to enter and reside*" in the country to which they have fled may nevertheless still fall within the ambit of the qualification expressed in s 36(3).

RELEVANT CONSIDERATIONS AND IRRELEVANT CONSIDERATIONS

111 The second *Ground of Appeal* alleged the failure to take into account relevant considerations and the taking into account of irrelevant considerations as follows:

> Cameron FM erred in failing to hold that the Refugee Review Tribunal committed a jurisdictional error in so far as it failed to take into account relevant considerations and took into account irrelevant considerations.
>
> *Particulars*
>
> (a) The Tribunal concluded that the challenges the Appellant would face in Spain were "far removed" from "extreme hardship" (at [119]) and thus improperly excluded further consideration of the application of subsection 36(3) of the Act.
>
> (b) In so far as the Tribunal may have based its conclusion in 2(a) on its factual findings in relation to whether the Appellant would face a real chance of persecution in Spain, the Tribunal took into account an irrelevant consideration being only whether any extreme hardship faced by the Appellant would be due to a Convention reason.

112 Again, the challenge to the approach of the Tribunal – and the challenge to the decision of the Federal Magistrate – draws attention to paragraph [119] of the Tribunal's decision.

113 The Federal Magistrate rejected the argument. He concluded that as "*the Court has not accepted the applicant's submissions on what 'reside' means in s.36(3), the second ground of the application lacks the necessary foundation and thus discloses no jurisdictional error on the part of the Tribunal*": [2009] FMCA 1197 at [41].

114 The failure to take into account relevant considerations and the taking into account of irrelevant considerations may also constitute jurisdictional error: *Minister for Immigration*

and Multicultural Affairs v Yusuf [2001] HCA 30 at [82], 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ. The observations there made have since been repeatedly cited and applied by Judges of this Court: e.g., *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, 161 FCR 40 at [126] to [127] per Spender J (aff'd on appeal: *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, 163 FCR 414). See also: *Minister for Immigration and Citizenship v JSFD* [2010] FCA 569 at [34] per Marshall J.

115 Again two fundamental difficulties confront this *Ground of Appeal.*

116 One is that it is the *Migration Act* itself which primarily identifies the considerations to be taken into account. The second is that this *Ground* inherently seeks to advance a submission which challenges the weight given by the Tribunal to the challenges the Appellant would face in Spain. In *Minister for Immigration and Multicultural Affairs v Yusuf*, supra, McHugh, Gummow and Hayne JJ also observed:

> [73] It is, of course, essential to begin by considering the statutory scheme as a whole. To that extent the submission is right. On analysis, however, the asserted duty to make findings may be simply another way of expressing the well-known duty to take account of all relevant considerations. The considerations that are, or are not, relevant to the Tribunal's task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider. …
>
> [74] This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations for the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts. [footnotes omitted]

This passage has also been applied by decisions of the Full Court of this Court: *Applicant M185 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 230 at [8] per Sundberg, Marshall and Merkel JJ.

117 In addition to the basis upon which the Federal Magistrate rejected the same argument, it is considered that a further basis upon which it can be rejected is that the argument is an impermissible attempt to review the findings of fact made by the Tribunal.

118 Counsel on behalf of the Appellant, it should be noted, properly accepted that the second *Ground of App*eal must fail if the first *Ground* was unsuccessful.

FINDINGS AND EVIDENCE

119 The third *Ground of Appeal* alleging the making of findings of fact not open on the evidence was expressed as follows:

> Cameron FM erred in failing to hold that the Refugee Review Tribunal committed a jurisdictional error in so far as it made findings that were not open on the evidence before it.
>
> *Particulars*
>
> The Refugee Tribunal found that the Appellant's period of unemployment in Spain would be "short lived" because of his age, past work experience and the availability of "support groups and social networks" in Spain (at [138]).
>
> It was not open to the Refugee Review Tribunal to make this finding as there was no evidence before the Tribunal that:
> (a) young uneducated migrant non-citizens who do not speak Spanish and who were only experienced in menial labour were likely to find employment relatively quickly in Spain; and or
> (b) there were support groups and social networks in Spain which could support unemployed migrant non-citizens such as the Appellant.

