## 9. RACE

In ***Brandigampolage v MIMA*** **[2000] FCA 1400** in dealing with an issue of alleged persecution on the grounds of race of a Singhala who had assisted a Tamil Moore J. said:

". This submission assumes a wide operation of the Convention in that the applicant would not simply be claiming persecution motivated by the fact of his own race (in the sense that he was perceived to be a traitor to it), but also because of assistance that he is believed to have provided to members of another race.
8 Counsel were unable to point to any authority dealing with the operation of the Convention in this way though perhaps this is not surprising given that cases involving the provision of assistance to a member of another race often raise for consideration allegations of persecution for reasons of political opinion. Counsel for the respondent argued that "for reasons of race" could, at most, extend only to instances of persecution because of an asylum seeker's actual or imputed race in a way analogous to the reach of the Convention in relation to political opinion. In this case, it was submitted, the applicant was not persecuted because of his own race, and nor was he imputed to be a Tamil. Counsel for the applicant, on the other hand, submitted that where race is the motivation for harm caused there is no reason to limit the ambit of the Convention to instances in which that harm is caused because of the race, actual or imputed, of the asylum seeker.
9 The interpretation of the Convention advanced on behalf of the applicant may be correct though I would imagine it is controversial. However for reasons which will emerge shortly it is a matter I need not address [it]...

See regarding the treatment of claims based on race as inherently taking place in the context of the applicant's personal circumstances (***Visvalingam v MIMA*** **[2001] FCA 696**)

The Full Court in ***Rajaratnam v MIMA*** **(2000) 62 ALD 73 [2000] FCA 1111** (Moore (dissenting) Finn and Dowsett JJ.)) in allowing an appeal for error of law discussed the significance of the multi-faceted nature of extortion exhibiting elements both of personal interest and of convention-related pesecutoty conduct. The Tribunal had accepted the existence of persecution of Tamils through extortion but nonetheless found that the acts of an army officer directed at the applicant as a Tamil were not persecution for a Convention reason (race) . Finn and Dowsett JJ said that :the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship

and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.

24 There was substantial general evidence of bribery and extortion in Sri Lanka. It is summarized in the following passage from p 21 of the Tribunal's discussion of the checkpoint incident:

> *The Tribunal accepts as credible the applicant's evidence that he was extorted by three or four soldiers at a checkpoint. The applicant's evidence in this regard is consistent with the independent evidence above that suggests that extortion is widespread in Sri Lanka and that there is a prevalence of bribery and extortion at checkpoints. In fact, the independent evidence suggests that it is practiced by government officials, the police and security forces, the LTTE and anti-LTTE militant Tamil groups.*
>
> *The Tribunal is further satisfied that the applicant was extorted for a Convention reason - namely his race (Tamil), and is supported in this finding by the independent evidence above which suggests that Tamils, in particular in Sri Lanka, are targets of extortion - simply because they are Tamils.*

25 The Tribunal accepted the appellant's claims concerning his treatment at the hands of Ratnayake and as to the checkpoint incident, but rejected certain other claims. It then considered the Ratnayake incidents and the checkpoint incident separately.

26 In relation to the former, the Tribunal directed itself as follows:

> *Because persecution implies an element of motivation, a bare causal connection between the harm feared and a Convention ground is not enough. Although the applicant is a Tamil, and the applicant was harmed by Lt. Ratnayake, in order for the Tribunal to be satisfied that the applicant fulfils the requirements of the Convention, it must be satisfied that Lt. Ratnayake was motivated to harm the applicant for a Convention reason.* (p 20)

27 The Tribunal then referred to the judgment of French J in *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293 at 299-300 in support of this proposition and continued:

> *The applicant gave evidence that Lt. Ratnayake sought to do him harm because he made a complaint to the Army about Lt. Ratnayake's behaviour. He gave evidence that the incident in which he was kidnapped and brutalised by Lt. Ratnayake was because the Lieutenant wanted to scare the applicant into withdrawing his complaint. The applicant's witness gave evidence that Lt. Ratnayake would carry on a "*personal vendetta*" against the applicant. Thus, although the applicant is a Tamil, the Tribunal is satisfied from the applicant's evidence that Lt. Ratnayake's* ***motivation*** *in seeking to harm the applicant in the past, and at any time in the future, was personal and not because of his race, religion, nationality, membership of a particular social group or political opinion.* (p 21) (Emphasis added)

28 The Tribunal then noted the comments of Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 to the effect that the requirement that persecution be "for reasons of" one of the prescribed categories excludes

from the purview of the Convention "indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim ...". The Tribunal concluded:

> *The evidence supplied by the applicant at his hearing makes it clear that Lt. Ratnayake was interested in the applicant - not because of his Tamil race [or nationality] - but rather as an individual, initially because he was able to make money from their dealings, and later because he did not want the applicant to pursue any complaints against him. Lt. Ratnayake's interest in the applicant was* purely personal*, and not characteristic of any Convention grouping. The Tribunal therefore cannot be satisfied that the applicant has a well founded fear of being persecuted for a Convention reason.* (p 21) (The words "purely personal" are italicised in the original text, presumably for emphasis.)

29 As to the incident at the checkpoint, the Tribunal accepted that it amounted to persecution for reason of the appellant's Tamil ethnicity and referred to independent evidence that extortion directed at Tamils was common. However it concluded that it was not satisfied that the appellant's fear of extortion in the future was well-founded, stating:

> *Extortion is, according to the independent evidence, widespread in Sri Lanka. The applicant lived* all his life *(until 1996) in Colombo apart from the four years he spent in Saudi Arabia between 1980-84. In all these years - and in particular since 1984-1996 - the applicant has claimed* one incident *of extortion even though he must have passed through checkpoints on innumerable occasions. The applicant's evidence thus suggests that he suffered an isolated incident of persecution.* (Emphasis is original.)

> *Based on the applicant's own previous experiences and evidence at the hearing, and in light of the independent evidence which suggests that the government is making attempts [albeit slowly] to redress the problem of extortion through the anti-harassment committee, and through official investigations, the Tribunal cannot be satisfied that there is a real chance of the applicant being extorted in Sri Lanka, in the foreseeable future. Rather, based on the applicant's own evidence the chance is remote and insubstantial. The Tribunal cannot therefore be satisfied that the applicant's fear of persecution for reasons of his race (extortion because he is a Tamil) in the foreseeable future in Sri Lanka is well founded.* (p 22)

30 The conclusion that the appellant had only once been the victim of racially motivated extortion assumed that the Ratnayake incidents could not be so described. Those incidents also occurred during 1995. It should be noted that after the checkpoint incident, the appellant left Colombo for Kandy, residing there from January 1996 until he departed for Australia in April of that year.

**...**

40 As we understand the appellant's case, it comprised three elements, namely:

* That extortion directed at Tamils was relatively widespread in Sri Lanka, being practised by the Tamil guerilla organization (LTTE) and similar groups and by government officials, the police and security forces. Although the government has taken some steps to remedy the situation, it has historically been unable to protect Tamils from such extortion;
* That the appellant experienced such extortion at the hands of Ratnayake from the time when the latter first failed to pay for the goods in question, culminating in the quite shocking incident in which two young Tamils were killed in the appellant's presence; and
* That the appellant was also subjected to extortion in the checkpoint incident.

41 The general evidence of extortion directed against Tamils could, by itself, have been

sufficient to justify an inference that the appellant had a well-founded fear of persecution for a Convention reason although it is unlikely that the Tribunal would have drawn such an inference in the absence of evidence of racially motivated extortion directed at the appellant, his family or associates. However the appellant offered evidence of such personal experience which the Tribunal accepted. Both the Ratnayake incidents and the checkpoint incident were arguably incidents of extortion or similar conduct, said to be commonly directed against Tamils. The Tribunal appears to have considered that the former incidents should not be so treated, perhaps because no precisely similar incident was referred to in the general evidence concerning extortion directed at Tamils. If that is the reason, then we consider that the Tribunal has taken an unjustifiably narrow view of the circumstances which may constitute extortion. New methods of extortion will be developed to exploit every opportunity. However such an error would not justify intervention by this Court. Nevertheless, the Tribunal's view of the Ratnayake incidents seems to have led it to consider the evidence concerning them in isolation from the general evidence of extortion directed at Tamils. These incidents were then dismissed from further consideration on the basis that they were motivated by "personal" considerations rather than by race. By so dismissing the Ratnayake incidents, the Tribunal established a doubtful factual basis for its ultimate conclusion that the appellant's fear of racially motivated extortion could not be well-founded because he had only once experienced such extortion.

42 It is appropriate, at this stage, to consider the mechanism by which extortion may constitute persecution for reason of race. This question was addressed by Burchett and Lee JJ in *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274, especially at pars 15 and 16 as follows:

> *A separate issue in the Tribunal related to the question of extortion. The appellant gave evidence of extortionate demands made upon her by the LTTE, enforced by violence and threats of violence, from which the government was plainly unable to protect her. As to this, the Tribunal found:*
>
> "While there is no doubt that the LTTE approaches Tamil[s] for funding, its primary reason for selecting individuals as prime targets for extortion is because of their perceived wealth ..."
>
> The appellant was seen as affluent. Although the Tribunal expressly accepted that "the LTTE has frequently attempted to extort money from the applicant", and that, given its "current strength in the Eastern Province ... there is a real chance based on past occurrences that the LTTE would make similar demands on the applicant were she to return to her home and estates in Thambiluvil", it did not regard activity of this kind as "persecution for a Convention reason".
>
> The Tribunal cited Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, where Burchett J said (at 569), in a judgment with which O'Loughlin and R D Nicholson JJ agreed:
>
> "Plainly, extortionists are not implementing a policy; they are simply extracting money from a suitable victim. Their forays are disinterestedly individual."
>
> But this was in the context (as appears from the same judgment at 567) of an express finding by the Tribunal that "the applicant has not satisfied me that the extortion was anything other than a criminal act, or that he was targeted for any reason other than he was known to have money". Here, the Tribunal's finding is the opposite: it says "there is no doubt that the LTTE approaches Tamil[s] for funding".

> The additional fact that the particular Tamils approached are chosen "because of their perceived wealth" is no more legally relevant than the fact (in Paramanthan) that the security forces targeted, among Tamils, young males from Jaffna who might be thought more likely to be guerillas. Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and Ram does not suggest it can. On the evidence, it was plainly open to the Tribunal to conclude that the fanatical combatants in the LTTE saw it as the obligation of every Tamil to make sacrifices, willingly or by coercion, for Tamil Eelam. No doubt, it was for this reason the finding was made "that the LTTE approaches Tamil[s] for funding". A motivation of this kind is sufficient for the purposes of the Convention. The words "persecuted for reasons of" look to the motives and attitudes of the persecutors (see Ram at 569), and if the LTTE practices extortion, with violence and threats of violence, against Tamils, the government being unable to provide protection, because the LTTE holds that Tamils must be coerced into supporting it, the terms of the Convention are satisfied.

43 The appellant's case concerning the Ratnayake incidents was that the latter was able to exploit the former because of his Tamil ethnicity and the relative lack of protection extended to Tamils by the Sri Lankan government. There was substantial evidence to support this view. On the occasion on which the appellant first raised with Ratnayake the possibility of discontinuing the supply of goods unless he was paid, he was subjected to racist abuse. After the appellant complained to the army about Ratnayake's conduct, he and other armed soldiers came to the shop and again offered violence. Ratnayake spoke of his duty to eliminate all Tamils from Sri Lanka. The incident involving the two young Tamils was clearly intended to demonstrate to the appellant that Ratnayake could do what he liked where Tamils were concerned. This appears to have been the appellant's reading of it.

44 This evidence would certainly justify an inference that Ratnayake was exploiting the vulnerability of Tamils for his own financial benefit and perhaps, in order to prevent detection of his misconduct. Although Ratnayake's initial default in payment may have been unrelated to the appellant's ethnicity, there is reason to conclude that his subsequent conduct was based upon exploitation of the appellant's vulnerability, which vulnerability was because of his ethnicity. We may not usurp the role of the Tribunal in this matter, and we do not assert that such a conclusion was inevitable. However we consider that if the Tribunal had fully understood the import of the passage from *Perampalam* which we have quoted above, it would inevitably have recorded a much more detailed assessment of this evidence and of any other circumstances which might have tended to prove or disprove that Ratnayake's conduct constituted persecution for a Convention reason. In particular, we note that:

* there was no explanation of why the Tribunal concluded that Ratnayake's conduct was not motivated by matters of race, given that such conduct was overtly based upon such matters;
* the general evidence as to racially-based extortion was not considered in connection with the Ratnayake incidents; and
* there was no explanation as to why random extortion by soldiers at a checkpoint should be found to be racially motivated whilst exploitation of the same person, with ethnic abuse and violence directed to persons of shared ethnicity, should be found not to be so motivated.

45 Of course, it was open to the Tribunal to conclude that the Ratnayake incidents and the checkpoint incident were motivated in different ways, and there were reasons for so concluding. However, we would have expected to see a discussion of these matters in the

reasons if the Tribunal had considered them. We stress that we are here seeking to identify and evaluate the process of reasoning undertaken by the Tribunal. We are not questioning the adequacy of the Tribunal's exposure of that process in its reasons.

46 As this Court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a Convention reason: see eg *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 166 ALR 641 at 645-646. The need for this is apparent enough. In the usual case of extortion the extorting party will be acting for a self-interested reason (ie to gain an advantage for himself or herself, or for another). In this sense, his or her interest in the person extorted can always be said to be personal. What needs to be recognised, though, is that the reason why the extorting party has that interest may or may not have foundation in a Convention reason. The extorted party may have been chosen specifically as the target of extortion for a Convention reason, or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion. Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.

47 Likewise in the course of practising extortion on a person, self-interested action may be taken against the extorted party for the benefit and/or protection of the extorting party. Again it can be said that in taking such action, the extorting party's interest in the effect of it on the other is a "personal interest". But depending on whether the extortion itself is being practised for a reason that includes a Convention reason, the action in its setting may nonetheless be relevantly persecutory in character.

48 In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.

49 We suspect that the Tribunal failed to recognise this possible duality when making its finding in relation to the isolated act of extortion at the checkpoint. After all, those soldiers were also certainly motivated by self-interest. However, as to the Ratnayake incidents, it is clear that the Tribunal did not recognise that Ratnayake's conduct towards the appellant had to be assessed in the setting in which it occurred. Having succeeded to an established procurement arrangement with the appellant's business which provided for the payment of a secret commission to him, Ratnayake's initial interest in the appellant could properly be characterised as being an interest in the appellant as an individual "because he [Ratnayake] was able to make money from their dealings". Likewise to the extent that later interest was shown in the appellant because the Lieutenant "did not want [him] to pursue any complaints against him", that interest in taking action against the appellant could again be characterised as an interest in the appellant "as an individual". But the sum of these two interests by no means exhausted his interest.

50 First, he transformed an illegal, but previously mutually acceptable and long standing, procurement arrangement into one oppressive of the appellant because of non-payment for goods supplied. Secondly, the appellant's initial resistance to this was met by racial abuse and a continuation by Ratnayake of his practice of purchasing goods but of paying little.

Thirdly, after the appellant's formal complaint to the army, two incidents involving Ratnayake occurred. The second of these, the summary execution of the Tamil youths could be viewed as designed to induce the appellant to withdraw his complaint or to secure the continuation of the extorsive relationship that had previously existed between the parties. In either case, the totality of the evidence accepted by the Tribunal necessarily raised for consideration whether that conduct was practised for a Convention reason. Given the obvious manifestation of racial attitudes during the course of Ratnayake's dealings with the appellant, it was necessary to address the complex causation inquiry mentioned earlier. When one has regard to the particular matters focussed upon by the Tribunal, it is clear that the Tribunal misconceived how that inquiry was to be undertaken. It was not sufficient to find that at particular times or in respect of particular actions, Ratnayake's interest in the appellant was personal. Such a finding, while unexceptionable as far as it goes, simply does not exhaust the causation inquiry. The Tribunal was, in the circumstances, obliged to consider whether the totality of Ratnayake's actions (including those manifesting a personal interest) in the setting in which they occurred had, as well, a Convention-related character. The Tribunal failed to do this. In so doing it misunderstood what was required of it in applying the law to the claims and evidence it had accepted.

….

The same point was made by Moore J. although his Honour was in dissent in relation to the particular matter:

> *[10] When extortion is involved, the conduct of a persecutor may arise in the context of a personal or business relationship and the conduct may be engaged in because of personal attributes of the victim. A person who is subjected to extortion will often have personal characteristics (most obviously wealth or the appearance of wealth or at least property available to meet the demands of the extortionist) that have attracted the attention of those engaging in the extortion. Knowledge of those attributes may arise because of some personal or business association between the persecutor and victim. However, the existence of those characteristics and the fact that they may have attracted attention through a personal or business relationship does not remove from consideration the possibility that the race or ethnicity of a victim is also a factor, and perhaps a critical factor, influencing the conduct of or motivating those engaging in the extortion and, perhaps, that there is no effective protection offered to people of that race or ethnicity. So much is apparent from the consideration of the applicable legal principles discussed by Burchett and Lee JJ in* Perampalam v Minister for Immigration and Multicultural Affairs *(1999) 84 FCR 274; 55 ALD 431 particularly in [15] and [16].*

## 10. PERSECUTION

### a) General

In dealing with the concept of "persecution" reference can be made to the observations of JC Hathaway, The Law of Refugee Status at 104-105 where "persecution" is defined as:

> "...the sustained or systematic violation of basic human rights demonstrative of a failure of state protection".

in Chan Mason C.J. at 388, described ‘persecution’ as:

"... some serious punishment or penalty or some significant detriment or disadvantage if he returns. Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. ... The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason.

The correct approach to the construction of the term "persecution" is that of McHugh J in Applicant A v Minister (1997) 190 CLR 225 at 258 where it was said:

> "Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however the applicant may be the only person is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.
>
> Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object would ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution."

Brennan CJ at 233 emphasised the importance of the discriminatory character of the feared persecution. He put it thus:

"The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination (race, religion, nationality, membership of a particular social group or political opinion) mentioned in Art 1A(2). The persecution must be "for reasons of" one of those categories....The qualification also excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of "refugee"."

Note Chan v Minister (1989) 169 CLR 379 at 430 per McHugh J. who accepted that harm could amount to persecution even if not inflicted over a period of time:

"Nor is it a necessary element of 'persecution' that the individual be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and the harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention."

McHugh J went on to point out at p 429-431 that:

"... the harm threatened need not be that of loss of life or liberty. Other forms of harm short of inference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution... Thus the U.N.H.C.R. Handbook asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugees would constitute persecution: par.151. In Oyarzo v Minister of Employment and Immigration [1982] 2 FC 779 at p783 the Federal Court of Appeal of Canada held that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of 'Convention refugee' in the Immigration Act 1976 (Can), s2(1). The Court rejected the proposition that persecution required deprivation of liberty [1982] 2 FC at p782. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social. Political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason..."

."

In Applicant A Mc Hugh J. made it clear that the notion of persecution is not open-ended at 257-8:

"When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind... discrimination - even discrimination amounting to persecution - that is aimed at the person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled

out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or appears to be powerless to prevent that private persecution."

The majority judgment in Chen Shi Hai (supra) corrected the misconception that the motivation to harm must be based on enmity or malignity:

"Where discriminatory conduct is motivated by "enmity" or "malignity" towards people of a particular race, religion, nationality, political opinion or people of a particular social group, that will usually facilitate its identification as persecution for a Convention reason. But that does not
mean that, in the absence of "enmity" or "malignity", that conduct does not amount to persecution for a Convention reason. It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention".

In Roguinski v MIMA [2001] FCA 1327 the Applicant's case called for consideration of the words "being persecuted" in Article 1A (2) of the Convention. Kenny J. quoted the complete passage taken from McHugh J.'s judgment in Chan (at 429-130) dealing with this notion then said:

25 McHugh J returned to this description of "being persecuted" in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 175 ALR 585 ("Ibrahim"). In connection with the expression "systematic conduct", his Honour said at [99]:

> It is an error to suggest that the use of the expression 'systematic conduct' ... was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or 'must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic'. The fear of a single act of harm done for a Convention reason will satisfy the Convention definition of persecution if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person. (Citations omitted)

26 As McHugh J noted in Ibrahim at [55], the Convention protects persons from persecution, although not from discrimination not amounting to persecution. There may be occasions when selective harassment is not "so intensive, repetitive or prolonged that it can be described as persecution": see Ibrahim at [55]. His Honour considered that "the harm or threat of harm will ordinarily be persecution only when it is done for a Convention reason and when it is so oppressive or recurrent that a person cannot be expected to tolerate it": see Ibrahim at [61]. Drawing these ideas together, his Honour said at [65]:

> Framing an exhaustive definition of persecution for the purpose of the Convention is probably impossible. Ordinarily, however, given the rationale of the Convention, persecution for that purpose is:
>
> * unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason
>
> * which constitutes an interference with the basic human rights or dignity of that person or the persons in the group
>
> * which the country of nationality authorises or does not stop, and
>
> * which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned.

27 Gaudron J also discussed the meaning of "being persecuted" in Ibrahim. At [16]-[18], her Honour observed:

> The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a 'well-founded fear of persecution'. Nor does the Convention require that the individual establish a systematic course of conduct directed against a particular group of persons of which he or she is a member. On the contrary, a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion.
>
> ...
>
> As a matter of ordinary usage, the notion of 'persecution' includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means. That being so, conduct of that kind, if it is engaged in for a Convention reason, is, in my view, persecution for the purposes of the Convention.

Her Honour also accepted that the discriminatory conduct must be "sufficiently serious" to constitute persecution: see Ibrahim at [24]. See also Gummow J (with whom Gleeson CJ and Hayne J agreed) at [152]-[155].

The learned judge then quoted [45] [48] from the Full Court's judgment in Gersten v MIMA [2000] FCA 855 at [28]-[29] of her judgment:.

"28…It said at [45]:

> It is clear that, while the word [persecution] means infliction of harm, not every kind of harm constitutes persecution. That having been said, harm short of interference with life or liberty may suffice. Many forms of social, political and economic discrimination may constitute persecution, including denial of access to employment and restriction on freedom of worship. Denial of access to education, food or health care constituted persecution in [Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 170 ALR 553]. However that harm

which is merely trivial or insignificant could not constitute persecution in the Convention sense.

29 After referring to observations of Mason CJ in Chan and Branson J in Kanagasabai v Minister for Immigration and Multicultural Affairs [1999] FCA 205, the Full Court concluded at [48]:

> It is inappropriate to attempt a definition of 'persecution', if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case. This is a point emphasised in the Handbook on Procedures and Criteria for Determining Refugee Status (1992) published by the Office of the United High Commission for Refugees. It is also a point made by Kirby J in Chen. To the extent that the Tribunal did equate persecution with significant harm and applied that as a rigid test, the Tribunal would have erred. However we do not think that it did. In our view the Tribunal did no more than reiterate, as Mason CJ had in Chan, the proposition that persecution involves harm that is more than trivial or insignificant.

Cooper J. in SBAS v MIMIA [2003] FCA 528 canvassed the leading authorities on the subject of what conduct can constitute persecution at the Convention standard saying:

THE LAW

44 In Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, McHugh J dealt with the concept of persecution in the following way (at 429.- 431):

> 'The term "persecuted" is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. He or she may be "persecuted" because he or she is a member of a group which is the subject of systematic harassment: ... . Nor is it a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention. The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution: ... . Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution: ... . The Federal Court of Appeal of Canada rejected the proposition that persecution required deprivation of liberty. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic

discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: ... .'

See also Mason CJ (at 388).

45 In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, McHugh J said (at 258 - 259):

'Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. (Yang v Carroll (1994) 852 F Supp 460 at 467). Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race. (cf Korematsu v United States (1944) 323 US 214. But the sanction must be appropriately designed to achieve some legitimate end of government policy. Thus, while detention might be justified as long as the safety of the country was in danger, lesser forms of treatment directed to members of that race during the period of hostilities might nevertheless constitute persecution. Denial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases. It need hardly be said that a law or its purported enforcement will be persecutory if its real object is not the protection of the State but the oppression of the members of a race, religion, nationality or particular social group or the holders of particular political opinions.)

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. (cf Shapiro v Thompson (1969) 394 US 618 at 634; City of Cleburne v Cleburne Living Center Inc (1985) 473 US 432 at 440.) In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in

the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.'

Gummow J said (at 284):

'In ordinary usage, the primary meaning of "persecution" is (Oxford English Dictionary, 2nd ed (1989), vol 11, p 592):

"The action of persecuting or pursuing with enmity and malignity; esp the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it; the fact of being persecuted; an instance of this."

Accordingly, I agree with the following formulation by Burchett J in giving the judgment of the Full Federal Court in Ram v Minister for Immigration and Ethnic Affairs ((1995) 57 FCR 565 at 568. Judgment in Ram was delivered after that of the Full Court in this case):

"Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution.'"

46 In Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) said (at 302 - 303):

'[24] As already indicated, there is a common thread linking the expressions "persecuted", "for reasons of" and "membership of a particular social group" in the Convention definition of "refugee". In a sense, that is to oversimplify the position. The thread links "persecuted", "for reasons of" and the several grounds specified in the definition, namely, "race, religion, nationality, membership of a particular social group or political opinion". (Art 1A(2)).

[25] As was pointed out in Applicant A, ((1997) 190 CLR 225 at 232-233, per Brennan CJ; at 257 - 258, per McHugh J; at 284, per Gummow J. See also Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568, per Burchett J, with whom O'Loughlin and R D Nicholson JJ agreed), not every form of discriminatory or persecutory behaviour is covered by the Convention definition of "refugee". It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

[26] The need for different analysis depending on the reason assigned for the discriminatory conduct in question may be illustrated, in the first instance, by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race,

religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

[27] The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups - for example, terrorist groups - which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views - for example, those who advocate violence or terrorism - differently from other members of society.

[28] As McHugh J pointed out in Applicant A, the question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". (Applicant A (1997) 190 CLR 225 at 258). Moreover, it is "[o]nly in exceptional cases ... that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving [some] legitimate government object and not amount to persecution" (Applicant A (1997) 190 CLR 225 at 259).

[29] Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.'

(Emphasis added)

47 In Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1, Gaudron J said (at 6 - 7):

'[14] ... The difficulty in applying the Convention definition of "refugee" in circumstances such as those in Somalia lies in recognising what, in those circumstances, is involved in the notion of "persecution".

[15] It should at once be noted that a person who claims to be a refugee, as defined in Art 1A (2) of the Convention, has only to establish a "well-founded fear of being persecuted". That is usually established by evidence of conduct amounting to persecution of the individual concerned or by evidence of discriminatory conduct, amounting to persecution, of others belonging to the same racial, religious, national or social group or having the same political opinion. And to establish that the conduct in question is "for reasons of" race, religion, nationality, etc, the individual concerned may seek to establish that that conduct is systematic, in the sense that there is a pattern of discriminatory conduct towards, for example, persons who belong to a particular religious group.

[16] The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a "well-founded fear of persecution". Nor does the

Convention require that the individual establish a systematic course of conduct directed against a particular group of persons of which he or she is a member. On the contrary, a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion.

[17] A second matter should be noted with respect to the Convention definition of "refugee", namely, that, as a matter of ordinary usage, the notion of "persecution" is not confined to conduct authorised by the state or, even, conduct condoned by the state, although, as already pointed out, the Convention has, until recently, usually fallen for application in relation to conduct of that kind. (Hathaway, The Law of Refugee Status (1991), pp 101-105; Kalin, "Refugees and Civil Wars: Only a Matter of Interpretation?", International Journal of Refugee Law, vol 3 (1991) 435; cf von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", International Journal of Refugee Law, vol 9 (1997) 169; Okoth-Obbo, "Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law", in Gowlland-Debbas (ed), The Problem of Refugees in the Light of Contemporary International Law Issues (1996) 7, at pp 7 - 17). Nor, as a matter of ordinary usage, does "persecution" necessarily involve conduct by members of a particular group against a less powerful group.

[18] As a matter of ordinary usage, the notion of "persecution" includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means. That being so, conduct of that kind, if it is engaged in for a Convention reason, is, in my view, persecution for the purposes of the Convention. And that is so whether or not the conduct occurs in the course of a civil war, during general civil unrest or, as here, in a situation in which it may not be possible to identify any particular person or group of persons responsible for the conduct said to constitute persecution.'

(Emphasis added)

48 McHugh J, after a review of the authorities in Ibrahim, said (at 20 - 21):

'[60] All these statements are descriptive rather than definitive of what constitutes persecution for the purpose of the Convention. In particular, they do not attempt to define when the infliction or threat of harm passes beyond harassment, discrimination or tortious or unlawful conduct and becomes persecution for Convention purposes. A passage in my judgment in Chan v Minister for Immigration and Ethnic Affairs ((1989) 169 CLR 379 at 430) suggests that a person is persecuted within the meaning of the Convention whenever the harm or threat of harm "can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class". Read literally, this statement goes too far. It would cover many forms of selective harassment or discrimination that fall short of persecution for the purpose of the Convention. Moreover, it does not go far enough, if it were to be read as implying that there can be no persecution unless systematic conduct is established.

[61] Given the objects of the Convention, the harm or threat of harm will ordinarily be persecution only when it is done for a Convention reason and when it is so

> oppressive or recurrent that a person cannot be expected to tolerate it. This accords with the discussion of what constitutes a "well-founded fear of persecution" in para 42 of the Handbook On Procedures And Criteria For Determining Refugee Status ((1979); re-edited 1992) issued by the Office of the United Nations High Commissioner for Refugees:
>
> " In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there." (Emphasis added)
>
> [62] Dr Hathaway in his book The Law of Refugee Status ((1991), p 102) thought that the Canadian Immigration Appeal Board had "succinctly stated the core of the test" of persecution when it said that "[t]he criteri[on] to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression".

49 Importantly, as appears in par [60], his Honour qualifies the observations which he made in Chan to make clear that a course of systematic conduct is neither necessary nor sufficient in itself to make out persecution under Art 1A(2) of the Convention.
50 The approach which the RRT must take to its task was identified by McHugh J in Ibrahim (at 33):

> '[102] ... In this case, among the questions which the tribunal should have asked were: (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) why will the applicant be subjected to that harm? and (d) if the answer to (c) is "because of his membership of a particular social group", would the harm constitute persecution for the purpose of the Convention?'

51 That approach was cited with approval by Lord Bingham of Cornhill in Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 (HL) at 872 in a passage which adopts for the United Kingdom the same test (see at 871 - 872). See also R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840 at 854 (HL).
…

The Full Court (Gray von Doussa and Selway JJ.) allowed an appeal in SBBG v MIMIA [2003] FCAFC 121 (2003) 199 ALR 281 74 ALD 398 in finding appealable error in the reasoning of the primary judge and remitted the application to a single judge. The court in deciding to take this course commented on the issue of whether certain conduct amounted to persecution at the Convention standard

3 The appellant is a citizen of Iran. Iran has an Islamic government. Within that system of government there is no separation between the institutions of government and those of the established Islamic religion.
4 The appellant and his family are members of the Mandaean religion (also called the Sabaean, or Sobbi religion). The appellant claimed to have a well-founded fear of persecution in Iran by reason of his religion.
…

7 The persecution alleged by the appellant, supported by his wife and children, fell into two categories. The first was what might be described as 'general' discrimination against all

Mandaeans. This discrimination arose because the Mandaean religion was not an official religion in Iran. The Mandaeans were treated as 'dirty'. The discrimination alleged included:
(a) Mandaean men are very limited in what employment they can undertake. In general terms they are limited to working with jewellery, particularly goldsmithing. They are particularly limited from working with food. Mandaean women would seem to be even more limited in the jobs they can do.
(b) Mandaeans will not be employed by the government.
(c) If Mandaean children are to educated in government schools then they receive compulsory education in Islam.
(d) Mandaeans suffer discrimination in the courts. Some remedies that are available to Islamic citizens are not available to Mandaeans. The judiciary is affected by religious influence. Even where Mandaeans apparently have equal rights, their evidence is unlikely to be believed, particularly where it conflicts with evidence of a Moslem person.
(e) Mandaean places of worship have been seized by the government. Their cemeteries have been destroyed.
(f) Mandaeans suffer general abuse and vilification from their Moslem neighbours. Women, in particular, are assaulted and often raped.
(g) The authorities do not protect the rights of Mandaeans. To the contrary, Moslems that abuse and attack Mandaeans will be protected in the education and judicial systems and by the police.
8 In considering these claims the Tribunal compared them to other information available to the Tribunal. We comment further on this below. The Tribunal concluded:

> 'The Tribunal finds that as a religious minority in Iran, the Sabian/Mandaean community faces some discrimination, and that as individuals, Sabian/Mandaeans may thus face some discrimination...The Tribunal finds that these occurrences are unpleasant but do not consider that such treatment amounts to "serious punishment or penalty" or "significant detriment or disadvantage" [see McHugh J in Chan's Case] and therefore does not amount to persecution for the purposes of the Convention.'

9 In addition, the appellant and his wife and children made specific claims of individual events of persecution to which they claimed to have been subjected. So, for example, the appellant claimed to have been assaulted for wearing a cross. The appellant's wife claimed that she had been harassed for non-compliance with the Islamic dress code for women; that she was assaulted by an official when she tried to enrol her daughter at school; and that she was often assaulted in the street. The appellant's son gave evidence of being assaulted at school and of the school principal supporting the assailant. He also gave evidence of having been taken into detention and then being assaulted by the Iranian authorities. The appellant's daughter gave evidence of threats that had been made to her to induce her to convert to Islam; of having had acid thrown at her in the street; of having been kidnapped; of having been forced to wear the chador.
10 As to these specific claims the Tribunal generally disbelieved the appellant, his wife and children. This disbelief was usually based either upon inconsistencies between the specific claim made and the other information available to the Tribunal, or on the basis that the claim made was inherently unreasonable or illogical….
…
28 One of those arguments was that the Tribunal had misunderstood the legal test for 'persecution' under the Act. Section 91R of the Act provides in part:

'(1) For the purposes of the application of this Act and the 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:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.'

This provision raises a number of interesting questions. The test of 'serious harm' may be the same test as that proposed by Mason CJ in Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379 ('Chan') at 388: 'some serious punishment or penalty or some significant detriment'. This may be the same test as that applied by McHugh J in Chan at 429-431. However, McHugh J gave some greater explanation of what was encompassed within the test:

'...denial of access to employment, to the professions and to education or to the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.'

