FEDERAL COURT OF AUSTRALIA

NBLB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1051

MIGRATION – application for review of decision by the Refugee Review Tribunal – whether '*all possible steps*' should be construed as meaning '*all reasonably practicable steps*' for the purposes of s36(3) of the *Migration Act 1958* (Cth) – whether subjective fear of travelling to a country is relevant to operation of s 36(3) - whether there can be persecution that does not involve serious harm for purposes of s 36(4) – concept of persecution to be treated as a single consistent concept for purpose of s 36.

Judiciary Act 1903 (Cth), s 39B
Migration Act 1958 (Cth), ss 36, 91R

NBLB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS & ANOR

NSD 460 OF 2005

EMMETT J
1 AUGUST 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD460 OF 2005**

BETWEEN:	**NBLB** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**EMMETT J**
DATE OF ORDER:	**1 AUGUST 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first and second respondents' costs.

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

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NEW SOUTH WALES DISTRICT REGISTRY **NSD460 OF 2005**

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AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
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JUDGE:	**EMMETT J**
DATE:	**1 AUGUST 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The applicant, who is a citizen of North Korea, arrived in Australia on 15 October 2003. On 10 January 2005, he lodged an application for a protection (Class XA) visa under the *Migration Act 1958* (Cth) ('the Act'). On 12 January 2005, a delegate of the first respondent, the Minister for Immigration & Multicultural & Indigenous Affairs ('the Minister'), refused to grant a protection visa. On 14 January 2005, the applicant applied to the second respondent, the Refugee Review Tribunal ('the Tribunal'), for review of the delegate's decision. On 24 February 2005, the Tribunal affirmed the decision not to grant a protection visa.

2 On 24 March 2005, the applicant commenced a proceeding in this Court, seeking relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) in respect of the Tribunal's decision. A further amended application was filed, without objection, on 20 June 2005 at the commencement of the hearing of the proceeding.

THE APPLICANT'S CLAIMS

3 In a statutory declaration in support of his application for a protection visa, the applicant claimed that, in late 1976, while resident in North Korea, he visited some friends who were

listening to a radio program broadcasting from South Korea. Shortly afterwards, those friends were arrested and imprisoned. After that arrest, the applicant was interrogated by officers from the North Korean intelligence agency about listening to broadcasts from South Korea. He was detained overnight and then released. However, he was kept under close surveillance by the intelligence agency for two years and was required to attend their offices regularly. As a result of the incident, the applicant was banned from joining the North Korean military.

4 The applicant claimed that he lived close to the Chinese border in North Korea. Along part of the border is a river that freezes during winter, such that it is possible to walk over the river. In December 1997, on a night on which it was snowing heavily, he fled to China across the river, concealed by the falling snow. His intentions were to work in China and send money back to his family in North Korea. However, the applicant claimed that in about December 2000, he used the same means to return to North Korea in order to take his wife and two sons back to China. Subsequently, he decided to leave China. A relatively wealthy aunt living in China arranged a people smuggler for him. The applicant claimed that he wanted to go to South Korea but believed that, if he went to South Korea, the North Korean authorities would learn of his whereabouts and his remaining relatives in North Korea would be placed in danger. Under the constant supervision of various people smugglers, the applicant arrived in Australia by way of Hong Kong, Malaysia, Vietnam and New Zealand.

5 On 9 February 2005, the solicitors acting for the applicant wrote to the Tribunal, making submissions in support of his claims. The submissions were detailed and contained sophisticated legal arguments in support of the applicant's contentions. The submissions were supported by a statement by the applicant, which made the following assertions:

> '…
> *(b) In early 2002, the Chinese authorities starting cracking down on the illegal North Koreans living in Yun Kil city, Yun Kil state, China.*
>
> *(c) In about March/April 2002, as a result of the Chinese authorities' repatriation to North Korea of numerous North Koreans living illegally in Yun Kil city, I decided to send my wife and children to live with a distant cousin in a place known to me as Huek Ryong Kang Sung.*
>
> *(d)* …

