# FEDERAL CIRCUIT COURT OF AUSTRALIA

*MINISTER FOR IMMIGRATION v SZRTC & ORS* *[2013] FCCA 1*

Catchwords: MIGRATION – Review of Refugee Review Tribunal decision – eligibility for protection visa – whether the visa applicants had a right to enter and reside in a safe third country for the purpose of s.36(3) of the *Migration Act 1958* (Cth) considered – Tribunal finding that a right to enter and stay for up to six months was not a right to "reside" – there is no arbitrary temporal limitation on a right of residence – whether a right of residence will be sufficient for the purpose of s.36(3) of the Migration Act ordinarily requires consideration of the application of s.36(4), (5) and (5A) of that Act.

Legislation: *Migration Act 1958* (Cth), ss.36, 198A

Cases cited: *M70/2011 v Minister for Immigration* [2011] HCA 32
*SZMWQ v Minister for Immigration* (2010) 187 FCR 109, [2010] FCAFC 97
*W228 v Minister for Immigration* [2001] FCA 860
*WAGH v Minister for Immigration* (2003) 131 FCR 269

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|---|---|
| Applicant: | MINISTER FOR IMMIGRATION & CITIZENSHIP |
| First Respondent: | SZRTC |
| Second Respondent: | SZRTD |
| Third Respondent: | REFUGEE REVIEW TRIBUNAL |
| File Number: | SYG 1860 of 2012 |
| Judgment of: | Judge Driver |
| Hearing date: | 27 February 2013 |
| Delivered at: | Sydney |
| Delivered on: | 12 April 2013 |

**REPRESENTATION**

| | |
|---|---|
| Counsel for the Applicant: | Mr G Kennett SC |
| Solicitors for the Applicant: | DLA Piper |
| Counsel for the First and Second Respondents: | Mr J F Gormly |

**ORDERS**

(1) A writ of certiorari shall issue removing the record of the Refugee Review Tribunal decision made on 23 July 2012 into the Court for the purpose of quashing it.

(2) A writ of mandamus shall issue requiring the Refugee Review Tribunal to redetermine the review application before it according to law.

**FEDERAL CIRCUIT**
**COURT OF AUSTRALIA**
**AT SYDNEY**

## SYG 1860 of 2012

**MINISTER FOR IMMIGRATION & CITIZENSHIP**
Applicant

And

**SZRTC**
First Respondent

**SZRTD**
Second Respondent

**REFUGEE REVIEW TRIBUNAL**
Third Respondent

# REASONS FOR JUDGMENT

## Introduction and background

1. The applicant Minister seeks judicial review of a decision of the Refugee Review Tribunal (Tribunal) made on 23 July 2012. The Tribunal remitted the matter before it for reconsideration by the Minister's Department with a direction that the applicants satisfy the criterion for a protection visa in s.36(2)(a) of the *Migration Act 1958* (Cth) (Migration Act). The issue to resolve is whether the Tribunal erred in concluding that s.36(3) of the Migration Act did not apply to the visa applicants. This depends upon the meaning of the words "reside" and "temporarily" in that section. I have found that the Tribunal erred in finding that a right to enter and stay for up to six months was not a right to enter and reside for the purposes of s.36(3).

2. The following statement of background facts is derived from the submissions of the parties.

3. The first and second respondents (respondents), a married couple, are citizens of Burundi who arrived in Australia on 24 April 2011. They claimed to fear persecution in Burundi because of their membership of an opposition political group.[1]

4. The Tribunal found the respondents to be credible witnesses,[2] and accepted that there was a real chance that they would suffer persecution for reason of their political opinion if they were to return to Burundi in the reasonably foreseeable future.[3] On this basis it concluded that the respondents were persons to whom Australia had protection obligations under the Refugees Convention.[4]

5. In reaching this conclusion the Tribunal considered whether the respondents were prevented from meeting the criterion in s 36(2)(a) of the Migration Act by s.36(3), which provides as follows:

> *(3) Australia is taken not to have protection obligations in respect of 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.*

6. Section 36(3) is limited by subsections (4), (5) and (5A), but these did not arise in the Tribunal's consideration of the present case.

7. There was evidence before the Tribunal concerning the establishment of the East African Community (EAC), a regional intergovernmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, and the Republics of Rwanda and Burundi.