The particulars, of course, make reference to paragraph [138] of the Tribunal's reasons.

120 A mere factual error, leaving aside jurisdictional facts, is unlikely to constitute jurisdictional error: *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* [2001] HCA 10, 177 ALR 473. McHugh J there observed:

> [35] The tribunal understood the question that it had to answer. Even if it applied an erroneous precedent, it did not commit a jurisdictional error. The expressions "disability" and "other serious circumstances" were used in reg 1.03 in their ordinary, non-technical sense. The ordinary meaning or common understanding of a non-technical word is generally a question of fact. Leaving aside questions of jurisdictional fact, an administrative tribunal will ordinarily not commit a jurisdictional error unless it has made an error of law. A factual error made in the course of making a determination or decision is unlikely to be a jurisdictional error unless the particular fact is a jurisdictional fact. Courts should be slow to find that an erroneous finding of fact or an error of reasoning in finding a fact, made in the course of making a decision, demonstrates that an administrative tribunal so misunderstood the question it had to decide that its error constituted a jurisdictional error.
>
> [36] If an administrative tribunal applies a wrong legal test or asks itself or decides a wrong legal question, it may be a short step to concluding that it did not decide the question that it had to decide. But questions of fact are ordinarily for an administrative tribunal to determine and so are the reasoning processes employed to make such findings. Disagreement with a finding of fact or the reasoning process used to find it is usually a slender ground for concluding that a tribunal misconceived its duty.

Kirby J has likewise concluded that a complaint that the Refugee Review Tribunal came to the wrong decision on the facts placed before it, without more, does not "*[enliven] the*

jurisdiction of this court to provide a constitutional writ. Specifically, it is a complaint that falls short of showing jurisdictional error on the part of the tribunal": *Re Refugee Review Tribunal; Ex parte HB* [2001] HCA 34 at [25], 179 ALR 513 at 518 to 519.

121 But, in *Minister for Immigration and Multicultural and Indigenous Affairs v VOAO* [2005] FCAFC 50 at [5] and [13] it was accepted that a finding of fact "*without any supporting probative evidence*" may constitute jurisdictional error. And in *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231, 77 ALD 402, an argument was advanced that there was no information available to found a conclusion "*that there was a government in control of the place from which the appellant came that could or would protect the appellant from persecution*". Mansfield, Selway and Bennett JJ observed:

> [19] This argument, if it were made out, would be sufficient to establish that the tribunal had made a 'jurisdictional error' so as to found jurisdiction in this court to intervene. If the tribunal makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding then this may well constitute a jurisdictional error: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–357; 94 ALR 11 at 37-8; 21 ALD 1 at 23-4. If the decision of the tribunal was '*Wednesbury*' unreasonableness or if the material on which the tribunal relied was so inadequate that the only inference was that the tribunal applied the wrong test or was not, in reality, satisfied in respect of the correct test, then there would also be jurisdictional error: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* (2003) 198 ALR 59 at 62, 67, 76, 90–91…

See also: *SZMSB v Minister for Immigration and Citizenship* [2009] FCA 373 at [45] to [52], 108 ALD 361 at 372 to 373 per Reeves J.

122 These conclusions are also supported by the much earlier decision of the High Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100. Dixon CJ, Williams, Webb and Fullagar JJ there referred to the distinction between a finding of fact for which there was no basis and a finding which may be founded upon an "*inadequacy of … material*". Prohibition, it was said, would lie where "*on the facts no basis could exist*" for exercising a power. When considering a power to cancel or suspend registration, their Honours said at 117 to 118:

> … There can be no foundation for a writ of prohibition unless and until it appears, whether from the course of the inquiry or from the preliminary statement of the matters to which the inquiry is directed, that there can be no basis for the exercise of the power conferred by s 23(1) or that an erroneous test of the liability of the employer to the cancellation or suspension of his registration will be applied or that some abuse of authority is likely. In any such case a writ of prohibition may lie but it must be a writ restraining the ordering of

> cancellation or suspension. If on the facts no basis could exist for exercising the power it would be a proper exercise of this Court's jurisdiction to award a writ of prohibition prohibiting unconditionally or peremptorily the cancellation or suspension threatened. For in the first place the board and the delegate are doubtless officers of the Commonwealth. At all events that has not been disputed.