If one looks at the citation of the relevant passages by Mason CJ and McHugh J in later judgments it is at least arguable the two passages are treated as consistent. The relevant citations are discussed in Minister for Immigration and Multicultural and Indigenous Affairs v Kord [2002] FCA 334 at [15]-[30].

29 In this regard it would seem that the Tribunal accepted that Mandaeans were limited in their employment, their education (including primary education), their practice of religion, their protection by and access to the courts and so on. On the High Court authority it is at least arguable that what the Tribunal described as 'inconveniences, disruptions and limitations' are, in law, 'persecution' under the Convention. This then raises the further question (assuming that the respondent wishes to put it) whether s 91R of the Act limits the meaning of persecution from the meaning it has under the Convention. This involves ascertaining the meaning and effect of the words at the start of ss (2), 'Without limiting what is serious harm for the purposes of paragraph (1)(b)...'. This is not to say that the full exploration of this issue after full argument may not have the consequence that the decision

of the Tribunal is, in essence, the result of its factual findings, rather than any error as to jurisdiction: see SBBA v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 90. It is only to say that the exploration of that issue, on the facts of this case and the findings actually made by the Tribunal, is not futile.

…

The Full Court in MIMIA v VFAY; MIMIA v SHBB [2003] FCAFC 191 ( 2003) 134 FCR 402 allowed the Minister's appeals from VFAY v MI [2003] FMCA 35 SHBB v MI [2003] FMCA 82 (Driver FM) where the issue of children and unaccompanied minors of Hazara ethnicity as a particular social group had been considered. The Court said in relation to the requirement that the fear of being persecuted be by reason of membership of a particular social group:

REASONING

49 In Applicant A v Minister, at 242, Dawson J accepted, by reference to Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, at 568, per Burchett J, that there is a "common thread" which links the expressions "persecuted", "for reasons of" and "membership of a particular social group" in Article 1A(2) of the Convention. As was said in Ram v Minister, the link is

> "a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of the particular social group. He is persecuted because he belongs to that group".

50 Dawson J's approach was endorsed in Chen Shi Hai v Minister, at 299, 302, per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The Honours added this observation:

> "As was pointed out in Applicant A, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct."

51 McHugh J in Applicant A v Minister, at 257-258, made a similar point:

> "When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of international discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. Discrimination - even discrimination amounting to persecution - that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return."

52 It is for these reasons that Dawson J in Applicant A v Minister observed that the humanitarian scope of the Convention is limited. His Honour commented (at 248) that:

> "[n]o matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees.
>
> ...It would...be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them".

53 Gummow J (with whom Gleeson CJ and Hayne J agreed) endorsed this passage in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1, at 49. Gummow J pointed out (at 49) that the Convention's definition

> "does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention."

54 The decision in Haji Ibrahim establishes that it is an error to employ the notions of "differential operation" or "differential impact" as criteria for determining whether an applicant has a well-founded fear of persecution for one of the Convention reasons. As Gummow J observed (at 51) such expressions are distractions from the text of the Convention definition.

55 Chen Shi Hai v Minister establishes that persecution for the purpose of the Convention (in that case of "black" children born in breach of China's one child policy) can proceed from reasons other than "enmity" or "malignity": at 305. That does not, however, deny the need for a fear of discriminatory infliction of harm amounting to persecution. The joint judgment endorsed (at 304) the proposition put by French J that

> "the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted".

56 Similarly, McHugh and Gummow JJ said in Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, at 28, that the reason for the persecution must be found in the "singling out of one or more of the five attributes expressed in the Convention definition".

57 In our view, the RRT in the present case correctly appreciated the questions that it had to ask. It plainly accepted that VFAY was at risk of harm if he were to return to Afghanistan. The RRT also plainly understood, on the assumption that separated children or unaccompanied Hazara minors were particular social groups, that it had to consider whether the feared harm would be inflicted by reason of VFAY's membership of those social groups. The RRT answered this question in the negative, finding that any difficulty VFAY might encounter would be because of his limited capacity to manage in the generalised insecurity and hardship prevailing in Afghanistan.

58 In answering this question in the negative, the RRT drew a distinction that has been recognised in the authorities. In Haji Ibrahim, for example, the RRT found that the applicant's fear of harm in conditions of class warfare prevailing in Somalia was not by reason of his membership of a particular clan, but was the consequence of civil unrest (at 53). This finding was held by the High Court not to involve any error.

59 In effect, the RRT in the present case found that VFAY would not be subject to discriminatory conduct amounting to persecution by reason of his status as an unaccompanied Hazara minor or a separated child. Indeed, the RRT's finding that, in view of the changed circumstances in Afghanistan, Hazaras were not at risk of persecution necessarily led it to conclude that VFAY was not at risk of persecution by reason of membership of a social group comprising unaccompanied Hazara minors.
60 It is true, as Ms Mortimer pointed out, that the RRT recognised that as an unaccompanied child in Afghanistan, VFAY would be "vulnerable" to harm. But the RRT's reference to the UNHCR advice shows that what it had in mind was that certain groups, such as children, the sick and the elderly, would be less able to cope with the "generalised insecurity and hardship". The fact that the general conditions in Afghanistan might have a differential impact on some groups does not show that the members of those groups will be subject to persecution because of their membership of a particular group. Nor was it an error for the RRT to find otherwise.
…

In Sepet (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2003] 1 WLR 856 [2003] UKHL 15 (20 March 2003) Lord Bingham (Lords Steyn and Hutton agreein) said strictly obiter the Appeal having been disposed of on other grounds:

21…It was argued that, in deciding whether an asylum applicant had been or would be persecuted for Convention reasons, "the examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution: Ward v Attorney General of Canada [1993] 2 SCR 689, 747." Support for this approach is found in Immigration and Naturalization Service v Elias-Zacarias (1992) 502 US 478, a decision very strongly criticised by Professor Hathaway ("The Causal Nexus in International Refugee Law" (2002) 23 Michigan Journal of International Law 207). The Court of Appeal unanimously rejected this argument (paragraphs 92, 154 and 182) and some of the authorities point towards a more objective approach: Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, 304, 313, paras 33 and 65; Refugee Appeal No 72635/01 of the New Zealand Refugee Status Appeals Authority, (unreported) 6 September 2002, paragraphs 167-173.
22. I would express the test somewhat differently from the Court of Appeal in this case. In his judgment in Sivakumar v Secretary of State for the Home Department [2001] EWCA Civ 1196; [2002] INLR 310, 317, para 23, Dyson LJ stated:

> "It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution."

This seems to me to be a clear, simple and workmanlike test which gives effect to the 1951 Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the

imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group) one is concerned not with the correctness of the matter imputed or attributed but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith. I take this approach to reflect that put forward by McHugh J in Minister for Immigration and Multicultural Affairs v Ibrahim [2000] HCA 55 at paragraph 102:

> "In this case, among the questions which the tribunal should have asked were (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) why will the applicant be subjected to that harm? and (d) if the answer to (c) is 'because of his membership of a particular social group', would the harm constitute persecution for the purpose of the Convention?"

Treatment is not persecutory if it is treatment meted out to all and is not discriminatory: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 258, per McHugh J. The question held to be appropriate in the field of racial discrimination in Qureshi v Victoria University of Manchester [2001] ICR 863 at 874, suitably adapted to the particular case, is in my view apt in this context also:

> "Were racial grounds an effective cause of the difference in treatment?"

23. However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical….

The Full Bench of the High Court in Appellant S395/2002 v MIMA; Appellant S [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 (Gleeson CJ (diss), McHugh, Gummow, Kirby, Hayne, Callinan (diss) Heydon (diss) JJ. allowed the appeal from Kabir v MIMA [2002] FCA 129 [2002] FCAFC 20. The majority held that it was an error of law to reject an applicant's claim because he can avoid harm as a homosexual by acting discreetly. It was re-stated that persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. The Judges of the Joint Reasons (Mc Hugh and Kirby JJ. Gummow and Hayne JJ.) explored the relationship between membership of a particular social group and persecution (see CHAPTER 7 e) Membership of a particular social group )

Past persecution which is finished notwithstanding that what an applicant may suffer is the results of the past persecution does not have Convention consequences. Applicant S70 of 2003 v MIMIA [2004] FCAFC 182 (Emmett Conti and Selway JJ.) (appeal from S70 v MIMIA [2004] FCA 84 (Hely J.) was dismissed. The Court said:

33 The final ground of appeal relates to the appellant's daughter. Some of the material put to the Tribunal by the appellant showed that the appellant's daughter had suffered, and was continuing to suffer, post traumatic stress disorder as a result of the events surrounding the eviction from the tenancy in 2000. It also showed that the symptoms of that disorder were exacerbated when she sighted Indigenous Fijians, including in Australia. On this basis it might be expected that the symptoms of that disorder would be exacerbated if she returned to Fiji. The Tribunal concluded that there was no evidence that the Fijian government declined 'for a Convention reason' to provide adequate medical treatment for those citizens that require it…

…

35 The Tribunal's treatment of the claim (assuming that there had been one) was plainly correct. The disorder from which she was suffering was the result of past persecution. That persecution was finished and over. The possible exacerbation of that disorder if she returned to Fiji was not itself 'persecution'. If it were then she would suffer 'persecution' wherever and whenever she was at risk of seeing indigenous Fijians, including in Australia. 'Persecution' means more than the infliction or exacerbation of harm: see Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 at [18]. The relevant 'persecution' in this context is not the potential for exacerbation of harm, but the possibility of treating it. That possibility cannot sensibly include any obligation upon any government to ensure that the appellant's daughter does not come into contact with indigenous Fijians. Rather it involves an obligation not to deny the appellant's daughter proper treatment of her disorder for a Convention reason. That is the conclusion reached by the Tribunal:

> '...there is no suggestion in the evidence before me that the Fijian government declines, for a Convention reason, to provide adequate medical treatment for those of its citizens who require it.'

In our view that approach to the issue was a correct approach, assuming that the Tribunal was required to consider it at all.

….

The Full Court in ***Rajaratnam v MIMA*** **(2000) 62 ALD 73 [2000] FCA 1111** (Moore (dissenting) Finn and Dowsett JJ.)) in allowing an appeal for error of law discussed the significance of the multi-faceted nature of extortion exhibiting elements both of personal interest and of convention-related pesecutoty conduct. The Tribunal had accepted the existence of persecution of Tamils through extortion but nonetheless found that the acts of an army officer directed at the applicant as a Tamil were not persecution for a Convention reason (race) . Finn and Dowsett JJ said that :the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal

interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.

24 There was substantial general evidence of bribery and extortion in Sri Lanka. It is summarized in the following passage from p 21 of the Tribunal's discussion of the checkpoint incident:

> *The Tribunal accepts as credible the applicant's evidence that he was extorted by three or four soldiers at a checkpoint. The applicant's evidence in this regard is consistent with the independent evidence above that suggests that extortion is widespread in Sri Lanka and that there is a prevalence of bribery and extortion at checkpoints. In fact, the independent evidence suggests that it is practiced by government officials, the police and security forces, the LTTE and anti-LTTE militant Tamil groups.*
>
> *The Tribunal is further satisfied that the applicant was extorted for a Convention reason - namely his race (Tamil), and is supported in this finding by the independent evidence above which suggests that Tamils, in particular in Sri Lanka, are targets of extortion - simply because they are Tamils.*

25 The Tribunal accepted the appellant's claims concerning his treatment at the hands of Ratnayake and as to the checkpoint incident, but rejected certain other claims. It then considered the Ratnayake incidents and the checkpoint incident separately.

26 In relation to the former, the Tribunal directed itself as follows:

> *Because persecution implies an element of motivation, a bare causal connection between the harm feared and a Convention ground is not enough. Although the applicant is a Tamil, and the applicant was harmed by Lt. Ratnayake, in order for the Tribunal to be satisfied that the applicant fulfils the requirements of the Convention, it must be satisfied that Lt. Ratnayake was motivated to harm the applicant for a Convention reason.* (p 20)

27 The Tribunal then referred to the judgment of French J in *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293 at 299-300 in support of this proposition and continued:

> *The applicant gave evidence that Lt. Ratnayake sought to do him harm because he made a complaint to the Army about Lt. Ratnayake's behaviour. He gave evidence that the incident in which he was kidnapped and brutalised by Lt. Ratnayake was because the Lieutenant wanted to scare the applicant into withdrawing his complaint. The applicant's witness gave evidence that Lt. Ratnayake would carry on a "*personal vendetta*" against the applicant. Thus, although the applicant is a Tamil, the Tribunal is satisfied from the applicant's evidence that Lt. Ratnayake's* ***motivation*** *in seeking to harm the applicant in the past, and at any time in the future, was personal and not because of his race, religion, nationality, membership of a particular social group or political opinion.* (p 21) (Emphasis added)

28 The Tribunal then noted the comments of Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 to the effect that the requirement that persecution be "for reasons of" one of the prescribed categories excludes from the purview of the Convention "indiscriminate persecution which is the product either

of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim ...". The Tribunal concluded:

> *The evidence supplied by the applicant at his hearing makes it clear that Lt. Ratnayake was interested in the applicant - not because of his Tamil race [or nationality] - but rather as an individual, initially because he was able to make money from their dealings, and later because he did not want the applicant to pursue any complaints against him. Lt. Ratnayake's interest in the applicant was* purely personal*, and not characteristic of any Convention grouping. The Tribunal therefore cannot be satisfied that the applicant has a well founded fear of being persecuted for a Convention reason.* (p 21) (The words "purely personal" are italicised in the original text, presumably for emphasis.)

29 As to the incident at the checkpoint, the Tribunal accepted that it amounted to persecution for reason of the appellant's Tamil ethnicity and referred to independent evidence that extortion directed at Tamils was common. However it concluded that it was not satisfied that the appellant's fear of extortion in the future was well-founded, stating:

> *Extortion is, according to the independent evidence, widespread in Sri Lanka. The applicant lived* all his life *(until 1996) in Colombo apart from the four years he spent in Saudi Arabia between 1980-84. In all these years - and in particular since 1984-1996 - the applicant has claimed* one incident *of extortion even though he must have passed through checkpoints on innumerable occasions. The applicant's evidence thus suggests that he suffered an isolated incident of persecution.* (Emphasis is original.)
>
> *Based on the applicant's own previous experiences and evidence at the hearing, and in light of the independent evidence which suggests that the government is making attempts [albeit slowly] to redress the problem of extortion through the anti-harassment committee, and through official investigations, the Tribunal cannot be satisfied that there is a real chance of the applicant being extorted in Sri Lanka, in the foreseeable future. Rather, based on the applicant's own evidence the chance is remote and insubstantial. The Tribunal cannot therefore be satisfied that the applicant's fear of persecution for reasons of his race (extortion because he is a Tamil) in the foreseeable future in Sri Lanka is well founded.* (p 22)

30 The conclusion that the appellant had only once been the victim of racially motivated extortion assumed that the Ratnayake incidents could not be so described. Those incidents also occurred during 1995. It should be noted that after the checkpoint incident, the appellant left Colombo for Kandy, residing there from January 1996 until he departed for Australia in April of that year.

...

40 As we understand the appellant's case, it comprised three elements, namely:

* That extortion directed at Tamils was relatively widespread in Sri Lanka, being practised by the Tamil guerilla organization (LTTE) and similar groups and by government officials, the police and security forces. Although the government has taken some steps to remedy the situation, it has historically been unable to protect Tamils from such extortion;
* That the appellant experienced such extortion at the hands of Ratnayake from the time when the latter first failed to pay for the goods in question, culminating in the quite shocking incident in which two young Tamils were killed in the appellant's presence; and
* That the appellant was also subjected to extortion in the checkpoint incident.

41 The general evidence of extortion directed against Tamils could, by itself, have been sufficient to justify an inference that the appellant had a well-founded fear of persecution

for a Convention reason although it is unlikely that the Tribunal would have drawn such an inference in the absence of evidence of racially motivated extortion directed at the appellant, his family or associates. However the appellant offered evidence of such personal experience which the Tribunal accepted. Both the Ratnayake incidents and the checkpoint incident were arguably incidents of extortion or similar conduct, said to be commonly directed against Tamils. The Tribunal appears to have considered that the former incidents should not be so treated, perhaps because no precisely similar incident was referred to in the general evidence concerning extortion directed at Tamils. If that is the reason, then we consider that the Tribunal has taken an unjustifiably narrow view of the circumstances which may constitute extortion. New methods of extortion will be developed to exploit every opportunity. However such an error would not justify intervention by this Court. Nevertheless, the Tribunal's view of the Ratnayake incidents seems to have led it to consider the evidence concerning them in isolation from the general evidence of extortion directed at Tamils. These incidents were then dismissed from further consideration on the basis that they were motivated by "personal" considerations rather than by race. By so dismissing the Ratnayake incidents, the Tribunal established a doubtful factual basis for its ultimate conclusion that the appellant's fear of racially motivated extortion could not be well-founded because he had only once experienced such extortion.

42 It is appropriate, at this stage, to consider the mechanism by which extortion may constitute persecution for reason of race. This question was addressed by Burchett and Lee JJ in *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274, especially at pars 15 and 16 as follows:

> *A separate issue in the Tribunal related to the question of extortion. The appellant gave evidence of extortionate demands made upon her by the LTTE, enforced by violence and threats of violence, from which the government was plainly unable to protect her. As to this, the Tribunal found:*
>
> "While there is no doubt that the LTTE approaches Tamil[s] for funding, its primary reason for selecting individuals as prime targets for extortion is because of their perceived wealth ..."
>
> The appellant was seen as affluent. Although the Tribunal expressly accepted that "the LTTE has frequently attempted to extort money from the applicant", and that, given its "current strength in the Eastern Province ... there is a real chance based on past occurrences that the LTTE would make similar demands on the applicant were she to return to her home and estates in Thambiluvil", it did not regard activity of this kind as "persecution for a Convention reason".
>
> The Tribunal cited Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, where Burchett J said (at 569), in a judgment with which O'Loughlin and R D Nicholson JJ agreed:
>
> "Plainly, extortionists are not implementing a policy; they are simply extracting money from a suitable victim. Their forays are disinterestedly individual."
>
> But this was in the context (as appears from the same judgment at 567) of an express finding by the Tribunal that "the applicant has not satisfied me that the extortion was anything other than a criminal act, or that he was targeted for any reason other than he was known to have money". Here, the Tribunal's finding is the opposite: it says "there is no doubt that the LTTE approaches Tamil[s] for funding". The additional fact that the particular Tamils approached are chosen "because of

their perceived wealth" is no more legally relevant than the fact (in Paramanthan) that the security forces targeted, among Tamils, young males from Jaffna who might be thought more likely to be guerillas. Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and Ram does not suggest it can. On the evidence, it was plainly open to the Tribunal to conclude that the fanatical combatants in the LTTE saw it as the obligation of every Tamil to make sacrifices, willingly or by coercion, for Tamil Eelam. No doubt, it was for this reason the finding was made "that the LTTE approaches Tamil[s] for funding". A motivation of this kind is sufficient for the purposes of the Convention. The words "persecuted for reasons of" look to the motives and attitudes of the persecutors (see Ram at 569), and if the LTTE practices extortion, with violence and threats of violence, against Tamils, the government being unable to provide protection, because the LTTE holds that Tamils must be coerced into supporting it, the terms of the Convention are satisfied.

43 The appellant's case concerning the Ratnayake incidents was that the latter was able to exploit the former because of his Tamil ethnicity and the relative lack of protection extended to Tamils by the Sri Lankan government. There was substantial evidence to support this view. On the occasion on which the appellant first raised with Ratnayake the possibility of discontinuing the supply of goods unless he was paid, he was subjected to racist abuse. After the appellant complained to the army about Ratnayake's conduct, he and other armed soldiers came to the shop and again offered violence. Ratnayake spoke of his duty to eliminate all Tamils from Sri Lanka. The incident involving the two young Tamils was clearly intended to demonstrate to the appellant that Ratnayake could do what he liked where Tamils were concerned. This appears to have been the appellant's reading of it.

44 This evidence would certainly justify an inference that Ratnayake was exploiting the vulnerability of Tamils for his own financial benefit and perhaps, in order to prevent detection of his misconduct. Although Ratnayake's initial default in payment may have been unrelated to the appellant's ethnicity, there is reason to conclude that his subsequent conduct was based upon exploitation of the appellant's vulnerability, which vulnerability was because of his ethnicity. We may not usurp the role of the Tribunal in this matter, and we do not assert that such a conclusion was inevitable. However we consider that if the Tribunal had fully understood the import of the passage from *Perampalam* which we have quoted above, it would inevitably have recorded a much more detailed assessment of this evidence and of any other circumstances which might have tended to prove or disprove that Ratnayake's conduct constituted persecution for a Convention reason. In particular, we note that:

* there was no explanation of why the Tribunal concluded that Ratnayake's conduct was not motivated by matters of race, given that such conduct was overtly based upon such matters;
* the general evidence as to racially-based extortion was not considered in connection with the Ratnayake incidents; and
* there was no explanation as to why random extortion by soldiers at a checkpoint should be found to be racially motivated whilst exploitation of the same person, with ethnic abuse and violence directed to persons of shared ethnicity, should be found not to be so motivated.

45 Of course, it was open to the Tribunal to conclude that the Ratnayake incidents and the checkpoint incident were motivated in different ways, and there were reasons for so concluding. However, we would have expected to see a discussion of these matters in the reasons if the Tribunal had considered them. We stress that we are here seeking to identify

and evaluate the process of reasoning undertaken by the Tribunal. We are not questioning the adequacy of the Tribunal's exposure of that process in its reasons.

46 As this Court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a Convention reason: see eg *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 166 ALR 641 at 645-646. The need for this is apparent enough. In the usual case of extortion the extorting party will be acting for a self-interested reason (ie to gain an advantage for himself or herself, or for another). In this sense, his or her interest in the person extorted can always be said to be personal. What needs to be recognised, though, is that the reason why the extorting party has that interest may or may not have foundation in a Convention reason. The extorted party may have been chosen specifically as the target of extortion for a Convention reason, or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion. Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.

47 Likewise in the course of practising extortion on a person, self-interested action may be taken against the extorted party for the benefit and/or protection of the extorting party. Again it can be said that in taking such action, the extorting party's interest in the effect of it on the other is a "personal interest". But depending on whether the extortion itself is being practised for a reason that includes a Convention reason, the action in its setting may nonetheless be relevantly persecutory in character.

48 In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.

49 We suspect that the Tribunal failed to recognise this possible duality when making its finding in relation to the isolated act of extortion at the checkpoint. After all, those soldiers were also certainly motivated by self-interest. However, as to the Ratnayake incidents, it is clear that the Tribunal did not recognise that Ratnayake's conduct towards the appellant had to be assessed in the setting in which it occurred. Having succeeded to an established procurement arrangement with the appellant's business which provided for the payment of a secret commission to him, Ratnayake's initial interest in the appellant could properly be characterised as being an interest in the appellant as an individual "because he [Ratnayake] was able to make money from their dealings". Likewise to the extent that later interest was shown in the appellant because the Lieutenant "did not want [him] to pursue any complaints against him", that interest in taking action against the appellant could again be characterised as an interest in the appellant "as an individual". But the sum of these two interests by no means exhausted his interest.

50 First, he transformed an illegal, but previously mutually acceptable and long standing, procurement arrangement into one oppressive of the appellant because of non-payment for goods supplied. Secondly, the appellant's initial resistance to this was met by racial abuse and a continuation by Ratnayake of his practice of purchasing goods but of paying little. Thirdly, after the appellant's formal complaint to the army, two incidents involving

Ratnayake occurred. The second of these, the summary execution of the Tamil youths could be viewed as designed to induce the appellant to withdraw his complaint or to secure the continuation of the extorsive relationship that had previously existed between the parties. In either case, the totality of the evidence accepted by the Tribunal necessarily raised for consideration whether that conduct was practised for a Convention reason. Given the obvious manifestation of racial attitudes during the course of Ratnayake's dealings with the appellant, it was necessary to address the complex causation inquiry mentioned earlier. When one has regard to the particular matters focussed upon by the Tribunal, it is clear that the Tribunal misconceived how that inquiry was to be undertaken. It was not sufficient to find that at particular times or in respect of particular actions, Ratnayake's interest in the appellant was personal. Such a finding, while unexceptionable as far as it goes, simply does not exhaust the causation inquiry. The Tribunal was, in the circumstances, obliged to consider whether the totality of Ratnayake's actions (including those manifesting a personal interest) in the setting in which they occurred had, as well, a Convention-related character. The Tribunal failed to do this. In so doing it misunderstood what was required of it in applying the law to the claims and evidence it had accepted.

….

The same point was made by Moore J. although his Honour was in dissent in relation to the particular matter:

> *[10] When extortion is involved, the conduct of a persecutor may arise in the context of a personal or business relationship and the conduct may be engaged in because of personal attributes of the victim. A person who is subjected to extortion will often have personal characteristics (most obviously wealth or the appearance of wealth or at least property available to meet the demands of the extortionist) that have attracted the attention of those engaging in the extortion. Knowledge of those attributes may arise because of some personal or business association between the persecutor and victim. However, the existence of those characteristics and the fact that they may have attracted attention through a personal or business relationship does not remove from consideration the possibility that the race or ethnicity of a victim is also a factor, and perhaps a critical factor, influencing the conduct of or motivating those engaging in the extortion and, perhaps, that there is no effective protection offered to people of that race or ethnicity. So much is apparent from the consideration of the applicable legal principles discussed by Burchett and Lee JJ in* Perampalam v Minister for Immigration and Multicultural Affairs *(1999) 84 FCR 274; 55 ALD 431 particularly in [15] and [16].*

### b) Laws of general application

In Chen Shi Hai v MIMA (2000)170 ALR 553 ; 74 ALJR 775, [2000] HCA 19 the High Court, in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ, while reinforcing the proposition that ordinarily enforcement of a law of general application does not constitute discrimination (at par [21]), added an important caveat. Their Honours said:

"To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory…

Z v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 51 also stands for the proposition that where a law of general application is selectively enforced or punished on the basis of a Convention ground, the application of that law could involve persecution for a Convention reason.

In that case at 58, Katz J referred to the comments of the Full Court, comprising Beaumont, Hill and Heerey JJ, in Minister for Immigration and Ethnic Affairs v "A" & Ors [1995] FCA 401, and observed:

"Their Honours did not identify those additional features which, in their view, would render enforcement by a country of one of its prohibitory criminal laws of general application persecution for a Convention reason. However, I infer that what they had in mind was either selective prosecutions under the relevant law, the criterion of selection of persons for prosecution being those persons' race, religion, nationality, membership of a particular social group or political opinion, or the imposition of punishments on persons convicted under the relevant law, such punishments being greater than they would otherwise have been by reason of the convicted persons' race, religion, nationality, membership of a particular social group or political opinion."(bold added)

In MIMA v Darboy [1998] 931 FCA Moore J. referred to Applicant A where McHugh J said at 398-399:

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.
However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the

relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.

He continued:

The issue of the operation of laws of general application and whether their enforcement may enliven the definition of refugee was addressed less directly by Dawson J at 389 and Kirby J at 419.
It is not entirely clear what the findings of the Tribunal were about the status of the law whose operation the applicant would be exposed to if he was to return to Iran. However the better view of the Tribunal's reasons is that it concluded the applicant would be prosecuted under the criminal code in the "Criminal Public Court" but for an offence which had its origins in Islamic law and which proscribed adultery. It appears the Tribunal was proceeding on the basis that it was a law of general application notwithstanding its genesis in Islamic law and even if it was given effect to by judges who were also clerics. Given that it was a law of general application it was necessary for the Tribunal to inquire whether sanctions arising from the operation of the law applied generally and not in a way that was discriminatory. That is, in a way that would constitute persecution. This it did not do. It is quite conceivable that a Muslim in Iran might believe adultery was wrong and that to engage in it was contrary to his or her religious beliefs. Nonetheless that person might be involved in an adulterous relationship for temporal or worldly reasons and notwithstanding his or her religious beliefs. It appears from the discussion by the Tribunal of the implementation of the criminal code that the Muslim in the situation just posited would be exposed to the same penalty as the applicant. If so, the treatment of the applicant would not, on its face, have the appearance of being discriminatory and thus would not constitute persecution.
This question of whether the law was applied in a way that was discriminatory was not addressed. This, in my opinion, discloses a reviewable error of law. A range of considerations might arise when the law is recognized as one of general application. Whether the law was applied in a way that was discriminatory would depend on the facts as they have been or might be found by the Tribunal, but the considerations which are relevant are conveniently catalogued in the judgment of McHugh J.

(for application of principle in Applicant A of a legitimate object to promote the general welfare of society in the context of illegal departure see Lin v MIMA [2001] FCA 991 (Ryan J.) at [14][16])

In ***Weheliye v MIMA*** **[2001] FCA 1222** the following error of law in the context of the interpretation and application of laws of universal application was made out:

31…* The Tribunal failed to interpret correctly and/or apply the test for determining whether the applicant had a well-founded fear of persecution on the grounds of her membership of a particular social group by misstating the effect and application of the principles regarding laws of general application in the circumstances of the case and in relation to the consequences of her adultery. The applicant relied on s 476(1)(e) of the Act.

The applicant submitted that the Tribunal incorrectly defined what was a law of general application as it did not apply the principle that a law of general application was one applying throughout the whole of the country to the whole population. It was said that the Tribunal directed its attention to whether the law was applicable to the applicant, rather than to whether it was a law which applied, and was administered, throughout the whole country. The applicant placed particular emphasis on the Tribunal's finding (see par 28) that Somalia's national legal structure had collapsed and that the law under which the applicant was convicted was not a law that relied on the existence of a national legal system for its enforcement. Goldberg J. added at [42]

…The applicant submitted that in arriving at this conclusion, the Tribunal wrongly found that the punishment for adultery was a law of general application in Somalia, or alternatively, failed to appreciate that when it was applied in the process of reaching a conviction, it operated discriminatorily in the sense of the trial and sentencing process.

His Honour stated the relevant principles to be:

46 In order for feared persecution to entitle a person who fears the persecution to be considered a refugee, the persecution must be discriminatory. In Ram v Minister for Immigration and Ethnic Affairs (supra) Burchett J said at 568:

> "Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution. Consistently with the use of the word 'persecuted', the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is 'membership of a particular social group'. If harmful acts are done purely on an individual basis, because of what the individual has done or may do or possesses, the application of the Convention is not attracted, so far as it depends upon 'membership of a particular social group'. The link between the key word 'persecuted' and the phrase descriptive of the position of the refugee, 'membership of a particular social group', is provided by the words 'for reasons of' - the membership of a particular social group must provide the reason. There is thus a common thread which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group'. That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

47 The relevance of a person being punished under a law of general application is that it is said that although the punishment may be severe, it is not occurring for a discriminatory reason but, rather, because a person has broken a law of the land which applies to all the population. In Applicant A v Minister for Immigration and Ethnic Affairs (supra), McHugh J said (at 258):

> "Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It

depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race."

The proposition that the enforcement of a law of general application does not necessarily result in persecution which is discriminatory was stated by the majority of the High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) in Chen Shi Hai v Minister for Immigration and Multicultural Affairs (supra) at 301:

"Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, 'black children', as distinct from children generally - cannot properly be described in that way. Further and notwithstanding what was said by Dawson J in Applicant A, the fact that laws are of general application is more directly relevant to the question of persecution than to the question whether a person is a member of a particular social group.

In Applicant A, McHugh J pointed out that '[w]hether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct [but]...on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. In that context, his Honour also pointed out that 'enforcement of a generally applicable criminal law does not ordinarily constitute persecution.' That is because enforcement of a law of that kind does not ordinarily constitute discrimination."

This decision demonstrates that a law will not be a law of general application if it applies only to a particular section of the population.

48 Although it might be said that the decision to prosecute, convict and sentence the applicant was not discriminatory in the sense that the relevant law against adultery covered her circumstances, it was still necessary to determine whether that law applied throughout the country and to all the population in the sense that it was applied and enforced throughout the land in a non-discriminatory way.

…

50 The applicant submitted that the law under which the applicant was punished was not a law of general application because it was not a law which applied throughout the whole of

Somalia. The applicant referred to material before the Tribunal which demonstrated that there was no national judicial system functioning throughout the country. However, whether a law is a law of general application turns on identifying those members of the population to whom it applies and upon whom it is administered, rather than on its geographic applicability and the extent of its application throughout the country.

51 There are two aspects to a consideration of whether punishment under a law of general application may constitute persecution for a Convention reason because it is discriminatory. The first aspect is to determine whether the law is in fact of general application and is not a law which targets or applies only to a particular section or group of the population. The second aspect is to determine whether, if the law is of general application to the whole of the population, it is nevertheless applied and administered in a discriminatory manner.

52 This second level of consideration has been addressed in a number of authorities. In Z v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 51 Katz J accepted as correct the approach of Beaumont, Hill and Heerey JJ in Minister for Immigration and Ethnic Affairs v Respondent A (1995) 57 FCR 309. Their Honours said at 319:

> "Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.
>
> The foregoing may seem a truism, but it needs to be kept firmly in mind because some of the reasoning in the authorities does disclose a tendency to argue that the more abhorrent the persecution is, the more likely it is that the targets of that persecution are members of a particular social group."

53 Katz J pointed out that the High Court affirmed on appeal the decision of the Full Federal Court in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 and that Dawson J, who with McHugh and Gummow JJ comprised the majority, cited this passage from the judgment of the Full Federal Court and approved it (at 245). Katz J noted that McHugh J took a somewhat different approach from that of Dawson J to the issue of the enforcement of a generally applicable criminal law and that Gummow J did not specifically refer to the question whether the enforcement of generally applicable criminal laws can involve either persecution for a Convention reason or persecution simpliciter. Katz J found nothing in the judgment of the majority of the High Court in Applicant A which compelled him to depart from the approach of Beaumont, Hill and Heerey JJ and he accepted that approach as correct. Katz J continued at 58:

> "I turn now to a discussion of the fact that Beaumont, Hill and Heerey JJ, in their approach to the question whether enforcement by a country of one of its prohibitory criminal laws of general application could involve persecution for a Convention reason, sounded a warning note. That warning note was that such enforcement would not, without more, involve persecution for a Convention reason.
>
> Their Honours did not identify those additional features which, in their view, would render enforcement by a country of one of its prohibitory criminal laws of general application persecution for a Convention reason. However, I infer that what they had in mind was either selective prosecutions under the relevant law, the criterion of

> selection of persons for prosecution being those persons' race, religion, nationality, membership of a particular social group or political opinion, or the imposition of punishments on persons convicted under the relevant law, such punishments being greater than they would otherwise have been by reason of the convicted persons' race, religion, nationality, membership of a particular social group or political opinion."