8. The delegate had noted that Burundi became a full member of the EAC in 2007 and considered provisions of the EAC Treaty providing for the free movement of persons between EAC states, concluding that the

[1] Court Book (CB) 462 [22].
[2] CB 476 [68].
[3] CB 476 [69]-[71].
[4] CB 476 [72].

respondents had an existing and legally enforceable right to enter and reside in any EAC country.[5]

9. In a submission to the Tribunal, the respondents' adviser challenged that conclusion, submitting that the right to reside in EAC countries (as opposed to merely passing through them) depended on employment.[6] In attachments to that submission, the adviser placed before the Tribunal extracts from the EAC *Protocol on the Establishment of the East African Community Common Market*,[7] the *East African Community Common Market (Right of Residence) Regulations*,[8] and an article downloaded from the internet about the establishment and structure of the EAC.[9]

10. The Tribunal also had regard to documents which it referred to as the *EAC (Free Movement of Workers) Regulations*[10] and the *EAC Regulations on the Free Movement of Persons*,[11] which it downloaded from the official EAC website for Burundi and quoted in its reasons, and a discussion by the University of Oxford Refugee Studies Centre on freedom of movement within regional economic communities.

11. The Tribunal summarised this material as follows:[12]

> *The evidence before the Tribunal indicates citizens of Burundi can enter other EAC countries and receive a pass to stay for up to 6 months. Citizens of Burundi who have a contract of employment in another EAC country can apply for a work permit to stay longer than 6 months. There is no evidence before the Tribunal that either applicant has a contract of employment in another EAC country. They therefore presently have only the right to enter and reside for up to 6 months.*

12. There is no dispute that this was a finding consistent with the evidence. While the EAC provisions for the free movement of workers provided for a right to stay in a country dependent on a contract of employment in that country, the Regulations on the Free Movement of Persons

[5] CB 185.
[6] CB 215.
[7] CB 268.
[8] CB 284.
[9] CB 292.
[10] CB 471.
[11] CB 473.
[12] CB 475 [65].

provided that a citizen of an EAC country, upon presenting a common standard travel document or a national identity card, was to be issued with a pass entitling him or her to enter the host state and "stay for a period of up to six months".[13] (The same regulations also provided for an application for an extension of that pass, and for the application to be granted where the applicant provided justification for a longer stay.)

13. Despite making that finding, and noting that s.36(3) in its terms applies whether a right to reside is permanent or temporary, the Tribunal found that the respondents did not have a "right to enter and reside" in any EAC country for the purposes of s.36(3). This was on the basis that the right to enter and reside for up to six months was not a "right to enter and reside" in the relevant sense.[14]

14. Having reached this conclusion, the Tribunal did not consider whether the respondents had taken "all possible steps" to avail themselves of a right to enter and reside in another country for the purposes of s.36(3). Nor did the Tribunal consider claims by the respondents that they faced a real risk of significant harm or a real chance of persecution in other EAC countries, or *refoulement* from those countries to Burundi, which if accepted might have enlivened ss.36(4), (5) or (5A).[15]

## The judicial review application

15. These proceedings began with a show cause application filed by the Minister on 27 August 2012. The Minister now relies upon an amended application filed on 21 December 2012. There are two particularised grounds in that application:

> *1. In remitting the application with the direction that the first and second respondents ('visa applicants') satisfy section 36(2)(a) of the* Migration Act 1958 *(Cth) ('the Act'), the third respondent erred in concluding that section 36(3) of the Act did not apply to the visa applicants.*
>
> *a. Having found that the first and second respondents had a right to enter and reside for up to 6 months in any EAC country, the Tribunal held (at [66]-[67]) that*

[13] CB 473.
[14] CB 475 [66]-[67].
[15] CB 218.

*that did not constitute a 'right to enter and reside' within the meaning of section 36(3).*

*b. The third respondent erred in relying on* WAGH v Minister for Immigration and Multicultural Affairs *[2003] FCAFC 194 in that the visa applicants could not be regarded as not holding the 'right to enter and reside' in an EAC country.*

*2. Further, the third respondent also erred in failing to ask the right question required by section 36(3) of the Act, namely whether the visa applicants had not taken all possible steps to avail themselves of a right to enter and reside in any EAC country.*

*Particulars*

*e. The third respondent was required to ask this question in circumstances where none of sections 36(4), 36(5) or 36(5A) of the Act was found to apply (so as to have the effect that section 36(3) of the Act did not apply).*