Their Honours then went on to observe at 119 to 120:

> It is in this respect only that the stage at which the present application is made becomes important. But the chief point of difficulty in the case lies in the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the tribunal and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends. It is not enough if the board or the delegate of the board, properly interpreting pars (a) and (b) of s. 23(1) and applying the correct test, nevertheless satisfies itself or himself on inadequate material that facts exist which in truth would fulfil the conditions which one or other or both of those paragraphs prescribe. The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.

The power conferred by s 75(v) of the *Commonwealth of Australia Constitution Act* to grant a "*writ of … prohibition*", it will be recalled, is exercised where there is jurisdictional error: *Darling Casino Ltd v New South Wales Casino Control Authority* (1996) 191 CLR 602 at 632 to 633 per Gaudron and Gummow JJ. "*Ever since the time of Edward I. the word 'prohibition' has been used in English jurisprudence to denote a judicial proceeding in which one party seeks to restrain another from usurping or exceeding jurisdiction*": *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 at 445 to 446 per Griffith CJ.

123 Where there is "*probative material*" upon which a decision may be reached, jurisdictional error is thus not established where it was open to the decision-maker to reach the decision sought to be impugned: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, 84 ALJR 369.

124 More difficult to resolve is the issue of whether jurisdictional error is established where there is said to have been an illogical process of reasoning applied to probative material which can arguably support the administrative decision under review. The claimant to refugee status in *SZMDS* claimed persecution by reason of his homosexuality. That claim had been rejected by the Minister's delegate and that decision had been affirmed by the Refugee Review Tribunal. An application to the Federal Magistrates Court was dismissed but

an appeal was allowed by a Judge of this Court: *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210, 107 ALD 361. In allowing the appeal, it was said that "*[t]he Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning*" with the result that the Tribunal "*fell into jurisdictional error having regard to the way it reached the conclusion that the applicant was not a homosexual*". Special leave to appeal was granted. Heydon J and Crennan and Bell JJ allowed the appeal. Gummow ACJ and Kiefel J in a joint judgment dissented. In their own joint judgment, Crennan and Bell JJ concluded:

> [135] On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims. There was. The Tribunal did not believe the first respondent's claim that he had engaged in the "practice of homosexuality" in the UAE and accordingly it was not satisfied that he feared persecution if he returned to Pakistan.
>
> [136] There is no sense in which the decision that the first respondent did not fear persecution, or the findings upon which that decision was based, could be said to be "clearly unjust", "arbitrary", "capricious", "*not* bona fide" or "*Wednesbury* unreasonable". Whilst these analogous categories were not relied on, they serve to confirm the want of jurisdictional error by reference to the closely related complaints of illogicality and irrationality. Neither the decision that the Tribunal was not satisfied that the first respondent feared persecution nor the findings on the way to that conclusion were "irrational" or "illogical" in the sense explained in these reasons. The Tribunal's decision did not show any jurisdictional error.

125 For present purposes it may thus be accepted that the making of a finding of fact which is a critical step in the ultimate conclusion reached and for which there is no evidential support may constitute jurisdictional error. No question as to illogicality or irrationality presents itself in the present appeal.

126 The passage upon which the present *Ground of Appeal* focuses is paragraph [138] of the Tribunal's reasons for decision and its finding that "*any period of unemployment will be short-lived, given the applicant's age and the nature of his past work, and it is satisfied that there are support groups and social networks in Spain that are available to ensure that he does not suffer harm amounting to persecution*".

