FEDERAL COURT OF AUSTRALIA

V872/00A, V900/00A, V854/00A, V856/00A, and V903/00A v Minister for Immigration & Multicultural Affairs [2002] FCAFC 185

MIGRATION – operation of Article 33 of the Refugee Convention in assessment of whether appellants are persons to whom Australia has protection obligations – where Refugee Review Tribunal found that effective protection was and is available in third country – where Refugee Review Tribunal's finding of availability of effective protection included finding of practical capacity to bring about entry into third country - whether it is necessary for finding of availability of effective protection in third country that appellants have a 'legally enforceable' right to enter and reside in that third country.

PRACTICE AND PROCEDURE – principles governing a Full Court declining to reconsider an earlier Full Court decision and following that decision.

Migration Act 1958 (Cth), ss 36(2), 36(3)
Convention Relating to the Status of Refugees 1951, Articles 31, 32, 33

Al-Rahal v Minister for Immigration and Multicultural Affairs (2001) 184 ALR 698 followed
Tharmalingam v Minister for Immigration and Multicultural Affairs [1999] FCA 1180 considered
Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 followed
Al-Zafiry v Minister for Immigration and Multicultural Affairs [1999] FCA 443 approved
Al-Zafiry v Minister for Immigration and Multicultural Affairs [1999] FCA 1472; 58 ALD 663 followed
Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 followed
Minister for Immigration and Multicultural Affairs v Applicant C [2001] FCA 1332 considered
R v Secretary of State for the Home Department; Ex parte Canbolat [1997] 1 WLR 1569 considered

V872/00A, V900/00A, V854/00A, V856/00A, AND V903/00A v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
V876 of 2001, V877 of 2001, V878 of 2001, V879 of 2001 and V880 of 2001

BLACK CJ, HILL AND TAMBERLIN JJ
18 JUNE 2002
SYDNEY (HEARD IN MELBOURNE)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN DISTRICT REGISTRY

V876 of 2001
V877 of 2001
V878 of 2001
V879 of 2001
V880 of 2001

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**V872/00A** **V900/00A** **V854/00A** **V856/00A** **V903/00A** **APPELLANTS**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGES:	**BLACK CJ, HILL AND TAMBERLIN JJ**
DATE OF ORDER:	**18 JUNE 2002**
WHERE MADE:	**SYDNEY (HEARD IN MELBOURNE)**

THE COURT ORDERS THAT:

1. The appeals be dismissed.
2. The appellants pay the respondent's costs of the appeals.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN DISTRICT REGISTRY **V876 of 2001**
V877 of 2001
V878 of 2001
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ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**V872/00A** **V900/00A** **V854/00A** **V856/00A** **V903/00A** **APPELLANTS**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGES:	**BLACK CJ, HILL AND TAMBERLIN JJ**
DATE:	**18 JUNE 2002**
PLACE:	**SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

BLACK CJ:

1 These appeals were heard together, as were the cases at first instance, because they raise a common question about the content of Australia's obligations under Article 33 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as affected by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention").

2 The relevant facts are set out in the reasons for judgment of Tamberlin J, which I have had the advantage of reading, and I need make only brief reference to those facts.

3 Each of the appellants applied for a protection visa under the *Migration Act 1958* (Cth) ("the Act") claiming to fear persecution for a Convention reason. Each had his application refused by the delegate of the Minister for Immigration and Multicultural Affairs and in each case the Refugee Review Tribunal (differently constituted) affirmed the decision of the delegate because it concluded that the applicant would have effective protection from persecution in Syria.

4 The appellants then sought judicial review of the Tribunal's decisions. Their applications were heard by Allsop J, who dismissed them, with costs.

5 The essential question that emerged before Allsop J, and before us on appeal from his Honour, is whether Australia has protection obligations within the meaning of s 36(2) of the Act to a non-citizen who, although lacking any legally enforceable right of entry to a third country (i.e., a country other than the country of nationality) is likely to be allowed entry to the third country and is likely, as a matter of practical reality, to have effective protection there and not be subject to *refoulement* contrary to Article 33 of the Convention. The appellants contend that the availability of protection within a third country does not affect Australia's protection obligations, absent any legally enforceable right of entry to that country.

6 A line of authority in this Court, including the majority decision of the Full Court in *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 698 stands, however, against the proposition for which the appellants contend. That authority must prevail and be followed by this present Full Court unless we are persuaded that it is plainly wrong. I am far from persuaded that it is.

7 The appellants rely upon what was said by another Full Court in *Tharmalingam v Minister for Immigration and Multicultural Affairs* [1999] FCA 1180 at [12] but, as the learned primary judge in the present cases concluded, the statement there was not part of the ratio of *Tharmalingam* and if even if the reference in it to a "right to re-enter the third country" does bear the meaning for which the appellants contend, it was not a meaning mandated by the earlier Full Court decision of *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 referred to by the Court.

8 The appeals should be dismissed, with costs.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable the Chief Justice.

Associate:

Dated: 18 June 2002

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN DISTRICT REGISTRY **V876 of 2001**
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ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **V872/00A**
V900/00A
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APPELLANTS

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

JUDGES: **BLACK CJ, HILL AND TAMBERLIN JJ**

DATE: **18 JUNE 2002**

PLACE: **SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

HILL J:

9 Before the Court are five appeals brought by nationals of Iraq from judgments given by a Judge of this Court dismissing applications for judicial review under s467 of the *Migration Act 1958* (Cth) ("the Act") of decisions of the Refugee Review Tribunal. The Tribunal was differently constituted in each case.

10 I have had the opportunity of reading in draft form the reasons for judgment of Tamberlin J which sets out the facts relevant to the present appeal. I am thus relieved of the need to set them out here.

11 It suffices to say that in each appeal the relevant appellant had, before coming to Australia lived in Syria. In each the Tribunal found that the relevant appellant could return to

Syria, where he would be able to enter, with or without sponsorship and thereafter continue to reside there. Once admitted to Syria there was no suggestion that the appellant would have a well founded fear of persecution for a reasons set out in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as affected by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). Rather each appellant would have effective protection in Syria. Nor was there any suggestion that once in Syria that country would return an appellant to Iraq. However, in none of the cases would it seem that the relevant appellant had a legally enforceable right to enter Syria.