(e) *I had to stay in Yun Kil city such that I could earn a living.*

(f) *I have not seen my wife and children since they went to Huek Ryong Kang Sung.*

(g) *It was very difficult for me to be separate from my wife and children but I knew that, at least, they would be safer in Huek Ryong Kang Sung.*

(h) *Since leaving China in September 2003, I have had no news of my wife and 2 children's fate or whereabouts.*

(i) *I suspect that there may now be more North Koreans living in Huek Ryong Kang Sung and that the Chinese authorities may be repatriating North Koreans living illegally in Huek Ryong Kang Sung, in the same harsh manner as they were repatriating North Koreans living illegally in Yun Kil city.*

(j) *Perhaps my wife and 2 children have also been repatriated back to North Korea.*

(k) *…*

(l) *…*

(m) *Aside from my wife and 2 children who may have been repatriated to North Korea… my one remaining sibling, being my brother…, is living in North Korea.*

(n) *Further, I have a number of cousins, uncles, aunties, and in-laws still living in North Korea.*

(o) *I would never go to South Korea, as doing so will place:*
(i) *my brother (and his family);*
(ii) *my wife and children (if they have been repatriated);*
(iii) *my cousins, uncles, aunts and in-laws (and their respective families)*
in danger of persecution in North Korea.

(p) *The North Korean authorities have agents in South Korea. Such agents will notify the North Korean authorities of my presence in South Korea.*

(q) *Further, if I am forced to go to South Korea, I too will suffer persecution.*

(r) *First, I believe that the guilt from the knowledge that my relatives are being persecuted (or are at risk of persecution) due to my forced residence in South Korea, will cause me to become mentally imbalanced and lead me to suffer severe psychological harm.*

(s) Secondly, I believe that the agents of North Korean authorities in South Korea will seek to harm me.'

6 At a hearing before the Tribunal on 18 February 2005, the Tribunal put to the applicant the proposition that, since he was a North Korean, he had the right to enter and reside in South Korea. The applicant said that he did not wish to go to South Korea and stated that, if it was a choice between death and South Korea, then he would choose South Korea but that he did not consider South Korea to be a real option for him. When asked to elaborate, the applicant stated that he was in fear of North Korean authorities, should he reside in South Korea. He repeated his claim of having being caught listening to a radio program broadcast from South Korea and that, as a consequence, he had a criminal offence against him.

7 The applicant stated that he '*should go crazy*' if he lived in South Korea. When asked whether he was in fear of physical harm, the applicant said that it was not so much fear of physical harm but more psychological harm. He stated that the psychological harm he would experience in South Korea was fear and concern that spies in North Korea would know of his presence in South Korea and that, as a result of this, his family in North Korea would suffer. When asked how his whereabouts in South Korea would be known, the applicant stated that the authorities '*know these things and would feed it back*'. The applicant reiterated that he would experience great worry and concern, if he were to reside in South Korea, at the thought that the authorities would harm his family. He claimed that he would experience psychological harm in South Korea that he would not experience in Australia.

8 In response to the proposition that the bulk of his family are living in China and not in North Korea, the applicant stated that he was not sure whether, in fact, his family might have been repatriated back to North Korea. He said that, although he had last seen his family in 2003, he did not know whether, since then, they had been sent back to North Korea. The applicant's adviser said that it should not be assumed that the applicant's family are in China and that there is a chance that they could have been repatriated to North Korea. It was said that, in any event, the applicant's brother is in North Korea and, therefore, the applicant would experience psychological harm in South Korea from worrying about the safety of his brother and his brother's family in North Korea, should his presence in South Korea be detected. The applicant's advisor also suggested that the applicant's presence in South Korea would be easily detected since the North Korean authorities could monitor citizenship

ceremonies. The advisor also suggested that spies could easily feed back to North Korea, by way of radio transmission, information about the presence of the applicant and that that, in turn, could lead to harm of the applicant's family by North Korean authorities.

9 Following the hearing, the applicant's solicitors wrote again to the Tribunal on 21 February 2005, submitting further country material in relation to conditions in North Korea. In their letter of 21 February 2005, the applicant's solicitors cited extracts from independent country material suggesting that North Korean defectors may be at some risk in South Korea. The material also suggested that North Korean defectors complain of bias and discrimination and a feeling that many South Koreans regard them as second-class citizens.