Katz J concluded that the Tribunal had not been compelled on the material before it to find that the prosecution of the applicant on his return to Iran would be selective or that the punishment would be discriminatory.

…

55 In Chen Shi Hai v Minister for Immigration and Multicultural Affairs (supra), the majority of the High Court recognised that the fact that a person was likely to suffer punishment under a law of general application was not the end of the inquiry. Their Honours said at 559:

> "To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory."

56 In the passage to which I have referred above (par 43) the Tribunal found that the law against adultery was one of general application in Somalia. The Tribunal concluded that in the particular circumstances of the applicant's case her prosecution, conviction and punishment was not discriminatory because her circumstances came within the law. However, the Tribunal did not address the issue whether the law against adultery was in fact applied and administered in a discriminatory manner in Somalia. That was a different line of inquiry from the Tribunal's inquiry and analysis in respect of the reason why the applicant was prosecuted, convicted and sentenced…

57 However, the Tribunal had already recognised that:

* there might well be variations in the application of the law against adultery;
* the national legal structure had collapsed;
* the law against adultery did not rely on the existence of a national legal system for its enforcement.

The Tribunal did not investigate or determine whether these factors led to a conclusion that the law against adultery was in fact applied and administered in a discriminatory manner. Although the Tribunal focussed on the particular circumstances which resulted in the applicant in being brought before the Court, it did not consider the manner in which the law against adultery was applied and administered in Somalia.

58 The applicant had submitted to the Tribunal that she was treated differently from those who had power and influence, but the Tribunal did not address that issue, rather, it considered that the particular circumstances of the applicant warranted her being brought before the Court. The Tribunal found that the prosecution, conviction and sentencing of the applicant was not an act of discrimination or persecution for a Convention reason because a law of general application was applied to the applicant. The Tribunal fell into error because it should have asked and answered the question whether the law against adultery was applied and administered in Somalia in a discriminatory manner.

The Full Court (Whitlam, North and Stone JJ.) in MIMA v Applicant M [2002] FCAFC 253 allowed the appeal from Carr J.'s judgment [2001] FCA 1412 and disapproved of the trial judge's treatment of the issue of laws of general application . The Court said:

3 The respondent arrived in Australia on 11 July 2000. When interviewed after arrival, he said that he came to Australia in order to avoid being pressed into fighting for the Taliban in Afghanistan…

…

The Decision of the Refugee Review Tribunal

4 The Tribunal accepted that -

* the respondent was an Afghan national and a member of the majority Pushtun tribe;
* he came from a part of Afghanistan which had been under Taliban control for several years;
* the Taliban had a practice of press-ganging young men into their armed forces;
* the respondent's cousin was forcibly recruited in this fashion and killed in battle shortly afterwards;
* the respondent was "of fighting age";
* the Taliban had tried to "conscript" him, but he avoided being conscripted because his father paid the Taliban; and
* the respondent feared that he would be conscripted to fight for the Taliban and that he could face serious harm or death.

5 The Tribunal did not accept that the respondent had ever spoken out against the Taliban or that the Taliban regarded him as an opponent…

It said of his fear of being recruited by the Taliban (at pp 18-19):

> "While the ad hoc practice of recruitment and press ganging new recruits including young students as described in the independent material cited above, is not one which would be condoned internationally, Taliban's motivation is solely based on whether or not the recruits are capable of fighting. This selective process which targets young, able bodied males does not amount to discrimination for a Convention reason. The selection of young men or men of fighting age albeit in an 'ad hoc' manner does not amount to discrimination and is not Convention related any more than regularised conscription is in other countries."

The Tribunal then cited (at p 19) a statement of Branson J in Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834, where her Honour said at [23]:

> "... This Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention ..."

…

The Decision of the Primary Judge

7… His Honour held at [25] that the Tribunal accordingly failed to consider whether the respondent "would be singled out from other objectors to conscription on the basis that he was a conscientious objector and thus held a political opinion for which he would be persecuted".

An Imputed Political Opinion as a Conscientious Objector?
8 His Honour thought that the respondent had "put forward" to the Tribunal a claim that he would be at risk of persecution by reason of a political opinion attributed to him on the basis of his pacifist views…
9 In the statement dated 25 July 2000 the respondent said:
…
I do not agree that the Taliban should make young people go to the war zone and fight. I will never agree to kill anybody. If the Taliban caught me and wanted me to go and fight and I refused, they would either have taken us by force, put me in jail or killed me.
…
Why I believe they will harm or mistreat me if I go back:
First of all they would kill me because I escaped from Afghanistan, second of all because they asked us to go to the fight and I refused.
…
14 So far as the appeal papers disclose, the respondent never advanced any argument before the Tribunal under the rubric of "conscientious objection to military service". However, in its discussion of Mijoljevic, the Tribunal mentioned (at p 19) that the asylum claimant in that case objected to military conscription on the basis of his pacifist views. In the Court below counsel for the respondent, with considerable ingenuity, seized on this notion to link it with a political opinion allegedly to be imputed to his client.
15 We think that the Tribunal's reference in the present case to the respondent's "pacifist" views is entirely equivocal. The delegate's decision shows that what the respondent said about his unwillingness to fight was intended to buttress his evidence to the effect that he was not a supporter of the Taliban and that he feared being conscripted by them. By the time of the Tribunal hearing, Ms Fitzpatrick was advancing on behalf of the respondent a quite explicit "political opinion" as the relevant reason for persecution under the Refugees Convention, and it was not a reason based upon a principled objection to military service…
16. We do not read the respondent's claim that he would be killed if he refused to fight as an assertion that such a fate would befall him because he was perceived to be a conscientious objector. In our view, there simply was no case raised by the evidence and material before the Tribunal that the respondent would have attributed to him a political opinion such as that identified by the primary judge. In the present case the respondent never suggested that he articulated or demonstrated in any way any principled opposition to conscription so that a political opinion might be imputed to him. It follows that, in our opinion, the primary judge erred in holding that the Tribunal was obliged to consider the issue he formulated
Conscription and the Concept of Persecution
17 The primary judge also held that the Tribunal fell into error when it relied on the decision in Mijoljevic. His Honour distinguished at [29] that case and the authorities cited by Branson J in that case on the basis that "they concerned the enforcement of laws of general application providing for compulsory military service." His Honour said at [33] that in the present case "there was no evidence of a law of general application on the matter of conscription. All the evidence points to forcible conscription by the Taliban without any lawful justification."
18 It may be that the Tribunal has misunderstood the reasoning in Mijoljevic. In Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 Gleeson CJ, Gaudron, Gummow and Hayne JJ observed (at 302) that the question whether conduct is undertaken for a so-called "Convention reason" cannot be entirely isolated from the question whether that conduct amounts to persecution. Conscription into the Yugoslav armed forces in the 1990s might well have been regarded as involving a real chance that a

person would suffer serious harm, and Mijoljevic may stand for no more than the undeniable proposition that such a person must be able to show that he was singled out for conscription for one of the five reasons under the Refugees Convention.
19 The fact that there was not a law of general application in the present case is, in our opinion, not to the point. That merely meant that there was no need to inquire whether there was a sanction for disobedience. In any event, for what it is worth, here the Tribunal noted that there was no such penalty. It was clear that, if a person suffered the misfortune to be recruited by the Taliban, he went into service. There was no alternative. That is why the Tribunal accepted that a person may face serious harm or death as a consequence of being recruited by the Taliban. (Incidentally, the expression, a law of "general application", is hardly a term of art. For example, in England, the prerogative of the Crown to impress seafaring men survived for many years as an exception to the right of personal liberty. This arbitrary power was not founded on any statute, but on immemorial usage. See Holdsworth, A History of English Law, (1938), vol X, pp 381-382.)
20 An argument about the lawfulness of the Taliban's random recruiting is sterile. So long as the "accountability" theory of the interpretation of the Refugees Convention holds sway, the way in which the Taliban treat people under their control will have to be assessed, whether or not the Taliban are non-State actors. The critical point is that, even if such treatment is regarded as amounting to "persecution", there is still the further requirement of "a Convention reason".

The High Court (Gleeson CJ. Mc Hugh Gummow Kirby and Callinan JJ. in Applicant S v MIMA [2004] HCA 25 25 (2004) 206 ALR 242 77 ALD 541 78 ALJR 854 allowed the appeal from MIMA v Applicant S [2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256 ) (by a majority) and in dismissing the appeal to the Full Court restored the orders of Carr J. setting aside the decision of the RRT. The majority judgments emphasised the general principle is not that a particular social group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of society. Its possession of a common attribute or characteristic must distinguish the group from society at large (at [36] per Gleeson CJ. Gummow and Kirby JJ. It is not necessary that the society in which the group exists must recognise the group as a group that is set apart from the rest of the community (at [67]) per Mc Hugh J.The Court upheld the submission that Afghan society's perceptions of whether there is a particular social group is relevant to the question of whether there is such a particular social group, but it is not a requirement . (see above Chapter 7a))

The majority judgments dealt with the issue of persecution and laws of general application in the context of the forced and random and arbitrary conscription conducted by the Taliban. the judgment of the Full Court in MIMA v Applicant M [2002] FCAFC 253 must be read in the light of the following reasoning. The Taliban

were not pursuing a “legitmate nationol objective”, nor (if it was) would their conduct have been considered appropriate and adapted in the sense of proportionate in the means used to achieve that policy.)at [47]-[49] per Gleeson CJ., Gummow and Kirby JJ.) The Taliban's policy did not allow for conscientious objectors. The Tribunal appeared to accept the appellant's claims that he was a pacifist and that he was not committed to the aims and objectives of the Taliban. Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society (at [83] per McHugh J.) .

Gleeson CJ Gummow and Kirby JJ. said:

Persecution

…

38 Chen decided that persecution can proceed from reasons other than "enmity" and "malignity"[48] (2000) 201 CLR 293 at 305 [35], 311-312 [60]. From the perspective of those responsible for discriminatory treatment, the persecution might in fact be motivated by an intention to confer a benefit[49] 2000) 201 CLR 293 at 305 [35]. This in itself does not remove the spectre of persecution.

39 Secondly, during oral argument the Minister sought to apply the decision in Minister for Immigration and Multicultural Affairs v Israelian[50] (2001) 206 CLR 323, heard together with Minister for Immigration and Multicultural Affairs v Yusuf. ….

40 In concluding that the applicant was not a member of a particular social group comprised of either or both deserters and draft evaders, McHugh, Gummow and Hayne JJ found that the Tribunal had not committed an error of law and concluded[51] (2001) 206 CLR 323 at 354-355 [97]; see also at 342 [55] per Gaudron J; cf at 380 [183] per Kirby J dissenting.

:

> "that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application".

Law of general application

41 In the present appeal, the Minister submitted that the facts here also reveal "a law of general application" and therefore the conclusion in Israelian must follow. This is not the case. There was no evidence before the Tribunal that the actions of the Taliban amounted to a law of general application. The policy of conscription was ad hoc and random.

42 Further, what was said in Israelian does not establish a rule that the implementation of laws of general application can never amount to persecution. It could scarcely be so given the history of the Nuremberg Laws against the Jews enacted by Nazi Germany which preceded, and help to explain, the purposes of the Refugees Convention. Rather, the Court

majority determined that, on the facts of that case, it had been open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was not capable of resulting in discriminatory treatment. A law of general application is capable of being implemented or enforced in a discriminatory manner.

43 The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]"[52] 1997) 190 CLR 225 at 258 These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen[53] (2000) 201 CLR 293 at 303 [28]. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in Israelian. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.

44 In Applicant A, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens[54] (1997) 190 CLR 225 at 258. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory[55] (1997) 190 CLR 225 at 258. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.

45 The joint judgment in Chen expanded on these criteria[56 (2000) 201 CLR 293 at 303 [29] :

> "Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective." (emphasis added)

That ultimate consideration points to the answer in the present case.

46 The Taliban can be taken to have been the de facto authority in Afghanistan at the relevant time, but it does not necessarily follow that it pursued legitimate national objectives in the sense indicated above. An authority recognised by Australia and other states as the government de facto, if not de jure (to use the terminology which was employed in customary international law when the Convention was adopted[57] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 at 906, 957-958. In 1988, Australia abandoned the practice of formally recognising or withholding recognition of foreign governments; rather, relations, formal or informal, would be conducted "with new régimes to the extent and in the manner which may be required by the circumstances of each case": Starke, "The new Australian policy of recognition of foreign governments", (1988) 62 Australian Law Journal 390 at 390. See also Shaw, International Law, 5th ed

(2003) at 376-383. ), of a state may pursue objects that offend the standards of civil societies which seek to meet the calls of common humanity. Such regimes would also have been all too well known in Europe itself when the Convention was adopted. The traditional view that the recognising state was not concerned with the legality of the state of things it was recognising[58] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 at 957 is not all that is involved here. The notion in the case law construing the "refugee" definition of a law of general application, given the nature of the Convention, involves more. The point may be seen in the discussion by Lord Wilberforce in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)[59] 1967] 1 AC 853 at 954, with reference to Locke, of a government without laws as inconsistent with at least "a civilised and organised society" and by Lord Salmon in Oppenheimer v Cattermole[60] 1976] AC 249 at 282-283 and Lord Steyn in Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)[61] [2002] 2 AC 883 at 1101-1102of arbitrary activities not deserving of recognition as a law at all.
47…it could be said that the objective of the conscription policy was to protect the nation. Generally speaking, this is an entirely legitimate national objective[62] See, for example, Pt IV of the Defence Act 1903 (Cth), which is headed "LIABILITY TO SERVE IN THE DEFENCE FORCE IN TIME OF WAR". However, in this case the position of the Taliban as an authority which was, according to the Tribunal, considered by international standards a ruthless and despotic political body founded on extremist religious tenets must affect the legitimacy of that object.
48 Furthermore, assuming for a moment that the object was a legitimate national objective, it appears that the conduct of the Taliban could not have been considered appropriate and adapted, in the sense of proportionate in the means used to achieve that objective. The policy of conscription described by the evidence was implemented in a manner that was random and arbitrary. According to the Tribunal, this would not be condoned internationally[63] The Taliban's policy did not allow for conscientious objectors. The Tribunal appeared to accept the appellant's claims that he was a pacifist and that he was not committed to the aims and objectives of the Taliban.
49 These conclusions by the Tribunal indicate that, had it by application of the correct principles respecting "perception" reached the stage of considering whether no more was involved than a law of general application, the Tribunal correctly would have concluded that the Taliban was not pursuing a "legitimate national objective" spoken of in Chen.

Mc Hugh J. said:

54 This appeal …raises the question whether proof of "a particular social group" requires evidence that the relevant society in which the group exists perceives the group to be a collection of individuals who are set apart from the rest of that society.
…
56 The appellant claims that, if he were returned to Afghanistan, he would be persecuted for reasons of his membership of a particular social group. He identifies the social group as "young, able-bodied Afghan men" and claims that, as a member of that group in Afghanistan, he would be subject to forcible conscription by the Taliban and required to fight in the Taliban army
….

Persecution
…

80 This Court has not yet considered, in any detail, whether compulsory military service can amount to persecution for the purpose of the Convention. The issue was touched upon in Minister for Immigration and Multicultural Affairs v Israelian[106]
2001) 206 CLR 323 (heard together with Minister for Immigration and Multicultural Affairs v Yusuf), a case concerning an Armenian national who had sought to avoid being called up for military service in his home country. The primary issues in that appeal were whether - as the Minister argued - the Tribunal was obliged to make findings on material questions of fact and, if so, whether a failure to make such findings constituted reviewable error. The Minister succeeded. As a result, Mr Israelian's notice of contention - that the Tribunal had failed to consider whether he had a well-founded fear of persecution for reasons of his membership of a particular social group consisting of deserters and/or draft evaders - became relevant.
81 In our joint judgment, Gummow and Hayne JJ and I said that, even if Mr Israelian was a member of a particular social group comprising deserters or draft evaders, the Armenian law which operated to punish those who had avoided a call-up notice was one of general application. Accordingly, Mr Israelian would not be the subject of persecution. Gummow and Hayne JJ and I said[107] Israelian (2001) 206 CLR 323 at 354-355 [97]:

> "[The Tribunal] concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The Tribunal is not shown to have made an error of law in that respect."

82 Gaudron J said[108] Israelian (2001) 206 CLR 323 at 342 [55]:

> "The Tribunal's conclusion that the punishment Mr Israelian would face 'for avoiding his call-up notice ... would be the application of a law of common application' necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution." (footnote omitted)

83 This case is different from Israelian. Given the facts found by the Tribunal in the present case, the finding was open that the conscription methods of the Taliban constituted persecution. On the Tribunal's findings, the Taliban had an ad hoc practice of recruitment, which practice included press-ganging new recruits in a manner that would not be "condoned internationally"[109] RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [49].. Accordingly, if the Tribunal had decided the particular social group issue in favour of the appellant, it was also open to the Tribunal to find that the appellant had a well-founded fear of persecution for a Convention reason. Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society.
…

Callinan J. dissented.

In the context of punishment under a law prohibiting demonstrations said to be a law of universal application, where a Tribunal holds that this is sufficient to prevent the existence of a Convention nexus it may commit a reviewable error of law in certain circumstances. In Shams v MIMA [2001] FCA 1420 Hill J. said:

8…The Tribunal went on to say that if it was wrong and the applicant was indeed arrested in Abadan, it was not satisfied that he was a refugee. In this respect, it suggested that one reason why he would not be a refugee was that any arrest he suffered was as a result of offending what the Tribunal referred to as a law of general application, that is to say, a law prohibiting demonstrations. The Tribunal took the view that the authorities would not impute political opinions to him in any event as a result of what he had done.

…

10…I should say… that had the Tribunal based its decision on the conclusion that imprisonment contrary to a law prohibiting demonstrations could not constitute persecution for a Convention reason, namely political opinion, it would in my opinion, in many cases at least, have committed a reviewable error. A law prohibiting demonstrations can be said on one view to be a law of general application. But, where such a law is used to prevent political views being expressed, as may well be the case in a country such as Iran, it seems to me not correct to regard such a law just as a law of general application. A person who disobeys that law in order to express a political opinion would suffer punishment, in my view, for that political opinion even if it is correct otherwise to describe the law as one of general application.

11 However, as I have said, it seems clear enough from the Tribunal's reasons that the Tribunal simply did not accept that the applicant was arrested or detained in Iran, as he said he was, or that he had departed from Iran in the circumstances he described. It is not for this Court to substitute its view of the facts for that of the Tribunal. So to do is to engage in merits review rather than judicial review.

The Full Court (Lee,Hill and Hely JJ.) allowed an appeal in the matter of WAEZ of 2002 v MIMIA [2002] FCAFC 341 because in finding that the Appellant was likely to face criminal charges and persecution if returned to Iran, but that this would not be for a Convention reason, the fact that any possible execution arose under a law of general application was not supported by any evidence that was before the Tribunal. It said:

28 A person may be motivated to persecute another for more than one reason. It is sufficient to establish refugee status that one of the reasons for which persecution is feared is for a Convention reason: Minister for Immigration & Multicultural Affairs v Sarrazola (2001) 107 FCR 184.

29 The enforcement of a generally applicable law does not ordinarily constitute persecution: Applicant A v Minister for Immigration & Ethnic Affairs (1996-1997) 190 CLR 225 at 258-259 (McHugh J); Wang v Minister for Immigration & Multicultural Affairs (2001) 179 ALR 1 at [50] - [68]. But where the punishment is disproportionately severe, that can result in the law in that case being persecutory for a Convention reason: Wang (supra) at [63]. Laws which apply only to a particular section of the population are not properly described as laws of general application: Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 170 ALR 553 at [19].

30 In the present case the RRT referred to these authorities in the context of considering whether enforcement of a law of general application would ordinarily amount to persecution. Whilst the RRT did not say so in express terms, the essential thrust of the RRT's reasons is that whilst the appellant is at risk of execution if returned to Iran, the

Iranian law under which the appellant may face execution is a law of general application. So much is implicit in the RRT's reasoning process ….
31 There was no evidence before the RRT that the appellant's conduct exposed him to the risk of imposition of the death penalty by virtue of a law having general application. The RRT was unable to say under what law the appellant was likely to be charged. For the reasons given by the primary Judge it may have been open to the RRT to infer that the appellant's conduct was likely to be contrary to the criminal laws of Iran in a general sense, but there were no materials before the RRT which would sustain a conclusion that exposure to the risk of execution by reason of that conduct was by virtue of a law of general application.
…

The Full Court (Gray von Doussa and Selway JJ.) allowed an appeal in SBBG v MIMIA [2003] FCAFC 121 (2003) 199 ALR 281 74 ALD 398 in finding appealable error in the reasoning of the primary judge and remitted the application to a single judge. The court in deciding to take this course commented on the issue of whether cetain conduct amounted to persecution at the Convention standard

30 Another more limited question also arises in this context. In relation to some of the specific allegations of persecution, particularly those relating to the legal obligation on women to wear the chador, the Tribunal concluded that this was a general obligation of Iranian law and thus could not constitute persecution. However, when an apparently general obligation in fact imposes a requirement reflecting discrimination for a Convention reason it is not a 'general requirement'. We refer to the decision of the Full Court in Wang v Minister for Immigration and Multicultural Affairs (2000) 179 ALR 1 at 13-16 [50]-[68]. For example, a law requiring everyone who gives evidence in court to take an oath on the Christian bible appears to be general in form but is discriminatory on all those who are not Christians. Whether that discrimination constitutes 'persecution' or not may depend upon the surrounding circumstances, such as what the practical consequence of the law might be. These issues have not been explored in the submissions before us. However, it seems to us that the appellant does have reasonable arguments that can be put in relation to those issues, whether or not those arguments might ultimately be successful.

Merkel J. in ***VTAO v MIMIA*** **[2004] FCA 927 (2004) 81 ALD 332** held that the RRT fell into the same kind of error in relation to the reasoning in Applicant A as the Full Court of the Federal Court fell into in Chen. Applicant A was not concerned with, and did not decide, whether parents who have breached China's family planning laws can constitute a particular social group. Rather, it was concerned with whether the fear of the consequences of failing to abide by those laws can, alone, be relied upon as a uniting element or characteristic to define a particular social group. Further, the High Court has not treated Applicant A as deciding that parents who breached China's one-child policy, or that parents of "black children", are not capable of constituting a particular social group. In the RRT's reasoning here in

respect of the applicant parents it treated the parents' reliance on their fear of the penalties they are likely to suffer under laws of general application as precluding them, on the basis of Applicant A, from being members of a particular social group. As a result of that conclusion the RRT did not consider the correct issue of whether the harm and disabilities parents of "black children" suffer have, as a result of the legal and social norms prevalent in Chinese society, over time resulted in such persons becoming a particular social group.

His Honour then said concerning laws of general application :

36 In arriving at the above conclusion I have taken into account that the RRT stated as one of its findings that the "only characteristic of the applicant parents which may separate them from other members of Chinese society is the fact of having been penalised, or anticipating penalties, because of their breach of China's family planing regulations". If that finding was arrived at after considering the legal and social norms in the manner discussed above the applicant parents' claim would fail. However, the reasoning and findings of the RRT do not warrant the conclusion that it considered those norms. Further, in its reasoning the RRT appeared to be relying upon its view that breaching of the "family planning policy", a law of general application, cannot amount to the imposition of penalties for a Convention reason. In that regard the RRT was relying upon Applicant A as establishing that a breach of a law of general application cannot be a defining element of a particular social group. For the reasons explained in Chen at 300-301 ([18]-[21]) and in Applicant S that is not determinative of whether the persons who breach those laws can constitute a particular social group.
37 The RRT, in its reasons for rejecting the claims of the applicant child, also relied upon its view that the family planning laws were laws of general application, are not discriminatory, are applied equally to all Chinese citizens and are directed at a legitimate purpose. Plainly, those matters will be of particular relevance to the claims of the applicant parents on any remitter. As the views relate to a question of some importance it is appropriate to make some observations about them.
38 There are two fundamental difficulties with the RRT's approach. It may be accepted that the family planning laws, in so far as they relate to parents, are laws of general application in the sense that, although they may vary from province to province, in general, they give effect to China's one-child policy by penalising parents who have more than one child. However, as was pointed out in Chen at 301 [21] even general laws that are apparently non-discriminatory may impact differently on different people and, thus, operate discriminatorily. Also, the selective enforcement of such laws may result in discrimination. In the present case the country information accepted by the RRT stated:

- documents or administrative approvals can be obtained (or penalty avoided) through personal connections or payment of "incentives";
- practice in relation to the laws "can vary considerably from place to place";
- there is a considerable difference in enforcement of the laws between rural areas, where enforcement is lax, and in urban areas where it is stringently enforced.

39 The country information actually drawn upon by the RRT was scant and very general. That probably came about because it did not appreciate the complexity of the issues discussed in Chen and explained in Applicant S, which was handed down after the RRT's

decision. Plainly, the country information accepted by the RRT is to the effect that the one-child laws do operate or impact discriminatorily on certain groups. A question on any remitter will be whether there is a real chance of that occurring in relation to the applicant parents.

40 The second, and more fundamental, difficulty arises in relation to the observations by Gleeson CJ, Gummow and Kirby JJ in Applicant S at 253-254 [43]-[45]:

> "The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is 'appropriate and adapted to achieving some legitimate object of the country [concerned]'. These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen. ...
>
> In Applicant A, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the state and its citizens. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the state ordinarily persecutory. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.
>
> The joint judgment in Chen expanded on these criteria:
>
> 'Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.'" [Emphasis in original]

41 The RRT did not enquire whether the harm feared by the applicant parents was appropriate and adapted to achieving the legitimate object of population control. That issue is to be determined by reference to "the standards of civil societies which seek to meet the calls of common humanity" (see Chen at 303 [29]). As was explained in Chen, visiting the "sins" (if they be that) of the parents on the child can be persecutory of the child. Similarly, there are many instances where the view may be taken that the birth of a second child may not have come about as a result of any "sin" on the part of the mother. The birth of twins, or a child born as a result of a rape, or even failed contraception, are examples. A law of general application mandating the imposition of severe penalties on the mother irrespective of her personal circumstances may be regarded as a measure that, according to the standards of civil societies, is not appropriately adapted to achieving a legitimate object.

42 The position of the first applicant in the present case is a case in point….

43 Plainly, whether China's general laws are appropriately adapted to meet the varying situations of parents who have more than one child is a question of some complexity and difficulty. It was not a question that was considered by the RRT.
44 Finally, I have considered whether, notwithstanding the RRT's jurisdictional error, its findings in relation to the financial harm the applicant parents might suffer fall short of the persecutory conduct required by Art 1A(2) and s 91R and, as a consequence, the applicant parents' claim must have failed in any event: see Stead v State Government Insurance Commission (1986) 161 CLR 141 and Minister for Immigration and Multicultural Affairs v Al Shamry (2001) 110 FCR 27 at 41 [42].
45 As explained later in these reasons I have concluded that the RRT also erred in its approach to "serious harm" in accordance with s 91R when it considered the claims of the applicant child. However, it is not necessary to pursue that aspect of the matter at this stage as the harm claimed to be feared by the applicants included the forced sterilization of the second applicant which can plainly constitute serious harm (see for example Cheung v Canada (Minister of Employment and Immigration) [1993] 2 FC 314 at 322-325). As there was no finding on that issue, which found some support in the country information accepted by the RRT, it cannot be concluded that the applicant parents' claim must have failed in any event.

In relation to the child's claims Merkel J. said that the Tribunal's conclusions would also have been based on a misunderstanding of the requirement of discriminatory and persecutory conduct in relation to the applicant child's claims because it misunderstood the distinction between a law that applies generally and a law, such as that applicable in the present case, that targets or impacts adversely upon "black children". As a result of the misunderstanding, the RRT did not address the questions required to be addressed.

The applicant child's claims

55 The RRT's reasoning process was difficult to analyse as it tended to state conclusions without explaining the basis for them. At [45] of its reasons the RRT stated that the family planning regulations are not "discriminatory but are applied equally to all Chinese citizens and are directed at a legitimate purpose". At [46] the RRT stated that it was not satisfied that the imposition of a fine on parents for breach of the family planning regulations is "discriminatory or persecutory to unregistered children as a particular social group". If, in arriving at those conclusions, the RRT was relying on the laws being of general application and serving a legitimate purpose, then as explained above, the reasoning in Chen make it clear that those matters do not result in the enforcement of the family planning laws not being discriminatory or persecutory of "black children". Further, the reasoning in Chen makes it clear that the 4-1 majority regarded enforcement of China's family planning laws as involving conduct that is systematic and is discriminatory against "black children". The RRT appears to have misunderstood the distinction between a law that applies generally and a law, such as that applicable in the present case, that targets or impacts adversely upon "black children" by preventing their household registration, with the disabilities that attend that lack of status, until the "social subsidy fee" is paid (see especially Chen at 300-301 [18]-[19]). Thus, the RRT's conclusion would have been based on a misunderstanding of

the requirement of discriminatory and persecutory conduct in relation to the applicant child's claims and, as a result of the misunderstanding, the RRT did not address the questions required to be addressed.

….

The Full Court in MZQAP v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 35 (Branson Marshall and Hely JJ) considered the circumstances in which conduct undertaken pursuant to a law of the country of nationality of the putative refugee may constitute persecution - persecution/prosecution dichotomy. It was concluded by the RRT that fear of harm arising from enforcement in a non-discriminatory way of a law of general application is not a fear of persecution within the meaning of Article 1A(2).On appeal the appellant's submission was in effect that the RRT mischaracterised the POTA (Prevention of Terrorism Act (india)) as a law of general application and failed to consider whether the enforcement of the POTA could give rise to persecution. The question on appeal involved consideration of whether (a) legislation banning terrorist organisations, and (b) the banning of the LTTE under such legislation, are appropriate and adapted to achieve legitimate government objectives. It was held on appeal that the Tribunal gave consideration to these two questions. There was a a further question involving consideration of whether the POTA was being enforced in India in a way that is not appropriate and adapted to achieve a legitimate government objective. The Tribunal expressly found that there was no evidence that the POTA was being selectively enforced for a Convention reason. It was held by the Court that the RRT did ask itself the appropriate questions concerning the POTA and its enforcement. The second question on appeal was whether appellant, if prosecuted under the POTA, would be exposed to persecutory harm because of his support of the LTTE. The court accepted that the Tribunal's finding that there was no real chancethe appellant will be persecuted for reason of his support of the LTTE involves implicit recognition that the appellant may face a real chance of prosecution under the POTA – nonetheless the finding that there is no real chance that appellant will be persecuted for reasons of his support of the LTTE involves a finding that there is no real chance of appellant suffering persecutory harm as a consequence of being prosecuted under the POTA. The Court said:

1 This appeal from a judgment of the Federal Magistrates Court calls for consideration of the meaning of the phrase 'being persecuted' in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees ('the Convention'). In particular the appeal calls for consideration of the circumstances in which conduct undertaken pursuant to a law of the country of nationality of the putative refugee may constitute persecution within the meaning of Article 1A(2) of the Convention.

….

3 In NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [27] observed:

> 'Section 36(2) is awkwardly drawn. Australia owes obligations under the Convention to the other Contracting States, ... . Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals.'

Their Honours dealt with the awkward way in which subs 36(2) is drawn by proceeding on the basis that the subs 36(2) criterion should be understood as requiring the applicant to be a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Convention. We must proceed on the same basis.

4 The appellant has consistently claimed to fear persecution in India because of his support, in Tamil Nadu in the south of India, of Sri Lankan Tamil refugees and of LTTE cadres. In his statement in support of his application for a protection visa the appellant claimed to have joined the Revolutionary DMK (which is also known as the MDMK) in 1998 and to have worked closely with the party's hierarchy. He asserted that by late 1999 he was one of the front line members of the Revolutionary DMK.

….

7…the Tribunal found that he was not a high level member but rather a supporter or low level member.

8 The Tribunal noted that the MDMK is a legal political party, has members in the Parliament and is part of the ruling coalition.

9 The Tribunal did not accept that the MDMK will be banned in the foreseeable future. It found that the leader of the MDMK, together with other leaders of the party, has been arrested under the Prevention of Terrorism Act ('the POTA') for pro-LTTE activities but not because of their membership of the MDMK. The Tribunal concluded that there is no real chance that the applicant will be persecuted merely because of his support and involvement in activities of the MDMK as a legal political party.

10 The Tribunal noted that the LTTE is banned as a terrorist organisation in India, as it is in Australia, Canada and the United States of America. It also noted that, under the POTA, membership or support of a terrorist organisation can attract a jail term of 10 years and fundraising for such an organisation can attract a jail term of 14 years. However, the Tribunal rejected the appellant's claim to be entitled to a protection visa because of his support for the LTTE for the following reasons. First, it observed that the POTA is applicable to all persons in India and concluded that the fear of harm arising from the enforcement in a non-discriminatory way of a law of general application is not a fear of persecution within the meaning of Article 1A(2) of the Convention. The Tribunal concluded that there was no evidence that the POTA is being, or will be, selectively enforced for a Convention reason.

….

12 The Tribunal found that there was no real chance that the appellant will be persecuted for reasons of his political opinions, or for an imputed political opinion, in the reasonably foreseeable future if he were to return to India…

…

14….The alleged failure was identified by his Honour as being a failure to find that the POTA was applied selectively or enforced selectively so as to constitute persecution for a Convention reason.

…

CONSIDERATION

17 By an amended notice of appeal the appellant claims that the Federal Magistrate erred in not finding that the Tribunal had failed to give effect to the Convention because it misunderstood the nature of persecution and, in effect, mischaracterised the POTA as a law of general application and failed to consider whether the enforcement of the POTA could give rise to persecution.

18 Both the appellant and the respondent place reliance on the judgment of Goldberg J in Weheliye v Minister for Immigration and Multicultural Affairs [2001] FCA 1222. His Honour at [51] observed:

> 'There are two aspects to a consideration of whether punishment under a law of general application may constitute persecution for a Convention reason because it is discriminatory. The first aspect is to determine whether the law is in fact of general application and is not a law which targets or applies only to a particular section or group of the population. The second aspect is to determine whether, if the law is of general application to the whole of the population, it is nevertheless applied and administered in a discriminatory manner.'