12 The question which arises in the appeal is whether Australia has protection obligations to a person who, while not having a legally enforceable right of entry to a third country, not being the country of nationality, was likely in fact to be admitted to that country and on admission, it was likely that he or she would be afforded effective protection there and not then be subject to refoulement in the sense that word is used in Article 33 of the Convention.

13 On behalf of the appellants it is submitted that Australia would only cease to have protection obligations to a person who, within the meaning of the Convention would be a refugee if that person had a legally enforceable right of entry or reentry to a safe third country. Practical likelihood of the person being permitted to enter was not enough. For the respondent it is submitted that the question whether a person would be refused entry to a safe third country is one to be determined as a matter of practical reality.

14 It is necessary to remind ourselves of the issue before the Tribunal when applications for review of decisions of the Minister or a delegate of the Minister come before it. The Tribunal is obliged to consider whether it is **satisfied** that the applicant before it is a person in respect of whom Australia has protection obligations. So, the issue before the Tribunal is not whether the applicant **is** a person to whom Australia has protection obligations. Rather the issue is whether on the material before it the Tribunal is **satisfied** that Australia has, towards the applicant, protection obligations. The existence of that element of satisfaction provides a degree of flexibility in the decision making process.

15 It is implicit in various Articles of the Convention, that a contracting party (and Australia is a contracting party) has protection obligations to persons who fall within the

definition of "refugee" in Article 1A(2) of the Convention. It must be said, however, that the Convention does not speak specifically in the language of protection. However, it can be inferred from the Convention that a contracting State is obliged either to afford to refugees treatment which is sometimes required to be no less favourable than treatment afforded to nationals and sometimes treatment no less favourable than that afforded to aliens generally.

16 One obligation that a contracting State assumes is that in Article 33 of the Convention. That Article provides:

> *"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion."*

17 Article 33 was, no doubt, intended to be read together with Article 32 which forbids, subject to the Article, a contracting state expelling a refugee. I say ordinarily, because Australia in ratifying the Convention did not adopt Article 32. Article 32 reads as follows:

> *"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.*
>
> *2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*
>
> *3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."*

18 It is implicit in Article 33 without Article 32, that a Contracting State would not be in breach of the Convention if it expelled from Australia a person who is a refugee and deported that person to a third country so long as that third country would not expel or return the

refugee to the frontiers of a territory (whether the country of nationality, or another country) where that person would, objectively, have a well-founded fear of persecution. But there is nothing in Article 33 or any other Article of the Convention (when Article 32 is left out of consideration) that either obliges a contracting party to keep a person who qualifies as a refugee within its own territory or which forbids a contracting party from expelling a refugee to a third country, so long as Article 33 is not infringed. Article 33 assumes that the asylum seeker has been accepted into the third country. It is not concerned with any test of admission to that third country.

19 The obligations in the Treaty, so far as they are relevant to a consideration of whether Australia has protection obligations to a person are affected by s36 of the Act, which provides:

> "***36 Protection visas***
>
> *… 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 reason 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."

20 It may be noted that s 36(3) is both expressed in the negative ("*Australia is taken **not** to have protection obligations…*" and that it speaks in terms of "right to enter and reside". It can be argued that the section tells little about the circumstances where protection obligations will exist, save, perhaps that it may be possible to infer that absent s 36(3) Australia would have had protection obligations to a person who was a refugee within the meaning of the Convention where that person had a legally enforceable right to enter and reside in a safe third country. It might be inferred that Parliament believed that it would be contrary to the Convention to remove even such a person from Australia notwithstanding Article 33. However, it may also merely be the case that s 36(3) was inserted to remove any doubt about the matter and to express clearly the view of Parliament that a person who fell within s 36(3) was not a person to whom Australia had protection obligations whatever the situation might be with Article 33 of the Convention. Section 36(3) is a slender reed upon which to base any conclusion.

21 The background to the insertion of these subsections is well known to any who have followed the debates on the subject of refugees, boat people and illegal immigrants. The amendments inserting them are to be found in the *Border Protection Legislation Amendment Act 1999* (Cth). The general policy of that Act appears both from its title and the Explanatory Memorandum accompanying the Bill as presented to Parliament. However, the Explanatory Memorandum offers no specific notes on Schedule 1 Part 6 of the *Border Protection Legislation Amendment Act 1999* (Cth) which added subsections (3), (4) and (5) to s 36 of the Migration Act. The policy also is well known to any reader of current political news. It is alleged to have been the case that persons who came to Australia, claimed to be refugees and sought protection visas, often either had previously resided in a third country where they had no fear of persecution or alternatively travelled via safe third countries en route to Australia but preferred to travel on and not remain in the safe third country because the economic conditions in Australia would provide better living standards than those available there. There is no suggestion that Parliament in framing the subsections intended in any way to explain or modify the provisions of Article 33 or otherwise limit the obligations which Australia had to refugees, other than by providing an automatic disqualification for persons falling within s 36(3) from obtaining a protection visa.

22 I use the phrase "automatic disqualification" because that is the consequence of s 36(3). There is no question of discretion; no room for differences of opinion. A legally enforceable right to enter and reside in a safe third country automatically disqualifies a person from being granted a protection visa in Australia. If the ability to enter and reside is not a legally enforceable right, then there is no automatic disqualification. The particular circumstances of the applicant must then be considered by the Minister, or on a review, by the Tribunal to determine whether he or it is satisfied that Australia owes protection obligation to the person.