*f. The failure of the third respondent to consider whether the visa applicants had not taken 'all possible steps' was unreasonable. The only conclusion, based on the probative evidence, was that the visa applicants had not taken all possible steps to avail themselves of a right to enter and reside in any EAC country.*

16. Ground 2 in the amended application was not pressed.

17. As to Ground 1, the Minister makes the following submissions:

> *… it has been noted above that the Tribunal found, as a matter of fact, that the Respondents had a "right to enter and reside" in any EAC country for up to six months.*[16] *The delegate in her reasons had described this right as "legally enforceable",*[17] *echoing the terms of the judgment of Stone J in* Minister for Immigration and Multicultural Affairs v Applicant C,[18] *and the Tribunal did not express any different view on that aspect.*
>
> *Rather, the Tribunal's reasoning appears to have been that right which the Respondents possessed was not a "right to enter and reside" in the relevant sense, because of its limited scope. In*

[16] CB 475 [65].
[17] CB 185.
[18] (2001) 116 FCR 154 at [65].

*reaching this view the Tribunal summarised, and apparently relied upon, the reasoning of Lee and Hill JJ in* WAGH v Minister for Immigration and Multicultural and Indigenous Affairs.[19]

*Each of the appellants in* WAGH *held, at relevant times, a visa which allowed him or her to enter the United States and stay for up to six months, for the purpose of business and tourism, with a capacity to apply for an extension for a further six months.*[20] *The Tribunal had held that they therefore had a "right to enter and reside" which engaged s 36(3). Each member of the Full Court held that that conclusion involved error, for different reasons.*

*Lee J held that s 36(3) was to be construed as limited to a right to enter and reside, granted by another country, "pursuant to a prior acceptance or acknowledgement by that country that it will accord that person protection from the risk of persecution that would exist if that person were returned to his or her country of nationality".*[21] *In other words, his Honour regarded s 36(3) as excluding the operation of Australia's "protection obligations" in relation to a person, only where another country had accepted the same obligations. This approach was not adopted by other members of the Court in* WAGH,[22] *and has not been applied or approved in any subsequent decision.*[23] *It is, with respect, contrary to the plain terms of s 36(3) and clearly incorrect. His Honour appears to have considered that s 36(3) needed to be given this strained construction in order to avoid a result that was inconsistent with Australia's obligations under the Refugees Convention.*[24] *That is an inversion of the proper approach, which is to seek to understand from the terms of the Act the extent to which it seeks to implement those obligations.*[25]

*Hill J, in a passage quoted by the Tribunal in the present case, observed that a "transit visa" would not constitute a "right to enter and reside".*[26] *His Honour went on to note that s 36(3) expressly includes a right of residence which is temporary, and to observe that whether a tourist visa was to be seen as authorising temporary residence was "a difficult question".*[27] *The question*

[19] (2003) 131 FCR 269.
[20] 131 FCR 269, 274 [17].
[21] 131 FCR 269, 278 [34].
[22] See at 283 [62] per Hill J, at 284 [69] per Carr J.
[23] See *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109, 120 [34] per Rares J,
[24] 131 FCR 269, 277-278 [30].
[25] *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, 71-72 [61], 73 [69], *per* Callinan, Heydon and Crennan JJ.
[26] 131 FCR 269, 283 [64].
[27] 131 FCR 269, 283-284 [65].

*might have been better described, with respect, as one whose answer in each case would depend on the particular terms of the visa. So, for example, (as Hill J noted) a tourist would not normally establish an abode in a country so as to be properly described as "residing" there; but there might be cases where that would occur, or at least be permitted to occur. His Honour held that the Tribunal had erred by not considering whether the visas which the appellants held conferred on them a right to "reside", in that sense.*[28]

*Carr J decided the case on the limited basis that, if the appellants had attempted to enter the United States in order to seek protection there, they would not have been entering that country for the purposes permitted by the visas and would not have had any entitlement to be admitted. The Tribunal had erred by failing to appreciate that point.*[29]

WAGH *therefore does not stand as authority for any particular construction of s 36(3). Three points may, however, be noted.*

*First, plainly, nothing in the reasoning of Hill J or Carr J required the conclusion that the right enjoyed by the Respondents in the present case was not a "right to enter and reside". Their Honours' reasoning turned, respectively, on the failure by the Tribunal in* WAGH *to address an issue and the particular terms of the visas considered in that case.*