19 In Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25; 77 ALD 541 ('Applicant S') the joint judgment of Gleeson CJ, Gummow and Kirby JJ at [42] recognises that a law of general application is capable of being implemented or enforced in a discriminatory way such that implementation of the law can amount to persecution. At [43] their Honours stated:

> 'The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in Israelian. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.' (citations omitted)

20 Determination of whether discriminatory treatment is 'appropriate and adapted to achieving some legitimate objective of the country [concerned]' is ultimately a matter of judgment. The nature of the judgments involved was elucidated by Finn J in Applicant A101/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 556 at [24]-[25] where his Honour observed:

'When it is alleged that the enforcement or manner of enforcement of a generally applicable law is discriminatory by reference to political opinion, a complex inquiry may need to be engaged in. Where such a law is, or is said to be, one having the purpose of protecting a State or its institutions (i.e. it has a "political" purpose), the nature and reach of the law itself and the actual manner of its application will require consideration for the reason that its reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies: cf WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 341 at [32]. It is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.

The less such a law has an overtly political character (as where for example, its concern is with ordinary criminal acts in a society), the more attention will turn on the integrity of the enforcement process itself and on the risks to which a person might be exposed, e.g. ill-treatment or torture, in the course of that process. Is that process used selectively against critics of the State or against the advocates of particular political views? Is it fraudulently invoked for punitive purposes? Does its improper use expose a person to adverse consequences, e.g. torture in detention, even if that person is not later charged or tried with an offence?'

….

23 The appellant contended that the learned Federal Magistrate should have found that the Tribunal's decision was affected by jurisdictional error because the Tribunal failed to ask itself two critical questions:

> (a) whether the enforcement of the POTA was appropriate and adapted to achieve a legitimate objective of the Indian Government?

and

> (b) would the appellant, if prosecuted under the POTA, be exposed to persecutory harm because of his support of the LTTE?

24 Question (a) above may be seen to have two aspects. The first aspect involves consideration of whether (a) legislation banning terrorist organisations, and (b) the banning of the LTTE under such legislation, are appropriate and adapted to achieve legitimate government objectives. In our view the Tribunal gave consideration to these two questions when it referred to the fact that the LTTE is a banned organisation not only in India but also in Australia, Canada and the United States of America under the Charter of the United Nations (Anti Terrorism Measures) Regulations 2001. No further consideration of these two questions was, we consider, required.

25 The second aspect of question (a) above involves consideration of whether the POTA is being enforced in India in a way that is not appropriate and adapted to achieve a legitimate government objective. The Tribunal expressly found that there was no evidence that the POTA is being selectively enforced for a Convention reason. The appellant accepts that there was no evidence before the Tribunal that the POTA is being selectively enforced, whether for a Convention reason or otherwise…

26 We reject the contention that the decision of the Tribunal was affected by jurisdictional error because it failed to ask itself the first of the questions identified in [23] above. We conclude that it did ask itself the appropriate questions concerning the POTA and its enforcement and answered those questions adversely to the appellant.

27 We turn to question (b) above. The claim that the appellant would, if prosecuted under the POTA, be exposed to persecutory harm because of his support of the LTTE was not expressly put to the Tribunal. The appellant did, however, advance a claim that he, and other supporters of the LTTE, had been tortured by the authorities in Tamil Nadu. He further claimed that he had fled India to escape arrest by the authorities. The Tribunal appears to have accepted that the appellant might have been arrested and detained in 1991 in the wake of the assassination of Prime Minister Rajiv Gandi. However, it concluded that the circumstances that prevailed in 1991 do not continue in India and that there is no real chance that the appellant will be persecuted, as opposed to prosecuted, for reason of his support of the LTTE. The Tribunal rejected the appellant's claims to be presently wanted by the authorities in India and to have fled India to escape arrest.
28 We accept that the Tribunal's finding that there is no real chance that the appellant will be persecuted, as opposed to prosecuted, for reason of his support of the LTTE involves implicit recognition that the appellant may face a real chance of prosecution under the POTA. Nonetheless, the finding that there is no real chance that the appellant will be persecuted for reasons of his support of the LTTE involves, in our view, a finding that there is no real chance of the appellant suffering persecutory harm as a consequence of being prosecuted under the POTA. This finding is, we note, consistent with the Tribunal's conclusion that the authorities in India have no present interest in the appellant notwithstanding his support of the LTTE.
29 We therefore also reject the contention that the decision of the Tribunal was affected by jurisdictional error because it failed to ask itself the second of the questions identified in [23] above. Again we find that the Tribunal did ask itself this question and answered it adversely to the appellant.
…..

**c) Severity of harm**

(see now s91R)

The discussion in Gersten v MIMA [2000] FCA 855 at [43-8] that the harm feared be more than trivial or insignificant is important.The issue of at what point discrimination reaches the level of persecution, and the varying approaches of differently constituted Courts to this issue was comprehensivley discussed in Kord v MIMA [2001] FCA 1163 by Hely J. His Honour considered himself bound by the Full Court in Gersten to find error where the RRT decision did not apply a standard for persecutory conduct of harm which is more than trivial or insignificant. As a result he held that the Tribunal had overstated the severity or the gravity of the conduct which is required to be characterised as persecution coming within the Convention definition and set aside the decision.

An appeal from the judgment of Hely J. was allowed by the Full Court (Heerey, Marshall and Dowsett JJ.) MIMA v Kord [2002] FCA 334 [2002] FCAFC 77 (2002) 125 FCR 68 67 ALD 28. Heerey J. agreeing generally with the observations of Marshall and Dowsett JJ. added some observations of his own:

2 The Refugees Convention's definition of "refugee" speaks of a person's "fear of being persecuted". The use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted. In the many authorities cited by their Honours "persecution" and the associated word "harm" are used, sometimes in the same paragraph, both in the verb/action sense of conduct inflicting harm and in the noun/effect sense of the harm inflicted. This is not surprising, since, depending on the circumstances of a particular case, attention may be focussed on one aspect rather than another. In the case discussed by their Honours, Gersten v Minister for Immigration and Multicultural Affairs [2000] FCA 855, it seems the Court was concerned with the noun/effect sense. The Full Court spoke (at [43]) of the appellant's claim

> "...that as well as imprisonment the persecution he feared included, by way of example, the cost and inconvenience of defending a perjury charge, suffering political embarrassment, interference with his business relationships and disbarment. It is submitted that, in holding that these matters were not persecution but rather harm which fell short of persecution, the Tribunal erred in its interpretation and application of the word 'persecution', a word which it is submitted was not to be confined, as the Tribunal did, to 'serious harm'."

3 The Full Court held (at [48]) that the Tribunal "did no more than reiterate ... the proposition that persecution involves harm that is more than trivial or insignificant". For the reasons given by Marshall and Dowsett JJ, the same can be said of the Tribunal's reasoning in the present case. The Tribunal, citing and applying the relevant authorities, engaged in a qualitative assessment of the harm it accepted the respondent had suffered, on the implicit assumption that there was no objectively well founded fear that he would suffer harm of greater magnitude were he to be returned to Iran. That qualitative assessment was a question of fact. No legal error is disclosed. I do not think it useful to be drawn into a semantic debate as to whether harm may be sufficient for the purposes of the Convention definition if it is characterised as more than "trivial or insignificant" even though less than "serious or significant".

Marshall and Dowsett JJ. said:

11 The Tribunal concluded that although the respondent had encountered some difficulty, it did not amount to persecution. The Tribunal also did not accept that he would encounter difficulty amounting to persecution should he return to Iran. In making these findings, the Tribunal took into account the fact that the respondent had become national wrestling champion, that he had been educated to a relatively high level, had completed his national service and had generally been able to find work. It identified the "central issue in the (respondent's) case" as whether the discrimination he faced amounted to persecution "in the sense of the Convention". His claim was that he would "suffer day to day from serious discriminatory acts should he return to Iran". The Tribunal noted that discrimination is not per se enough to establish refugee status and that a distinction must be drawn between a breach of human rights and persecution.

Their Honour's set out the relevant High Court authorities in some detail at [15] – [30] then said:

THE DECISION OF HELY J

31 At [29] - [30] Hely J observed that the Tribunal had found that the level of discrimination experienced by the applicant would have a "minimal impact" and continued:

> "[29] ... A 'minimal impact' may be something which is more than a trivial or insignificant matter, but is nonetheless an impact which the applicant can reasonably be expected to bear.
>
> [30] In substance, (the Tribunal) has concluded that although the applicant has been and is likely to be the victim of officially tolerated discrimination which (the Tribunal) regards as abhorrent, the 'minimal impact' which that will have on the applicant is such that he can reasonably be expected to bear it, rather than to seek international protection. A reasonable construction of (the Tribunal's) reason is that the unjustifiable and discriminatory treatment to which the applicant was exposed, and to which he would be likely to be exposed on return to Iran, whilst an interference with his basic human rights or dignity was not sufficiently serious to warrant characterization as persecution."

32 In Ibrahim, McHugh J observed (at [65]) that one of the qualities of persecution for a Convention reason was conduct "which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned." Hely J considered that the Tribunal's findings in the present case meant that this requirement was not met. However he considered that the decision of this Court in Gersten v Minister for Immigration and Multicultural Affairs [2000] FCA 855, was authority for the proposition that:

> "... unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant by virtue of his race is persecution, unless the impact of that conduct on the applicant is trivial or insignificant." (See [36].)

33 Hely J considered that Gersten was inconsistent with the views express by McHugh J in Ibrahim and felt obliged to follow the decision of the Full Court.

THE DECISION IN GERSTEN

34 If Gersten is authority for the proposition suggested by Hely J, then we find no support for it in the High Court decisions to which we have referred. Further, such a proposition appears to be inconsistent with numerous observations made in those decisions. We refer particularly to the following:

* The reference by Mason CJ in Chan to "some serious punishment or penalty or some significant detriment or disadvantage;
* The recognition by Dawson J in Chan that there is general agreement that a threat to life or freedom will amount to persecution but disagreement as to other (presumably less serious) consequences;
* The statement by Brennan CJ in Applicant A that: "When a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied.";
* The references in Chen to conduct which "offends the standards of civil societies which seek to meet the calls of common humanity" and to "a significant departure from the standards of the civilized world".

35 In our view, the High Court has carefully avoided any precise definition of the term "persecution". Indeed, the cases suggest that such an approach would be undesirable. Four main reasons for this view emerge from the decisions. They are:
* The interaction of the various aspects of the definition of "refugee";
* The wide range of discriminatory conduct which may be motivated by one or other of the identified Convention reasons for persecution;
* The possibility that apparent discrimination may be justified in some circumstances by legitimate community needs; and
* The possibility that a fear of persecution may, in some cases, be based upon one, or a very small number of serious acts of discrimination experienced in the past and feared for the future, whilst in other cases the conduct experienced or feared may involve sustained repetition of conduct which might be tolerable if experienced only once or very rarely.
36 It is important to distinguish between past acts of discrimination and acts which it is feared will occur in the future. The Convention definition requires that the relevant person be outside of his or her country of nationality "owing to well-founded fear ...". He or she must also be unwilling to avail himself or herself of the protection of that country "owing to such fear". The latter "fear" is of future acts. It is well-established that past events may offer a reasonable guide to what may be expected in the future. For that reason, decision-makers in this area tend to focus upon past events, making a tacit assumption that they may well be repeated in the future. However that will not always be the case. Decision-makers must consider whether or not there are circumstances which would lead to past events being unreliable as guides to the future. Ultimately, it is the relevant person's fears for the future which must be considered in the light of the available information, including the past experiences of that person and other relevant material. The "seriousness" of past discriminatory conduct will obviously be a relevant consideration in determining whether or not he or she holds the requisite subjective fear, a fear which leads him or her to wish to avoid returning to the country in question. Such conduct will also be relevant in determining whether or not such fear is "well-founded". McHugh J was referring to this exercise in Ibrahim when he referred in [64] to the "tolerability of the applicant's situation". Mason CJ appears to have had the same considerations in mind in the passage from Chan cited above.

Their Honours then dealt (at [37]- [40]) with the issues arising from the approval of the Full Court of the judgment of Branson J. in Kanagasabai v MIMA [1999] FCA 205 which was appeared to have been partially responsible for the view which Hely J. formed as to the meaning of Gersten particularly at [38]:

38 Her Honour then observed:

> "... there is in my view a real difference between the concepts of 'serious punishment or penalty' and 'significant detriment or disadvantage' to which Mason CJ referred and 'serious or significant harm' in the sense in which that phrase was used by the Tribunal. Nothing in the reasons for decision of the High Court in Guo's case suggests that the High Court intended in that case to reconsider established authority on the meaning of 'persecution'. It rather intended, as I read the case to make explicit what had in earlier authority been implicit, namely, that the type of harm which can constitute persecution cannot be trivial or insignificant harm but rather must be harm of significance."

They then said:

41 At [21] her Honour set out the Tribunal's findings that it was not satisfied:

> "that the arrests and extortions to which the Applicant has been subject have caused her such serious or significant harm as to amount to persecution. The harm suffered by the Applicant has caused her to be frightened, inconvenienced and intimidated, but the Tribunal does not consider that the harm suffered would amount to persecution."

42 This passage is the key to her Honour's concerns. The Tribunal appears to have distinguished between the alleged persecutory acts (arrest and extortion) and the harm caused to the applicant as a result thereof. In common usage, the word "harm" may describe either the act of causing harm (often as a verb) and the injury actually caused by such an act (often as a noun). In the above passage, the Tribunal used the word in the latter sense, however the cases suggest that the Convention definition focuses upon the conduct which causes harm and the motives for such conduct. The Tribunal thus created a misleading distinction between the relevant conduct and the damage suffered by the victim. This error led the Tribunal to substitute for the test of well-founded fear of persecution, that of fear of significant harm. Such an approach inevitably confuses the subjective and objective elements of the definition of "refugee". Branson J was concerned to correct this departure from principle.

At [43] – [46] they referred to the facts and the reasoning of the Full Court in Gersten then said:

47 Their Honours then set out the extract from her Honour's judgment in Kanagasabai which appears above and continued at [48]:

> "It is inappropriate to attempt a definition of 'persecution', if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case. ... To the extent that the Tribunal did equate persecution with significant harm and applied that as a rigid test, the Tribunal would have erred. However we do not think that it did. In our view the Tribunal did no more than reiterate ... the proposition that persecution involves harm that is more than trivial or insignificant. The Tribunal concluded that the conduct complained of by Mr Gersten fell short of persecution in all the circumstances of the case, a conclusion with which we agree."

48 There were obvious parallels between the passages disclosing the error identified by Branson J in Kanagasabai and the passage cited above from the reasons of the Tribunal in Gersten. Both appeared to distinguish between persecutory conduct and the harm caused thereby. The Full Court appears to have accepted the correctness of the view expressed by Branson J in Kanagasabai but found that in the case under consideration, the Tribunal had not committed the same error. We consider that the words in [48] of Gersten, "equate persecution with significant harm" referred to the error identified by Branson J in Kanagasabai. Both decisions appear merely to accept that an applicant must fear that the anticipated persecution will cause harm to him or her, and that such harm must not be merely "trivial or insignificant" (bold added). In the present case, there is no reason to believe that the Tribunal erred in the way in which it did in Kanagasabai. It follows that the decision in Gersten, when properly understood, is not relevant to the present case.

CRITICISMS OF THE TRIBUNAL'S REASONS

49 Clearly, had Hely J shared our view as to the meaning of Gersten, he would not have set aside the Tribunal's decision. However the matter has proceeded before us upon the basis that regardless of the correctness or otherwise of the decision in Gersten, the Tribunal erred in law.

…

52 Firstly, the respondent criticizes the Tribunal's use of the expression "the standard of a sustained or systemic denial of core human rights". It is difficult to attribute any real meaning to that expression, taken in isolation, unless one is able to identify the rights encompassed within the expression "core human rights". However, in the preceding sentence, it is observed that some acts of "regular but petty discrimination" may not necessarily "amount to a denial of human dignity in the sense of the Refugee Convention". This suggests that the Tribunal considered that denial of human dignity might constitute persecution and that discrimination might amount to such denial. The Tribunal also referred to the words of Mason CJ, "some serious punishment or penalty or some significant detriment or disadvantage", from the passage which was approved by a majority of the High Court in Gua, and is set out above. The Tribunal also referred to selective harassment, serious violations of human rights and measures in disregard of human dignity as reflecting the shades of meaning attributable to the word "persecution".

53 The Tribunal was not, in our view, seeking to create its own succinct test for determining whether or not particular conduct amounted to persecution. It was rather adopting the various descriptions used from time to time in the authorities and so informing itself as to the nature of the concept of persecution. It follows that the Tribunal's decision was informed by its consideration of these descriptions. Having so directed itself as to the law, the Tribunal recorded its conclusion that any fear of persecution on the respondent's part was not well-founded. When one looks at the facts of the case it is not difficult to see why the Tribunal came to that conclusion. Although the respondent complained of difficulty in obtaining some forms of employment, it seems that he generally enjoyed regular employment while in Iran. His difficulties were relevant matters for consideration by the Tribunal, but they were not conclusive. Had he not been able to find employment at all, or if the differences between the conditions of the employment open to him and of that not open to him were significant, those matters would also have been relevant, but they seem not to have been in issue.

54 Evidence of other discrimination was scanty…

…

57 In [20] it was asserted that:

> "Despite the appellant's submissions, and some authority for the proposition, it should not be accepted that for the purposes of the Convention there is a difference between 'discrimination' and 'persecution'."

58 Unfortunately for the respondent, the High Court has held that there is such a distinction. As much is implicit in the use by Mason CJ of the adjectives "serious" (to qualify "punishment or penalty") and "significant" (to qualify "detriment or disadvantage"). Similarly, in Chen at [25] and [29], the High Court makes it clear that discrimination is not necessarily persecution. See also the reasons of Gaudron and McHugh JJ in Ibrahim.

Jacobson J. in NAIY v MIMIA [2004] FCA 455 explained Kord as follows:

47 It is unnecessary to trace the discussion of the meaning of the term "persecution" in the authorities. As a number of Justices of the High Court of Australia observed in Chan, the

terms "persecution" and "persecuted" are not defined in the Convention or the Protocol; see at 388 (Mason CJ), 399 (Dawson J), 429 (McHugh J). And as McHugh J said in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 ("Ibrahim") at [65], framing an exhaustive definition is probably impossible. Nevertheless, the basic elements were conveniently summarised by McHugh J at [65] in Ibrahim. What is involved is unjustifiable and discriminatory conduct which is so oppressive that the person threatened cannot be expected to tolerate it.
48 As Marshall and Dowsett JJ (with whom Heerey J was in general agreement) said in Minister for Immigration and Multicultural and Indigenous Affairs v Kord (2002) 125 FCR 68 ("Kord") at [36], it is important to distinguish between past acts of discrimination and acts which it is feared will occur in the future. But the seriousness of the conduct will be a relevant consideration in determining whether the person holds the requisite fear and whether the fear is well-founded; per Marshall and Dowsett JJ at [36].
49 However, where the RRT has engaged in a qualitative assessment of the harm which the respondent has suffered, and has done so on the implicit assumption that there is no objectively well-founded fear that the person in question would suffer harm of a greater magnitude if he or she were to return to the country of citizenship, the qualitative assessment is a question of fact; see Kord at [3] (Heerey J).

The various authorities which doubted the reasoning at first instance in Kord have been proved correct.

In Applicant Z v MIMA [2001] FCA 1714 Carr J. was of the view , contra Hely J., that the Full Court in Gersten did not intend to hold that any harm which was more than trivial or insignificant amounted to persecution but rather was establishing a benchmark below which persecution could not be found. His dealt with the submission that:

7…he Tribunal had failed to apply the correct test about the meaning of persecution. He argued that unjustifiable and discriminatory conduct, officially tolerated, directed at the applicant for a Convention reason amounted to persecution, unless the impact of the conduct was "trivial or insignificant" - citing Gersten v Minister for Immigration and Multicultural Affairs {2000] FCA 855 at [48] and Kord v Minister for Immigration and Multicultural Affairs [2001] FCA 1163 at [35-37].
And that:

8…that the Tribunal had erred in law in construing (at the first page of its reasons) persecution as "... some serious punishment or penalty or some significant detriment or disadvantage in [Iran] ...". It also erred, so he submitted, in defining persecution as requiring the applicant to show serious harm.

Carr J. reasoned as followed:

8 In Gersten the Full Court revisited the authorities on the meaning of the word "persecution" and said at [48]:

> "It is inappropriate to attempt a definition of "persecution", if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case. This is a point emphasised in the Handbook on Procedures and Criteria for Determining Refugee Status (1992) published by the Office of the United High Commission for Refugees (sic). It is also a point made by Kirby J in Chen. To the extent that the Tribunal did equate persecution with significant harm and applied that as a rigid test, the Tribunal would have erred. However, we do not think that it did. In our view the Tribunal did no more than reiterate, as Mason CJ had in Chan, the proposition that persecution involves harm that is more than trivial or insignificant. The Tribunal concluded that the conduct complained of by Mr Gersten fell short of persecution in all the circumstances of the case, a conclusion with which we agree."

9 In Kord, Hely J [at 36] took the Full Court's observations as meaning that unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant by reason of his race, is persecution unless the impact of that conduct on the applicant is trivial or insignificant. His Honour felt bound to follow Gersten rather than the observations of McHugh J in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 175 ALR 585 at [65] where his Honour referred to one of the ordinary requirements of persecution as being that it "is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned", or to follow Gaudron J's observation at [24] that conduct had to be "sufficiently serious" to constitute persecution.

10 With all due respect to Hely J, I think that his Honour read too much into what the Full Court said in Gersten. In that case, I do not think that the Full Court intended to hold that any harm which was more than trivial or insignificant amounted to persecution, but was simply establishing a benchmark below which persecution could not be found. The Full Court was not, in my view, suggesting that everything above that benchmark amounted to persecution.

11 From paragraph [32] of Hely J's reasons in Kord, it can be seen that his Honour saw the Full Court in Gersten as endorsing the decision of Branson J in Kanagasabai v Minister for Immigration and Multicultural Affairs [1999] FCA 205 and accepting that persecution does not necessarily involve serious harm.

12 Again with respect to Hely J, I do not read that into the decision in Gersten. It is true that the Full Court set out in its reasons an extract from [27] of Branson J's reasons. But the Full Court dismissed the appeal, notwithstanding the Tribunal's references, in its reasons, to "serious harm" and the fact that the appellant had not been "seriously disadvantaged". Hely J at [19] also cited Hill J, sitting as a member of a Full Court, in Minister for Immigration and Multicultural Affairs v Khawar [2000] FCA 1130 as stating that persecution involves, in a general sense:

> "... an element of harm which is not insignificant."

13 Hill J certainly said that at [8] in that case. But, in his Honour's short summary at [77(2)] Hill J also stated that persecution "... must involve some serious detriment, disadvantage or harm ...".

14 As I see it, the ratio of the Full Court's decision in Gersten is that a Tribunal would fall into error if it applied a rigid test, whether of significant harm or serious harm.

15 It is clear that in Kord, but for his view of what the Full Court decided in Gersten, Hely J would have applied a consistent line of authority and learned commentary which he set out at [20] to [36]. That clearly emerges from his Honour's comments at [18].

16 Hely J's reasons set out and trace through a consistent line of authority and views of the learned commentators, which include Hathaway and Grahl-Madsen, to the effect that the notion of persecution in the context of the Convention implicitly requires that the harm feared must be sufficiently serious as to justify international protection. I agree, respectfully, with what (but for Gersten) Hely J considered had been established by those authorities.
17 The manner in which the Tribunal phrased the test for persecution was, as counsel for the respondent submitted, very similar to the construction proposed by Mason CJ in Chan …namely:

> "... some serious punishment or penalty or some significant detriment or disadvantage ...".

18 In my view, the Tribunal did not err in its references to "serious harm" in paragraph numbered 2 of its reasons above.
19 In my opinion, the Tribunal did not misdirect itself in law on the meaning of the word "persecution"; it was following well established authority, including Minister for Immigration and Ethnic Affairs v Guo… and the other authorities to which I have referred and incorporated by reference above.
20 Alternatively, if I am wrong in my assessment of what was decided in Gersten, I would hold that despite its reference to "serious harm" the Tribunal did not equate persecution with an impermissibly high level of harm and apply that as a rigid test any more than the Tribunal did in Gersten. Its findings indicate that any "harm" which the applicant sustained was not more than trivial or insignificant.
21 I should add that whether the particular matters of which the applicant complained amounted to persecution within the meaning of the Convention was a question of fact for the Tribunal. It is not for this Court to interfere with its assessment in that respect, see for example Ji Dong Wang v Minister for Immigration and Multicultural Affairs [2000] FCA 511 at [42].

See also Regina v. Secretary of State for the Home Department (Appellant ex parte Sivakumar (Respondent) [2003] 1 WLR 840 [2003] UKHL 14 (Lord Bingham of Cornhill Lord Steyn Lord Hoffmann Lord Hutton Lord Rodger of Earlsferry) the past persecution suffered by the applicant (despite its severity) had been wrongly seen by the Special Adjudicator as being outside the protection of the Convention because it had been inflicted in the course of investigating suspected terrorist acts.

Accepting that calls threatening death had been made on a number of occasions but rejecting that these constituted serious harm demonstrated a failure to address the claims made and a failure to apply itself to the question S91R prescribes. The contention that the making of oral or written threats provides no more than evidence of a “threat” within the meaning and contemplation of section 91R(2)(a) is wrong . However, the threat constituted by words or actions must be a real threat to the person’s life or liberty. In other words, the threat must not (for example) be

an idle one or made in jest. *see* ***VBAO v MI*** **[2004] FMCA 268** . An appeal from the judgment of Walters FM was allowed in ***MIMIA v VBAO [*****2004] FCA 1495** . Marshall J. held that It could not have been the intention of Parliament that threats in the form of declarations of intent, could prima facie on their own constitute serious harm. He accepted the submission that a threat to person's life or liberty meant an instance of serious harm which manifests itself as a danger to life and liberty. The question of whether something may constitute serious harm is determined at the time at which the RRT considers an application. The process involves an assessment as to whether the conduct or action relied on as constituting an instance of serious harm, in the case of s 91R(2)(a), endangers or puts in jeopardy the applicant's life or liberty and, whether the fear which attends this conduct or action and the chance of its reprisal, is well-founded.

2 The question for determination in the appeal is whether the Federal Magistrate erred in concluding that the RRT had misapplied s 91R of the Migration Act 1958 (Cth) ("the Act") by incorrectly determining the meaning of "persecution" in the context of its findings concerning the respondent.

….

6 The RRT accepted that the respondent might have received intimidating and threatening telephone calls and letters and that thugs connected with an opposing political party assaulted him.

7 The RRT said that it considered the telephone calls and letters, "while no doubt troubling" not to involve serious harm to the respondent. It considered the assault on the respondent as an "isolated incident". It found that there was no serious intent to harm him. It also found that the chance of the respondent coming to serious harm upon return to Sri Lanka because of his past political involvement was remote, given the nature and extent of that involvement.

8 The RRT finally considered that there is a "measure of police action [which] further limits the chance that the [respondent] would face serious harm because of political activity in which he might take part upon his return."

Legislative Context

9 Section 91R of the Act provides that:

"Persecution

(1) For the purposes of the application of this Act and the 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:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:
(a) a threat to the person's life or liberty;
….

10 The Federal Magistrate said that the RRT accepted that the respondent "had received threats to his life" and that "(p)rima facie, such threats must comprise instances of serious harm within ... section 91R of [the Act]."
11 His Honour described the reference in s 91R(2)(a) of the Act to "a threat to a person's life or liberty" as an instance of serious harm for the purposes of section 91R(1)(b). His Honour concluded that oral or written threats to a person's life constitute persecution under s 91R, provided that such threats were "real" ones, and not made idly or in jest. He said at [33] of his reasons for judgment that:

> "In my opinion, a threat falls within the meaning and contemplation of section 91R(2)(a) if the words spoken or written, or the action taken, could fairly engender in the mind of a reasonable person a reasonable apprehension that his life or liberty is genuinely at risk."

12 His Honour concluded that the RRT had failed to "properly or fairly address" the respondent's claims and "failed to properly apply s 91R..." and thereby made a jurisdictional error.
13 The essence of the judgment below appears to be that the RRT erred by considering that threats made to the respondent did not constitute persecution under s 91R.
The appellant's submissions
14 Counsel for the appellant submitted that the controversy regarding the application of s 91R could be resolved by recourse to established principles of statutory construction. The respondent did not resile from this approach and before this Court, the argument was essentially reduced to a contest between disparate definitions of the word 'threat', as it appears in s 91R(2)(a).
15 Counsel for the appellant submitted that the word 'threat' must connote 'risk', in the sense of danger or hazard, so that considered in its entirety, s 91R(2)(a) contemplates persecution involving an instance of serious harm which manifests itself as danger to life or liberty, as distinct from a possibility of danger. In making this submission, counsel had regard to the ordinary meaning of the word 'threat' and its immediate statutory context.
16 Counsel for the appellant acknowledged that the word 'threat' could be defined in the manner contended for by the respondent, i.e. to mean 'a declaration of intention or determination [to inflict punishment, pain or loss]' but submitted that, when viewed in its proper statutory context, the only plausible meaning to be attributed to 'threat' was the one relied on by the appellant.
17 Counsel referred to the syntax of s 91R(2)(a) as indicative of the Legislature's intention to adopt the meaning of threat contended for by the appellant. Counsel submitted that the draftperson, faced with a discernible choice, employed language (a threat to life or liberty) that was compatible with the word 'threat' being synonymous with 'danger'. As a matter of syntax, 'threat' in that context, must be a risk or danger to something. Counsel submitted that the contrary meaning of threat, for which the respondent contends, would, as a matter of syntax, be followed by the preposition 'to' and a verb (eg. a declaration of intention to kill).
18 Counsel for the appellant also called in aid the common law presumption that a draftperson will have used a word consistently. Counsel submitted that the word 'threat', albeit appearing in a different grammatical form elsewhere in s 91R(2), consistently with s 91R(2)(a), bore the meaning in sections 91R(2)(d), (e) and (f) of a threat, in the sense of

danger, to a person's capacity to subsist, consequent upon respectively, significant economic hardship, denial of access to basic services and denial of capacity to earn a livelihood of any kind.

19 It was further contended on behalf of the appellant, that elsewhere in the Act, the word 'threat' has the meaning 'risk,' 'peril' or 'danger'; see ss 500A(1)(d) and 202(1)(a). This, counsel submitted, was evidence of the consistent treatment the word 'threat' has received throughout the Act.

20 Finally, on the point of construction, counsel for the appellant submitted that the Court should have regard to certain extrinsic materials, including notably, the Explanatory Memorandum to the Migration Legislation Amendment Bill (No 6) 2001, which stated at [19] by way of introducing the new section 91R, that: "claims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell well short of the level of harm accepted by the parties to the Convention to constitute persecution". It follows, counsel submitted, that the Legislature could not be taken to be endorsing the adoption of a lower level of harm than would amount to persecution under the Refugees Convention. In relation to the judgment of the Federal Magistrate, counsel submitted that the finding that a 'threat' in the sense advanced by the respondent, is prima facie an instance of serious harm within the meaning of s 91R is inconsistent with the Legislative intent as evidenced by the Explanatory Memorandum.

21 Counsel for the appellant submitted that even if s 91R(2)(a) does not have the meaning for which the appellant contends, then the appeal must succeed if the RRT is found to have made either of two findings of fact and that it was open to it to do so. The first of those findings of fact was that the oral and written threats received by the respondent did not, in all the circumstances, amount to 'serious harm' within s 91R of the Act.

22 Counsel referred to the RRT's finding that, contrary to his claim, the respondent had not escaped serious harm simply by hiding. Counsel noted the following passage in the RRT's reasons:

> "Had there been a serious intent to harm him, I consider that those determined to do so could have watched and waited and seized the moment."

23 It was contended that on a fair reading of the RRT's decision, the RRT considered that the threatening telephone calls and letters did not amount to serious harm in the circumstances. It was further contended that the Federal Magistrate should have held that that finding was open on the evidence before the RRT, given:

- his Honour's acceptance that not all threats of death will necessarily constitute "serious harm"
- his Honour's conclusion below that the respondent had conceded that the threat must be a real threat as distinct from an idle one or one made in jest
- his Honour's view that the number of threats may mean that the degree of actual risk is either increasing or diminishing (in the latter sense showing that those making the threats could not carry them out)
- his Honour's conclusion that the form of the threat and the capacity of the person making it to carry it out is a relevant factor in determining whether the threat is comprehended by s 91R(2)(a).

24 Counsel for the appellant submitted that whether the respondent was at risk of serious harm was a question dealt with by the RRT, which concluded that he was not at such risk. It was further submitted that that finding of fact was open on the evidence before the RRT and could not be overturned in judicial review proceedings.

25 Counsel also drew the Court's attention to the findings of the RRT (collectively, the second findings of fact) that:

• the respondent had limited political involvement
• the chance of the respondent being seriously harmed because of that involvement or a resumption of it was remote
• police action would limit any chance of serious harm occurring on account of political activity.

26 Counsel submitted that the RRT did not fall into jurisdictional error but properly applied s 91R of the Act to the claims made by the respondent. Given the finding of the RRT that the police in Sri Lanka could protect the respondent from politically motivated attitudes, effective protection to the respondent, it was submitted, could be provided in his own country: see Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003 (2004) 205 ALR 487 at [21] to [25]. Accordingly, as the argument ran, the respondent could not be said to have a well-founded fear of persecution, even if the threats could constitute serious harm.

The respondent's submissions

27 Counsel for the respondent submitted that under s 91R, a threat to life, of itself, is taken to be serious harm. Counsel referred to s 91R(2)(a), which describes "a threat to the person's life or liberty" as one of several instances of serious harm.

28 Counsel contended that s 91R defines serious harm but does not deal with whether the harm will eventuate, which is an assessment to be made as part of an objective consideration of the chance that the harm feared will occur.

29 Counsel submitted that the appellant is wrong in contending that a threat to life must be read as a risk or danger to life of such a degree so as to require the RRT to assess the likelihood of life being lost or endangered as part of its assessment of whether the harm is serious. Counsel contended that to do so would be to invite the RRT to engage in a meaningless process of evaluating the chance of a chance.

30 Counsel contended that the correct approach is for the RRT to:
• acknowledge that, provided it has the capacity to instil fear, a threat to life is "serious harm" which would constitute persecution if carried out for a Convention reason
• then decide whether the fear of that harm occurring is well founded, such that it is likely that the fear will eventuate if the person is returned to the country concerned.

31 Counsel submitted that the Federal Magistrate was correct to conclude that the making of a threat to life is serious harm for the purpose of s 91R(1)(b). Counsel contended that the apprehension attending a threat to life is the type of psychological injury to which the Refugees Convention is directed. It followed, counsel submitted, that his Honour was correct to find that the RRT erred by not properly applying s 91R…..