23 Where s 36(3) has no application, nothing in the Act or the Convention expressly deals with the question whether Australia is entitled to return a person to a safe third country (I use that expression in these reasons, as referring to a third country to which removal would not involve Australia being in breach of Article 33 of the Convention). More particularly, nothing in the Convention or the Act (other than s 36(3) of the Act and Article 32 of the Convention) deals at all with the question whether Australia might remove from its Territory a person, otherwise a refugee, and cause that person to be sent to a safe third country, in a case where that person had no legally enforceable right to enter and thereafter reside in that third country. Nor is there anything in the Act or the Convention which necessarily would cast doubt on the ability of a country which is a party to the Convention to remove a person from its territory in circumstances where as a practical matter, that third country would admit the person and permit him or her to reside there.

24 Tamberlin J has referred to the judgments in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543, *Al-Zafiry v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 663, *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549, *Tharmalingam v Minister for Immigration and Multicultural Affairs* [1999] FCA 1180, and *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 698. As his Honour has pointed out, there are, what might be taken to be, divergent views expressed in these cases. Much of what is said there is dicta, albeit that the passage cited by Tamberlin J from *Al-Rahal* would seem to form part of the ratio of the majority in that case. Lee J dissented.

25 It is well accepted that this Court should follow its own decisions, unless it forms the view that they are clearly wrong: cf *Transurban City Link Ltd v Allan* (1999) FCR 553. Hence the question for decision is whether this is so.

26 I have read the judgment of Lee J. There is much to be said for the views expressed by his Honour. They are formulated with his Honour's usual logical clarity.

27 The Convention must be read against the background of International Law. It can hardly be doubted that prior to the Convention and subject to any international treaty to which a State may be a party there is, inherent in the concept of national sovereignty the notion that a State has the right to remove from its Territory any non-citizen, just as it is part of national sovereignty that a State may refuse admission to a non-national. Reference may be made to *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29-30 per Brennan Deane and Dawson JJ and *Ruddock v Vadarlis* (2001) 183 ALR 1 at 6 per Black CJ, at 30-32 per Beaumont J and at 50 per French J.

28 International Law is subject to change over time: see *Nulyarimma v Thompson* (1999) 165 ALR 621 at 655. It may be affected by International Conventions such as the Refugee Convention. At least so far as the parties to the Convention who have accepted Article 33 are concerned, International Law clearly forbids a State returning a refugee to a third country where there is a real chance that the refugee may be returned to the country of persecution. Even for countries which are not parties it may be seen as a "law-making" treaty and thus a direct source of International Law: see Shearer, *Starke's International Law* 11th ed. 1994 at p. 37-39.

29 As Lee J points out in *Al-Rahal* there is, at the least, a de facto impediment to the expulsion of a refugee by removal to a safe third country but where that person is unable to gain entry, if only because that person may then have no other alternative than to return to the country of persecution or, just as likely, that the third country refusing entry, in fact itself returns the person to the country of persecution. It is also a principle of international comity, although not perhaps a principle of international law, that a person not be expelled to a country which does not consent to admit the person. (See the discussion of Marx in "Non – Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims", (1995) 7(3) *IJRL* 383 at 395-6 quoted by Lee J at 708). No doubt, if the person has a legally

enforceable right to enter that territory the principle of international comity is not infringed. Likewise, if the person in fact is permitted to enter, then the principle of international comity, whether or not actually infringed, is not material and could be taken to be waived at least once entry is permitted.

30 When these matters are put together with Article 33 it can be concluded that Australia would have no protection obligations where the safe third country consents to admit the refugee, where the refugee has a legally enforceable right to enter the safe third country or where as a matter of fact the safe third country in fact admits the refugee. On the other hand it is arguable that Australia would still have an obligation to the refugee, or otherwise would not have complied with the Convention where it expelled a refugee to a third country which refused the refugee entrance for this would place the refugee in danger of being repatriated to the country in which he or she has suffered persecution.

31 The question then becomes whether it is open to the Tribunal to find that Australia's obligations under the Convention are satisfied to a person, otherwise a refugee, present in Australia, where that person is to be removed to a safe third country and practically it is likely that the refugee would be accepted by that country, but where the refugee had no legally enforceable right to enter it (and there is no evidence that the third country consents to the person being admitted).

32 The view that Australia's obligations would not be satisfied in such a case requires that nothing short of a legally enforceable right to enter (or evidence that the third country consents to admit the person) would operate to relieve Australia of its protection obligations to a person who is, otherwise, a refugee. Each view presents a difficulty. On the one hand it can be said that if, the Tribunal were to consider that Australia owed no protection obligation to a person who, practically, is likely to obtain entry to a safe third country Australia could be in breach of the Convention if, as a matter of fact, entry was refused and the person was left at the border and thus ran the risk of being returned to the country of persecution. On the other hand, even were an applicant for a protection visa entitled as of right at the time the Tribunal was required to make a decision to enter the safe third country there would always be the possibility that by the time the applicant is removed to that third country the law or

policies of that third country may have changed so that again the person is left at the border unable to gain admittance.

33 Since it must be presumed that Parliament did not intend that decisions on entitlement to a protection visa could put Australia in breach, or even potential breach, of its international obligations, or of international comity, I am inclined, subject to one matter, to think that the better view would be that it is only in a case where the refugee has a legally enforceable right to enter the safe third country (or there is evidence of that country's consent) that the Tribunal could definitively conclude that Australia no longer had protection obligations to the refugee.

34 The one matter to which I refer is the fact that, as I have already emphasised, decisions of the Tribunal are conditioned not upon the Tribunal finding that Australia actually has protection obligations to a person, but rather upon the Tribunal's satisfaction that it does. So, if the Tribunal is satisfied that a person will be permitted entry to a safe third country if removed from Australia, the Tribunal's decision will most likely, neither leave Australia in breach of its international obligations nor will its decision leave Australia in breach of international comity. A one hundred per cent guarantee that the asylum seeker will be admitted to the third country can hardly be expected.

35 I would not, however, express the issue before the Tribunal to be whether in the opinion of the Tribunal there is a real chance that the third country would refuse admission, even although to do so produces a symmetry between the test whether the person is a refugee and the present issue. To adopt a real chance test here is to convert the language of the case law applicable to the question whether the person has a well-founded fear of persecution into a statutory test arising in a rather different context. It suffices to say that the Tribunal must consider whether it is satisfied that the third country will permit entry so that the applicant will not be left at the border and denied admission. In deciding whether it is satisfied the Tribunal will take into account the important matters of international obligation and comity to which I have made reference as well as the significance of the decision to the individual whose life or liberty may be at risk. Where there is a doubt, that doubt should be resolved in favour of the applicant.