127 There are at least two answers to this *Ground of Appeal*, namely:

- as is apparent from paragraph [137] of the Tribunal's reasons, the Tribunal did "*not accept that the essential and significant reason for any period of unemployment will be the applicant's race, his membership of any particular social group (such as 'unemployed Roma non-citizens') or any other Convention ground (such as his nationality, as a non-Spaniard)*"; and/or
- albeit based upon conflicting evidence, the finding made by the Tribunal was one which found some support in the evidence.

128 The factual basis upon which the Tribunal proceeded included not only the submissions made on the now Appellant's behalf but also publications, including a publication in 2002 of the *Open Society Institute*. His submissions, for example, included the following statement of facts:

> As he does not have any connections with Spain, [the Appellant] will need to either find employment or access social assistance payments in order to begin the process of establishing a permanent residence. The current financial crisis in Spain has resulted in an employment rate of 17.4 per cent and acceptance that there is a "severe and deep economic crisis". It is reasonable to assume that [the Appellant], as a young man without vocational or language skills, will be unable to gain employment. I note that even before the financial collapse of late 2008, citizens of the Czech Republic had a low profile as foreign workers in Spain and most of those employed in EU states held university degrees or high school diplomas.
>
> EU documents indicate that [the Appellant] will not be able to access any financial assistance from the Spanish government. Financial assistance is only available to job-seekers if there is a "genuine link" between the job-seeker and the employment market in the host state. It will be impossible for [the Appellant] to prove that he has any link with the Spanish employment market, apart from mere presence. Unemployment payments are dependent on prior work experience in the host state, prior contribution payments into national protection schemes, or prior unemployment payments from the applicant's national government. He will not be entitled to any language or vocational training, therefore his future chances of gaining employment will be limited. [footnotes omitted]

The publication of the *Open Society Institute* contained material specifically on "*The Situation of Roma in Spain*" and stated in part as follows:

> *Government response*
> Governmental response to employment issues affecting the Romani community has been framed in terms of clichés and generalisations about lack of skills and different cultural attitudes towards work among Roma/gitano communities; little consideration has been given to the role played by racial discrimination, and as a result few strategic policy responses to the reality of discrimination have been developed.
>
> A number of "employment integration" schemes have received State and AC funding through the Roma Development Programme, including pre-employment training, career guidance, assistance and supervision to help young people integrate into the labour market, vocational

> training for groups excluded from standard training, and training for intercultural mediators. The Ministry of Social Affairs and local governments have financed various programmes to assist street sellers.
>
> One encouraging development is "Acceder," an EU-supported programme, which for the first time includes the Romani community as a special target group for the operative programmes of the European Social Fund. The Programme aims to work with ACs and municipalities to secure employment for 2,500 Romani individuals over a seven-year period. "Acceder" branches opened in each participating municipality function as a network of parallel employment offices for Roma/gitanos, providing training, counselling and mediation services. The programme is administered by the Fundación Secretariado General Gitano (FSGG) and financed by the EU and Autonomous Communities. It has over 150 full-time staff persons, who work in five-member multicultural teams, and collaborators in 32 municipalities in 13 ACs. [footnotes omitted]

129 The third *Ground of Appeal* is, in essence, an objection to the weight given by the Tribunal to the materials before it or, alternatively, a challenge to the inferences drawn from those materials. Either way, no jurisdictional error is made out.

130 The third *Ground of Appeal* is rejected.

PROCEDURAL FAIRNESS — SECTION 425

131 The final *Ground of Appeal* alleging a denial of procedural fairness was expressed as follows (without alteration):

> Cameron FM erred in failing to hold that the Refugee Review Tribunal committed a jurisdictional error in so far as failed to accord the Appellant procedural fairness.
>
> *Particulars*
>
> The Refugee Review Tribunal failed to inform the Appellant that the following issues arose in relation to the decision under review:
>
> (a) Whether the Appellant would generally face extreme hardship in Spain such that his right to residence was negated (at [119]);
> (b) The Tribunal's belief that there were support groups and social networks which could support the Appellant in Spain (at [138]); and/or
> (c) The Tribunal's belief that young uneducated migrant who do not speak Spanish and who are only experienced in menial labour were likely to be able find employment relatively quickly in Spain (at [138]).