32 Finally, counsel submitted that the RRT formed no view as to whether the respondent would face threats to his life in the future and, to the extent that state protection was considered, it was not done so in respect of the harm contemplated by s 91R(2)(a). Counsel contended that, in any event, any subsequent reasoning of the RRT could not cure its fundamental antecedent error of construction.

Consideration

33 In the introductory portion of the RRT's reasons for decision, the RRT noted that there were "four key elements in the Convention definition" of refugee. The first was that the visa applicant must be outside the country of origin. The second was that the visa applicant must fear persecution as defined by s 91R. The third was that the visa applicant must fear persecution for a Convention reason. The fourth was that the fear of persecution for a Convention reason must be well founded.

34 The RRT was satisfied as to the first key element. The RRT was not satisfied as to the second key element. It considered that the death threats did not constitute serious harm. In my view, this finding was entirely open to the RRT.

35 The principles of statutory construction, applied to s 91R(2)(a), favour the definition of 'threat' advanced by the appellant. When regard is had to extrinsic material, in particular the Explanatory Memorandum referred to at [20], the position is put beyond doubt.
36 Section 91R is a relatively recent addition to the Act, designed to set the parameters and raise the threshold of what can properly amount to 'serious harm', within the spirit of the Refugees Convention. Against this backdrop, the word 'threat', in the context of s 91R(2)(a), cannot sensibly be construed to have the meaning contended for by the respondent.
37 It could not, in my view, have been the intention of Parliament that threats in the form of declarations of intent, could prima facie constitute serious harm. Even with the qualification to s 91R(2)(a), which the respondent submits must operate to exclude from its scope, threats which do not have the capacity to instil fear, it is clear that application of the respondent's definition would be productive of anomalous consequences.
38 For example, a threat to kill, inadvertently directed to an individual in a case of 'mistaken identity', may well engender fear in the unsuspecting recipient not appraised of the circumstances in which the threat has been made. However, this could not be serious harm of the type contemplated by either Parliament or the Refugees Convention.
39 Conversely, instances of what may well have been contemplated as constituting serious harm, may avoid this classification if they take the form of actions which in fact threaten a person's life or liberty but are not accompanied by any declaration of intent. An example which comes to mind is a failed assassination attempt.
40 As counsel for the respondent, in his written submissions, contended, 'whether adverse treatment constitutes persecution, involves a consideration of whether the harm is sufficiently serious'. In my view, Parliament did not intend that threats in the form of declarations of intent, can prima facie on their own constitute serious harm.
41 Counsel for the respondent contended in written submissions that 'if an applicant fears he or she will lose their life there is no doubt the harm feared would constitute persecution...' That is to elevate the element of fear to an impermissible level. All instances of alleged serious harm have the potential to agitate their victim but this is not the hallmark of their categorisation as instances of serious harm. Rather, serious harm contemplates that a person's livelihood or well-being will be jeopardised in a material way. This is not to deny that threats of the kind directed at the respondent can never constitute serious harm, but they do not, of themselves, automatically qualify for that description.
42 The question of whether something may constitute serious harm is determined at the time at which the RRT considers an application. The process involves an assessment as to whether the conduct or action relied on as constituting an instance of serious harm, in the case of s 91R(2)(a), endangers or puts in jeopardy the applicant's life or liberty and, whether the fear which attends this conduct or action and the chance of its reprisal, is well-founded. Whilst the assessment does involve postulating two different questions, there is an air of unreality accompanying an insistence that the questions be answered independently.
43 Steps two and four, referred to above at [33], are to be considered contemporaneously by looking at the circumstances which prevailed at the time of the alleged instance of serious harm and the factors which are operable at the time of the decision.
44 Whilst the RRT answered step 2 adversely to the respondent, it went on to consider whether there was a well-founded fear that the respondent would suffer persecution if returned to Sri Lanka. The RRT did not accept that death threats, in the circumstances in which they had been made, were instances of serious harm. However, it did not conclude its assessment at that point. The RRT proceeded to assess the chance of the respondent coming to serious harm upon return to Sri Lanka on account of his political opinion. It did so, having regard to the past treatment of the respondent and the then current political

climate. It considered that effective protection could be afforded to the respondent by Sri Lankan police and that the respondent had a low political profile. That was a question of fact for it to determine. In arriving at this conclusion, the RRT correctly applied s 91R…
**….**

In ***VBAS v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCA 212** Crennan J. dismissed an appeal from Federal Magistrates Court The appellant had been in receipt of threatening phone-calls – the finding by the Tribunal was that the frequency of calls were exaggerated or the callers had no serious intent to harm applicant. Further that an assault was an isolated incident. The appellant submitted that the death threats made to the appellant necessarily fell within the definition of 'serious harm' referred to in ss 91R(1)(b) and (2) without the need for any evaluative exercise; submission was rejected. It was held on appeal that it was necessary to establish under s91R that persecution involves 'serious harm' to the relevant person - provisions require an applicant to have a well-founded fear of *persecution involving serious harm* - first instance of 'serious harm' 'a threat to the person's life or liberty' does not mean that every death threat or threat of imprisonment necessarily constitute 'serious harm'; a distinction was to be made between a real or genuine threat to cause harm or a hollow threat to do so and between a threat to kill intended to be acted upon, and a threat to kill intended to intimidate, but not to be acted upon - 'threat' is used in the general sense of 'danger' or 'risk', rather than used in the narrower sense of 'a declaration of intention or determination to cause harm or to take some hostile action.' Given the construction of s 91R(2)(a) as a reference to 'threat' in the sense of 'danger' or 'risk', it follows that when a Tribunal finds such threats have been made, that does not foreclose further enquiry to determine whether such threats amount to 'serious harm'. *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* **[2004] FCA 1495** was followed. There was a further issue – the Tribunal regarded assault as one of serious, but isolated harm which did not evidence a serious intent to harm appellant in the future – its finding of past ability to avoid more serious harm referred to 'additional or further serious harm' rather than to "more" as an intensive. Crennan J. said:

10 After considering the evidence as a whole the Tribunal was not satisfied that the appellant satisfied the criterion set out in s 36(2) of the Act for grant of a protection

visa. In considering the appellant's evidence, the Tribunal found:

**…**

*am prepared to accept that the* [appellant] *might have received threatening telephone calls during around the time of the 2000 election and that he may have also been spoken to in a threatening manner in person but I consider that he has either exaggerated the frequency of such calls or that the callers had no serious intent to harm him: he said that there were three or four calls almost every day for some months all saying the same thing about how the* [appellant] *should stop his political involvement yet nothing happened to him for a long time. I do not consider that the calls and threats he has described exhibit the characteristics necessary for them to constitute persecution within the meaning of the Refugees Convention and find that they did not involve serious harm. I also consider that the evidence indicates that the assault in April 2000 (sic), if it occurred as the applicant has described, was an isolated incident, followed by no further attempt to harm him. I am not satisfied that the reason why the applicant was able to avoid more serious harm was because there was no regular pattern to his life: on his own evidence he was visiting his family sometimes and going to work in the office with his injured arm. Had there been a serious intent to harm him, I consider that those determined to do so could have watched out for him or sought him out.'*

**…**

**Applicant's submissions**

14 In essence, it was submitted on behalf of the appellant that the death threats made to the appellant necessarily fell within the definition of 'serious harm' referred to in ss 91R(1)(b) and (2) without the need for any evaluative exercise. This was said to follow from the inclusion in s 91R(2)(a) of the expression 'a threat to the person's life or liberty'.

It was contended that the plain and ordinary meaning of 'threat' was a declaration of intention to harm and therefore 'threat' as it occurs in s 91R(2)(a) should be so construed. To support this, reference was made in the appellant's written submissions to dictionary definitions of 'threat' as follows:

*'Threat is defined in the* Macquarie Dictionary *(3rd ed, 1997) to mean* "a declaration of an intention or determination to inflict punishment, pain or loss on someone in retaliation for, or conditionally upon, some action or course." *It is defined in the* Shorter Oxford English Dictionary *(5th ed, 2002) to mean* "a declaration of an intention to take some hostile action, **esp** a declaration of an intention to inflict pain, injury, damage or other punishment in retribution for something done or not done".'

15 Then it was submitted that if, and to the extent that s 91R(2)(a) was ambiguous, support for the construction for which the appellant contended was also said to lie in paras [22] and [23] of the Explanatory Memorandum to the Migration Legislation Amendment Act (No 6) 2001 which provides:

*'22. Under new paragraphs 91R(1)(b) and 91R(1)(c), the persecution must involve serious harm to the person and systematic and discriminatory conduct. New subsection 91R(2) sets out a non-exhaustive list of the type and level of harm that will meet the serious harm test and fall within the meaning of persecution for the purposes of the Refugees Convention. New subsection 91R(2) makes it clear that serious harm **includes** a reference to any of the following:*

- *a threat to the person's life or liberty; or*

- *significant physical harassment of the person; or*
- *significant physical ill-treatment of the person; or*
- *significant economic hardship that threatens the person's capacity to subsist; or*
- *denial of access to basic services, where the denial threatens the person's capacity to subsist; or*
- *denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*

*23. The above definition of persecution reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. Persecution must constitute serious harm. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.'*

**Respondent's submissions**

16 The respondent's counsel contended that s 91R of the Act operated to qualify Art 1A(2) of the Convention. Thus it was now necessary to establish a well-founded fear of 'persecution' within the meaning of Art 1A(2) and also necessary to establish that such persecution involves 'serious harm'. Art 1A(2) of the Convention and ss 91R(1)(b) and (2) operating together require an applicant to have a well-founded fear of *persecution involving serious harm*. In essence, it was then contended that in s 91R(2)(a) the legislature uses the term 'threat' in the sense of risk, danger, hazard or peril and was not intending to confine 'threat' to the making of oral or written threats. That submission then relied on a number of contextual points, and authorities, in support of the proposition that whether particular circumstances amount to 'persecution' within the meaning of the Convention and/or 'serious harm' within the meaning of s 91R, is a question of fact and degree…

**Consideration**

17 The criteria for the grant of a protection visa are set out under s 36(2) of the Act: an applicant must be a person to whom the Minister is satisfied Australia has protection obligations under the Convention as amended by the Protocol; that is, a person who is a 'refugee' as defined in Art 1A(2) of the Convention: *NAVG and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 6 at [33]; see also *NAFG v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 57 at [4]. An element of the definition is that the person has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'

18 However, the protection obligations owed to a refugee are those provided for in the Act. Section 91R, added in 2001, qualifies the application of Art 1A(2) of the Convention. Art 1A(2) does not apply in relation to persecution unless (among

other things) the persecution involves 'serious harm' to the person (s 91R(1)(b)). The submission for the respondent is correct: whilst it remains necessary to establish a well-founded fear of 'persecution' within the meaning of Art 1A(2) of the Convention, is it now also necessary to establish that such persecution involves 'serious harm' to the relevant person. Subsections 91R(1)(b) and (2) do not replace the test of 'persecution' with a test of 'serious harm'; rather, those provisions require an applicant to have a well-founded fear of *persecution involving serious harm*. The first instance of 'serious harm' set out in s 91R(2)(a) – 'a threat to the person's life or liberty' – does not mean that every death threat or threat of imprisonment made against an applicant will fall within that paragraph and necessarily constitute 'serious harm'.

19 Whilst it is clear from the dictionary definitions relied on by the applicant, the common meaning of the word 'threat' can include a declaration of intention or determination to cause harm or take some hostile action, common sense dictates that there is a distinction to be made between a real or genuine threat to cause harm or a hollow threat to do so. There is also a distinction to be made between a threat to kill intended to be acted upon, and a threat to kill intended to intimidate, but not to be acted upon.

20 Whilst courts frequently resort to dictionaries to aid in the construction of a word of ordinary meaning, in the final analysis a court must discern the legislative intention in a particular statutory provision by reference to the purpose, language and context of the provision, especially where, as here, the word 'threat' has more than one clear common meaning: *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 560/561 (per Mahoney JA) and *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 504/505 (per Mason P).

21 The applicant's counsel has not referred to any dictionary entries for 'threat' other than those supporting the construction for which he contends. The Shorter Oxford English Dictionary (5th ed 2002) includes for 'threat' the meaning 'danger' and the phrase 'under threat' is defined as 'at risk'. The word 'threat' as an ordinary word with a common meaning has two common meanings, a general meaning, which is 'danger' or 'risk', and a narrower meaning of 'declaration of intention to harm'.

22 Having regard to the context, purpose (set out in s 91R(1)) and language of s 91R, I accept the respondent's submission that 'threat' as used in s 91R(2)(a) in the expression 'a threat to the person's life or liberty' is used in the general sense of 'danger' or 'risk', rather than used in the narrower sense of 'a declaration of intention or determination to cause harm or to take some hostile action.'

23 Such a construction is not only consistent with the express purpose of s 91R, it is also consistent with the language employed in Arts 31 and 33 of the Convention referring respectively to refugees coming from a territory 'where their life or freedom was threatened' (*était menacée* – was in danger/threatened) or being returned to a territory where 'life or freedom would be threatened' (*serait menacée* – would be in danger/threatened). Such language in either English or French (both versions being authoritative) is not confined to the making of threats, that is declarations of intention to harm, made either orally or in writing. See also *Chan v*

*Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 (per Mason CJ) and at 399-400 (per Dawson J) where respective references to 'harm or the threat of harm' or 'a threat to life or freedom' in the context respectively of Arts 1A(2), then 31 and 33, are references to 'threat' in the general sense of 'danger' or 'risk'.
24 Furthermore, 'threatens' is used in the more general sense of 'endangers' or 'poses a risk to' in ss 91R(2)(d), (e) and (f) of the Act. In accordance with common principles of statutory construction, the legislature can be assumed to be using the words 'threat' and 'threatens' consistently, in the absence of some clear indication to the contrary.
25 Further, if, and to the extent that, s 91(R)(2)(a) is ambivalent there is nothing in the Explanatory Memorandum to derogate from this construction. In particular it is made clear in the Explanatory Memorandum that it is not intended to broaden the definition of refugee under the Convention, rather s 91R is intended to qualify it.
26 Marshall J had occasion to consider a similar set of facts and a similar argument in respect of s 91R(2)(a) in *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* [2004] FCA 1495 (*"VBAO"*). In rejecting a submission that oral or written threats to a person's life are necessarily included in s 91R(2)(a), he considered the categorisation of instances of serious harm in the subsection then said:
*'This is not to deny that threats of the kind directed at the respondent* (ie. oral and written threats) *can never constitute serious harm, but they do not, of themselves, automatically qualify for that description.'*

In an opportunity to make written submissions in respect of *VBAO,* which was published shortly after the hearing of this matter concluded, it was submitted on behalf of the appellant that for the reasons advanced before me Marshall J's decision was plainly incorrect and I ought not to follow it. Criticism was also made of some observations by Marshall J, which were *obiter*. Further it was suggested Marshall J made observations supporting a submission of the appellant's that the construction of s 91R(2)(a) advanced for the respondent conflated the questions of whether the conduct involves serious harm and whether the fear of persecution is well-founded (a submission with which I do not agree). The respondent's counsel relied on the decision of Marshall J as being directly in point and plainly correct.
27 There is a high value to be placed upon consistency in judicial decisions, especially those concerning an issue of statutory construction dealt with in the appellate jurisdiction, as here, and I should follow Marshall J's decision unless persuaded it was clearly or plainly wrong: *Applicant WAIW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1621 at [7] (Finkelstein J); *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [74]-[76] (French J). In accordance with established principle, I propose to follow Marshall J.
28 Given the construction of s 91R(2)(a) as a reference to 'threat' in the sense of 'danger' or 'risk', it follows that when a Tribunal finds such threats have been made, that does not foreclose further enquiry to determine whether such threats amount to 'serious harm' within the meaning of the subsection. Whether such

threats are sufficiently serious to amount to persecution within the meaning of Art 1A(2) of the Convention and serious harm within the meaning of s 91R is a question of fact and degree for the Tribunal: See *Mandavi v Minister for Immigration and Multicultural Affairs* [2002] FCA 70 at [13] and [25] (Carr J); *Ahwazi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1818 at [45] (Carr J); *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260 at 268, 271 (Hill J), which was of assistance to Conti J in the context of s 91R of the Act in *NACV v Minister for Immigration and Multicultural Affairs* [2002] FCA 411 at [3].
29 The Tribunal found that either the frequency of the calls containing threats, in the sense of expressing an intention to harm, had been exaggerated or that the callers had no serious intent to harm the appellant. As a consequence, the Tribunal made a finding of fact, that the threats did not involve 'serious harm'….
…
32 ….it is clear from the whole of the Tribunal's reasons it regarded the assault as one of serious, but isolated harm, which did not, however, evidence a serious intent to harm the appellant in the future. This is clear from the Tribunal's reference to avoidance of 'more serious harm' in the extract in paragraph 10 above, which on a fair reading according to the principle established in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*'Wu')* must be a reference to 'additional or further serious harm' rather than constituting a reference to "more" as an intensive. Even assuming that the Tribunal implicitly found that the assault constituted serious harm, within the meaning of s 91R(2)(c) for example, it is still open to the Tribunal to find that notwithstanding the instance of serious harm (as per s 91R), it is still not satisfied the appellant faced a real chance of persecution involving harm in the future. The requirements of s 91R(1) are cumulative requirements making it necessary for a Tribunal to not only make a finding as to whether conduct constituted 'serious harm' but to also make a finding that the conduct is systematic and discriminatory.

In ***SZAYT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 857** (Wilcox J.) allowed an appeal from FM Mowbray. The Tribunal accepted the appellant as truthful and her claims of harassment by indigenous Fijians, including a threat to kill her, and activities which affected her ability to live alone. Her submission was that the RRT committed jurisdictional error in failing to evaluate the extent of the threat to the appellant's life; and the actual risk posed by the threat, in particular, in failing to determine the genuineness and seriousness of the threat to kill her if she complained to the police . Wilcox J. held on appeal following ***Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* [2004] FCA 1495** (2004) 139 FCR 405 85 ALD 490 (Marshall J.) that the word 'threat' in s 91R(2)(a) connotes 'risk', in the sense of danger or hazard, so that s 91R(2)(a) 'contemplates persecution involving an instance of serious harm which manifests itself as danger to life or liberty, as distinct from a

possibility of danger'- the use of latter term not intended by Marshall J. to depart from 'real chance' test – His Honour was merely speaking about the past; the threatening words must have connoted real danger, as distinct from a non-serious possibility of danger . It was held on appeal that the relevant decision-maker must evaluate the 'threat' and determine whether it amounts to 'serious harm' taking into account all the surrounding circumstances - if the Tribunal has regard to all these circumstances, in a particular case, its conclusion as to whether the 'threat' amounts to serious harm, within the meaning of s 91R is 'a question of fact and degree for the Tribunal' - ***VBAS v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2005] FCA 212** (**2004) 84 ALD 312 216 ALR 307 (2004) 141 FCR 435** following ***VBAO*** cited and approved - in present case RRT did not embark upon such an evaluation - it did not give consideration to the nature of the threat and the circumstances under which it was made.

19…Mr Silva (who again appeared for the appellant) explained his point was that the Tribunal committed a jurisdictional error in failing to evaluate the extent of the threat to the appellant's life; in particular, in failing to determine the genuineness and seriousness of the threat to kill the appellant, if she complained to the police. Mr Silva emphasised that the Tribunal accepted such a threat had been made. Mr Silva acknowledged it was for the Tribunal to find the relevant facts and to assess whether the degree of harm it found to have been suffered by the appellant amounted to 'persecution', within the meaning of Article 1A(2) of the Convention. Mr Silva also accepted that, in determining this matter, the Tribunal was required to have regard to s 91R of the Act. That section relevantly provides:

*'(1) For the purposes of the application of this Act and the 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:*

*(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*

*(b the persecution involves serious harm to the person; and*

*(c) the persecution involves systematic and discriminatory conduct.*

*(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:*

*(a) a threat to the person's life or liberty;*

*(b) significant physical harassment of the person;*

*(c) significant physical ill-treatment of the person;*

*...'*

20 Mr Silva noted s 91R(2)(a) which instances, as 'serious harm', 'a threat to the person's life or liberty'. He argued that any genuine and serious threat to kill a person falls within this paragraph. Mr Silva acknowledged it is not uncommon for someone to make a non-serious statement about killing someone else and that a non-serious statement would not be 'a threat to the person's life' within the meaning of the paragraph. However, he argued, the Tribunal accepted that the relevant words were spoken by people who were antagonistic to the appellant. It was for the Tribunal to determine the seriousness of the threat. Its conclusion about that matter would be a finding of fact and not vulnerable to judicial

review. However, he contended, the Tribunal was obliged to address that question; its failure to do so constituted jurisdictional error.

…

25 Mr Silva pointed out that in *VBAO* (noted by Mowbray FM), counsel for the Minister had argued (and the magistrate had accepted) that the evidence of a threat to kill does not, of itself, establish the existence of serious harm; however, once one accepts that a 'bare' threat to a person's life or liberty is not enough to comprise 'serious harm', then it is necessary to undertake an analysis of the actual risk posed by the threat. Mr Silva's complaint was that, in the present case, the Tribunal did not undertake such an analysis.

26 Ms Morgan argued it was open to the Tribunal to conclude that the appellant had only been subjected to low-level harassment. She submitted the Tribunal correctly understood the requirements of s 91R of the Act. She pointed out that the decision of Walters FM in *VBAO* had been reversed on appeal: see *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* of 2002 [2004] FCA 1495. The appeal judge, Marshall J, accepted a submission of counsel for the Minister that the word 'threat' in s 91R(2)(a) of the Act connotes 'risk', in the sense of danger or hazard, so that s 91R(2)(a) 'contemplates persecution involving an instance of serious harm which manifests itself as danger to life or liberty, as distinct from a possibility of danger'.

27 Ms Morgan also cited the decision of Crennan J in *VBAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 212. At [19], her Honour said:

*'Whilst it is clear from the dictionary definitions relied on by the applicant, the common meaning of the word "threat" can include a declaration of intention or determination to cause harm or take some hostile action, common sense dictates that there is a distinction to be made between a real or genuine threat to cause harm or a hollow threat to do so. There is also a distinction to be made between a threat to kill intended to be acted upon, and a threat to kill intended to intimidate, but not to be acted upon.'*

28 Crennan J thought she should follow the decision of Marshal J in *VBAO*. She added, at [28]:

*'Given the construction of s 91R(2)(a) as a reference to "threat" in the sense of "danger" or "risk", it follows that when a Tribunal finds such threats have been made, that does not foreclose further enquiry to determine whether such threats amount to "serious harm" within the meaning of the subsection. Whether such threats are sufficiently serious to amount to persecution within the meaning of Art 1A(2) of the Convention and serious harm within the meaning of s 91R is a question of fact and degree for the Tribunal.'*

29 I also think I should adopt the view of s 91R(2)(a) taken by Marshall J, with which, subject to one clarification, I respectfully agree.

30 The clarification concerns his Honour's distinction between a 'danger to life or liberty' and a 'possibility of danger'. In making that distinction, I do not think Marshall J was intending to depart from the well-understood principle that a person who has to assess whether somebody else has a well-founded fear of persecution for a Convention reason is required to determine whether there is a 'real chance' that the person will suffer persecution if he or she is returned to the country of nationality: see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J). I do not think Marshall J was referring to the future situation, but merely speaking about the past; the threatening words must have connoted real danger, as distinct from a non-serious possibility of danger.

31 I agree with what Crennan J said about the consequences of Marshall J's view. Plainly, persecution is not established merely by proof that somebody has made a statement (the

'threat') about an intention to kill the person seeking recognition as a refugee. The relevant decision-maker must evaluate the 'threat' and determine whether it amounts to 'serious harm' within the meaning of s 91R(2)(a) of the Act. That evaluation needs to take into account all the surrounding circumstances including: the nature of the relationship between the relevant people; the occasion and manner of making the 'threat'; any immediate effect of the 'threat' upon the threatened person; the opportunity (if any) for the threatener to carry out the threat; and so on. Subsequent events may also be relevant, bearing in mind that the ultimate question for the Tribunal is not what has already happened to the protection visa claimant, but what might happen to that person in the future, if he or she returns to the country of nationality.

32 If the Tribunal has regard to all these circumstances, in a particular case, its conclusion as to whether the 'threat' amounts to serious harm, within the meaning of s 91R of the Act, is, as Crennan J said, 'a question of fact and degree for the Tribunal'.

33 In the present case, the Tribunal appears not to have embarked upon such an evaluation. The Tribunal accepted the appellant as a truthful witness. It accepted her claim 'that indigenous Fijians came drinking in her compound and that threats had been made that she would be killed if she complained to the police'. Apparently the appellant did not complain to the police, so the occasion for the indigenous Fijians to carry out their threat never arose. Nevertheless, was this a serious threat of harm? How many indigenous Fijians were involved? Were they people with whom the appellant might have expected to have future contact? What opportunity would they have had to carry out their threat? What was the effect of the threat on the appellant? What light (if any) is cast on the threat by subsequent events? The Tribunal seems not to have considered any of those matters.

34 The Tribunal member noted that he asked the appellant 'if the particular indigenous Fijians lived nearby', and she responded that she believed they did not live nearby, but she was not sure: see para 8 above. It is not clear to me that this exchange related to the people who said they would kill her if she complained to the police. Even if it did, the Tribunal's note does not deal with the issues I have identified. So far as is revealed by the Tribunal's reasons for decision, the member did not evaluate those issues at all. Yet the member said he was 'not satisfied that looked at individually or in their totality the mistreatment suffered by the [appellant] in the past is any more than low level harassment'; it 'is not of sufficient severity to amount to serious harm', within the meaning of s 91R of the Act.

35 Mowbray FM noted the Tribunal had described the appellant's travails as being not more than 'low level harassment'. He said, at [16], that it was implicit in this finding 'that any threat to the applicant's life was not a genuine threat'. That may be so, but the Tribunal was not entitled to reject the genuineness of the threat without giving some consideration to its nature and the circumstances under which it was made. The Tribunal did not do this.

36 It seems to me the Tribunal's failure to consider the seriousness, and likely effect, of the threat to kill the appellant amounted to jurisdictional error. In accordance with common practice, the Tribunal chose to evaluate the appellant's claimed fear of future persecution by reference to what had happened to her in the past. The appellant's claim in relation to the past is that she had suffered 'serious harm' within the meaning of s 91R(2)(a) of the Act, amongst other things, by receiving a threat to her life. If the Tribunal was to use the past as a guide to the future, it needed to evaluate that threat.

….

## d) Restriction on political expression

In U Win v MIMA [2001] FCA 132 the issue was whether persecution could be constituted by restriction upon political expression.

“13 It was submitted by counsel for the applicants that the Tribunal's reasoning, though addressing the applicants' primary claim that they may be suspected of clandestine activity by Burmese officials, and persecuted for that reason, failed to address the subsidiary claim, that the applicants faced persecution because they would be denied the right to express their political opinions freely if returned to Burma.
14 Counsel for the respondent argued that such harm could never amount to persecution under the Convention. It was said that the Tribunal was only required, under the terms of the Convention, to consider whether the applicants would be punished (in the form, for example, of arrest, detention or torture) for their political opinions. Therefore it was said that, since the applicants claimed to have operated clandestinely in the past and gave no indication that they would not do so in the future, it was appropriate for the Tribunal merely to ask, as it had done, what the prospects were that the authorities would discover their activities in the future.

Madgwick J. defined the issue in the following manner:

15 The scope of the concept of "persecution" recognised by the Convention was considered in Chan v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379. Mason CJ said at 388:

> "The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute [persecution], although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason." (emphasis added)

McHugh J said at 431:

> "... the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: [reiterated in] Goodwin-Gill, pp. 38 et seq. In Reg v Immigration Appeal Tribunal; Ex parte Jonah [[1985] ImmAR 7] Nolan J ... held as a matter of law that there was a well-founded fear of persecution when the adjudicator had found 'that if the appellant on his return to Ghana sought to involve himself once again in union affairs, he could be in some jeopardy, but there is no acceptable evidence to indicate that he would be at any material risk if he was to resume his residence in his remote family village where he spent a year and a half immediately prior to coming to this country' [at 12]."

It is clear from these comments that Mason CJ and McHugh J hold that at least in respect of some kind of rights, persecution may take the form of a prohibition on the exercise of them, and is not limited only to actual punishment for exercising such rights. However, it is to be noted that their Honours each said that denial of fundamental freedoms "may", not would, constitute persecution.
16 Counsel for the applicants also supported his case by analogy from cases considering persecution on the membership of a particular social group and religion grounds referred to in the Convention. In Minister for Immigration & Multicultural Affairs v Zheng [2000] FCA 50, Hill J said at para 41 (Carr J agreeing at para 57):

> "For my part I am prepared to accept that the prohibition legally to practise one's religion could, and probably would, constitute persecution on religious grounds for the purposes of the Convention."

It was however held in that case that it was open to the Tribunal, on the evidence, to reach the conclusion that there was no such prohibition in fact.

17 Likewise, it has been held that the need for a homosexual to remain discreet may constitute persecution. In "Applicant LSLS" v Minister for Immigration & Multicultural Affairs [2000] FCA 211 Ryan J said at para 28:

> "An error of law could readily have been imputed to the Tribunal had it acknowledged, on the one hand, that the practice of a homosexual lifestyle as a whole is 'protected' by the operation of the Convention, but, on the other, had denied the applicant all means of meeting prospective sexual partners, thereby reasoning that the Convention does not, as a matter of law, 'protect' a part of the activity of a particular social group that is necessary and integral to the defining characteristic of that group. That erroneous reasoning would render illusory the protection afforded by the Convention, but I am not persuaded that the approach of the Tribunal has been infected by that error and this ground is not made out."

18 There appears to be no reason why, similarly, a denial of freedom to express one's political opinion may not, of itself, constitute persecution…

19 However the mere fact that a particular right is denied is not, in my opinion, necessarily enough to establish refugee status. It will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right. To take an extreme example, heterosexuals could not claim to be persecuted because they are prohibited from engaging in homosexual acts. To take a more mundane example, a person so caught up in the daily round (or grind) as to have no real interest in political questions such as the right to assemble or to speak freely may be an unlikely candidate for refugee status based on an assertion that the impugned country of nationality denies its citizens such rights. However, even for such people, the subject regime may be so appalling as to galvanise them into ardent if terrified support of political change, if only in a dimly understood direction towards an abstraction such as "democratic rights". An opinion that favours full or greater enjoyment of the sorts of civil and political rights commonly enjoyed and aspired to in the Western democracies is or may be the subject of a "political opinion" within the ordinary meaning of that term, used in the Convention.

20 The principle, it seems to me, is that a denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one. But, of course, the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on earth, however important civil and political rights may, as a matter of mere intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potentially real suffering.

21 It is unclear exactly which civil and political rights the Convention extends to protect. Free speech, however, upon the authority of Mason CJ and McHugh J in Chan is clearly

one of them. It is unnecessary, in this case, to determine the limits of such protected rights: there is no question that Burma is ruled by an extremely repressive regime. ..
23 In this case, the more difficult part of the factual assessment may be to determine whether the entire situation of the applicants in Burma was (more correctly: is likely to be) such that their human dignity would be truly affronted by the denial of civil and political rights inherent in the disposition there if they have to return. It is sufficient for present purposes to say that, despite the Tribunal's rejection of certain important aspects of the applicants' story, it cannot be concluded that they must necessarily fail if this matter were properly considered.
Was the alternative claim really raised?
24 Counsel for the respondent also argued that the claim of persecution by denial of political freedom had not been sufficiently raised before the Tribunal. As indicated above, the applicants did state in written submissions to the Tribunal that if returned to Burma, they would "not have the right to speak freely, the right to writing freedom and the right to living freedom." …It appears to me that although what counsel for the applicant termed the "primary" claim was mainly argued before the Tribunal, there is nothing to suggest that the subsidiary claim stated in the application was not pressed by the applicants, who were unrepresented before the Tribunal
25 In light of the high degree of political commitment that the applicants claimed to have demonstrated in the not so distant past (and even though some of their claims more recently to have been politically motivated in their actions were rejected), combined with the independent information considered by the Tribunal, their claim to have been persecuted on the basis of being denied the right to political expression was not only distinctly but also sufficiently raised by the written submission just referred to. The fact the applicants may have been persecuted in this way (if, for them, the denial of civil and political rights did amount to persecution) for some length of time before leaving Burma, or that they may have restrained themselves (if they did) from expressing themselves politically, in the face of grave risks, does not of itself undermine their claim to have been persecuted for being denied the right to free political speech.
26 In the present case the Tribunal accepted that free expression of political opinion was not tolerated by the Burmese government and that those actually undertaking such expression were subject to persecution. It seems clear enough, from its reasons, that the Tribunal did not appreciate that, accordingly, it was required in these circumstances to consider whether, if they returned to Burma, the applicants would face persecution by the very denial to them of their right to free political expression. This failure, in my opinion, constitutes an error of law under s 476(1)(e) of the Act. Further, the Tribunal's failure to apply the law to the claims, constituted a constructive failure by the Tribunal to exercise its jurisdiction and thus gives rise to a reviewable error under s 476(1)(c) of the Act: Sellamuthu, Minister for Immigration & Multicultural Affairs v Guo (1997) 191 CLR 559, Sinclair v Maryborough Mining Warden (1975) 132 CLR 473.

In ***NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2002] FCAFC 259** dismissing appeal from ***Shaibo v MIMA*** **[2002] FCA 158** (Gyles J.) Madgwick J. said( Merkel and Conti JJ. agreeing) distinguishing Win :

Claim of persecution because of denial to express political opinion in the future

19 In oral argument before the Court, there was discussion of whether the Tribunal had erred in failing to consider whether there was a real chance of persecution, should the appellant return to Sri Lanka, because he would not be able to express his political opinion, namely opposition to the conduct of certain police officers towards the Tamil community. Reference was made to Win v Minister for Immigration & Multicultural Affairs [2001] FCA 132. In that case I held that the Tribunal had erred because it had failed to consider the applicants' claim on the basis that, if they returned to Burma, they would be denied the freedom of expressing their political opinion and this could amount to persecution in circumstances where "that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can fairly be said to be integral to his or her human dignity". In Win, there was evidence which could show that the applicants had demonstrated a high degree of recent political commitment and action against the Burmese government.
20 However, the circumstances in this case are very different from those in Win and, whilst it is not essential that the applicant exhibit "a capacity for martyrdom" (Win at [20]) there nevertheless must at least be some evidence to establish a serious affront to human dignity. There was no evidence in this case to suggest the appellant would wish to assert his opposition to the conduct of the police upon his return to Sri Lanka nor that his conscience would be seriously affronted if he felt unable to do so.