36 The statutory issue in the United Kingdom which was discussed in *R v Secretary of State for the Home Department; Ex parte Canbolat* [1997] 1 WLR 1569 was somewhat

different, although it provides some assistance. The legislation to be interpreted was the *Asylum and Immigration Appeals Act 1993* as affected by the later *Asylum and Immigration Act 1996*. The former Act was enacted to give effect in the domestic law of the United Kingdom to the Convention. Under it a person could not be removed from the United Kingdom where the Secretary of State gave a certificate that it would be contrary to the obligations of the Convention for that person to be removed. The later Act provided that the former Act was not to prevent an asylum seeker being removed to a member State of the European Union or other country or territory designated where the Secretary gave a certificate, inter alia that the asylum seeker would not be threatened in a country to which the person was "to be sent" in such a way that his life or liberty would be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion. Like Article 33, therefore, it assumed the third country would actually accept the asylum seeker. Indeed, the legislation went further to assume the country in question was a member of the European Union so that right of entry was not an issue at all.

37 Lord Woolf MR, who delivered the judgment of the Court of Appeal, rejected the test, adopted in the Divisional Court that the issue of what might happen in the third country was to be approached by reference to whether there was *"a reasonable degree of likelihood"* of persecution. The "reasonable degree of likelihood" test is the test which, in the United Kingdom is applied in determining whether an asylum seeker has a well-founded fear of persecution. In his Lordship's view a lower threshold was involved. There could be no one hundred per cent certainty. Aberrations could occur. The matter was to be considered by having regard to expectation. His Lordship pointed out that there was an implication that a certificate could be properly granted in a case where the system in the third country was such that, so long as it operated as it ordinarily did, the asylum seeker would be protected. In so doing his Lordship said at 1577:

> *"All that can be expected and therefore all that Parliament could have intended should be in place prior to the grant of a certificate was a system which can be expected not to contravene the Convention. What is required is that there should be "no real risk that the asylum seeker would be sent to another country otherwise than in accordance with the Convention". The unpredictability of human behaviour or the remote possibility of changes in administrative law or procedures which there is no reason to anticipate would not be a real risk."*

38 Although, in the United Kingdom therefore, as a consequence of this decision, there is no symmetry between the test to be applied in determining whether a person has a well-founded fear and that to be applied in determining the issue of persecution under Article 33 (at least where enacted as part of the United Kingdom domestic law). I see no reason, as presently advised, why the standard to be applied should differ in Australia. However, that is not the issue in the present proceedings. However, if the same standard is to be applied the decision in *Ex parte Canbolat* is, at least, persuasive authority for the view that this is not because there is any necessary legal rule which requires there to be symmetry.

39 It may well be that there is little if any difference between the approach I would adopt to the question whether a person might be deported to a safe third country notwithstanding that the person had no legal right to be admitted to that country and the test applied in this country in determining whether a person has a well-founded fear of persecution in the country of nationality. Whether or not this is so, given the significance of the issue to the asylum seeker and the obvious importance to Australia of its international obligations and responsibilities, the Tribunal will need to be comfortably satisfied that the applicant, with no legal right to enter a safe third country, will be granted admission there before it will be satisfied that the person who it believes will practically be granted admission is for that reason not a person to whom Australia owes protection obligations.

40 For these reasons I cannot say that the decision in *Al-Rahal* which rejected the need for a third country to admit an asylum seeker as of right before Australia's protection obligations would cease and accepted instead a test which looked at the practical reality of the case, was "clearly wrong". It follows, in my mind, that this differently constituted Full Court should follow it.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Hill.

Associate:

Dated: 18 June 2002

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN DISTRICT REGISTRY **V876 of 2001**
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ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **V872/00A**
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APPELLANTS

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

JUDGES: **BLACK CJ, HILL AND TAMBERLIN JJ**

DATE: **18 JUNE 2002**

PLACE: **SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

TAMBERLIN J:

41 These are five appeals brought by Iraqi nationals against judgments given by Allsop J on 3 August 2001 dismissing applications for review from decisions of the Refugee Review Tribunal ("the Tribunal"). Each of the appellants resided in Syria for various periods before travelling to Indonesia and from there came to Australia by boat where they applied for protection visas under the *Migration Act 1958* (Cth) ("the Act"). Although the appellants are unrelated, their Federal Court applications have been grouped together because they raise common legal issues and the applications for review were heard together by Allsop J. All five appeals have also been heard at the one time by the Full Court. His Honour's judgment in V856/00A is said by counsel for the appellants to be the leading judgment.

42 Each of the five applications has been refused by the delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") and the Tribunal in each case has affirmed the delegate's decision that the appellants were not persons to whom Australia had protection obligations under s 36(2) of the Act.

43 In four instances the appellants claimed that they feared persecution in Iraq by reason of their association with Al Da'awa, the Shi'ite political party that opposes the Sunni-dominated regime of Sadam Hussein's Ba'ath party. The appellant in matter V903/00A claimed fear of persecution by reason of his conscientious objection to compulsory military service as being a Shi'ite Muslim.

44 Each of the applications for review was dismissed by the Tribunal on the ground that the applicants would find effective protection from any alleged persecution in a third safe country, namely Syria. In three instances the Tribunal did not find it necessary to make a finding about the applicant's claim that he feared persecution for a Convention reason because it found that the applicant could find effective protection in Syria. In matter V903/00A, the Tribunal also said that it was satisfied that the applicant's claim would not bring him within the ambit of the Convention, but this does not appear to have been treated as a finding. In two matters the Tribunal found that the applicant had a genuine fear of persecution for a Convention reason but that he nevertheless had access to effective protection from that persecution in Syria.