*Secondly, s 36(3) expressly refers to a right to enter a country and reside in it "temporarily or permanently". No temporal boundaries are placed on the concept of a right to enter and reside. A form of permission to enter a country which allowed only a fleeting presence there (such as the transit visa referred to by Hill J) might for that reason not be regarded as conferring a right to "reside" at all; but once there is conferred a right which can properly be described as a right to "reside", the fact that it is only for a limited duration does not take the case outside s 36(3). The Tribunal's conclusion that it did "not accept that the right to enter and reside up to 6 months is a 'right to enter and reside' as intended by s 36(3)"*[30] *thus involved error.*

*Thirdly, although (as Hill J appeared to suggest) a right to "reside" in a country may possibly entail more than mere presence in that country, it need not involve entitlement to the*

[28] 131 FCR 269, 284 [66].
[29] 131 FCR 269, 285 [75].
[30] CB 475 [67].

*attributes of citizenship or refugee status,*[31] *or the ability to obtain employment or participate in welfare benefits.*[32] *The relevant right is a right to enter and reside, not to enter and reside comfortably.*[33]

*In the present case, a possible (although very strained)*[34] *reading of the Tribunal's reasons is that it regarded the right to be issued with a pass to enter an EAC state and "stay" for up to six months as not amounting to a right to "reside" because of some limitation on the content of the rights that would thereby be conferred. To the extent that it reasoned in that way, the Tribunal also fell into error.*

(a) *In light of the principles referred to in the previous paragraph, any such limitation would need to be of a fundamental kind (eg, an inability to obtain basic sustenance) in order to take the matter outside s 36(3). No such limitation – indeed, no limitation at all – was identified.*

(b) *The Minister did not bear any onus of satisfying the Tribunal that the Respondents had a right to remain in an EAC country which amounted to a right to "reside". On the contrary, it was for the Respondents to satisfy the Tribunal that they did not have such a right.*[35] *The Tribunal was not able properly to have that state of satisfaction, by reason of any limitation on the rights the Respondents would enjoy as temporary residents in an EAC country, without that limitation being identified and shown to be applicable.*

18. The respondents contend that there is no legislative intention that may be discerned from the text or the object or purpose of s.36, or the extrinsic material relating to the amendment of the section to include ss.36(3)-(5) that s.36(3) allows for the qualification of Australia's protection obligations regardless of the availability of protection in the receiving third country.

19. The respondents make the following submissions:

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31 *SZMWQ* 187 FCR 109, 120 [34].
32 *SZMWQ* 187 FCR 109, 139 [109]-[110].
33 *SZLAN v Minister for Immigration and Citizenship* (2008) 171 FCR 145.
34 The description of the right possessed by the Respondents as a "right to enter and reside" (CB 475 [65], [67]) strongly suggests that the Tribunal did not see that right as falling short of the concept of "residence".
35 *SZLAN* 171 FCR 145, 159 [58].

*In* SZMWQ v MIAC *(2010) 187 FCR 109, [2010] FCAFC 97 at [101] Flick J referred to an ability to reside in a third country for so long as was necessary to secure the protection of that country as being implicit in Lee J's judgment in* WAGH. *Flick J gave no indication that this view was not correct or that this time period was inconsistent with Hill J's other differences with Lee's judgment which Flick J extracted or with any other authority.*

*Despite their other differences there is an underlying expectation by both Lee J and Hill J that the receiving third country would provide protection. Hill J said in* WAGH *at [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.** (*emphasis added*)

*In* W228 v MIMIA *[2001] FCA 860 French J said of s 36(3) at [41]:*

> In summary, the case for which s 36(3) provides is a subset of the larger class of cases in which effective protection is available to a non-citizen from a third country and by reason of which return to the third country would not constitute a breach of Australia's non-refoulement obligation under Article 33.

*A construction of s 36(3) as being unconcerned with whether protection is available in the third country is contrary to the object and purpose sought to be achieved by s 36 as a whole. The operation of s 36(3) is to qualify the application s 36(2). Subsections 36(3)-(5) have no independent effect or operation. They are intended to operate only within the context of s 36(2):* NBLB v MIMIA *[2005] FCA 1051 per Emmett J at [38]*.

*The identification of the right of entry and residence with protection is apparent from the* Supplementary Explanatory Memorandum *to the* Border Protection Legislation Amendment Act 1999 *(Cth) which incorporated s 36(3)-(5) into the Act*[36]*:*

> 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

[36] More fully extracted in *SZMQW* by Flick J at [75].