THE TRIBUNAL'S DECISION

10 The Tribunal accepted that the applicant is a citizen of North Korea, that he departed North Korea illegally and resided in China illegally for some years before entering and residing in Australia illegally. The Tribunal also accepted that defectors from North Korea face execution, torture and imprisonment on their return to North Korea and that their families may also be punished because of their defection. The Tribunal was satisfied that such treatment amounts to persecution by reason of an imputed political opinion. Accordingly, the Tribunal was satisfied that the applicant has a well-founded fear of persecution, within the meaning of the Refugees Convention, as amended by the Refugees Protocol, should he return to North Korea.

11 However, the Tribunal found that North Korean defectors are entitled to citizenship in South Korea and that the applicant has a legally enforceable right to enter and reside in South Korea. The Tribunal further found that the applicant has not taken all possible steps to avail himself of that right. The Tribunal did not accept that the applicant has a well-founded fear of psychological harm, as he claimed, should he avail himself of his right to enter and reside in South Korea. The Tribunal also found that the applicant does not have a well-founded fear of being persecuted in South Korea or that South Korea would return him to North Korea. The Tribunal referred to the suggestion by the applicant's solicitors in their letter that the country information indicates that recent arrivals from North Korea to South Korea can experience difficulties in adjusting to a more modern lifestyle and face social stigma and discrimination. While the Tribunal accepted that country information, the Tribunal did not

accept that that level of discrimination was of a nature or degree '*that amounts to* ***serious harm*** *as indicated for instance by s 91R of the Act*'.

12 Accordingly, the Tribunal concluded that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The criterion referred to in s 36(2) of the Act, which is essential for the grant of a protection visa, was therefore not satisfied.

GROUNDS OF REVIEW

13 In his further amended application, the applicant relied on three broad grounds for contending that the Tribunal's decision was infected by jurisdictional error, such that it should be quashed by order of the Court. The first broad ground is concerned with the reasoning of the Tribunal in concluding that the applicant's claimed fear of psychological harm is not well-founded.

14 The second ground is that the Tribunal misconstrued s 36(3) in so far as it found that the applicant had not taken all reasonable steps to avail himself of the right to enter and reside in South Korea. The applicant contended that in the light of the subject fear that he harboured, it was not reasonably possible for him to do so.

15 The third ground is that the Tribunal erred in the interpretation and application of s 36(4) in so far as it found or assumed the meaning of persecution set out in s 91R defined persecution for the purposes of s 36(4).

FEAR OF PSYCHOLOGICAL HARM

16 The first ground is based on the following paragraph in the Tribunal's reasons:

> *'Taken together the applicant's absence of profile and specific adverse interest to the North Korean authorities, his limited family connections in North Korea and his vagueness as to his anticipated psychological harm the Tribunal does not accept the applicant's claimed fear of psychological harm, in terms of increased concern for this family's safety by his residing in South Korea, is well-founded.'*

That sentence has some syntactical peculiarities. However, in essence, the Tribunal was clearly recording its conclusion that the applicant's claimed fear of psychological harm from residing in South Korea is not well-founded.

17 In reaching that conclusion, the Tribunal adverted to three separate matters, each of which gives rise to a complaint by the applicant. The three matters are:

- the absence of a profile that would be of specific adverse interest to the North Korean authorities;
- the risk to the applicant's family in North Korea;
- the vagueness of the applicant's claims as to psychological harm.

I shall deal separately with each of those matters.

Profile

18 The Tribunal observed that the applicant was unable to elaborate on how he thought the North Korean authorities would come to know of his presence in South Korea and then set about locating his remaining family in North Korea. The Tribunal considered that the adviser's suggestion that North Korean spies would monitor citizenship ceremonies and relay information back to authorities in North Korea was mere speculation. While the Tribunal accepted that there are North Korean spies operating in South Korea, it found that the extent and the number of North Korean spies operating in South Korea was unclear and remained, at best, an estimation.