45 The five appellants had lived in Syria for various periods of time prior to coming to Australia, ranging from twenty-nine days in one instance to fifteen years in another. In the case of the appellant who had spent twenty-nine days in Syria, the circumstances were that the appellant had travelled between Iraq and Syria frequently over a number of years for the purpose of buying and selling goods and on two occasions he was found to have smuggled people who wished to leave Iraq illegally.

46 The Tribunal was constituted by different members in each of the five cases, but each member referred in every case to substantially the same independent country information in their decision. In each case the Tribunal found, on the basis of review of the country information, that Iraqi nationals can enter, or return to Syria if they are sponsored for a security clearance. They did not need a visa. A security clearance for re-entry might be

refused if a person had a criminal record. Iraqi nationals might be sponsored by a family member, a friend, or one of the Iraqi opposition parties operating in Syria. The Tribunal found that the authorities would send the security clearance to the nominated point of entry. The Tribunal found that once they were in Syria, the status of an Iraqi was no different from that of other Arabs, who could remain in the country indefinitely without a residence permit. They could work with a permit, but it was found that the authorities tended to turn a blind eye to employment or conduct of small businesses without a permit, and such persons could access free health and education services. There was a finding in each case that they were unlikely to be expelled unless they contravened the law, in which case a deportation order must be issued by a court.

TRIBUNAL FINDINGS ON RIGHT TO ENTER SYRIA

47 The findings of the Tribunal in each of the five matters can be summarised as follows:

- **"V854/00A"** - The Tribunal found that the applicant entered Syria using a genuine Iraqi Identification card, having been provided with a security clearance from the Syrian authorities. It was satisfied that he was sponsored into Syria. Although the Tribunal could not firmly identify the applicant's sponsor, it concluded that it may have been his cousin, who is legally resident in Syria, and with whom he stayed on his arrival in Damascus. The Tribunal also found that the applicant had left Syria travelling on a genuine Iraqi passport. From this the Tribunal concluded that the applicant could be sponsored to return to Syria by the same person who sponsored him previously, or by his cousin residing in Syria.
- **"V856/00A"** – the Tribunal found that the applicant had entered Syria through sponsorship arranged by a Syrian contact, and had left Syria legally. Prior to his departure for Australia, he had travelled in and out of Syria on a number of occasions. The Tribunal therefore concluded that the applicant would be able to re-enter Syria, and, once there, to reside in Syria indefinitely.
- **"V872/00A"** - The Tribunal found that the applicant had a strong connection with Syria, and departed legally, and therefore "will be able to re-enter Syria to resume effective protection there".
- **"V900/00A"** – The Tribunal found that the applicant entered Syria on a genuine Iraqi Identification card prior to 1994, registered and studied at a national

university, and had no criminal record in Syria. Further, the applicant applied for, and was granted, a Syrian police clearance document from Australia, and was likely to have contacts in Syria who could sponsor him into that country. On these bases the Tribunal found that he could return to Syria.

- **"V903/00A"** – the Tribunal found that the applicant entered Syria legally using genuine documentation including a security clearance issued by Syrian authorities while he was still in Iraq, and that he was permitted to remain there. The Tribunal did not identify the person who had sponsored the applicant's entry into Syria, but concluded that the applicant could still be sponsored to return to Syria by that person or party and could thus arrange legal entry into the country as he did previously.

48 The relevant factual background in relation to each matter is more specifically set out by the primary Judge in his reasons in each matter. It is not necessary to repeat that material in these reasons.

ISSUES RAISED ON APPEAL

49 The appellants pose the relevant issues essentially in these terms:

(a) Whether the application of s 36(2) of the Act and the principle of effective protection, so as to relieve Australia of its "protection obligations", requires at the time of determination, the existence of an enforceable legal right of entry or re-entry to a safe third country?

(b) Whether there must be an acceptance by the third safe country of an obligation to receive and protect an asylum seeker?

(c) Whether the obligations of Australia could be satisfied by a practical likelihood of being given effective protection by being permitted to enter that third country?

RELEVANT PROVISIONS

50 Section 36 of the Act provides:

*"**36 Protection visas***

(1) There is a class of visas to be known as protection visas.

(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

…

(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 … 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)

51 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") provides in Article 1A, that a person is a refugee as defined if:

"(2)… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …"

52 Article 33 of the Convention relevantly reads:

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

53 The provisions of the Act contained in ss 36(3)-(5) are amendments made to provide for applicants who have the right to avail themselves of protection in third countries.

54 These amendments apply to applications made after 16 December 1999 and apply to the present applications.

TRIBUNAL FINDINGS

55 The Tribunal was satisfied that the appellants could in fact access and remain in Syria indefinitely and would not be at risk of being returned to Iraq by Syrian authorities unless they became involved in illegal activities or were a threat to the security of the country. The Tribunal was satisfied that the appellants' fears of refoulement to Iraq were not well-founded. This was largely on the basis of available country intelligence. In assessing the likelihood that the appellants might be refouled to Iraq, the Tribunal concluded that there was not a real chance of that occurring. The Tribunal did not accept that the appellant in each case was at any real risk of being harmed by Iraqi agents in Syria. Nevertheless, if it was believed there was such a risk, the Tribunal considered that in each case, the Syrian authorities would provide the necessary protection to shield the appellant from attacks by Iraqi agents. The Tribunal did not accept that there was a real chance that the appellants faced persecution at the hands of Syrian authorities because they were from Iraq or had been the target of false accusations by Iraqi agents.