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

*Similarly the Minister said in his* Second Reading Speech *to the House of Representatives on 28 August 2001:*

> 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. (*emphasis added*)

*The protection contemplated in s 36(3) does not extend to all the attributes of citizenship or even refugee status in the other country (per Rares J in* SZMWQ *at [34]), nor is it a right to reside comfortably or free from discrimination: per Graham J in* NBLC v MIMIA *(2005) 149 FCR 151, [2005] FCAFC 272 at [63].*

*However as Lee J found in* WAGH *at [34] there are temporal limits to the right which are determined by the availability of protection. Lee J's temporal requirement for the right to extend to a period coexistent to that which protection is required sets a minimum period. Rares J in* SZMWQ *at [35] described the maximum period:*

> …the right (to enter and reside) can be temporary in nature and last for no particular period greater than the time taken to meet the exigency that gave rise to the non-citizen's well-founded fear of persecution in the country whence he or she had fled.

*For each justice the common variable in the temporality of s 36(3) is the availability of protection.*

*As to particular (b) to Ground One of the amended application, it is incorrect to conflate the multiple rights to enter and reside under EAC regulations with that term of art employed in s 36(3) simply because of the coincidence of language. Unlike the rights to enter and stay or reside in the EAC regulations, the right to "enter and reside" in s 36(3) is a term of art which expresses a composite right which should be construed as a composite whole*

*having regard to the object and purpose of s 36 as a whole: per Flick J in* SZMWQ *at [96]-[97]*.

20. In summary the respondents submit that s.36(3) properly reads as a qualification of Australia's protection obligations, but not to the extent of disregarding a claimant's need for protection elsewhere.

21. I have before me as evidence the court book filed on 21 September 2012.

## Consideration

22. Section 36 of the Migration Act sets out the criteria for the grant of a protection visa. The section provides:

> *(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 in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*
>
> *(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; 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; or*
>
> *(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:*

*(i) is mentioned in paragraph (aa); and*

*(ii) holds a protection visa.*

*(2A) A non-citizen will suffer significant harm if:*

*(a) the non-citizen will be arbitrarily deprived of his or her life; or*

*(b) the death penalty will be carried out on the non-citizen; or*

*(c) the non-citizen will be subjected to torture; or*

*(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or*

*(e) the non-citizen will be subjected to degrading treatment or punishment.*

*(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:*

*(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or*

*(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or*

*(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.*

*Ineligibility for grant of a protection visa*

*(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:*

*(a) the Minister has serious reasons for considering that:*

*(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or*

*(ii) the non-citizen committed a serious non-political crime before entering Australia; or*

*(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or*

*(b) the Minister considers, on reasonable grounds, that:*

*(i) the non-citizen is a danger to Australia's security; or*

*(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.*

*Protection obligations*

*(3) Australia is taken not to have protection obligations in respect of 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, subsection (3) does not apply in relation to a country in respect of which:*

*(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or*

*(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.*

*(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:*

*(a) the 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.*

*(5A) Also, subsection (3) does not apply in relation to a country if:*

*(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and*

*(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other 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.*

23. Subsections 36(3)-(5A) qualify in domestic law Australia's protection obligations under the Refugees Convention. The effect of those subsections is to require an outcome that an applicant is ineligible for a protection visa if the applicant has a legal right to enter and reside in a third country where the applicant will not be persecuted (or harmed significantly) and from which the applicant would not be returned to the country from which he or she has fled.

24. The Tribunal dealt with the application of those provisions in the following way:[37]

*The delegate found the applicants could access third country protection as they had the right to enter and reside in other EAC countries and therefore were excluded from Australia's protection by s.36(3) of the Act.*

*The evidence before the Tribunal indicates citizens of Burundi can enter other EAC countries and receive a pass to stay for up to*

[37] CB 475-476.