19 Given that North Korean spies do operate in South Korea, the Tribunal could not rule out the possibility that the applicant may, in some way, at some point in time, encounter such operatives in South Korea. However, the Tribunal found that that possibility was remote and not a real chance in the case of the applicant. The applicant's evidence was that his departure from North Korea was uneventful and that, when he returned in 2000, he did so in secret. Accordingly, the Tribunal did not accept that the applicant is a person of whom the North Korean authorities would be aware, or in whom the North Korean authorities would have an interest in pursuing. The Tribunal found that the applicant does not have a profile, political or otherwise, over and above his being a defector from North Korea. Contact by the applicant with North Korean spies in South Korea, or in any other country, would therefore be a chance occurrence and a remote possibility.

20 The applicant complained that the Tribunal's conclusion, in that regard, was not supported by any evidence. He contended that there was no evidence before the Tribunal that the North Korean authorities only target, or seek to identify, high profile defectors in South Korea or that, with such a rigidly totalitarian state as North Korea, there was even a concept of a defector with a profile. Rather, the evidence suggested that:

- the North Korean authorities are interested in monitoring and classifying all of its citizens and punishing those, and the family of those, it considers to be a threat; and
- the South Korean authorities appear to consider that defectors are likely to be targeted by North Korean agents and thus attempt to provide police surveillance for 5 years after arrival.

Accordingly, so it was said, in so far as the Tribunal made the findings summarised above, by relying on the alleged lack of profile on the part of the applicant, the Tribunal failed to exercise its jurisdiction because its satisfaction was based on findings not reasonably open on the evidence before it.

21 However, that contention is based upon a misapprehension of the Tribunal's reasoning. The reasoning summarised above indicates that the Tribunal was doing no more than making a finding about the prospect of the applicant coming to the attention of North Korean spies, if he were reside in South Korea. On a fair reading of the Tribunal's reasons, it was not saying that the North Korean authorities were only interested in defectors who had a relevant profile. Rather, the Tribunal was saying that, unless a North Korean residing in South Korea had a particular profile, the chances of the defector coming to the attention of North Korean authorities through spies in South Korea was remote and not a real chance. That was a finding of fact that was open to the Tribunal on the material before it.

The Applicant's Family

22 The Tribunal observed that the only members of the applicant's family residing in North Korea were his brother and his brother's wife and children. The Tribunal found that the applicant's parents are deceased and that his wife and children were residing in China in the care of relatives, when he last had contact with them. The Tribunal considered that the suggestion, that the applicant's wife and children may have been repatriated to North Korea, after he had arrived in Australia, was mere speculation and unsubstantiated. That seems to be

the finding referred to by the Tribunal when it referred to the applicant's '*limited family connections in North Korea*'.

23 The applicant contended that the Tribunal overlooked, and therefore did not address, the possibility that the applicant's brother and his family might be harmed because of the applicant's defection. The Tribunal made no express finding that the applicant's brother and his family would not be at risk and, in those circumstances, the Tribunal failed to take account of a relevant consideration, namely, the fact that the family of a defector would be at risk in North Korea. The applicant also contended that the Tribunal erred in dismissing the possibility of harm that might be inflicted on the applicant's wife and children, if they were, in fact, in North Korea.

24 However, the complaint is answered by the finding of fact to which reference has already been made. The applicant's family, whether it is his brother and his brother's family or the applicant's wife and children, would not be at risk of harm by reason of his being a defector, unless the North Korean authorities became aware that he was, in fact, a defector. If the North Korean authorities are presently aware that he is a defector, then those members of his family who are still in North Korea are presently at risk. They would be at no greater risk if he were to reside in South Korea. On the other hand, if the North Korean authorities are not presently aware that the applicant is a defector, the Tribunal found that the chance of the North Korean authorities becoming aware, by reason of the applicant's residing in South Korea and harming his family is remote and is not a real chance. That is to say, the Tribunal found that the possibility that the applicant might come to the attention of North Korean spies in South Korea, if he was residing in South Korea, is remote and that there is no real chance of that possibility.