56 The reasons for decision in case V854/00A, which is typical for present purposes of all appeals, concluded:

> *"**In summary, the Tribunal is satisfied that the Applicant can re-enter Syria, resume residence on an indefinite basis and would not be at risk of being refouled to Iraq**. He does not have a well founded fear of persecution in Syria. It finds that as a matter of practical reality and fact, effective protection is available to the Applicant in Syria. He is not, therefore, a person to whom Australia has protection obligations and does not meet that*

criterion for the purposes of the grant of a protection visa." (Emphasis added)

APPELLANTS' SUBMISSIONS

57 The appellants agree that s 36(2) and ss 36(3)-(5) of the Act have separate operations and that the test for the application of s 36(3) requires the existence of a **legally enforceable right** of entry to a "safe third country". The appellants refer to the observations of Sundberg J in *V1043/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 910 at [16] that:

> *" …the denial of a protection visa because of a non-citizen's connection with a third country can result from either an application of s 36(3) or the fact that he or she has effective protection in the third country."*

58 The appellants submit that the ultimate findings that the appellants can in fact re-enter Syria where, as a matter of practical reality, effective protection is available, do not address the essential element of the appellants **being permitted to enter**. It is said that on the country information before the Tribunal the capacity or ability of the appellants to enter or re-enter or return to Syria was always subject to the discretion of the Syrian government. That is said not to be sufficient. Reference is made in the country information before the Tribunal to a statement that Syria was prepared to consider re-admission of Iraqi nationals to Syria on a case by case basis. Further reference is made to the circumstance that re-admission of Iraqis would only be **considered** in situations where they were either, married to a Syrian national who still lived in Syria, or had other strong connections with a Syrian citizen and that these were the only Iraqis that Syria would consider for long term residence.

59 The appellants argue that the primary Judge erred in not finding that the Tribunal was wrong in its interpretation and application of the test for effective protection. The principal submission for the appellants is that it must be shown that the appellants had a legally enforceable right to enter, re-enter and remain in the third country claimed to be a safe haven. No such enforceable rights existed in the case of the present appellants. On this submission, it is not sufficient to establish that as a matter of practical effect and reality or obligation, as opposed to one of right or obligation, a person is able to access the third country. It is contended that the line of reasoning originating in the decision at first instance in *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 is wrong.

60 In that case Emmett J, after referring to the decision of the Full Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 said at [24] – [26]:

> *"24 It was accepted by the Minister that, if that is the correct approach, the Tribunal was in error because it did not adopt that approach. In other words, the Tribunal did not find that the applicant at present has a* ***legally enforceable right*** *to enter, re-enter and reside in Jordan. Nor did the Tribunal decide that the applicant had a* ***legally enforceable right*** *to have any application for refugee status considered in accordance with the Convention. Jordan is not a party to the Convention.*
>
> *25 I do not consider that there is any warrant in the observations made by von Doussa J for concluding that his Honour was intending to refer to a legally enforceable right. That was certainly not necessary for the decision in* Thiyagarajah*. In that case, the applicant had in fact been granted rights by France. In* Rajendran*, the applicant had been given permanent residence in New Zealand, and the Full Court held that that was sufficient to satisfy any concern about possible contravention of Article 33. Article 33 does not speak in terms of any rights. It speaks only in terms of* refoulement *to the frontiers or territories where an applicant's life or freedom would be threatened on account of Convention reasons.*
>
> *26 I consider that all that von Doussa J was saying (and this is consistent with the approach adopted by the Full Court in* Rajendran *and by Weinberg J in* Gnanapiragasam*) is that so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and to live in a third country where he will not be under any risk of being refouled to his original country, that will suffice. I am satisfied therefore that the first ground has not been made out."* (Emphasis in original)

61 The last quoted paragraph makes it clear that his Honour did not consider it necessary to demonstrate that there was a right to enter and live in a third country which was in effect, a safe haven, but that provided as a matter of practical reality and fact that a person was likely to be given effective protection by being admitted to enter and live in the third country, Australia would not be in breach of its Convention obligations to that person.

62 In *Thiyagarajah* at 562, after pointing out that Article 33 of the Convention imposes the central obligation required by the Convention on a contracting State, von Doussa J (with whom Moore and Sackville JJ agreed) said:

> *"It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee*

> *status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee,* ***and has accorded that person effective protection, including a right to reside, enter and re-enter that country****. The expression 'effective protection' is used in the submissions of the Minister in the present appeal. In the context of the obligations arising under the Refugees Convention, the expression means protection which will effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee."* (Emphasis added)

63 An appeal to the Full Court in *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 1472 was dismissed. On appeal the Court said at [11] that the statement by von Doussa J in *Thiyagarajah* was a correct statement of the law. In so doing, the Court was adopting the observations of the primary Judge to the effect that in referring to "a right" to reside and enter a third country, the Court was referring to an ability to enter and continue to reside as a matter of practical reality and was not stating that it was necessary to have a legally enforceable right to enter and reside. Although in some instances, the existence of a legally enforceable right to enter the country may be a sufficient requirement to satisfy Article 33, it is not a necessary requirement.

64 It is submitted for the appellants that there is a clear conflict of appellate authority between the approach taken in *Al-Zafiry* which was approved by the Full Court in *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 558-9 and that taken in *Tharmalingam v Minister for Immigration and Multicultural Affairs* [1999] FCA 1180.

65 In *Al-Sallal* the principal question under consideration was whether Australia owed protection obligations to persons who can enjoy effective protection from persecution in a safe third country notwithstanding that such country is not a signatory to the Convention. In that case the Court said at 559:

> ***"Can Art 33(1) be satisfied where the third country is not a party to the Convention?***
>
> *Article 33(1) is, so to speak, the engine room of the Convention. In Australia prior to 1992 its significance may not have been so apparent because, as von Doussa J points out in* Thiyagarajah *at 552, decision-makers then were concerned only to determine whether an asylum-seeker satisfied the*

Art 1A(2) definition of 'refugee', this having been expressly made part of Australian domestic law by s 4(1) of the Act.

Since 1992 the focus is on Art 33(1). This is so whether the proposed refoulement is (i) direct to the asylum-seeker's country of nationality (country A) or (ii) indirect by means of refoulement to country B which will, or might, refoule him or her to A.

In (i) the 'territories' are the territories of A. In (ii) the territories are also those of A, the only difference is that the alleged breach of Art 33(1) would be achieved indirectly ('in any manner whatsoever') by refoulement to B.