The same issue as in Win arose in Oo v MIMA [2001] FCA 348 and was treated by Lindgren J. as follows:

Whether well-founded fear of persecution by reason of political opinion established by absence of freedom of speech and of expression of political opinion
39 Counsel for Mr Oo submits that the RRT erred in not categorising the monitoring for a period which it found Mr Oo would be likely to face upon returning to Burma as being " of sufficient seriousness to amount to persecution". No doubt what may amount to persecution for reason of political opinion of a person with a high degree of political commitment may not amount to persecution for that reason of a person with no such commitment. Similarly, what may amount to persecution for reason of religion of a deeply religious person may not amount to persecution for that reason of an irreligious person.
40 Counsel for Mr Oo submits that the factual findings of the RRT in favour of Mr Oo established that he "holds a well-founded fear that he will not be able to exercise the right to free speech or political opinion should he return to Burma." Counsel referred to Minister for Immigration & Multicultural Affairs v Zheng [2000] FCA 50 (FC) ("Zheng"); and Win v Minister for Immigration & Multicultural Affairs [2001] FCA 132 ("Win").
41 In Zheng, Hill J stated that "the prohibition legally to practise one's religion could, and probably would, constitute persecution on religious grounds for the purposes of the Convention" (at [41]). His Honour concluded, however, that it had been open to the RRT to find, as it had done, that the Chinese authorities did not prohibit Roman Catholics, including the respondent to the appeal from practising their religion. Carr and Whitlam JJ agreed with Hill J in this respect.
42 Win is a recent decision of Madgwick J. His Honour held that the RRT had failed to consider a subsidiary claim of the applicants that they "faced persecution because they would be denied the right to express their political opinions freely if returned to Burma" (at [13]). He concluded that a denial of freedom to express one's political opinion may, of itself, constitute persecution. But his Honour stated (at [19]):

> "However, the mere fact that a right is denied is not, in my opinion, necessarily enough to establish refugee status. It will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right. To take an extreme example, heterosexuals could not claim to be persecuted because they are prohibited from engaging in homosexual acts."

His Honour also stated (at [20]):

> "The principle, it seems to me, is that a denial of [civil rights] would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom."

43 In Win, the applicants had claimed in their written submissions to the RRT to fear persecution because, if returned to Burma, they would "not have the right to speak freely, the right to writing freedom and the right to living freedom" (at [4]). Madgwick J held that, "having accepted that free expression of political opinion was not tolerated by the Burmese government and that those actually undertaking such expression were subject to persecution", the RRT was bound to consider this subsidiary claim made by the applicants because, firstly, the applicants had claimed to have demonstrated a high degree of political commitment in the not so distant past, and, secondly, the claim was distinctly and sufficiently raised (at [25] and [26]).

44 Mr Markus for the Minister refers to an earlier decision of Madgwick J, Cho v Minister for Immigration & Multicultural Affairs [1998] FCA 1663 ("Cho"). In Cho, his Honour held that the applicant had not claimed to have a well-founded fear of persecution based on the fact that she was likely to wish to assert her political opinions in Burma, and, therefore, that the RRT had not made an error of law based on a failure to consider the claim made or on a failure to make a finding on a material question of fact.

45 Mr Markus submits that both cases taken together establish that "in some instances, people who are particularly active in political life, to whom their political activity is so central, denial of those political activities or free expression can be so serious a matter as to amount to persecution". He submits that there are two reasons why the present case is not of this kind. First, the RRT found that Mr Oo had not been an "active dissident" since he was released from his second imprisonment in 1989. I think it is clear from the RRT's findings, including its findings in relation to Mr Oo's participation, but not as a leader, in demonstrations in Sydney and Canberra, that the RRT meant that Mr Oo was not a "prominent" or "leading" or "notable" dissident voice. Secondly, Mr Oo did not claim to fear persecution of the kind and for the reason mentioned. 46 Because I accept the second of these submissions, I need not address the first further

47 It is true that Mr Oo did not claim before the RRT to hold a well-founded fear of persecution by reference to the fact that he would not be at liberty to express his political opinion upon returning to Burma. Rather, his claim was that he feared persecution based on political activities in which he claimed to have participated in the past, in Burma, Thailand and Australia…

Win and Oo were considered by Katz J. in Mar v MIMA [2001] FCA 812 at [36]-[42].

In ***MIMA v Islam*** **[2001] FCA 1681** the Full Court said considering Win (supra):

The decision of the primary judge

8 The respondent's application for an order of review of the Tribunal's decision in this Court was based on s 476(1)(e) of the Act although he did not identify any details of the alleged breach. In reviewing the Tribunal's decision the learned primary judge concentrated on its conclusion that the respondent could avoid political violence by not attending political rallies such as the 1998 rally referred to at [6] above. His Honour expressed concern at this conclusion given his view that the respondent is,

> "in possession of findings from the Tribunal to the effect that he had a history of political activism spanning 10 years, including significant student leadership roles and recent involvement in the organisation of a political rally, as well as actual participation in the rally."

9 The primary judge relied on his decision in Win v Minister for Immigration & Multicultural Affairs [2001] FCA 132 ("Win"). In Win his Honour said at [20]:

> "The principle, it seems to me, is that a denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one. But, of course, the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on earth, however important civil and political rights may, as a matter of mere intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potentially real suffering."

10 Applying that principle to the respondent's situation the primary judge stated:

> "It was implicit in the [respondent's] claim that he is the sort of person who would want to continue to express his political opinion and the Tribunal's findings do not negate this. It cannot necessarily be concluded from the Tribunal's reasons that for the [respondent] to be practically unable, for want of effective state protection against serious violence, to participate in public political assemblies in Bangladesh would not, in the restrictive sense explained in Win, affront his human dignity. It may be possible to conclude that the [respondent] is driven by his conscience, in a way integral to his human dignity, to wish to express his political positions publicly. I stress that it also may not be possible. In any case, the matter should have been examined."

…
THE APPEAL

12 The appellant challenged the decision of the primary judge on the basis that the respondent had not claimed that he feared persecution constituted by a complete denial of his freedom of political expression and that, in any event, the findings made by the Tribunal would not support such a claim. In making this claim the appellant recognised that the primary judge was relying on an implicit claim of a denial of freedom of political expression rather than an explicit claim; see [10] above.
13 The principle in Win, on which the primary judge relied, is said to be that the relevant denial of civil rights must be "so complete and effective that it actually and seriously offends a real aspiration" that is "integral to [the asylum seeker's] human dignity". The situation must be one that involves "actual or potentially real suffering". For the appellant it was submitted that even if, as a matter of principle, the views expressed in Win are correct, there is no basis for its application in this case.
14 The case the respondent presented to the Tribunal was that he had fled Bangladesh in fear of his life, occasioned by the beating he received at the political rally he organised, the false cases filed against him and the warrant issued for his arrest. However, the only aspect of this claim accepted by the Tribunal is that the respondent was beaten at a rally in circumstances that did not support a claim to have been targeted for his political opinions. The Tribunal concluded that the respondent could avoid the harm he had experienced in the past by not attending such rallies. The Tribunal did not accept that all avenues of political opposition would be closed to the respondent. In the passage quoted at [7] above the Tribunal referred to the respondent's own circumstances as supporting the conclusion that there was some freedom to express political opinion opposed to the current government of Bangladesh, without the consequence of charges being brought against him.
15 There is nothing in the facts as found by the Tribunal to suggest that the respondent had claimed (expressly or by implication) that non-attendance at political rallies would involve such an infringement of his right to express his political opinions as to constitute persecution or be capable of constituting persecution or cause the kind of suffering contemplated in Win.
16 The respondent's application for an order of review of the Tribunal's decision is similarly focused on his concern for his physical safety…
…
18 In our opinion, the conclusion of the primary judge appears to require that the Tribunal make good a case that the respondent not only has not articulated but one that would be inconsistent with the facts as found by the Tribunal, and at best purports to present some elements of a claim….

Note in Applicant in V 528 of 2000 v MIMA [2002] FCA 1072 consideration of the same issue as Oo per Ryan J.:

Did the Tribunal err in failing to address the risk of persecution by denial of the applicant's right to express his political opinions?
42 This second respect in which the Tribunal was said to have erred in law was its failure to apprehend a "free standing" claim of fear of persecution distinct from the more generalised fear of bodily harm or harassment, which I take to include deprivation of, or restrictions on, the applicant's physical liberty. Counsel for the applicant contended for this discrete claim by pointing to the second part of the answer to the question asked on page 7 of the Application for a Protection Visa which is quoted at [19] above. The relevant sentence, it will be recalled, was;

"I will never be able to express my political opinions in Cambodia while the Hun Sen regime is in power."

43 According to Counsel for the applicant, that sentence expressed a separate fear of restrictions on, or denial, of the applicant's right of freedom of political expression, which was a separate form of persecution from that claimed to be feared by reason of his membership and activities in support of FUNCINPEC. In support of this part of the applicant's case stress was laid on those statements in which he referred to his role as a communicator in the cause of democracy and human rights…

…

48 Against that background, Counsel for the applicant referred to this passage from the judgment of Lindgren J in Oo v Minister for Immigration and Multicultural Affairs [2001] FCA 348, at [39];

"Counsel for Mr Oo submits that the RRT erred in not categorising the monitoring for a period which it found Mr Oo would be likely to face upon returning to Burma as being 'of sufficient seriousness to amount to persecution'. No doubt, what may amount to persecution for reason of political opinion of a person with a high degree of political commitment may not amount to persecution for that reason of a person with no such commitment. Similarly, what may amount to persecution for reason of religion of a deeply religious person may not amount to persecution for that reason of an irreligious person."

49 As I understand the argument, it was sought to identify the present applicant as a deeply committed political activist for whom even a slight amount of "monitoring" or restriction of the expression of his views in support of human rights and democracy would amount to persecution. However, as indicated earlier in these reasons, the Tribunal, in fact, accepted that the applicant was a committed FUNCINPEC activist but was unable to find, in light of the changed circumstances in Cambodia, that he would be at risk of persecution in any of its forms.

50 At [42] in Oo Lindgren J referred to the judgment of Madgwick J in Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132 and noted;

"... His Honour held that the RRT had failed to consider a subsidiary claim of the applicants that they "faced persecution because they would be denied the right to express their political opinions freely if returned to Burma" (at [13]). He concluded that a denial of freedom to express one's political opinion may, of itself, constitute persecution. But his Honour stated (at [19]):

"However, the mere fact that a right is denied is not, in my opinion, necessarily enough to establish refugee status. It will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right. To take an extreme example, heterosexuals could not claim to be persecuted because they are prohibited from engaging in homosexual acts."

His Honour also stated (at [20]):

"The principle, it seems to me, is that a denial of [civil rights] would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a

claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom."

In Win, the applicants had claimed in their written submissions to the RRT to fear persecution because, if returned to Burma, they would "not have the right to speak freely, the right to writing freedom and the right to living freedom" (at [4]). Madgwick J held that, "having accepted that free expression of political opinion was not tolerated by the Burmese government and that those actually undertaking such expression were subject to persecution", the RRT was bound to consider this subsidiary claim made by the applicants because, firstly, the applicants had claimed to have demonstrated a high degree of political commitment in the not so distant past, and, secondly, the claim was distinctly and sufficiently raised (at [25] and [26])."

51 Madgwick J in Win had observed, at [20];

"The principle, it seems to me, is that denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one. But, of course, the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on earth, however important civil and political rights may, as a matter of mere intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potentially real suffering."

52 Like Lindgren J in Oo, I am not persuaded that the claim to fear persecution in the form of restrictions on the applicant's freedom of political expression was sufficiently raised as a separate and distinct fear from the fear of undifferentiated persecution by reason of his political activism…

…

54…unlike the claim considered by Madgwick J in Win, the case made by the present applicant did not contain a separate subsidiary assertion that he would be denied the right to express his political opinions freely if he were returned to Cambodia…

In Vaka v MIMA [2001] FCA 404 O'Loughlin J. had earlier noted:

19…It is quite clear that persecution can be found to exist even though there is no physical contact: Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 430-1 per McHugh J and at 405 per Toohey J. Mr Clisby claimed that there was support for his argument in the judgment of Mansfield J in Rana Singh v Minister of Immigration and Multicultural Affairs [2000] FCA 1706. In that case his Honour quoted from a passage from the reasons of the Tribunal which was as follows:

"The applicant gave oral evidence that there was danger to his life in India from the police. On the applicant's own evidence he was questioned and ill treated by the

police on several occasions, including following the death of the Chief Minister. If the Tribunal were to accept this evidence, the police had ample opportunity to kill him if they so wished. He has not provided evidence of any attempt to kill him. For this and all the above reasons the Tribunal does not accept this claim."

His Honour then said:

"That passage, the applicant submitted, also demonstrated an error of law. It is capable of being construed as meaning that the absence of an attempt to kill the applicant means that he was not arrested as a perceived Sikh activist and mistreated for that reason. Conduct amounting to persecution does not necessarily require conduct involving an attempt to kill a visa applicant. It may be constituted by conduct falling significantly short of that. See for example the observations of McHugh J in Chan at 427 and 429-431. As his Honour pointed out at 430, 'persecution' need not involve being threatened with loss of life or liberty. See also per Toohey J at 405 who agreed with McHugh J on that matter. It does not follow from the fact that the applicant was not killed, or that the authorities did not attempt to kill him, that he was not arrested and mistreated."

With respect, I agree with his Honour's remarks. They do not, however, contrary to the arguments advanced on behalf of the applicant, assist the applicant. The applicant in Rana Singh's case was successful; however, his success was not directly and exclusively attributable to that passage in the Tribunal's reasons. The applicant was successful because, as his Honour found, the Tribunal had erred in the way in which it applied an evidentiary test with respect to the weight that should be given to a letter and to an affidavit (see par 40 of his Honour's reasons).

In Win v MIMA [2001] FCA 1451 (18 October 2001) it was said (per Tamberlin J.):

12 The applicant submits that the RRT decision does not deal with his claim that, if returned, he will speak out or act against the regime and that there is a real chance that he will be persecuted for so doing. It is also submitted that the repression of the applicant's right to free speech in Burma is substantial and would constitute persecution.

13 In answer to these submissions, it is argued for the Minister that the question of the applicant speaking out against the regime was not raised or argued before the RRT, nor was evidence furnished to this effect. It is also said that the RRT found that the applicant did not strike it as the "kind of person" who would influence anti-government activities if returned to Burma. Furthermore, it is submitted that the RRT found that any harassment arising from the applicant's action or speech in Burma, of the type considered by the RRT, would not amount to persecution.

14 As to the first question, I am satisfied that the claim as to the applicant's future conduct if returned to Burma was raised before the RRT. The solicitor's letter expressly raised it and referred to the material on which it was based; namely, the applicant's continued political activities as evidenced by his conduct as a repetitive demonstrator in Australia. In addition, there is the accepted country information that a person may be of more than "little concern" to Burmese authorities if perceived by them to be a "repetitive demonstrator". There is authority that the restriction on free expression may amount to persecution if it can actually and seriously offend a real aspiration held by an asylum seeker such as to offend human dignity. It is not necessary to show that the claimant is a leading exponent or a prominent activist: see Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132 at [20] per Madgwick J; Islam v Minister for Immigration and Multicultural Affairs [2001] FCA 525 at [16] per Madgwick J.

15…the failure by the RRT in the present case to address the question whether the applicant would express anti-government opinion if returned and would be prevented from engaging in such expression or activities, amounted to an error of law within the reasoning accepted in Yusuf. This is because the submission as to future conduct was squarely raised, there was abundant material as to the severe repression of political views by Burmese authorities, and it was accepted both that the applicant was a repeat demonstrator and that his activities could be of "something greater than 'little concern'" to authorities in Burma…
..
16…the matters referred to above and the findings made by the RRT were sufficient to call for consideration of the questions whether there was a real chance of persecution of the applicant if returned to Burma for political opinion in the event that he expressed his views, and whether there was a real chance he would express his views openly so as to attract punishment.

The caveat that the existence of a generally repressive law does not of itself establish a discriminatory denial of freedom of expression to a particular social group or to persons by reference to the other Convention grounds should be kept in mind (W212 v MIMA [2001] FCA 1445 at [21] (French J.)

Kenny J. in VJAD v MIMIA [2004] FCA 468 considered the relevant principles raised in the Win cases, Oo and MIMA v Islam above and held that there had been no error of failing to deal with a claim as to future conduct on return to a country of nationality involving the restriction on free expression which offends a genuinely held aspiration. The applicant in the present case did not claim before the Tribunal that she would be at risk of persecution because, if she returned to Burma, she would not be able to exercise civil rights of the kind referred to in these cases. Her Honour said:

5 The applicant claims to have a well-founded fear of persecution if she were to return to Burma by reason of her political opinion…
…
20 In support of her case that the Tribunal's decision was affected by jurisdictional error because the Tribunal failed to have regard to relevant considerations - the applicant's status as a repetitive demonstrator and that she was in hiding from 1991 – the applicant's counsel referred to Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132 ("Win") and Phyo Thet Win v Minister for Immigration and Multicultural Affairs [2001] FCA 1451 ("Phyo Thet Win"). The applicant's counsel submitted that these cases supported the applicant's case "in terms of the analogy of this applicant having a depth of commitment, going into hiding, and then when the fetters of the regime are removed she comes to Australia, her anti-government activities bloom".
…
28…I reject the applicant's submission that the Tribunal did not take into account the fact that she attended demonstrations in Australia and the country information that related to it.
…

…
33 As already mentioned, the applicant relied heavily on the decisions in Win and in Phyo Thet Win. Counsel for the applicant relied on these decisions to support the proposition that, in the present case, the Tribunal failed to recognise that the taking of steps to hide political opinions and activities is no answer to a claim for refugee status where an applicant claims a well-founded fear of persecution for those opinions or activities. Further support for this submission is contained in the recent decision of the High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 ("S395/2002") at 124-126 [48]-[53] and 122 [40]-[41], 124 [48] per McHugh and Kirby JJ and 131-132 [80]-[82] per Gummow and Hayne JJ. Further, for present purposes, I accept, as both parties maintained, that nothing turns on the fact that s 91R of the Act was applicable at the time the Tribunal made the decision under challenge in this case, but was inapplicable at the time of the Tribunal decisions in Win and Phyo Thet Win: see Migration Legislation Amendment Act (No 6) 2001 (Cth) (No 131 of 2001), Sch 1, Pt 2, Item 7. This is, indeed, consistent with the observations of McHugh and Kirby JJ in S395/2002, at 124 [48]. For the reasons I am about to give, however, I accept that, as the respondent contended, these decisions are distinguishable from the present case.
34 As in this case, the applicant before the Court in Win was a Burmese national, whose application for a protection visa had been rejected, first, by the Minister's delegate and, subsequently, by the Tribunal. The protection visa applicant contended, in written submissions before the Tribunal, that he feared being persecuted on his return to Burma because, among other things, he would "not have the right to speak freely, the right to writing freedom and the right to living freedom": Win at [4]. Madgwick J treated this submission as a claim that certain forms of political expression were prohibited in Burma; that the applicant would comply with the prohibition if he returned to Burma; and that for the applicant to comply with the prohibition would constitute persecution of him for reasons of political opinion. His Honour stated, at [18]-[19] and [23] (emphasis original):
There appears to be no reason why, similarly, a denial of freedom to express one's political opinion may not, of itself, constitute persecution.
...

However the mere fact that a particular right is denied is not, in my opinion, necessarily enough to establish refugee status. It will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right. ...

In this case, the more difficult part of the factual assessment may be to determine whether the entire situation of the applicants in Burma was (more correctly: is likely to be) such that their human dignity would be truly affronted by the denial of civil and political rights inherent in the disposition there if they have to return.
35 Madgwick J held that the Tribunal was required to deal with the claim pressed by the applicant: see [24]-[25]. The Tribunal's failure to deal with the claim enlivened the grounds of review set out in pars 476(1)(c) and (e) of the Act: see [26]. His Honour said, at [25]:
In light of the high degree of political commitment that the applicants claimed to have demonstrated in the not so distant past (and even though some of their claims more recently to have been politically motivated in their actions were rejected), combined with the independent information considered by the Tribunal, their claim to have been persecuted on the basis of being denied the right to political expression was not only distinctly but also sufficiently raised by the written submission just referred to.
36 Madgwick J held that, when dealing with the claim on remittal, the Tribunal was required to ascertain the importance which the applicant placed on engaging in the

proscribed forms of political expression: see [19] and [20]. The denial of the ability lawfully to engage in forms of political expression would only amount to persecution of the applicant for reasons of political opinion if "that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity": see [20].

37 The applicant in the present case did not claim before the Tribunal that she would be at risk of persecution because, if she returned to Burma, she would not be able to exercise civil rights of the kind referred to in Win. Her claim to a well-founded fear of persecution derived from what she claimed she had done in Burma in the past and, more recently, in Australia. The Tribunal dealt with this claim: compare Than Zaw Oo v Minister for Immigration and Multicultural Affairs [2000] FCA 348 at [48] per Lindgren J. Win is distinguishable from the present case, because in this case the applicant did not make any claim concerning the exercise of her right to political expression in the future.

…

39 In Phyo Thet Win, the applicant was also a Burmese national, who claimed that there was a real chance of persecution for reasons of political opinion if he returned to Burma. Referring to Win and to Madgwick J's decision in Islam v Minister for Immigration and Multicultural Affairs [2001] FCA 525 (appeal allowed: see Minister for Immigration and Multicultural Affairs v Islam [2001] FCA 1681), Tamberlin J found, at [14] that, before the Tribunal, the applicant had raised a claim as to his future conduct if returned to Burma; and accepted that there was "authority that the restriction on free expression may amount to persecution if it can actually and seriously offend a real aspiration held by an asylum seeker such as to offend human dignity". His Honour held, at [15], that the Tribunal had failed to consider the nature of the applicant's future political activities and whether the regime would prevent him from engaging in them, and that this failure amounted to an error of law. According to Tamberlin J, at [15]:

This is because the submission as to future conduct was squarely raised, there was abundant material as to the severe repression of political views by Burmese authorities, and it was accepted both that the applicant was a repeat demonstrator and that his activities could be of "something greater than 'little concern'" to authorities in Burma.

40 As already noted, the applicant in this case did not raise the question of her future conduct if returned to Burma and, in any event, in contrast to the Tribunal in Phyo Thet Win, the Tribunal in this case held that the nature of her participation in demonstrations in Australia was not such as to lead her to "having a profile that would warrant the attention of the authorities on her return".

…

### e) Other forms of discrimination amounting to persecution including in Employment

(see now S91R)

Note the broad principle enunciated by the Full Federal Court in Chen v Minister for Immigration and Ethnic Affairs (1995) 58 FCR 96 at 104, that the denial of access to employment could constitute persecution, "if that denial is arbitrary and indefinite and part of a process of harassment by authorities for the purpose of suppressing political dissent".

If an Applicant will be unable to obtain employment for a Convention reason if he returns to his country of origin or that, for such a reason, he will be limited to jobs that are so dangerous or demeaning or so out of keeping with his qualifications, this may constitute 'persecution' for the purposes of the Convention: see Prahastono v MIMA (1997) 77 FCR 260 at 267-8; [1997] 586 FCA where Hill J. stated:

"Discrimination in employment may constitute persecution in the relevant sense if for a Convention reason. However, whether it does so depends on all the circumstances. Clearly, in an economy where there was no private enterprise at all, inability to obtain government employment for a convention reason would constitute discrimination because that would constitute an "act of oppression"…And it would be just as much oppressive and thus involve persecution if, instead of there being no ability to obtain employment, there is ability to obtain employment but limited tojobs which are dangerous or demeaning to to the person employed to do them. If, on the other hand, there existed a mixed economy, so that government employment merely competed with private employment and exclusion from government employment would not result or be likely to result in the person seeking work being unable to obtain appropriate work and thus an appropriate living, then it is hard to see that the refusal to permit employment would constitute persecution. That would not be oppressive, at least to any significant extent. Thus generally, whether restriction on employment amounts to persecution in a Convention sense will depend upon all the circumstances, and particularly upon whether there can be said to be oppression or real harm to the person." (emphasis added)

His Honour had earlier stated at 265:

So, it may be accepted that while, perhaps a fortiori, deprivation of liberty will amount to persecution, something short of that will suffice. Denial of access to employment or education might be persecution. Nothing in the above passage requires the conclusion that deprivation of employment, or for that matter education, will necessarily be persecution, even if done for a Convention reason. It will be necessary to look at all of the facts. We can, at this point, put to one side education for it is not suggested that the applicant wishes to engage in any further educational activities.

The judgment of Mason CJ in the same case refers to the notion of significant harm, detriment or disadvantage where persecution is to be found. His Honour said (at 388):

"The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason."

In Li Shi Ping at first instance before Drummond J ((1994) 35 ALD 557), it was argued that the applicant would face "employment difficulties" if returned to China. His Honour said (at 585), in a passage cited by the Tribunal:

"Such a detriment is I think well capable of constituting 'persecution' within the meaning of that term in the Convention definition of 'refugee': see Chan, supra, per McHugh J at CLR 430-1."

On appeal ((1994) 35 ALD 225)(and the Tribunal was criticised for not having noted that there had been an appeal, albeit that for relevant purposes the appeal did no more than affirm the judgment at first instance) the above passage was referred to with approval by Carr J, with whom the other members of the Court, Sheppard and Gummow JJ, agreed. His Honour continued at 231:
"The only evidence before Mr Barnsley relating to the consequences of being denied employment ... was to the effect that once sacked from a work unit for political activities a person would be very likely confined to obtaining employment in the private sector. The evidence was that employment in the private sector in China accounted for less than 1% of all urban workers. Employment would therefore be extremely difficult to find."

A claim of persecution by reason of denial of access to government employment was considered and rejected on the facts by RD Nicholson J. in W244/01A v MIMA [2001] FCA 52. His Honour said:

15…The political involvements of the family had caused one brother to become mentally ill and destroyed the life of another brother. It had also led to him not being able to work and having to leave the country. This was the consequence of the nature of the governmental system in his country. He also submitted that it was not satisfactory for the Tribunal to have found that he had employment in the private sector when the reality was that he worked in his brother's shop which did not have any of the remuneration for holiday and sick pay as a government job had.
16 It is the case that "denial of access to employment may constitute persecution": Chan v Minister of Immigration & Ethnic Affairs (1989) 169 CLR 379 at 429 - 431 per McHugh J. Denial of access to employment is therefore "capable of constituting persecution": Li Shi Ping v Minister for Immigration & Multicultural Affairs (1994) 35 ALD 557 approved by the Full Court in (1994) 34 ALD 228. In Prahastono v Minister for Immigration & Multicultural Affairs (1997) 77 FCR 260, an applicant was unable to obtain work in the public service because of his father's involvement in an anti-government coup. Though he had been employed at various times in the private sector. Hill J said (at p 267):

> "... discrimination in employment may constitute persecution in the relevant sense if for a Convention reason. However, whether it does so depends on all the circumstances. Clearly, in an economy where there was no private enterprise at all, inability to obtain government employment for a Convention reason would constitute discrimination because that would constitute an "act of oppression", to adopt the language of McHugh J in Chan. And it would be just as much oppressive and thus involve persecution if, instead of there being no ability to obtain employment, there is ability to obtain employment but limited to jobs which are dangerous or demeaning to the person employed to do them. If, on the other hand, there existed a mixed economy, so that government employment merely competed with private employment and exclusion from government employment would not result or be likely to result in the person seeking work being unable to obtain appropriate work and thus an appropriate living, then it is hard to see that the refusal to permit employment would constitute persecution. That would not be oppressive, at least to any significant extent."

…

23 In the submissions for the respondent it was said, seemingly based on that passage, that the Tribunal made a finding of fact to the effect that the applicant's inability to secure a government job did not amount to persecution because he had always found employment in the private sector. It is now accepted for the respondent, however, that the Tribunal did not make any finding of fact on the matter. Furthermore, under that section of the Tribunal's reasons headed "Findings and Reasons" there is no reference to whether the applicant's inability to secure a government job did or did not amount to persecution.
24 In the light of the authorities on the question of persecution and the issue of discrimination and employment, it is relevant to inquire whether the Tribunal was required to apply the law relating to persecution to the facts of the applicant's inability to secure a government job and to form an opinion at to whether or not that inability amounted to persecution and whether it did so.
…
26… the finding by the Tribunal that the applicant did not have a political profile, and did not suffer discrimination because of certain family members association either with the MKO and the Fadayeian Khalq, rendered otiose the making of a finding on the specific issue of whether the applicant was denied government employment, and if so, whether this denial of employment amounted to persecution.
…
30 Even if it is assumed that a degree in Business Management would ordinarily suffice to give an Iranian applicant an accounting job in government, the applicant must still show failure to secure such government employment because of his ideological profile so disadvantages the applicant that, on the McHugh J test in Ibrahim, the applicant "cannot be expected to tolerate it" or that the discrimination is such that it represents a "significant departure from the standards of the civilised world" (Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 201 CLR 293 at par 29 per Gleeson CJ, Gaudron, Gummow and Hayne JJ). I agree with the submissions for the respondent that only if the definition of persecution in Gersten is not only authoritative, but truly signifies that persecution need not be of a "serious" nature or of "significant" harm, would it be open to the Tribunal to conclude that the discrimination to this applicant's answers, on any view, "persecution" in the Convention sense.

In WAEW of 2002 v MIMIA [ 2002] FCAFC 260 the Full Court dismissed the appeal from W244 and said:

…

17 We are unable to discern any error in the reasoning of the RRT or, more importantly, in the reasoning of R D Nicholson J. In our view, the matters relied upon before the RRT did not demonstrate that the appellant had suffered persecution.
18 In Minister for Immigration and Multicultural Affairs v Kord [2002] FCA 334 Marshall and Dowsett JJ said at [53] that:

> "The Tribunal was not, in our view, seeking to create its own succinct test for determining whether or not particular conduct amounted to persecution. It was rather adopting the various descriptions used from time to time in the authorities and so informing itself as to the nature of the concept of persecution. It follows that the Tribunal's decision was informed by its consideration of these descriptions. Having so directed itself as to the law, the Tribunal recorded its conclusion that any

> fear of persecution on the respondent's part was not well-founded. When one looks at the facts of the case it is not difficult to see why the Tribunal came to that conclusion. Although the respondent complained of difficulty in obtaining some forms of employment, it seems that he generally enjoyed regular employment while in Iran. His difficulties were relevant matters for consideration by the Tribunal, but they were not conclusive. Had he not been able to find employment at all, or if the differences between the conditions of the employment open to him and of that not open to him were significant, those matters would also have been relevant, but they seem not to have been in issue."

19 In this case, although the appellant complained that he was unable to practise his chosen profession as an accountant because he could not obtain government employment, the RRT found that he had always held employment in Iran. That was a finding which the appellant sought to challenge before this Court, but which was plainly open. At least by implication, it concluded that although his inability to practice as an accountant was relevant to the issue of whether he faced persecution, it was not conclusive. In accordance with a well established body of authority dealing with the circumstances in which denial of access to employment may constitute persecution (referred to by his Honour at [16] of his judgment), there was nothing oppressive about his inability to obtain employment within the government sector, even assuming that fact, given that he was capable of finding other employment. His employment history revealed that he had qualified in Business Management, and that accountancy was merely one field open to him. Importantly, the foundation upon which his claim of discrimination was based was a refusal to hire him as a Human Resource Officer, and not a refusal to employ him as an accountant. His Honour correctly found that it was open to the RRT to find that any employment difficulties confronting him did not amount to persecution.

…

## f) Question of fact

Whether established claims are sufficiently serious as to amount to persecution is a question of fact and degree to be addressed by the Tribunal and not by the Court; Arumugam v MIMA [1999] FCA 251 at [37] (on appeal, [1999] FCA 1285) ;Beh v MIMA [2001] FCA 1054. If a Tribunal's conclusion that the type of harm experienced by the applicant does not amount to persecution is one that was open to it there is no reviewable error.

Note too Gersten v MIMA [2000] FCA 855 at [48] where the Full Court (Hill, Mathews and Lindgren JJ.) said:

It is inappropriate to attempt a definition of ‘persecution’, if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case…

.Minister For Immigration And Multicultural And Indigenous Affairs v SZANS [2005] FCAFC 41 (Weinberg Jacobson and Lander JJ.) allowed the appeal from SZANS v MI [2004] FMCA 445 (Driver FM) The claim by the respondent was that as a homosexual his family would impose a heterosexual marriage upon him and he did not wish to marry . The RRT held that any pressure upon the respondent to marry was not for a Convention reason. There was a further finding that respondent was discreet about his homosexuality and had made no claims that he suffered because of it . It held that as a discreet man whose pattern of behaviour would not change there was no real chance that he would be exposed as a homosexual if he returned . No contention that RRT committed error identified in Respondent S395/2002 v MIMA; Respondent S [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 . The argument was that the Tribunal overlooked element of claim that he faced serious harm from the consequences of a heterosexual marriage - Federal magistrate found that RRT failed to consider consequences whether respondent would be persecuted if he succumbed to pressure of marriage and that consequences of being forced to enter into a heterosexual marriage constituted persecution for a Convention reason

It was held on appeal

The RRT's findings that respondent would not change his pattern of behaviour, that he would not come to the adverse attention of people in Bangladesh and that there was no Convention nexus, effectively disposed of claim. There was no jurisdictional error in finding an absence of any Convention nexus.

The question whether a forced heterosexual relationship would constitute serious harm was a question of fact for the RRT - where the question is whether the material which was before the Tribunal reasonably admits of different conclusions as to whether it falls within the ordinary meaning of a statute, the question is one of fact - question of whether consequences of a homosexual being forced to participate in a homosexual marriage constituted "serious harm" for the purposes of the Convention, was plainly a question of fact . The Court said:

20 The RRT accepted that the expectation that offspring will marry is universal and non-discriminatory. It made the following findings:-

> "I find that any efforts on the part of the Applicant's family to get him to marry would be for this universal societal expectation and for no other reason.
>
> By his own account no one in the country is aware that he is Gay and this includes all members of his own family.
>
> As discussed above I find he would not at any time in the reasonably foreseeable future either act in a manner which would identify him as being Gay, nor would he open up to his family and tell them he is.
>
> This being the case, I find that the expectation or pressure for him to marry is not an act of harm or detriment based on any Convention reason, nor is there any discriminatory element to it."