Vagueness

25 The applicant contended that harming the applicant's family in order to punish him for his imputed political opinion as a defector would constitute persecution of the applicant, because the applicant would be seriously affected by such punishment.

26 The Tribunal did not find that the applicant did not subjectively hold fears of retribution against his family, should he return to South Korea. However, the Tribunal observed that the applicant's description, at the hearing, of his claimed psychological harm lacked specificity.

The Tribunal observed that the applicant described it simply in terms that he would '*go crazy*' and that living in South Korea was only preferable to death.

27 The Tribunal found, in express terms, that the applicant's claimed fear of psychological harm is not well-founded. Whether or not the applicant subjectively entertained the fear of harm to the members of his family, the Tribunal found that the risk of such harm, as a consequence of encountering North Korean spies in South Korea, was remote and that there was not a real chance of such an encounter. The Tribunal's observation that the applicant simply claimed that he would '*go crazy*', and that the alleged anticipated harm was vague, emphasises that the Tribunal found that there was no well-founded basis for any such fear as the applicant entertained.

Conclusion as to alleged deficiency of reasoning

28 I do not consider the first general ground has been made out. While the passage cited above as giving rise to this ground is not expressed as felicitously as it might be, it is clear enough what the Tribunal was saying. It was making a finding of fact that there was no real chance that the North Korean authorities would find out that the applicant is a defector, simply by reason of his residing in South Korea. Therefore, his fear of psychological harm is not well-founded, irrespective of whether that could constitute persecution.

SECTION 36(3) – ALL POSSIBLE STEPS

29 Section 36(2) of the Act relevantly provides that a criterion for the grant of a protection visa is that the applicant for the visa is a non-citizen to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. However, under s 36(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 any country apart from Australia.

30 The applicant contends that the phrase '*all possible steps*' should be construed as meaning '*all reasonably practicable steps*'. Further, the applicant says that, having claimed that he would suffer psychological harm by residing in South Korea, the Tribunal erred in not enquiring whether it would be unreasonable to require him to go to South Korea, given the subjective fears that he holds as to what could befall him and his family if he did so. The

applicant contends that it is not reasonably practicable for him to avail himself of the rights to enter and reside in South Korea because of his subjective fear that, if he did so, his family in North Korea would be at risk and he himself might be at some risk in South Korea.

31 It may be that the phrase '*all possible steps*' should be construed as meaning '*all steps reasonably practicable in the circumstances*'. However, that does not assist the applicant. Section 36(3) directs attention at taking steps **to avail oneself of a right to enter and reside in a country**. Section 36(3) is not directed to the consequences of entering and residing in a country. Rather, that question is addressed by ss 36(4) and 36(5). Those provisions make it clear that the Parliament has given attention to the possibility that entering and residing in some countries could be harmful to a non-citizen applicant.

32 Thus, if a 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, then the deeming effect of s 36(3) does not apply in relation to that country. Further, if a non-citizen has a well-founded fear that a country will return the non-citizen to another country and 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, then the deeming effect of s 36(3) will not apply in relation to that country. The phrase '*for reasons of race, religion, nationality, membership of a particular social group or political opinion*' is taken, of course, from the definition of '*refugee*' in Article 1A(2) of the Refugees Convention.

33 Thus, the scheme of s 36 is to provide that a non-citizen will not be entitled to a protection visa, unless the person is a refugee as defined in Article 1A(2) of the Refugees Convention. A refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and satisfies certain other pre-requisites. However, such a person will not be entitled to a protection visa if that person has a right to enter and reside in a country other than a country:

- in which the non-citizen has a well-founded fear of being persecuted for one of the five reasons; or
- in which the non-citizen has a well-founded fear that he would be returned to another country in which he would be persecuted for one of those reasons.

34 The presence of ss 36(4) and 36(5) emphasises that s 36(3) is directed to the steps that might be taken to avail the non-citizen of a right to enter and reside in another country and not to the consequences of taking the steps. Whatever steps can possibly be taken or, perhaps, whatever steps it is reasonably practicable to take, to avail oneself of the right to enter and reside in another country, must have been taken, irrespective of what the consequences of such entry and residence might be, unless the consequences are those referred to in s 36(4) or s 36(5).