132 Before the Federal Magistrate the present argument was advanced upon the basis that the Tribunal in reaching these conclusions had contravened s 425 of the *Migration Act*. The argument was rejected. The Federal Magistrate relevantly concluded that the submission "*confuse[d] the evidence which may be relevant to an issue with the issue itself*". The Federal Magistrate concluded that the issue being addressed "*was whether lack of income, perhaps*

combined with accommodation and other difficulties, might put the applicant at risk of harm". Paragraph [138] of the Tribunal's reasons for decision, according to the Federal Magistrate, disclosed that this issue had been raised on behalf of the now Appellant at the Tribunal hearing and, accordingly, was not an issue which s 425 required to be brought to his attention.

133 Section 425 provides as follows:

> **Tribunal must invite applicant to appear**
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
>
> (2) Subsection (1) does not apply if:
>
> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
>
> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
>
> (c) subsection 424C(1) or (2) applies to the applicant.
>
> (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

134 There is no doubt that, in appropriate circumstances, an opportunity to be heard consistent with s 425 may require a Tribunal to raise with a claimant a specific issue that may be determinative of his case: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, 228 CLR 152. Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ there observed:

> [44] The Tribunal did not accord the appellant procedural fairness. The Tribunal did not give the appellant a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision under review.
>
> [45] That conclusion is decisive of the present appeal. It is as well, however, to say something more about the third aspect of the appellant's account which the Tribunal considered to be determinative. That was his being allowed ashore to obtain medical treatment before he jumped ship. The delegate had concluded that the appellant's *returning* to his ship was not consistent with the fear which the appellant said he then held for his safety. It followed that what were the circumstances surrounding the appellant's going ashore on this occasion was an issue arising on the review by the Tribunal.
>
> [46] Three further general points should be made.
>
> [47] First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account

> that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.
>
> [48] Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:
>
> > "the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."
>
> Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.
>
> [49] Finally, even if the issues that arise in relation to the decision under review are properly identified to the applicant, there may yet be cases which would yield to analysis in the terms identified by the Full Court of the Federal Court in *Alphaone*. It would neither be necessary nor appropriate to now foreclose that possibility. [footnotes omitted; emphasis in original]

135 And in *SZGGD v Minister for Immigration and Citizenship* [2009] FCA 1250 at [20], Barker J observed that it "*is properly the function of the Tribunal, pursuant to s 425 of the Act, and as an inquisitorial body, to question an applicant about his or her claims. The Tribunal is entitled to control the direction of the hearing, including by asking questions in order to satisfy itself of the merits of the application*".

136 In the present appeal it is contended on behalf of the Appellant that there has been a failure to afford an opportunity to be heard by reason of the Tribunal failing to raise with the now Appellant three matters, namely those particularised in the fourth *Ground of Appeal*.

137 There are a number of difficulties confronting the Appellant in respect to this final *Ground of Appeal*.

138 First, each of the issues relied upon was in fact canvassed and an opportunity extended to the Appellant to advance evidence and make submissions. It was, for example, the Appellant himself in a submission to the Tribunal in April 2009 who first flagged as an issue to be resolved the need "*to consider if he has the right to establish himself in another state in the European Community, to gain employment, accommodation, and develop social ties*". The question as to the difficulties confronting the now Appellant was again addressed in "*Additional Submissions*" in May 2009 where the Appellant's advocate addressed the

particular circumstances that he would confront in Spain. The manner in which the Tribunal was approaching the analysis of the material being presented to it was unequivocally disclosed when it said during the course of the Tribunal hearing later in May 2009:

> TRIBUNAL MEMBER: ... The issue though … is not whether then you may face some problems but whether you have a well-founded fear of persecution for reason of your race or one of the other convention reasons.