This analysis suggests an answer to the present question. In the former case the decision-maker has to make a factual assessment. Is there a 'real chance' of persecution for a Convention reason in country A? That real chance may exist whether or not country A is a party to the Convention. Likewise in the latter case, the decision-maker has to assess (also in terms of 'real chance') the prospects of 'effective protection' in country B against refoulement to country A. ***It is, as Emmett J said in*** **Al-Zafiry,** ***a matter of practical reality and fact****. The question whether B is a party to the Convention is relevant, but not determinative either way.*

The respondent's case involves a substantial gloss on the plain language of Art 33(1). Moreover, it is inconsistent with the unchallenged proposition that there can be a real chance of lack of effective protection notwithstanding that the third country in question is a party to the Convention. The learned primary judge noted that there are currently 133 States which are parties to the Convention. It is a sad reality of modern times that countries do not always honour human rights, whether enshrined in domestic constitutions or in international treaties to which they are parties. To treat the fact of a country being a party to the Convention as conclusive would be a distortion of the Convention's language and subversive of its underlying purpose. The converse must logically follow. As a matter of fact, parties may have better effective protection in some countries which are not parties to the Convention (a category which, incidentally, includes the United States) than in many which are." (Emphasis added)

66 The Full Court endorsed the principle that the question of a safe haven should be approached as a matter of fact and practical reality by looking to the nature and substance of the ability to enter and the effective protection provided. It is noteworthy that the Court in *Al-Sallal* observed that countries do not always honour rights to which they nominally subscribe, whether such rights are enshrined in domestic constitutions or international treaties to which they are parties. For this reason it is more appropriate to examine the practical realities of the situation.

67 In *Tharmalingam* the Full Court accepted the approach taken in *Thiyagarajah* that there must be a finding that the applicant has a "right" to re-enter the third country but it is

evident that the Court was again speaking in terms of an ability to enter which was less than a legally enforceable right. The Court noted that the question considered by the Tribunal was whether there was a "real chance" that France would **refuse** the applicant renewal of his *titre de voyage* in the event that he was refused a protection visa in Australia. It was not suggested that there was an error on the part of the Tribunal in addressing the issue in terms of a real chance. In that case the Court found that it was unnecessary to determine whether the principle had been misapplied because the evidence permitted an inference that the requisite entitlement existed.

68 In the more recent Full Court decision in *Al-Rahal v Minister for Immigration and Multicultural Affairs* [2001] FCA 1141, I framed the relevant question in relation to the ability to re-enter a safe third country in these terms, at [93]:

> *"… the relevant question when determining whether* refoulement *would result in a breach of Art 33 by Australia is whether as a matter of practical reality there is a real chance that the third country will not accept a refugee and would* refoule *them to a country where … life or freedom would be at risk for a Convention reason. This is a question of fact and degree. It does not require proof of actual permission, or of a right, to enter that country."*

69 Lee J did not agree with my and Spender J's reasoning in that case. His Honour concluded that, for the purpose of s 36(2) of the Act, Article 33 applies if a third country has already accepted an obligation to protect a person who is an applicant for a protection visa so that the applicant has correlative rights, namely a right to reside in that country and a right to have issued to him or her travel documents that permit departure from and re-entry into that country. His Honour considered that unless these obligations and rights exist at the time the application for protection visa is determined by the Minister, Australia will have protection obligations to the applicant, if that person is a refugee.

70 It was accepted by the Full Court in *Thiyagarajah* (at 564) that the same standard, namely the "well-founded fear" standard, should be applied in relation to a consideration of the position of an applicant under both Article 1A(2), which sets out the definition of "refugee", and Article 33 which relates to "non refoulement". In *Thiyagarajah* at 564, the Full Court decided to follow the decision of the House of Lords in *R v Secretary of State for the Home Department; Ex parte Sivakumaran* [1988] AC 958 at 1001, to this effect.

71 Counsel for the appellants also referred to the judgment of Stone J (with whom Gray and Lee JJ agreed) in *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332. In that case the Court held that the Tribunal had wrongly construed s 36(3) of the Act because it decided that the expression "right" in that section did not require a legally enforceable right. However, the language of s 36(3) does not affect the operation of Art 33 of the Convention. After reviewing the authorities, Stone J concluded at [65]:

> *"The combination of the amendments to s36 and the doctrine of effective protection leads to this position. Australia does not owe protection obligations under the Convention to:*
>
> *(a) a person who can, as a practical matter, obtain effective protection in a third country; or*
> *(b) to a person who has not taken all possible steps to avail himself or herself of a legally enforceable right to enter and reside in a third country."*

72 This passage in subpar (a) emphasises that the approach to be taken is to focus on the "practical reality of accessing safe third country protection". It does not support the submission that an enforceable legal right is necessary under Article 33.

73 During the hearing of these matters the Court asked for further submissions with regard to the current state of the law in the United Kingdom, New Zealand and Canada, in relation to the circumstances in which a person might access protection in a third country being a country other than the person's country of nationality without contravention of Article 33. In particular, the Court was concerned with the test to be applied when deciding whether the person would be permitted to enter the third country. The Court has now had the assistance of further submissions from the Minister and counsel for the appellants has had an opportunity to comment on those submissions.

74 The Court has been referred to a number of regulatory regimes and decisions of courts and tribunals in other jurisdictions. However, because of the different statutory regimes there is no authority directly in point on the question presently before the Court. It is not necessary therefore to examine, in detail, the position in other jurisdictions.