*6 months. Citizens of Burundi who have a contract of employment in another EAC country can apply for a work permit to stay longer than 6 months. There is no evidence before the Tribunal that either applicant has a contract of employment in another EAC country. They therefore presently have only the right to enter and reside for up to 6 months.*

*Section 36(3) makes it clear that the right to reside can be permanent or temporary. This raises the question of what will qualify as a right to 'reside' temporarily for the purposes of s.36(3). There is no minimum period specified as being sufficient, but the term 'right … to reside' suggests more than a right to a mere transitory presence. Justice Hill observed in WAGH v MIMIA that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside. ((2003 131 FCR 269 at [64].) Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour's opinion, a more difficult question. The applicants in that case held US visas 'for the purpose of business and tourism'. Referring to the usual dictionary sense of 'reside', ('To dwell permanently or for a considerable time; have one's abode for a time': The Macquarie Dictionary (revised 3rd ed).) his Honour stated that it would be an unusual, but not impossible, use of the word to refer to a tourist: while a tourist may stay for a time in a country, that country would not be his or her place of abode, even temporarily (WAGH v MIMIA (2003) 131 FCR 269 per Hill J at [65].) In the same case, Lee J took a narrower approach. Justice Lee held that the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgement by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required. (WAGH v MIMIA (2003) 131 FCR 269 at [34].*

*The Tribunal finds the applicants have a right to enter other EAC countries and stay for up to 6 months. The Tribunal does not accept however that the right to enter and reside up to 6 months is a 'right to enter and reside' as intended by s.36(3) given the applicants would have to leave whichever EAC country they seek protection in after 6 months. The Tribunal notes the persecution of political opponents in Burundi is ongoing. On the basis of reports such as the Human Rights Watch report of May 2012 the*

> *Tribunal is not satisfied that persecution of political opponents in Burundi will cease within the foreseeable future or within 6 months such that the applicants could return to Burundi. The Tribunal finds in the circumstances of this case that such a temporary right to enter another EAC country for up to 6 months is not sufficient to amount to a right to enter and reside.*

25. It is, in my view, clear that ss.36(3)-(5A) should be read together and interpreted by reference to each subsection. Parliament has not specified in s.36(3) what length of time would constitute "temporary residence" for the purposes of s.36(3). It is an error to seek to impose some arbitrary temporal limitation on what constitutes temporary residence or residence generally. The courts have speculated, as is indicated in the parties' submissions, that a period of residence would have to be sufficiently long in order for a person to obtain the protection which is to substitute for Australia's protection obligations under the Convention. There is force in the respondents' submissions in that regard. However, how long that period may be must depend upon the circumstances. The determination of whether a period of residence will be sufficient for the purposes of s.36(3) does not depend upon the interpretation of the words "temporarily" and "residence" in isolation. Those words should be construed by reference to the qualifying provisions in ss.36(4), (5) and (5A). It may be that, in a particular case, a stay of only a few days would be sufficient in order to access the protection envisaged by those subsections. In another case, a stay of many months might be necessary. That assessment requires an analysis of the legal rights of residence in a particular country and, possibly, the practical arrangements for accessing protection in a country.

26. It would no doubt be relevant to consider whether the particular country or countries were parties to the Refugees Convention (or, for the purposes of complementary protection, the International Covenant on Civil and Political Rights and the Convention Against Torture). This approach is in my view consistent with the observations of Lee J in *WAGH*, French J (as he then was) in *W228* and Flick J in *SZMWQ*. That approach is also consistent with the High Court's decision in *M70/2011 v Minister for Immigration*[38] concerning the former

[38] [2011] HCA 32.

s.198A(3) of the Migration Act, which was another provision of the Act giving qualified authority to the transfer of Australia's protection obligations to a third country.[39]

27. Further, the Tribunal's concern over the question whether a period of six months would be sufficient to avoid the harm the visa applicants feared in Burundi cannot be addressed properly without considering the question of whether effective protection from that harm could be accessed in another EAC country. It is an error to limit consideration to whether the length of time a person can stay under a general legal right would be sufficient to avoid the feared harm in the person's country of origin. It is necessary also to consider whether that period would be sufficient to access more specific protection for a longer period, which almost inevitably involves consideration of ss.36(4)-(5A), and in particular subsections (5) and (5A).

## Conclusion

28. It would, in my view, be an unusual case where a decision maker could determine that a right of residence of any temporary period in a country would be sufficient (or insufficient) to obtain protection without considering the application of ss.36(4), (5) and (5A). The Tribunal erred by attempting to impose a temporal limitation in considering s.36(3) in isolation. In imposing that temporal limitation on the word "residence" in s.36(3) the Tribunal committed a jurisdictional error.

29. It follows that the Minister is entitled to the relief he seeks.

30. I will hear the parties as to costs.

**I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Judge Driver**

Date: 12 April 2013

[39] That qualified authority is now expressed in subdivision B of Division 8 of the Migration Act.