A little later in the same hearing, the advocate then appearing on behalf of the now Appellant again sought to emphasise the difficulties to be confronted in Spain and sought to "*just make one more submission on Spain*" and the following exchange took place:

> ADVOCATE: … I feel is quite compelling. [The Appellant] in a way has three hurdles in the situation with Spain. He's Roma. Secondly, he non-native Roma, so we've got foreigner problems as well as ethnic problems. Thirdly, we're now dealing with a Spain that in economic collapse, where the government doesn't have the resources it had even two years ago and where there is a lot more social tension.
>
> TRIBUNAL MEMBER: Okay. I think that they're certainly all factors that I will take into account in any real chance assessment. I will just note though, I think it's a very tall order to – say tall order – I think it's a serious finding to find that a European Union citizen has a well-founded fear of persecution in another EU member state. Now, that doesn't mean it doesn't happen, but I would expect that if European Union citizens are of – and there must be other Roma from EU countries elsewhere in Europe. If they are facing convention-related persecution, I think that's an extremely serious situation.

The advocate a little later reverted to the same submission and said:

> ADVOCATE: I would really like to put forward to the tribunal that I think that [the Appellant] may have a right, with a valid and current Czech passport, to enter and remain in Spain, but I don't think that that should be considered as equivalent to residence. I think that residence requires more. As I've indicated in these submissions and then the first round of submissions, [the Appellant] I think is going to find it virtually impossible to gain employment in Spain, despite his age and physical strength. Given the discrimination against Roma in Spain, he's going to find it very hard to get employment and he will not be eligible for any vocational education or language education.

An exchange then occurred when the advocate contended that the Tribunal had "*indicated that any problems that [the Appellant] would have in relation to employment would not be for a convention reason*". The Tribunal member responded:

> No, I suggested I would need to consider whether they amounted to persecution and whether they were for one or more of the convention reasons.

139 Any suggestion that the Appellant was not given an adequate opportunity to advance his claims, it is respectfully considered, is denied by a review of the submissions made and the exchanges that took place during the Tribunal hearing.

140 Second, notwithstanding the fact that the Tribunal performs an inquisitorial function (*Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 at [18], 259 ALR 429 at 434 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), it remains the primary responsibility of a claimant to present such evidence and to advance such submissions as are considered relevant to the claims being made: *Abebe v Commonwealth* [1999] HCA 14 at [187], 197 CLR 510 at 576. Gummow and Hayne JJ thus observed that it was:

> … for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.

See also: *SZJZS v Minister for Immigration and Citizenship* [2008] FCA 789 at [15] to [16], 102 ALD 318 at 321 to 322. "*[I]t is for the applicant for a protection visa to establish the claims that are made*": *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, supra, at [40].

141 Although there may be some circumstances where the language and cultural difficulties may seriously impede a claimant's ability to advance his claims, the present is not such a case. The detailed written submissions advanced on his behalf were carefully drafted and prepared by the solicitor retained on his behalf. He was represented throughout the hearing in May 2009.

142 Given that the Appellant in fact availed himself of the opportunity to advance materials and submissions in support of his claims, and the conclusion that these materials and submissions were in fact canvassed during the course of the Tribunal hearing, it almost seems inevitable that any further criticism that can be levelled at the Tribunal is an impermissible attempt to compel it to disclose to the Appellant its thought processes or the manner in which it was evaluating that material and those submissions. But any such attempt must be resisted: *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369. The comments there made by Lord Diplock are oft-cited: *SZNKR v Minister for Immigration and Citizenship* [2010] FCA 582 at [34] per Rares J; *SZNTO v Minister for Immigration and Citizenship* [2010] FCA 183 at [34], 114 ALD 129 at 136 per Yates J. See also: *Applicant S214 of 2003 v Refugee Review Tribunal* [2006] FCA 375

at [32], 90 ALD 632 at 641 per Edmonds J. An appeal against this decision has been dismissed: *Applicant S214/2003 v Refugee Review Tribunal* [2006] FCAFC 166.

143 The final *Ground of Appeal* is thus also rejected.

CONCLUSIONS

144 The appeal should be dismissed. None of the *Grounds of Appeal* have been made out.

145 There is no reason why costs should not follow the event. The Appellant should pay the costs of the First Respondent.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 6 August 2010