50…The appellant submits that the question whether a forced heterosexual relationship would constitute serious harm was a question of fact for the RRT, and not a matter for the Federal Magistrate to determine.

51 Where the question is whether the material which was before the Tribunal reasonably admits of different conclusions as to whether it falls within the ordinary meaning of a statute, the question is one of fact; see Hope v Bathurst City Council (1980) 144 CLR 1 at 8; Vetter v Lake Macquarie City Council (2001) 202 CLR 439 at [24] – [27].

52 Here, the question of whether the consequences of a homosexual being forced to participate in a homosexual marriage constituted "serious harm" for the purposes of the Convention, was plainly a question of fact, or of mixed fact and law, within the test stated in the authorities.

….

## 11. PERSECUTION BY NON-STATE AGENTS WHICH STATE UNABLE OR UNWILLING TO PREVENT

The House of Lords in Horvath v Secretary of State for the Home Department, [2000] 3 WLR 379, 6 July 2000 dealt with this issue as it concerns the requirement of establishing a lack of State protection and the point at which this becomes relevant in an analysis of conduct claimed to give rise to a Convention ground.

A succinct statement of the proposition for which this decision stands is provided by the majority judgment of the Full Court **in *MIMA v Khawar* (2000) 178 ALR 120, 61 ALD 321, 101 FCR 501** delivered by Lindgren J.His Honour said:

"142 In the recent case, Horvath v Secretary of State for the Home Department, unreported, 6 July 2000, the House of Lords was required again to consider the issue of lack of state protection in a case of persecution by a non-state agent. The appellant was a citizen of Slovakia. He lived there with his wife and other members of his family. They were Roma (gypsies) and were persecuted by "skinheads". He alleged that the state, through its police service, had failed to protect him from them.
143 The Immigration Appeal Tribunal concluded that while the appellant had a well founded fear of violence by skinheads, this did not amount to "persecution" because the appellant had not shown that he was unable, or through fear of persecution, unwilling, to avail himself of the protection of the state. The Court of Appeal dismissed his appeal from the Tribunal's determination.

144 Their Lordships' judgment on the appellant's further appeal to the House of Lords was delivered by Lord Hope of Craighead. His Lordship found it necessary to address only one question which the parties had identified as calling for determination. That question was:

> "[D]oes the word 'persecution' denote merely sufficiently severe ill-treatment, or does it denote sufficiently severe ill-treatment against which the state fails to afford protection?"

145 His Lordship stated that the Convention purpose which was of paramount importance for solution of the problem raised was that found in "the principle of surrogacy":

> "The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention in his own country to turn for protection to the international community."
>
> …

147 His Lordship thought that the lack of state protection had a part to play in the application of both limbs of the definition: the first "well-founded fear ..." limb, and the second "unable or ... unwilling" limb. Accordingly, he stated:

"... in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element."

148 Horvath differed from Islam and the present case in that in Horvath the harassment was Convention based (being directed against the Roma) whereas in Islam and the present case the violence was not directed against all Pakistani women or all Pakistani married women but only against the particular wife. It is noteworthy that Islam was not referred to in Horvath. Horvath is, nonetheless, of relevance for its emphasis on surrogate protection as providing the principle that unifies the various elements of the definition of "refugee". Their Lordships' analysis is to the effect that in a case of persecution by non-state agents, it is not only permissible, but necessary to find a well-founded fear of lack of state protection in order to find even the first limb satisfied (emphasis added). This view is consistent with both approaches to the present case that I outlined earlier".

See now the judgment of McHugh and Gummow JJ. in ***MIMA v Khawar*** **(2002) 210 CLR 1 76 ALJR 667 187 ALR 574 67 ALD 577 [2002] HCA 14** at [66]-[75] [84]-[87] see above **Chapter 7. MEMBERSHIP OF A PARTICULAR SOCIAL GROUP b) Women** followed in ***SBBK v MIMIA*** **[2002] FCA 565** per Tamberlin J. (at [31]-[35]) affirmed in ***MIMIA v SBBK*** **[2003] FCAFC 129 (2003) 199 ALR 43 75 ALD 40** in **Chapter 7**

In WAFH v MIMIA [2002] FCAFC 429 the Full Court (Lee Hill and Tamberln JJ.) said, accepting the principle, following Khawar , that conduct need not be state-sanctioned before it can be said to be persecution within the meaning of the Convention:

20 The primary submission made on behalf of the appellant was that the Tribunal had erred by imposing the requirement, inconsistent with the decision of the High Court in Minister for Immigration & Multicultural Affairs v Khawar (2002) 187 ALR 574, [2002] HCA 14 that before an act could constitute persecution in the sense used in Article 1(A)(2) of the Convention, that act must be officially sanctioned.

…

25 There was country material before the Tribunal, particularly a document prepared by the Department of Foreign Affairs and Trade ("DFAT") in 1996, which discussed the structure of power in Iran and, particularly, the role of a number of bodies that are independent, at least officially, from the government.

26 The country is, as is well known, an Islamic State. In addition to the normal secular authorities such as the police, there are what DFAT refers to as "semi-autonomous hard-line revolutionary elements who defend existing practices as being in conformity with revolutionary Islamic values". Under the heading "Internal Security" the material referred to the "'morals' police" which tend to operate as a separate unit, the Islamic Revolutionary Guard Corps (IGRCR or "Pasdaran") which is tasked in the constitution with "safeguarding the Revolution" and which plays a role, particularly in matters involved in internal unrest

and morals policing. The Basiji is a volunteer mobilisation force created during the Iran-Iraq war and made up of young Hezbollah. The Basiji is under the wing of the Pasdaran but enjoys an enhanced role in morals policing and the quelling of civil unrest.

27 Another document, a country assessment of Iran prepared by the UK Home Office refers to the Pasdaran as using violence to disperse unauthorised gatherings. The document, so far as relevant says:

> "In April 1998 the head of the Revolutionary Guard Corps made clear the fact that they would repress efforts to achieve reform by persons perceived to be 'counter-revolutionaries'...
>
> The Basij, or Baseej (paramilitary volunteer forces), come under the control of the Revolutionary Guards. ... They are active in monitoring the activities of citizens, enforcing the hijab and arresting women for violating the dress code, and seizing 'indecent' material and satellite dish antennae. In May 1999 the Minister of Islamic Culture and Guidance stated in public remarks that the Government might support an easing of the satellite ban. ... The 'Special Basijis' are not permitted to participate in political parties or groups, although other members of the Basij can belong to political associations if they are not on a Basij mission ...
>
> Hezbollahi ('partisans of God') consist of religious zealots who consider themselves as preservers of the Revolution. They have been active in harassing government critics and intellectuals, have firebombed bookstores and disrupted meetings. They are said to gather at the invitation of the state- affiliated media and generally act without meaningful police restraint or fear of persecution."

28 Another reference to the Hezbollah is to be found in a Human Rights Watch 1999 World Report, referred to the Tribunal by the appellant's representative which, inter alia, notes:

> "In March, Hezbollahi broke up a peaceful demonstration by students in Tehran criticizing the role of the Council of Guardians in excluding candidates from parliamentary by-elections. In May, after statements threatening such action by parliamentarians, attackers beat a speaker and disrupted a conference of surgeons which had criticized a proposed law to segregate health care along gender lines. Eventually, on September 11, reacting to the beating of a minister and a vice-president by Hezbollahi..."

29 Finally, reference may be made to a passage in the US State Department Country Report for Iran, released 25 February 2000, which is as follows:

> "Several agencies share responsibility for internal security, including the Ministry of Intelligence and Security, the Ministry of Interior, and the Revolutionary Guards, a military force that was established after the revolution. Paramilitary volunteer forces known as Basijis, and gangs of thugs, known as the Ansare-e Hezbollah (Helpers of the Party of God), who often are aligned with specific members of the leadership, act as vigilantes, and are released into the streets to intimidate and threaten physically demonstrators, journalists, and individuals suspected of counter-revolutionary activities. Both regular and paramilitary security forces committed numerous, serious human rights abuses."

30 In the course of submissions counsel for the appellant appeared to move from the submission to which reference has already been made to a rather different submission, namely that the Tribunal failed to consider the question whether the appellant had a well-founded fear of persecution on political grounds from organisations like the Hezbollah, the

Pasdaran or the Basiji - effectively vigilante organisations operating as "morals police" and operating without the sanction of the state, but without the state taking active steps to stamp out or protect persons from their activities.
31 In support of the basic submission that persecution in the Convention sense is not limited to state-sanctioned harm, reference was made to the decision of the High Court in Khawar where it was held by a majority of the Court, Gleeson CJ, McHugh, Gummow and Kirby JJ, Callinan J dissenting, that a Pakistani woman, married to a drunken and violent husband but who was unable to obtain State protection from that violence could, if the relevant facts were ultimately found by the Tribunal, come within the definition of "refugee" in the Convention.
32 There was a difference among their Honours in the High Court on the question of the position of the State in relation to the connection required between the harm and the State so as to constitute persecution within the meaning of the Convention. The Chief Justice noted that the relevant State conduct could be tolerance of, or condonation of, the inflicting upon the wife of the violence. McHugh and Gummow JJ were of the view that the persecution in that case lay in the discriminatory inactivity of State authorities in not responding to the violence of the non-State actor, the husband. Kirby J spoke of the persecution being condoned, tolerated, or there being a case where the State refuses or is unable to offer protection.
33 The analogy is said here to be that acts of harassment by the Hezbollah, or other groups, capable of constituting persecution were capable of being persecution within the meaning of the Convention because they were tolerated or condoned by the State…
34 It must be accepted following Khawar that harm or discriminatory conduct need not be sanctioned by the State before it can be persecution within the meaning of the Convention. Serious harm which is either condoned or tolerated by the State could be persecution….(bold added)

See also SFGB v MIMIA [2003] FCAFC 231 per the Full Court (Mansfield Selway and Bennett JJ.) at [27] - [28] (see below Chapter 14 STATE PROTECTION IN OWN COUNTRY OR OTHER COUNTRY OF NATIONALITY )

Applicant S70 of 2003 v MIMIA [2004] FCAFC 182 (Emmett Conti and Selway JJ.) (appeal from S70 v MIMIA [2004] FCA 84 (Hely J.) was dismissed. The Court said:

23 The second ground of appeal relates generally to the conclusion by the Tribunal that 'there is nothing to suggest that [state] protection would be ineffective or that it would be withheld by the Fijian authorities'….
24 In our view the primary judge's analysis of the Tribunal's reasons is clearly correct. It is clear from the Tribunal's reasons that the Tribunal's comments that the appellant had failed to seek State protection was related directly to its finding that 'The applicant failed at any time to seek redress for the damage to his personal property.'
25 More fundamentally, however, the appellant's argument that he was not afforded State protection at the time he was evicted from tenancy in 2000 is simply not relevant to the finding actually made by the Tribunal that the situation had changed since that time. Having reached that conclusion the evidence of what had occurred prior to that change was of limited relevance to the question of whether the appellant would have a well founded fear of persecution if he returned to Fiji at the date of the Tribunal's decision.

26 Further, the primary judge was clearly correct in his conclusion that the failure of the police to respond on a particular occasion or occasions when a person's rights are breached by private individuals does not necessarily mean that that person has suffered 'persecution' for the purposes of the Convention. The treatment of Indian Fijians at the time of the 2000 coup may well have constituted 'persecution' (indeed, the decision of the Tribunal in this case assumes that Indian Fijians may have suffered persecution at that time), but that does not mean that the individual acts of which the appellant gave evidence were sufficient in themselves to establish 'persecution'. Individual acts by persons other than State agents are not usually sufficient for this purpose: see Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 at [25]-[29]. It was only when that evidence was considered in the context of the country information to which the Tribunal referred in its reasons that a conclusion could properly be reached that the appellant had suffered persecution in the past.
27 On the other hand, if the appellant had argued before the Tribunal that a failure of State authorities to provide compensation for past persecution could constitute current persecution then it would be an answer to that argument that the appellant had not sought such compensation. As mentioned above, that appears to be the context in which the Tribunal made the comment about which the appellant complained both to the primary judge and to us. However, the sufficiency of that answer does not mean, of course, that a failure to provide compensation for past persecution would necessarily form a basis for a well founded fear of 'persecution' if the appellant and his family returned to Fiji.

In VRAW v MIMIA [2004] FCA 1133 Finkelstein J. while appreciating that for many purposes there is a difference between the illegal actions of state agents which are tolerated or encouraged by a state and wholly unauthorised actions of rogue officials, as Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891 shows, the actions of rogue officials should be treated as actions of the state for the purposes of considering a claim for asylum. When the tribunal has to determine whether a person has adequate state protection, the authorities establish that there is a different standard in the case of persecution by non-state agents and rogue state agents. In the case of rogue state agents there will only be adequate protection if the state is taking action to curb their illegal and unauthorised actions. The tribunal did not adopt this test. It ignored the distinction between state action and non-state action when it found that there was adequate state protection. It made a further error in finding that:"[T]he Applicant made no attempt to seek redress for the failure of the local police to take seriously and investigate her complaints of harassment, nor did she seek redress from any other avenue available to her, such as to pursue the matter with more senior police or the Procurator, the Ombudsman or the human rights organisations which operate in Russia… The failure of the state to provide the wife with protection from the criminal conduct which she faced is not compensated by the fact that she could

have sought "protection" from human rights organisations, the ombudsman or the procuratorThese institutions do not offer and cannot provide practical protection from persecution. In the case of the husband the Tribunal wrongly treated the actions of the colonel in the FSB as non-state action and therefore applied the incorrect test for determining whether there was adequate protection against persecution. The series of serious acts of persecution from various sources is set out at [2]-[9]

His Honour said:

1 The applicants, husband and wife, are Russian citizens who arrived in Australia in late 2000. They claimed refugee status by reason of a well-founded fear of persecution if required to return to Russia. The wife based her claim on her sexuality; she is bisexual and it is accepted that bisexuals can form a particular social group for the purpose of the Refugees Convention. The husband based his claim on his political opinion coupled with his wife's sexuality.

….

10 The tribunal accepted the applicants' version of events and found that each was "forthright and open" in the evidence that they gave. Nevertheless the tribunal found that neither applicant was a Convention refugee. The tribunal proceeded on the basis that the purpose of the Refugee Convention was to enable a person who did not have the benefit of protection from persecution in his own country to obtain that protection (surrogate or substitute protection) from a signatory country. On that basis (that is on the basis of what has come to be called the "protection theory"), to achieve refugee status a putative refugee must establish acts of persecution which involve serious harm, plus the failure of state protection: Regina v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629, 653. According to the "protection theory" a state has a positive obligation to take reasonable measures to protect those of its citizens whose lives are at risk: Osman v United Kingdom (1998) 29 EHRR 245, 305. The content of the duty is a matter to which I will return. Applying the "protection theory" the tribunal found that if the applicants returned to Russia they would have available to them the "effective protection" of the Russian government and that consequently their fear of persecution was not well-founded.

11 In two recent decisions, Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 and Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 78 ALJR 678, (the second handed down after the tribunal had delivered its reasons in this case), the High Court (by majority) adopted the protection theory at least in the sense that the ability or unwillingness of a state to protect its citizens is a relevant consideration when determining whether a putative refugee's fear of persecution is well-founded.

12 In considering whether the protection afforded by the state is sufficient the distinction between persecution by the state (or where the persecution is carried out by state agents) and persecution by non-state agents must be born in mind. In relation to persecution by the state, if the feared harm is sufficiently serious and inflicted for a Convention reason the victim will in almost all cases be a refugee. When the state is the agent of persecution there is no need for an inquiry into the extent or effectiveness of state protection; it is by definition absent. With respect to persecution by non-state agents the victim will only be a

refugee if the state condones or tolerates the persecution or refuses or is unable to offer adequate protection: Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, 13 per Gleeson CJ. Here the attitude or capacity of the state is directly relevant to the question whether the subjective fear of persecution is well-founded: Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 78 ALJR 678, 683 per Gleeson CJ, Hayne and Heydon JJ and 686 per McHugh J.

13 In Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 Gleeson CJ (at 13) explained that references in the authorities to state agents of persecution and non-state agents of persecution "should not be understood as constructing a strict dichotomy". He said, by way of example that "[p]ersecution may also result from the combined effect of the conduct of private individuals in the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in the circumstances where the state has a duty to provide protection against harm". There is another situation where the strict dichotomy cannot be applied. The situation I have in mind is where the persecution is by the hands of rogue state officials who act illegally or in abuse of their authority. In this circumstance it cannot be said that state protection is necessarily absent. I will discuss later what must be established to make out a case for surrogate protection. But before I do I must first explain why these issues are relevant in this case.

14 The tribunal did not regard any part of the wife's claim as founded on persecution by state agents. In so far as the wife relied upon mistreatment at the hands of the good citizens of Krasnoyarsk, the tribunal treated her claim as one based on non-state agent persecution in respect of which it was necessary for the tribunal to decide whether the state was unable or unwilling to provide protection. The tribunal's approach in this regard was correct, although whether it applied the correct test in determining the adequacy of state protection will require separate consideration.

15 The tribunal considered the actions of the head of the Administration unit and the security guards, who were state agents or employees, to be those of non-state agents. The tribunal explained its reasons for this approach. The tribunal said that the action of the head of the Administration Unit "could not have been undertaken as part of his official position in the regional administration because the Russian government does not encourage, condone or fail to protect against such discrimination". The security guards' conduct was also regarded as conduct of private individuals because it was "serious criminal [conduct] ... and as such the Russian government cannot be said to have condoned that harm or to be unwilling or unable to extend protection and redress to the Applicant for that harm".

16 Now, I think the tribunal made a serious mistake when it treated the acts of the head of the department and the security guards as non-state action. I appreciate that for many purposes there is a difference between the illegal actions of state agents which are tolerated or encouraged by a state and wholly unauthorised actions of rogue officials. However, as Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891 shows, the actions of rogue officials should be treated as actions of the state for the purposes of considering a claim for asylum.

17 On the other hand, when the tribunal has to determine whether a person has adequate state protection, the authorities establish that there is a different standard in the case of persecution by non-state agents and rogue state agents.

18 As a general rule a state should have a system of law which makes attacks by persecutors punishable. It should also have law enforcement agencies that will enforce those laws: Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 494. The obligation of enforcement is not absolute. In Osman v United Kingdom (1998) 29 EHRR 245, the European Court of Human Rights (at 305) said:

> "[T]he State's obligation [to safeguard the lives of its citizens] extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted [that] the ... Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
>
> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

According to Lord Hope in Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 500:

> "The standard to be applied is therefore not that would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its nationals. As Wood LJ said in [2000] INLR 15, 44G, ... it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection".

See also Lord Clyne who (at 510) said that there must be in place "a system of domestic protection and machinery for the detection, prosecution and punishment of [acts] contrary to the purpose which the Convention requires to have protected" as well as, more importantly "an ability and a readiness to operate that machinery".

19 In the case of rogue state agents a different standard applies. Here there will only be adequate protection if the state is taking action to curb their illegal and unauthorised actions. In Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891 Sedley LJ dealt with this issue. He said (at 1897):

> "The concept of 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state' seems to me to give a precise edge to the Convention scheme in the present context, and to make a clear distinction between state and non-state agents of persecution. While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them."

Later (at 1898) he said that there must be:

> "... convincing evidence, where the agents of persecution are themselves officers of the state, that the state not only possesses mechanisms for controlling its officials but operates them to real effect. In this respect, which is practical in form but constitutional in nature, it differs from the standard of protection from persecution by non-state agents ..."

20 The tribunal did not adopt this test. It ignored the distinction between state action and non-state action when it found that there was adequate state protection. On this score the tribunal said:

> "[T]he Applicant made no attempt to seek redress for the failure of the local police to take seriously and investigate her complaints of harassment, nor did she seek redress from any other avenue available to her, such as to pursue the matter with more senior police or the Procurator, the Ombudsman or the human rights organisations which operate in Russia. Similarly, the Applicant made no attempt to seek the protection of the Russian government from the criminal assault she suffered at the hands of security guards at her place of employment, nor the discriminatory dismissal of her by her former superior. In the absence of such approaches, I am not satisfied that had she done so she would have been prevented, because of her sexuality, from accessing protection or redress."

And later:

> "I am satisfied, on the information available to me that ... protection would have been and in future will be forthcoming. I cannot be satisfied that there was, or in the future would be, a failure of State protection where the Russian government was not given the opportunity to respond to the harm alleged by the Applicant."

21 These passages demonstrate further error. A person who is in imminent risk of serious injury, or has just suffered serious injury, will approach the police for help. It is the natural thing to do. It is the unit of government charged with the responsibility of protecting citizens and from which citizens expect to secure protection. But for the wife that protection was not forthcoming. The tribunal accepted that when the wife made complaints about harassment and property damage inflicted by neighbours and strangers she was "rebuffed by the police". It is true that the wife did not complain to the police about the actions of her superior and the security guards but, as I have already pointed out, by reason of her past experience, she no doubt had good reason to believe that any complaint would be ignored.

22 The failure of the state to provide the wife with protection from the criminal conduct which she faced is not compensated by the fact that she could have sought "protection" from human rights organisations, the ombudsman or the procurator. In Risak v Minister of Employment and Immigration (1994) 86 FTR 67 Dube J said (at 70) that there is nothing in Canadian jurisprudence "to the effect [that an] applicant has the further burden to seek assistance from human rights organisations or, ultimately, launch an action in court against the government". Our jurisprudence should be the same. Agencies such as human rights organisations, the ombudsman or the procurator do not provide protection against violence. They are certainly avenues of complaint against police inaction. On the other hand, these organizations cannot and do not offer practical protection from persecution. They may be wonderful advocates and proponents of human rights. But a person who fears for his well being is in need of immediate protection and is not overtly interested in making complaints. In Russia the organisation that provides immediate protection from imminent danger is the police.

23 In substance, when one has regard to the practical rather than the theoretical, a person who for good reason has a subjective fear that he or she might be killed or tortured has an objective basis for that fear when the only avenue of "protection" is the ombudsman, human rights organisations, the procurator or something similar. These institutions do not offer and cannot provide practical protection from persecution.

24 I now turn to the husband's claims. The tribunal did not make any finding as to whether the harm which he faced was for a Convention reason. In relation to the extortion by the colonel in the FSB, the destruction by fire of his business and the death of his relative the tribunal inclined to the view that the husband was targeted because he was a wealthy businessman who was financially capable of paying the money demanded. However, the

tribunal said that his wife's sexuality "may well have been a secondary reason" for him being targeted. That is a sufficient basis upon which to conclude that the husband feared persecution for a Convention reason. It is not necessary to show that the Convention reason is the only reason for persecution. No doubt "skinheads" may persecute some people on account of their race, but they may be just as motivated by their enjoyment of inflicting harm. Their acts will be for a Convention reason.

25 The tribunal disposed of the husband's case in much the same way as it dealt with the wife's claim. It said that it was satisfied that the husband had available to him effective avenues of protection in Russia. In reaching this conclusion it wrongly treated the actions of the colonel in the FSB as non-state action and therefore applied the incorrect test for determining whether there was adequate protection against persecution. As I have demonstrated, this was a serious mistake on the tribunal's part. The mistake was even more serious in the husband's case when one bears in mind that (1) the principal agent of persecution was a senior officer in the FSB and (2) the tribunal's acceptance that "by accessing any of the avenues of protection and redress available, would have resulted in a level of risk to the [husband] and to his family." In these circumstances the tribunal's finding that protection was available to the husband is quite startling.

26 I propose to set aside the tribunal's decision and remit the matter to be decided in accordance with this judgment. When the tribunal reconsiders the matter it should bear in mind the following matters. First, the observations of Sir Murray Stuart-Smith and Simon Brown LJ in Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891. Sir Murray Stuart-Smith said (at 1907) that "[t]he more serious the ill-treatment [by rogue state agents] both in terms of duration, repetition and brutality, the more incumbent it is upon the state to demonstrate that it can provide adequate protection." Simon Brown LJ (at 1909) said: "The more senior the officers of state concerned, and the more closely involved they are in the refugee's ill-treatment, the more necessary it will be to demonstrate clearly the home state's political will to stamp it out and the adequacy of their system for doing so and for punishing those responsible ...". Second, the country information before the tribunal does not suggest that Russia is taking any active steps to prevent rogue state agents from acting illegally. There might be such evidence, but for it to be accepted it must be cogent. Third, internal flight or relocation may not be of much relevance in this case. In Zhuravlvev v The Minister of Citizenship and Immigration [2000] 4 CF 3, 18 Pelletier J reminded us that internal flight might not be applicable in states (like Russia) where internal movement is restricted. In this case there is the added

## 12. SUR PLACE CLAIMS

The law regarding such claims is settled. Paragraphs 94-6 of the Handbook (see Ozmanian v MIMA [1997] 256 FCA ) accurately state the law.

It is well-established that a person can become a refugee sur place because of a fear of persecution arising out of events occurring in their country of origin after their departure, or as a result of the person's activities outside that country. The UNHCR Handbook describes a refugee sur place in this way:

> " A person may become a refugee "sur place" as a result of his own actions, such as associating with refugees already recognised, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities."

In MIMA v Mohammed (2000) 98 FCR 405 at 412, French J said:

"Turning back to the terms of the Convention, Art 1A is sufficiently widely expressed to allow for claims of refugee status which derive from events occurring while the claimant is outside the country or origin. Persons making claims based on such events, designated generally as "refugees sur place", may seek protection based upon post-departure change of circumstances or dramatic intensification of existing conditions in the country of origin or because of the consequences of their own activities while abroad: J.C. Hathaway, the Law of Refugee Status (1991), pp 33-34. It is a particular application of that general proposition and of the ordinary meaning of Art 1A(2) that political opinion, wherever and however expressed may give rise to a well-founded fear of persecution in the country of nationality which will attract Convention protection. This is not a controversial proposition. It is well recognised in writings on the topic and in authority: A Grahl-Madsen, The Status of Refugees in International Law (1966), Vol 1, p.248; Hathaway, p 33; United Nations High Commission on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992), par 96; Somaghi at 116.

Articles 1A, 1F and 33 are silent on whether a person's entitlement to protection as a refugee sur place because of activities abroad is conditioned by a requirement that they be engaged in good faith and not for the purpose of generating the very conditions which would otherwise give rise to the entitlement. The UNHCR Handbook says nothing explicit about the issue leaving it to the careful application of the words of the Convention to determine the question of status as a refugee sur place:

"96. A person may become a refugee 'sur place' as a result of his own actions, such as associating with refugees already recognised, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard

should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.""

The issues going to circumstances where a claim can be said to be contrived was dealt with in MIMA v Al Husaini [1999] FCA 1307. A full treatment of the authorities and legal texts concerning the way in which a claim to be a refugee sur place should be approached is provided by Lee J. in Mohammed v MIMA (1998) 56 ALD 210 ( and on the facts reaching a different conclusion O v MIMA [2000] FCA 265) particularly on the issue of a so-called good faith qualification for refugees sur place. Lee J's approach and finding remitting the matter to the RRT was approved by a majority of the Full Federal Court (Spender, French JJ.) in MIMA v Mohammed (2000) 98 FCR 405; 61 ALD 1 [2000] FCA 576. The correct position was concisely summarised by French J. at [46] as follows:

"46 The imposition of a good faith qualification for refugees sur place as a gloss upon the Convention is not warranted by its language and is capable of eroding, in its practical application, the protection that the Convention provides. That is because of its very vagueness. Moreover the problem which that gloss seeks to address is more apparent than real. There can be few, if any, cases in which political statements made from the country whose protection is sought for the sole purpose of generating the circumstances attracting Convention protection will be found to reflect any political opinion genuinely held by the person making them. And even if that obstacle is sidestepped by invoking imputed opinion, a demonstration of a well-founded fear or the necessary causal connection between apprehended persecution and Convention attribute in such a case would also be difficult. But each case turns upon its own facts. The Convention must be given effect according to its language. Even those who, notwithstanding their want of good faith, could show that the conditions for protection are satisfied are entitled to that protection. Want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined which is whether the applicant satisfies the conditions of Article 1A. It is not a rule of law to be laid over the words of the Convention".

In Farahanipour v MIMA [2000] FCA, the dissenting judge in Mohammed Carr J. considered that as there was no relevant distinction between the facts of the two cases he was clearly bound to apply Mohammed. The same judge in Kheirollahpoor v MIMA [2000] FCA 1350 at [50-5] found interlinking grounds of error of law and failure to make findings established after having indicated that, while the principle in Mohammed was to be followed, the present case was arguably distinguishable on its facts.

The Full Federal Court ( MIMA v Farahanipour (2001) 181 ALR 535;64 ALD 341; [2001] FCA 82) by a majority (Tamberlin J. dissenting) upheld the approach of the majority in Mohammed .

The question at issue was stated by Ryan J. to be :

3…whether effect should be given to the principle acknowledged by the majority (Spender and French JJ) of a Full Court of this Court in Minister for Immigration and Multicultural Affairs v Mohammed (2000) 98 FCR 405 ("Mohammed") or whether that principle should be discarded in favour of the views expressed by Gummow J as a member of another Full Court of this Court in Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100 ("Somaghi").

The issue on which the whole debate turned was the correctness of Lockhart J.'s provisional view at first instance in Somaghi endorsed by Gummow J. in the Full Court ( Somaghi v MILGEA (1991) 31 FCR 100 set out at [4] of Ryan J.'s judgment:

that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee sur place.

Gummow J. said:

…it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution to which the Convention refers, in such cases will not be well-founded".

Ryan J. canvassed in Farahanipour the judgments in both cases and referred to that of Spender J. in Mohammed:

"., the Tribunal's approach in regarding the question of whether the respondent was "acting solely out of desire to put himself in a position where he could claim to be endangered" as determinative of the question of whether that person was a refugee, was to erect a false test as to who is a refugee "sur place". Whether or not the circumstances were engineered by the respondent and whether or not they were engaged in good faith, the necessity remains for the Tribunal to address the central question: whether the respondent held a genuine fear that he would be persecuted and whether, if he were returned to Sudan, there was a real risk that serious harm would befall him by acts of persecution within the meaning of the Convention."

He went on at [9]:

…French J concluded his analysis [in Mohammed]by saying, at 419:

"As can be seen from the passages to which reference has been made, [Lockhart J's] observations about the good faith question were provisional and expressed to be provisional and in any event were obiter as the applicants had failed to make out their entitlement to Convention protection even were it to be assumed that their actions in sending the letters were in good faith. His Honour also found that there was no want of procedural fairness in the way that the applicants were dealt with."

10 French J, moreover, was unable to subscribe to Gummow J's absolute requirement of good faith. After quoting the passage from Gummow J's judgment in Somaghi, which is set out at par 4 above, French J continued, at 419:

"The last sentence of that passage suggests a constructional basis for the good faith requirement not expressed in the reasoning of Lockhart J but perhaps implicit in the qualified proposition set out in the second passage cited from his judgment at first instance. If the question of good faith is linked to the existence of a well-founded fear then it is not an implication or gloss on the words of the Convention. Rather it is evidentiary of the existence of the well-founded fear necessary to attract Convention protection. On the facts of the case it seems the delegate had uncontroverted advice that the sending of the letters in question, being a common tactic, might not lead the Iranian authorities to impute a political opinion to the senders.

The question to be answered in the case of political refugees remains always the same - is there, at the relevant time, namely the time of determination of refugee status, a well-founded fear of persecution by reason of the applicant's political opinion or an opinion attributed to the applicant. The passage quoted from the judgment of Gummow J reflects that approach. The so-called "good faith" restriction enunciated in that passage may be regarded as derived from the requirement that the fear be well-founded. So far as good faith is relevant in any case it should be seen to emerge from the practical operation of the words of Article 1A rather than be laid upon them as an "implication" of general application.

His Honour in relation to the judgment of Carr J. at first instance could see:

14…no error in the approach which led his Honour to that conclusion [following Mohammed]. Moreover, from the point of view of this Full Court, the decision of another Full Court in Mohammed should be followed unless it be thought to be plainly wrong; see Minister for Immigration and Multicultural Affairs v Prathapan (1998) 86 FCR 95 per Lindgren J (with whom Burchett and Whitlam JJ agreed) at 104 citing Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485 at 492; Qantas Airways Ltd v Cornwall (1998) 84 FCR 483 at 489-490 and other authorities referred to in Bank of Western Australia v Commissioner of Taxation (1994) 55 FCR 233 at 255.

Ryan J. noted that:

18…Danian v Secretary of State for the Home Department [2000] Imm A.R 96 and Secretary of State for the Home Department v Ahmed [2000] 1 NLW 1, which followed Danian, were cited with approval by Merkel J (with whom Wilcox and Gray JJ agreed) in Wang v Minister for Immigration and Multicultural Affairs (unreported [2000] FCA 1599) at pars 86-87. Another Full Court of this Court (Black CJ, Ryan and Moore JJ) in Omar v

Minister for Immigration and Multicultural Affairs [2000] FCA 1430, referred to Mohammed, Danian and Iftikhar Ahmed v Secretary of State for the Home Department [2000] 1 NLR 1, and continued, at para 38:

> "These cases, which reflect a common approach to the interpretation of a convention to which Australia and the United Kingdom are both parties, are determinative of the issue we are presently considering. They make it clear that questions such as those that are said to have arisen in the present matter are to be resolved by the practical operation of the words of Article 1A of the Convention. Putting to one side the issue of "bad faith" (which does not arise in this case and as to which differences of opinion have been expressed, particularly concerning the ratio of Somaghi and the related case of Heshmati v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 123), the recent cases in England and in this Court stand for the broader proposition that possible future conduct, including a so-called "spontaneous voluntary expression of political opinion", can provide an acceptable basis for a presently existing and well-founded fear of persecution for a Convention reason."

He concluded:

20 It would be unhelpful, given the present state of the authorities, to propose yet another gloss on the word "pretext" or to attempt to apply the elusive concept of "fraud" in this context. There is a clear finding that, in procuring the publication of the "Arash" article, the first respondent was actuated solely by the purpose of creating or reinforcing a fear of persecution were he to return to Iran. Such a fear may be no less genuine despite the artifice by which the circumstances which gave rise to it have been engineered. The epithet attached by the Convention to the requisite fear of being persecuted is "well-founded". As a matter of ordinary English usage, that connotes only that the fear have a sound or credible basis in fact…

Tamberlin J. dissenting stated the issues and gave detailed reasons for his conclusion that Somaghi should be followed:

44 In the present case the only question for the Court is whether the conduct of a claimant, who otherwise has not made out any case for refugee protection, carried out for the sole purpose of attracting protection as a refugee can be relied upon to support the claim. On the unchallenged findings of the RRT the only basis on which protection can be claimed in the present case is the real chance of persecution by the Iranian authorities brought about by the first respondent's deliberate conduct which was engaged in by him with the sole purpose of producing a risk of persecution where there was otherwise none.