75 However, the Court was referred to a judgment of Lord Woolf MR in *R v Secretary of State for the Home Department, Ex parte Canbolat* [1997] 1 WLR 1569 which provides some guidance. His Lordship (who delivered the judgment of the Court) addressed the question as

to how to apply a statutory test as to the satisfaction of the Secretary of State necessary for the issue of a certificate:

> *"… that the Government* [of the third country – France in that case] *would not send* [the applicant] *to another country or territory otherwise than in accordance with the Convention."*

76 In considering whether this requirement had been met, his Lordship stated at 1577:

> *"We do not accept Mr Pannick's adoption of a reasonable degree of likelihood test. This submission involves a lower threshold than that laid down by the Act. … The language of the condition is unqualified. This is the statutory test. It is a test imposed as a requirement of overriding the protection which would otherwise be provided by section 6 of the Act of 1993. Clearly it is necessary to treat the test as not being totally unqualified.* ***It must be subject to the implication that it is permissible to grant a certificate when there exists a system which will, if it operates as it usually does, provide the required standard of protection for the asylum seeker. No country can provide a system which is 100 per cent effective****. There are going to be aberrations. All that can be expected and therefore all that Parliament could have intended should be in place prior to the grant of a certificate* ***was a system which can be expected not to contravene the Convention. What is required is that there should be 'no real risk that the asylum seeker would be sent to another country otherwise than in accordance with the Convention.'*** *The unpredictability of human behaviour or the remote possibility of changes in administrative law or procedures which there is no reason to anticipate would not be a real risk."* (Emphasis added)

77 The above extract, which adopts a "real risk" approach to the task of deciding whether a person will be "refouled" from a third country, is consistent with the test laid down in *Al-Rahal.* The judgment in *Canbolat* does not advert to any requirement of any legally enforceable right to access or remain in the safe third country. Rather, the judgment looks to the actual circumstances as evaluated by the Secretary of State having regard to the "real risk" criterion.

78 Concern was expressed during the hearing as to what might occur if a person is refused entry to the country which had been found to be a safe third country. The Court requested submissions from the Minister as to the existence and nature of any obligation which Australia would assume if a person is refused a protection visa in Australia on grounds that include a finding that the person can access a safe third country and yet when returned to

that country access is denied. The Court was informed that in practice the situation does not arise because arrangements for entry into the third country are made before a person departs Australia. The Court was informed that such persons could make arrangements themselves, where they decide to return voluntarily, or the Australian Government may be involved in implementing arrangements for their return. The Court was informed that there is in practice no involuntary departure until satisfactory arrangements are in place. An asylum seeker who is refused a protection visa based on a finding that there is an accessible safe third country but in respect of which return arrangements to the safe third country are subsequently not able to be made, will not be returned to their country of origin where that would involve the breach of Article 33 of the Convention. Counsel for the Minister referred to s 48B of the Act which provides the Minister with a discretion to allow a further protection visa application to enable the asylum seeker's claims to be reconsidered in light of the fact that the return to the third country is not possible, should those circumstances eventuate. Alternatively, the Minister could, in the case of a Tribunal decision, consider making a substituted decision favourable to an applicant under s 417 of the Act.

REASONING ON APPEAL

79 I do not consider that there is any substance in the submission that the insertion of s 36(3) into the Act indicates that it is necessary **under Article 33** of the Convention to have a legally enforceable right to enter and reside in a safe third country. If such a right can be shown, then Australia does not have protection obligations, but s 36(2) is silent as to whether it is necessary under Article 33 to demonstrate a right to enter and reside in the third country before it can be said protection obligations do not arise.

80 The language of Article 33 is silent as to any requirement for the existence of a right to enter and reside in, and not be refouled from, the safe third safe country to a country where there might be a real chance of persecution for a Convention reason.

81 The concept of a right to enter which is **legally enforceable** has inherent difficulties. In order to properly determine whether the right can be legally enforced in the safe third country it would be necessary to examine the law of that country in detail. It is difficult to conclude that this type of exercise was intended by the signatories to the Convention. Such an exercise could be lengthy and difficult requiring the assistance of experts in foreign law.

82 In terms, Article 33 is a prohibition on the sending of a person either directly or indirectly to a territory where there is a real chance of persecution. In applying Article 33 in the present circumstances there are three questions to ask:

(a) Is there a safe third country where the applicant will not face a real chance of persecution for a Convention reason?

(b) Can the person gain access to that safe third country?

(c) If the person is admitted to that country is there a real chance that the person might be refouled to a country where there will be a real risk of persecution?

83 These questions do not necessarily involve the assertion of a right in the applicant to re-enter with a reciprocal obligation to allow re-entry, which is an enforceable right. Such an obligation may in some circumstances be sufficient but it will not always be so. In some countries the right may exist but in name only. Article 33 speaks in **factual** terms in the context of the availability of protection against being sent to a country where there is a real risk of persecution for a Convention reason. The answer to the question involves satisfaction as to the matters set out above and there is no reason in principle why the standard to be applied in relation to each of the factors to be considered, namely, ability to access, ability to remain and an absence of a real risk of refoulement to the place of anticipated persecution, should not be the same. On this approach, the appropriate question to ask in relation to securing **access** to the safe third country is whether there is any real risk that the applicant would **not** be able to secure access to that country so as to attract its protection. If the answer to that question is in the affirmative, then the existence of protection in a safe third country is of no practical or legal content because the person cannot access it. It is not a question of likelihood. Nor is it a consequence of a legally enforceable right. It is essentially a question of practical reality and fact to be assessed on the basis of whether there is real risk of not being able, in fact, to enter and reside in that country.

84 For these reasons I do not consider that the appellants in the present case have made good their submission as to the need for an enforceable right of access in relation to any of the applications.

85 Accordingly, the answers to the matters raised on [49] above are as follows:

(a) Whether the application of s 36(2) of the Act and the principle of effective protection, so as to relieve Australia of its "protection obligations", requires at the time of determination, the existence of an enforceable legal right of entry or re-entry to a safe third country? No.

(b) Whether there must be an acceptance by the third safe country of an obligation to receive and protect an asylum seeker? No.

(c) Whether the obligations of Australia could be satisfied by a practical likelihood of being given effective protection by being permitted to enter that third country? Yes

86 Since it is agreed this is the only substantial issue in the five appeals before the Court I consider that the appeals must be dismissed for the above reasons. I am of the view that costs should follow the normal rule and I therefore order that the appellants should pay the costs of the respondent on each of the appeals.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 18 June 2002

Counsel for the Applicant:	John A. Gibson
Solicitor for the Applicant:	Armstrong Ross
Counsel for the Respondent:	P.R.D. Gray
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 February 2002
Date of last submissions:	27 February 2002
Date of Judgment:	18 June 2002