35 Accordingly, whether or not '*all possible steps*' should be construed as '*all reasonably practicable steps*', the Tribunal did not fail to address the relevant question. There was no suggestion by the applicant that he was not able to avail himself of the right to enter and reside in South Korea. In ordinary circumstances, that right could be availed of by travelling to South Korea and applying for citizenship. There was nothing to suggest that the applicant could not have taken those steps. Since neither s 36(4) nor s 36(5) was applicable, Australia would be taken by s 36(3) not to have protection obligations to the applicant. Accordingly, as the Tribunal found, the criterion referred to in s 36(2) was not satisfied. This ground is not established.

SECTION 36(4) – SERIOUS HARM

36 Section 91R(1) relevantly provides that, for the purposes of the application of the Act and Regulations to a particular person:

> *'Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
> …
>
> *(b) the persecution involves serious harm to the person…'*

Section 91R(2) then provides that, without limiting what is serious harm for the purposes of s 91R(1)(b), the following are instances of serious harm for the purposes of that provision:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;

- denial of access to basic services, where the denial threatens the person's capacity to subsist;
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

37 The applicant points out that the effect of s 91R is to state when Article 1A(2) of the Convention does not apply. While s 36(2), in referring to protection obligations under the Refugees Convention, imports Article 1A(2), since Australia has protection obligations only in respect of persons who are refugees within the meaning of Article 1A(2), s 36(4) does not refer to Article 1A(2). He contends that s 36(4) should not be interpreted in a manner that would be more restrictive of Australia's obligations than those envisaged by the Refugees Convention itself. He says that the importing of the concept of serious harm into the concept of persecution, for the purposes of the application of Article 1A(2), to a particular person, narrows the concept of persecution, as that concept is picked up by s 36(2). The applicant says that there is no reason to narrow the term '*being persecuted*' in s 36(4) in the same way.

38 Sections 36(3), 36(4) and 36(5) have no independent effect or operation. They operate only as qualifications of s 36(2). That is to say, s 36(3) is a qualification of s 36(2) and s 36(4) and s 36(5) are qualifications on that qualification. While s 91R(1) refers only to Article 1A(2), it is clear enough that ss 36(3), 36(4) and 36(5) are intended to operate only within the context of s 36(2). It would be an anomalous construction to treat the concept of persecution in ss 36(4) and 36(5) as being different from the concept of persecution imported into s 36(2) by s 91R(1).

39 Certainly, the drafting approach of s 91R is somewhat curious. Section 91R(1) assumes that there can be persecution that does not involve serious harm to the person. Thus, the intent of s 91R(1) appears to narrow the operation of Article 1A(2). Australia is only to have protection obligations to a person who has a well-founded fear of persecution that involves serious harm. If the applicant's construction of s 36(4) is accepted, a person who has a well-founded fear of persecution that does not involve serious harm will not be entitled to a protection visa. However, where a person, who has a well-founded fear of persecution that involves serious harm, has not taken all possible steps to avail himself or herself of a right to enter and reside in a country, Australia will be taken not to have protection obligations to that

person, unless the country is one in which the non-citizen has a well-founded fear of persecution that does not necessarily involve serious harm.

40 I consider, on balance, that the preferable construction of s 36, as a whole, is to treat the concept of persecution that is found in s 36 as a single and consistent concept. That being so, the Tribunal made no error in enquiring as to whether any discrimination that might be suffered by the applicant would involve serious harm.

CONCLUSION

41 It follows that none of the grounds relied upon by the applicant have been established. Accordingly, the application should be dismissed with costs.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 1 August 2005

Counsel for the Applicant:	Mr R Beech-Jones and Ms R Francois
Solicitors for the Applicant:	Legal Aid Commission of New South Wales
Counsel for the Respondents:	Mr R. Bromwich
Solicitors for the Respondents:	Australian Government Solicitor
Date of Hearing:	20 June 2005
Date of Judgment:	1 August 2005