46 In my view the decision of the Full Court in Somaghi cannot be distinguished from the Full Court decision in Mohammed. Nor are the two decisions consistent. I agree with Buxton and Nourse LJJ, in the Court of Appeal in Danian, that the principle expressed in Somaghi is that where the sole reason for conduct is to attract Convention protection, the consequences of such conduct should not be taken into account in deciding whether a claimant is a refugee. I consider that the analysis of the word "pretext" used by Gummow J in Somaghi does not advance the applicant's case.

47 I do not accept that the Contracting States ever envisaged or intended the Convention to provide protection to a claimant in circumstances such as this case. The words "well-founded fear" sit uneasily with the notion of a fear generated by a course of conduct carried out for no other purpose than to create a false perception as to political opinion and thereby claim refugee protection. On a fair and reasonable reading of the Convention, a fear or risk of persecution founded not on any political, religious, social or racial basis, but simply on a desire to attract protection is not in my view "well-founded". ..

RD Nicholson J. set out his own reasons for adopting the approach of Mohammed:

79 The majority in Mohammed were each of the opinion that there was nothing in the Convention imposing a requirement of good faith or founding a bad faith exemption: 407 per Spender J and 411 - 421 per French J. They each considered that the necessity remained for the Tribunal to address the central question of whether a respondent held a genuine fear that he or she would be persecuted and that, if he or she were returned to the country of origin, there was a real risk that serious harm would befall him or her by acts of persecution within the meaning of the Convention: at 408 per Spender J and at 422 per French J. ..

81 I agree with the view of the majority in Mohammed that the Convention terms do not give rise to the implication of a good faith qualification or bad faith exemption. I agree in particular with the reasoning in that respect in the judgment of French J in Mohammed and I place reliance on the items 1 - 15 listed in the consideration of the issue in the reasons for judgment of Buxton LJ in Danian at p 24 - 27. However, I particularly rely and am influenced by the following matters :

(1) As it is the Convention which is being interpreted, it is appropriate to look to the Vienna Convention on the Law of Treaties signed 23 May 1969 and entering into force on 27 May 1980. Two matters arise:

(a) Article 31.1 provides that a Treaty should be interpreted "in good faith", in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose. That is a good faith requirement applicable to the interpretation and does not assist in relation to whether the Convention imposes a constructional limitation in relation to evidence of the nature of the action taken by an applicant for refugee status in the absence of something in the Convention itself on which that constructional element can be grounded.

(b) Article 32(b) of the Vienna Convention permits recourse to preparatory work of the treaty and the circumstances of its conclusion to determine whether the meaning resulting from the application of Article 31, inter alia, "leads to a result which is manifestly absurd or unreasonable". As was the case in Danian (see point 4 at p 25 in the reasons of Buxton LJ), we were not shown anything in the travaux preparatoires to indicate that the exclusion of a case of a person who has undertaken action for the sole purpose of invoking a claim to a well-founded fear of persecution was assumed or obvious because of its absurdity or any other reason. I have been unable, myself, to find any material to support any such assumption in the travaux preparatoires (Cambridge International Documents Series, vol 7). No argument was made on this appeal in any event. Absurdity has been equated with "repugnance to commonsense" - see Batcheller v Batcheller [1945] Ch 169 at 177. No argument based on this concept was made on the appeal.

(2) I agree with the reasons of French J at 421 for his conclusion that the imposition of a good faith qualification for refugee sur place is not something which flows from the language of the Convention. As the reasons of Spender J and French J in Mohammed and the Court in Danian make apparent, authorities are divided on the issue of good or bad faith as a constructional pre-condition to the Convention.

(3) In the absence of anything deriving from the terms of the Convention Articles themselves and in the absence of binding authority I regard the issue of whether an applicant for refugee status qualifies as such solely on actions taken by him or her to invoke the claim to a well-founded fear of persecution as falling to be decided on an evidentiary basis. The actions of the applicant in that respect will be part of the pool of evidence to which the fact-finder must have regard.
(4) When the evidence of the conduct of the applicant for refugee status has fallen into the pool of available evidence it may have the effect of resulting in a finding that there is no "well-founded fear". See point (vi) of the reasons for judgment of Buxton LJ in Danian at p 28, where he points out that someone who changes his position or makes allegations inconsistent with the attitude that he or she adopted in his home country may not find it easy to discharge the burden of establishing the existence of a well-founded fear. Acts of refugees expressing political opinions outside the country of nationality may be done for a variety of reasons all of which may be consistent with existence of a well-founded fear of persecution: see the examples given by French J at 421 of Mohammed and item 5 in the categories of items listed by Buxton LJ at p 25 of Danian.

His Honour answered the question should the appeal succeed as follows:

84 As previously stated, the view reached by Carr J in dissent in Mohammed and the view reached here by Tamberlin J (whose draft reasons I have had the advantage of reading) has much in logic and commonsense to support it. However I do not consider it is a view this Court, as distinguished from the ultimate court, can uphold on this appeal, for the two reasons which follow. Expressed shortly, I consider the issue raised on the appeal is one which can only and should be resolved by the ultimate court.
85 The first reason why I consider this to be the case is that the view in question does not appear to have any usual contextual or conceptual foundation nor has full argument been made to establish that position. It relies ultimately on an assertion - which an ultimate court would be entitled to make - that the words "well-founded" are themselves in their context the appropriate foundation. This assertion exists side by side with both the doubts concerning the scope of the dicta in Somaghi previously referred to and the inability for it to be properly said the majority decision in Mohammed is "plainly wrong", particularly in the light of the decision of the Court of Appeal in Danian. In my view, if the ratio of Somaghi is to be the law it requires the ultimate court to reach that view after full argument on all relevant considerations so that the ratio and its foundation are articulated beyond equivocation. I am reinforced in this view after reading the reasons of the High Court in Minister for Immigration & Multicultural Affairs v Ibrahim [2000] HCA 55 which make apparent the breadth of considerations to be taken into account in understanding the purpose and terms of the Convention and which have not been the subject of submissions on this appeal.
86 Secondly, unless Mohammed can be found to be "plainly wrong", there was no error by the primary judge in failing to apply the principle in Somaghi because he was bound to follow the Full Court in Mohammed. He followed the appropriate rules in that respect.

In MIMA v Kheirollahpoor [2001]FCA 1306 French J. considered himself bound by Mohammed and Farahanipour the principles for which they stood he set out at [5]-[6] especially that the Convention does not import any general good faith rule in relation to refugee claims.

The Minister has withdrawn his appeal to the High Court in Farahanipour possibly in the light of the introduction of S91R (3).

## 13. EFFECTIVE PROTECTION IN THIRD COUNTRY / ARTICLE 1E

The Full Bench of the High Court *in* ***NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and IndigenousAffairs*** **[2005] HCA 6 (2005) 213 ALR 668** ( Gleeson CJ Mc Hugh Gummow Kirby Hayne Callinan and Heydon JJ.) allowied the appeal from ***NAGV v MIMIA*** **[2003] FCAFC 144 (2003) 202 ALR 1 (2003) 77 ALD 699 130 FCR 46** affirming ***NAGV of 2002 v MIMIA*** **[2002] FCA 1456** (Stone J.) The issue was the interpretation s 36(2) prior to inclusion of s36(3)-(5) . The RRT made a finding that the appellants had a well-founded fear in relation to their country of nationality – Rusian Federation - on grounds of race/political opinion but conclusded that Israel was a third country where appellants would have effective protection because of effect of Law of Return and therefore Australia did not owe them protection obligations . The father was a Jew. On appeal it was held there was an error in construction of s36(2) . The Joint reasons (Gleeson CJ Mc Hugh Gummow Hayne Callinan and Heydon JJ.) stated that the Refugees Convention was of determinative importance only insofar as its provisions drawn into municipal law by adoption as a criterion of operation of s36(2). It was held that the phrase ""to whom Australia has protection obligations under the Act" describes no more than a person who is a refugee within the meaning of Article 1. If that criterion is answered there was no superadded derogation from that criterion by reference to the operation of Article 33 upon Australia's international obligations . Furthermore Article 1 in the context of s36 to be seen as a whole . The flaw in the Minister's argument was as follows: there is a non sequitur in reasoning that while the obligation exists because of well-founded fear not to return the appellants to their country of origin the fact that a non-refoulement obligation might not be breached by sending them to Israel does not mean that Australia has no protection obligations under the Convention. The adoption of the Minister's approach would have significant consequences (joint reasons) and render the Convention self-destructive (Kirby J.). Orders for certiorari and mandamus directed to the RRT were made. (See Chapter 14 below)

Applications for a protection visa may not need to be dealt with where pursuant to Article 1E, the Convention does not apply to a person recognised as having the rights and obligations attached to the possession of nationality of a third country.

Owing to the development of the concept of effective protection not offending the right of non-refoulement contained in Article 33, (subject now to the effect of NAGV and for persons arriving after 17 December 1999 the application of s36)3)-(5) it will usually not be necessary to examine the wider exclusion clause of Article 1E. Howerver in NAGV the Joint reasons said relevantly:

48 Something also should be said concerning Art 1E, which provides:

> "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

49 In Thiyagarajah[57], the Minister contended to the Full Court that Art 1E on its proper construction excluded from the definition of "refugee" a person having most, if not all, of the rights and obligations attached to the nationality of the host country, there France; the submission was that such an interpretation would be in accordance with the objects and purpose of the Convention, which did not extend to bestowing on a refugee the right to move from country to country, "asylum shopping". Acceptance of that construction would support the actual conclusion of the Full Court in Thiyagarajah that the RRT correctly had affirmed the refusal of protection visas to the respondent and his family.

50 The Full Court decided the appeal in Thiyagarajah in favour of the Minister but on other grounds. Nevertheless, whilst stating that it was "strictly unnecessary to decide"[58], the Full Court endorsed the interpretation given to Art 1E by Hill J in Barzideh v Minister for Immigration and Ethnic Affairs[59], with the qualification that "some disability suffered by an alien might be so slight as to be negligible"[60].

51 Hill J in Barzideh had construed Art 1E as follows[61]:

> "I do not think that the Article is rendered inapplicable merely because the person who has de facto national status does not have the political rights of a national. That is to say, the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have de facto nationality. But short of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them." (emphasis added)

52 The Full Court in Thiyagarajah added that this interpretation was in accordance with the literal meaning of the text[62]. However, the reference to "de facto nationality" as sufficient suggests the contrary.

53 If an issue respecting the construction of Art 1E hereafter arises before the Federal Court, it should not regard further consideration as limited by what was said respecting Art 1E in Thiyagarajah and Barzideh.

[57] (1997) 80 FCR 543 at 565-566.
[58] (1997) 80 FCR 543 at 568.
[59] (1996) 69 FCR 417.
[60] (1997) 80 FCR 543 at 568.
[61] (1996) 69 FCR 417 at 429.
[62] (1997) 80 FCR 543 at 566.

In MIMA v Al-Sallal (1999) 94 FCR 549 at 558-9 the Full Federal Court said:

"…so long 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"

The core principles were re-iterated in Al-Rahal v MIMA [2000] FCA 1005 by RD Nicholson J.:

"The Full Court in Al-Sallal at 185, in following the approach in Thiyagarajah, accepted that the standard required to be met for there to be no breach in the application of Article 33 is whether an applicant is likely to be given effective protection by being permitted to enter and to live in a third country where he or she will not be under any risk (my emphasis) of being refouled to his or her original country, that to be judged as a matter of practical reality and fact. It will be a relevant, but not determinative, circumstance for examination on that basis whether the third country is a party to the Convention: Al-Sallal at 185. It is not necessary that the applicant concerned have the right to "permanent residence" in the third country: Minister for Immigration & Multicultural Affairs v Gnanapiragasam (Federal Court, Weinberg J, 25 September 1998, unreported) cited in Al-Sallal at 180. The content and direction of these authorities is to abjure any rigid standard based on a check list and to rely on judicial assessment of the practical realities and relevant circumstances in relation to an applicant's position in a third country."

Al Rahal was affirmed without any reference to the 1999 Border Protection amendments (except where the dissentient Lee J. did so) in Al-Rahal v MIMA (2001) 184 ALR 698; 110 FCR 73; [2001] FCA 1141 (Spender, Lee and Tamberlin JJ.)

Spender J. said:

2 While the reasoning of Lee J in his reasons for judgment is both cogent and persuasive, in my opinion this Court, consistent with authority including Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997-1998) 80 FCR 543, should hold that a person, who may be expelled or returned by Australia to a third country where there is no threat to their life or freedom for a Convention reason (and therefore not within the prohibition on Australia contained in Article 33 of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol), is not a person to whom Australia has "protection obligations" within s 36(2) of the Migration Act 1958 (Cth) (the Act).
3 It was held in Thiyagarajah that it was sufficient to 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 if it was proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee and had accorded that person effective protection, including a right to reside, enter and re-enter that country: von Doussa J (with whom Moore and Sackville JJ) agreed at 562.
4 I take this to mean that it is sufficient for effective protection of a person in the third country if that person has a right to reside, enter and re-enter that country, but that it is not a necessary requirement of effective protection that the person have a formal right to reside, enter and re-enter that country.
…

7 The majority judges in the High Court [in Thiyagarajah]acknowledged that this reasoning correctly recognised that the error referred to in s 476(1)(e) has to be one which finds a necessary consequence in the ultimate decision to affirm refusal of the grant of a protection visa.
8 Whether Article 33 applies depends on whether refoulement would involve a threat to the person's life or freedom on account of his race, religion, nationality, membership of a particular social group or political opinion. That question, it seems to me, is a question of fact. Moreover, it does not necessarily require that a third country has already accepted an obligation to protect the person who is an applicant for a protection visa, with the consequence that that person has a right to reside in that country and a right to have issued to him travel documents that permit departure from and re-entry into that country. That view is consistent with the observations of French J in Patto v Minister for Immigration and Multicultural Affairs [2000] FCA 1554, particularly at [37].
9 The conclusion of the Tribunal in this case was:

> "The Tribunal therefore finds that the applicant can re-enter Syria where he can remain indefinitely; where there is nothing to suggest that he would be persecuted; and where the risk of deportation to Iraq, such that he would be in the hands of the Iraqi authorities, is highly unlikely to the point of being remote."

10 These findings were findings for the Tribunal to make…

Tamberlin J. said:

68 Article 33 is the central provision of the Convention because it is the provision which imposes the substantive obligation on the Contracting States. The right is expressed in a negative way: it is a right of non-refoulement to certain places. Australia, as a Contracting State, is not prohibited from refouling a refugee to a country where there is no threat to their life or freedom for a Convention reason (a "safe third country")…
…
70 The primary submission for the appellant is that the RRT failed to correctly apply the law because it did not decide that the appellant had a right to enter and reside in Syria. The submission is that the existence of protection under Article 33(1) cannot be determined on the basis of conjecture that Syria may exercise a discretion in favour of the appellant and grant him entry and residence rights. It is said that it must be established that entry and residence will be permitted and the RRT erred because it only satisfied itself that there was the potential for the appellant to gain entry to Syria.
….
88 The central question is whether the RRT erred in law in determining that the appellant could enter and remain in Syria. The appellant says that the RRT erred because it did not positively find that the appellant had a right to enter or reside in Syria. He contends that the RRT must be satisfied that an applicant has permission to enter and reside in a third country before it could be said that country offered effective protection. It is said that in determining this question the RRT acted on the basis of speculation and conjecture rather than on the material which was before it which did not support a conclusion that the appellant had the right to re-enter Syria, with the consequence that the primary Judge erred in not so finding.

Having cited Thiyagarajah, Al Sallal, Al Zafiry and Patto His Honour said:

93 Consistently with the authorities, 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 their 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.

There is no obligation to consider if an applicant is a refugee in such cases. Tanberlin J. said:

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101 The submission made in relation to this provision is that it was not open to the RRT to reach a conclusion on Art 33 without considering whether the appellant was a refugee.
102 Although Art 33 is predicated on the premise that the person concerned is a refugee, it is not essential to determine that question before deciding whether Australia has protection obligations. It is this latter question which the RRT is called upon to answer by the Act. If Australia does not have protection obligations under the Convention then it is immaterial that an asylum seeker may be a refugee.
103 The approach of addressing Art 33 without first deciding whether the person has the status of a refugee was recently approved by the High Court in Minister for Immigration and Multicultural Affairs v Thryagarajah (2000) 199 CLR 343. At 349-350 the majority said:

> "[16] In the Full Court, von Doussa J correctly emphasised two aspects of the case. The first was that the effect of ss 36 and 65 of the Act and subclass 866 of Sch 2 of the Migration Regulations was that the case turned upon the question whether an error of law was involved in the decision of the Tribunal that the respondent, his wife and child were not "persons to whom Australia has protection obligations under the [Convention]". In its applicable form, the legislation obliged the Minister to grant a protection visa if this criterion were met and to refuse the visa if it were not met. The second aspect was that, under the legislation, the inquiry was not confined (as it has been under earlier legislation (25)) to the question whether the asylum seeker had the 'status' of a 'refugee'. Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied." (Emphasis added)

Lee J. dissented ( and in doing so referred to a number of articles and texts on the subject) saying:

13 On 18 December 1999, significant amendments to the Act, contained in Pt 6 of Sch 1 of the Border Protection Legislation Amendment Act 1999 (Cth) ("the amending provisions"), came into effect. Item 70 of Pt 6 of Sch 1 of the amending provisions stated that the amendments made by that Part applied to applications made after the commencement of that item, that is, after 18 December 1999.
14 As will appear later in these reasons, the fact that the amending provisions did not apply to the appellant's application had a bearing on the "jurisdiction" that was exercisable by the Tribunal when it made its decision
…

.27.. Of course, Australia, by Executive act, or by legislation enacted by Parliament, may provide for persons to be expelled, or returned, without determining whether they are refugees. Prior to 18 December 1999 Parliament had so provided in a limited respect. Sections 91A-91G in subdiv AI of Div 3 of Pt 2 of the Act stated that certain non-citizens, in relation to whom there is a prescribed "safe third country", cannot apply for a protection visa and are subject to removal from Australia under Div 8 of Pt 2 of the Act. The provisions give effect to the terms of bilateral agreements made between Australia and a "safe third country" to give effect to the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees held at Geneva, Switzerland from 13 to 14 June 1989. Pursuant to s 91D, the "safe third country", and the degree of connection between the non-citizen and that country which will trigger the operation of the sub-division, are to be prescribed.

28 The Act thereby defines circumstances in which particular non-citizens who arrive in Australia are deemed to have a "safe third country" and are not persons able to make application for a protection visa unless the Minister exercises a discretion to permit such an application to be made.

29 If the Minister exercises that discretion then, notwithstanding that there is a prescribed "safe third country" for that person, the person may apply for a protection visa and the application may be determined. Obviously, as a matter of construction, it could not be said that the protection visa applied for by that person could not be granted because Australia had no "protection obligations" to that person under the Treaty by reason of the existence of a "safe third country" for that person.

…

39…Unilateral decisions based on the concept of a "safe third country" may lead to a waste of time and effort if persons whose applications have been refused on this ground, will not be accepted by the "safe third country". Furthermore, it would appear that under the Act such persons would face an indefinite period in "immigration detention". In the interests of international comity, accord between nations is essential if the concept of "safe third country" is to be given practical application. (Goodwin-Gill, G S, The Refugee in International Law, 2nd ed (1996) 339 (Fn: 65) 340-341, 344; Dunstan, R, Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office 'Safe Third Country' Practice, 7 IJRL, (1995) 4, 606.)

…

40

> …With regard to refugees who are in the country's territory, this means that they may not be turned back or expelled if no other State in which they are safe from persecution is obliged or willing to take them.]"

41 The consent of the third country is fundamental to the operation of any such principle of international law…

His Honour quoted Goodwin-Gill for the proposition:

42… [concerning] refugees and asylum seekers who, though not formally recognized, have found protection in another State. [Fn: Effective 'protection' in this context would appear to entail the right of residence and re-entry, the right to work, guarantees of personal security and some form of guarantee against return to a country of persecution;…]

…

The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter." (343)
…
45 It should be concluded from the foregoing that no principle of international law presents any implied context for the construction of the term "protection obligations" used in s 36(2) of the Act so as to provide a construction that does not include the obligations set out in Article 33 of the Treaty.
46 The construction of s 36(2) propounded by the Minister sits ill with the terms of s 91A-91G of the Act and with the amendments effected by the amending provisions which introduced additional subsections to s 36 to confine the meaning of "protection obligations" as used in s 36(2)…
47 The Minister submits that the foregoing subsections confirm the construction of s 36(2) as determined by earlier decisions of this Court. (See: Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543; Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549.) But the amending provisions also introduced ss 91M-91Q which may be seen as complementary to the amendments to s 36 [i.e.(3)-(5)]
…
48 The terms of s 91M do not appear to support the construction which the Minister now submits is to be applied to s 36(2) as it stood prior to the amendment of the Act effected by the amending provisions.
49 It may be accepted that even before the amending provisions, Australia did not have "protection obligations" under s 36(2) to a person who had been accepted as a refugee by another State and accorded rights by the State as contemplated by the Treaty, such as the issue of travel documents with the right to leave and re-enter that State…
…a person who has been accorded by Contracting States protection as contemplated by the Treaty, is not, at that time, a refugee requiring consideration by another Contracting State. Thiyagarajah was such a case and it was held that Australia did not have "protection obligations" under the Treaty to the applicant as required by s 36(2).
50 But as far as the operation of the Treaty is concerned under international law, equivalent protection to that required of a Contracting State under the Treaty must be secured to an applicant in a third country before it can be said that the person is not a refugee requiring consideration under the Treaty.
…
52 It may be thought that in the absence of further legislative provision, the obligation imposed on the Minister, and Tribunal, by the Act to determine an application for a protection visa according to whether the decision-maker is satisfied that Australia has "protection obligations" to that person under the Treaty, does not permit the application to be determined by an assessment whether Australia may seek to exercise a discretion to return the applicant to a third country if the applicant is otherwise a refugee under the terms of the Treaty.
53 The submission that the meaning of "protection obligations" does not include the obligations arising under Article 33 if the applicant for a protection visa is a refugee who may be taken to have "effective protection" in some other State adds, by implication, restrictions on the meaning of the term that Parliament did not express and replaces the apparent meaning with one for which the content and extent thereof is to be supplied by judicial elucidation.
54 As noted earlier, it is a matter of discretion for a Contracting State to decide whether it will seek to expel or refoul a person who is a refugee and unless the Act provides that such

a decision is to be part of the decision-making process in respect of the grant of a visa, the only issue for decision under s 36(2) is whether the applicant for a "protection visa" is a refugee and a person to whom Australia has protection obligations under the Treaty.
55 The conclusion on which the decision of the Full Court turned in Thiyagarajah was expressed in the following terms by von Doussa J with whom Moore and Sackville JJ agreed:

> "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." (562)

The construction of s 36(2) advanced in these reasons produces the same conclusion as that expressed by von Doussa J in Thiyagarajah. In so far as the reasons in Al-Sallal (supra) state that the "effective protection" accorded to a person is assessed as "a matter of practical reality and fact", there was no dissent from the fundamental principle stated by von Doussa J in Thiyagarajah in determining the meaning to be given to "protection obligations" in s 36(2). The application of "practical reality and fact" does not alter the relevant questions to be answered, namely, has an obligation to protect the applicant for a protection visa been accepted by a third country and have rights to reside in, leave, and re-enter that country been granted to the applicant by that country. That is, in effect, has a third country undertaken to receive and protect the applicant (emphasis added)
56 Although the appeal from the Full Court to the High Court in Thiyagarajah was limited to the question whether the orders of the Full Court exceeded the powers vested in the Court by s 481 of the Act, Gleeson CJ, McHugh, Gummow and Hayne JJ (Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 at [16]) referred, in passing, to the criterion "protection obligations" specified in s 36(2) and stated that even if an applicant for a protection visa were a refugee, he or she would not be a person to whom Australia had protection obligations "if Article 33 applied". Their Honours stated that von Doussa J had correctly identified and dealt with the issue as to the nature of Australia's obligations under the Treaty. It should be concluded, therefore, 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 and in consequence the applicant has correlative rights arising out of that obligation, 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.
57 Unless these obligations and rights exist at the time the application for a protection visa is determined by the Minister, Australia will have "protection obligations" to the applicant if that person is a refugee.
58 On no view of the material before the Tribunal could it be said that as at the time of determination of the application the appellant was a person in respect of whom Syria had undertaken the obligation to receive and protect the applicant as a person who possessed a right to reside in Syria, and a right to have Syria issue to him travel documents permitting him to leave and re-enter Syria. Syria had permitted the applicant to enter Syria as an Iraqi national for whom there was a sponsor present in Syria. That involved no right to travel

documents nor acceptance by Syria of an obligation to protect the applicant as a refugee. In fact, as the Tribunal noted, Syria expressly disavowed any obligation to refugees.

Further examples of the application of article 33 are MIMA v Al-Sallal (1999) 94 FCR 549; 167 ALR 175, Al-Zafiry v MIMA (1999) 58 ALD 663 ;[1999] FCA 1332; Al Anezi V MIMA (1999) 192 FCR 283 [1999] FCA 355; Sameh v MIMA [1999] FCA 875 on appeal affirmed in MIMA v Sameh [2000] FCA 578; MIMA v Kabail (1999) 93 FCR 498; Mylvaganam v RRT [2000] FCA 718; Velauthampillai v MIMA [2000] FCA 1015. Belay v MIMA [2001] FCA 9

French J. dealt with the broad principles concerning safe third country and effective protection in Patto v MIMA [2000] FCA 1554 at [27-36] and drew from the decided cases:

[37]… broad propositions in relation to the protection obligations assumed by Australia under Article 33 of the Convention in its application to persons who travel to Australia from the country in which they fear persecution by a third country in which they have stopped or stayed for a time:
1. Return of the person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.
2. Return of the person to the third country will not contravene Article 33, whether or not the person has right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.
3. Return of the person to a third country will not contravene Article 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason.
The preceding propositions are obviously not exhaustive. They do not expressly cover the situation in the present case where the applicant for a refugee visa has been residing in a third country, absent any right to do so but as a matter of sufferance for an extended period, and has been assessed for refugee status in that country but declined. That is the situation which faces this applicant.

He went on to deal with the instant case as follows:

"Effective Protection in Greece

38 The way in which the Tribunal approached the third safe country issue was to identify as the questions for consideration:

> "...whether or not the applicant would be permitted to re-enter Greece, at least on a temporary basis and ...if upon return to Greece, would the applicant be exposed to a real risk of being returned by Greece to Iraq?" (p 10)

The questions thus posed did not raise for determination whether Greece would give or had given proper consideration to its protection obligations under the Convention. The Tribunal had no information from the Greek government about Patto's right of return to that country. Nevertheless noting that Patto was refused refugee status by the Greek government, that he had resided there following that refusal for seven years and that his family still resided there, the Tribunal was satisfied that he had "... a right to return to Greece". With all due respect the conclusion of a right to return to Greece is a non-sequitur. There is nothing in the material to suggest a legal right to return to that country. While it may be that Patto could have remained in Greece indefinitely, his departure in Australia and prospective re-entry as a deportee from this country are circumstances which place in the realm of sheer speculation what the attitude of the Greek government might be to his re-entry. This difficulty also confronts the Tribunal's fall-back finding that even in the absence of a legal right he would, as a matter of "practical reality" be afforded effective protection in Greece".

Patto was followed in Applicant C v MIMA [2001] FCA 229 ( Carr J.) which holds that for S36 (3) to apply there must be a legally enforceable right to return to the third country (see below)

And see Tharmalingam v MIMA [1999] FCA 1180 on the obligation of an applicant to substantiate an inability to return or lack of a right of re-entry to a third country where there is no impediment to him doing so (note the comment by Marshall J. in Mire v MIMA .[2000] FCA 1149 where the issue of the ability to exercise a right of re-entry to a third country was raised because the applicant had destroyed his travel documentation. His Honour held that on an analysis of all the material the issue of re-issuing of this document was not "a matter of great concern", ipso facto it was not a material question of fact within S430(1)(c). He opined that if it had been so one would have expected the applicant's representative to have requested the RRT to make a further inquiry or have made one himself so as to put forward "whatever evidence or argument (he) wishes to advance in support of (his) contention(s)" See Abebe v Commonwealth (1999) 197 CLR 510 at [187] per Gummow, Hayne JJ.

As to the issue whether the Tribunal applied the right standard of protection required by article 33 of the Convention when considering the level of protection offered by a third country ( in this case Germany), and the correct test to apply in these circumstances, [note below re; levels of own state protection] Minister v Tas [2000] FCA 1657. Beaumont J. had this to say in relation to the Minister's

submission that the Tribunal did not ask itself the right question (see [32] and [33-42] in relation to the various authorities):

"53 It will further be recalled that the Tribunal went on to find that "[t]here is evidence that the German state may be unable [emphasis added] to protect [the applicant] from ... persecution [in the form of the 'racial harassment and discrimination' found by the Tribunal]".
54 On behalf of the Minister, it is submitted that there was evidence before the Tribunal of real efforts made on behalf of the German authorities to address the level of crime; and that whilst those efforts may not have eradicated the problem, so that the respondent could not be guaranteed protection, this standard is not required by the Convention. There was, the submission goes, no inquiry by the Tribunal into the question whether there had been a sustained or systemic failure of state protection; nor into the question whether the claimed lack of protection was such as to indicate that the State (Germany) was unable or unwilling to discharge its duty to establish and operate a system for protection against persecution.
55 In my opinion, there is considerable force in the submission. When the Tribunal's reasons in this area are read as a whole, it appears that the Tribunal did adopt too high a standard in its approach; and that, in truth, the Tribunal was addressing the question whether the German authorities could guarantee an adequate level of protection. Yet, as Lord Clyde observed in Horvath, the real question is whether there is a reasonable willingness on the part of the law enforcement agencies and the courts to detect, prosecute and punish offenders.
56 The Tribunal erred in law in this respect."

In MIMA v Yasouie [2001] FCA 1133 (2001) 116 FCR 7 Hill J. dealt with the same issue as in Tas.

An almost identical issue arose in S115/00A v MIMA (2001) 180 ALR 561 [2001] FCA 540 framed on the basis of error of law as well as no evidence where the Tribunal had found that the applicant had a right of return to a third country (Syria) where he enjoyed effective protection. The decision raised an issue of some possible general significance as to the operation of s 36(2) of the Act in light of the decision of Carr J in Applicant C v MIMA in relation to the operation of s 36(3) of the Act.Finn J. said:

4 Subject to a qualification noted below, the content of the question posed by s 36(2) - is a non-citizen in Australia a person to whom Australia owes protection obligations - is to be gauged by reference to the protection obligations owed by Australia under the Convention as a matter of international law: Minister for Immigration and Multicultural Affairs v Thiyagarajah (1998) 80 FCR 543 at 552. The qualification to this, wrought by the 1999 amendment to the Act, is that which results from s 36(3), (4) and (5). If s 36(3) applies to a person, Australia is deemed not to have protection obligations to that person irrespective of the terms of the Convention.
…

6 The protection obligations owed a person who satisfies the definition but who is not caught by the disqualifying conditions, are set out in Articles 31-33 of the Convention, the principal of which is contained in Art 33…

…

Where an applicant for a protection visa in Australia is "as a matter of practical reality and fact", likely to be given "effective protection" in a third country by being permitted to enter and live in that country where he or she will not be at risk of being returned to his or her original country, Australia can (consistent with Article 33) return the applicant to that third country without considering whether he or she is a refugee: see Minister for Immigration and Multicultural Affairs v Al-Sallal [1999] FCA 1332. Importantly, in order to find that a third country affords effective protection such as described above, it is not necessary to show that (i) the applicant has already been granted refugee status in that country: Minister for Immigration and Multicultural Affairs v Gnanapiragasam (1998) 88 FCR 1; (ii) the third country is a party to the Convention; Al-Sallal's case, above; or (iii) the applicant has a right of resident in that country: Patto v Minister for Immigration and Multicultural Affairs [2000] FCA 1554.

The "Applicant C" Issue

7 In Applicant C's case, above, Carr J held that in determining whether s 36(3) of the Act precluded a finding that Australia has protection obligations, it must be shown that the "right to enter and reside in ... any country apart from Australia" was a legally enforceable right. It is in consequence insufficient for s 36(3) purposes to show that, though not possessing such a right, an applicant as a matter of practical reality and fact is likely to be given effective protection in another country.

8 The effect of Carr J's decision is, in my view, that:

(i) where a non-citizen in Australia has a legally enforceable right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself of that right unless the conditions prescribed in either s 36(4) or (5) are satisfied, in which case the s 36(3) preclusion will not apply;

(ii) where a non-citizen in Australia does not have a legally enforceable right to enter and reside in a third country, Australia will nonetheless be entitled to refoule that person to that country consistent with Australia's obligations under Article 33 of the Convention, if that person is likely to be given effective protection in that country; and

(iii) if neither s 36(3) or the wider effective protection principle applies to a person, that person is owed protection obligations if he or she is otherwise a "refugee" within Article 1A the Convention to whom the provisions of the Convention apply or continue to apply: see Article 1C to F; see also s 91ff of the Act.

It should be noted, contrary to point (ii) above, that Carr J. seemed to be saying at [24] that the ‘common law’ test was the same as the statutory one so far as establishing the no evidence ground is concerned.

His Honour went on:

9. A consequence of these varying contingencies is that the denial of a protection visa because of a non-citizen's "connection" with a third country can result from either of two causes - (i) that s 36(3) applies to that person; or (ii) that the person nonetheless has effective protection in that third country. As the decision of Carr J illustrates it is important

for the decision-maker properly to identify which of these bases is the one being relied upon as they embody differing tests. In Applicant C the Tribunal purported to apply s 36(3) without any evidence that the applicant in that case (an Iraqi as here) had a legally enforceable right to enter Syria (as here). The Tribunal did not purport to apply the "effective protection" provision.
10 I should add that I was not asked to depart from Carr J's decision in this proceeding. As I do not consider it is clearly wrong, I would, as a matter of comity, refrain from doing so in any event.

Having dealt with the factual setting the learned judge continued:

15…the Tribunal turned to what it considered to be the "[k]ey issues for consideration". These it indicated to be:

> "whether the applicant has effective protection in Syria without risk of refoulement to Iraq and whether or not he has a well-founded fear of persecution in relation to Syria."

It went on to note the principal case law from Thiyagarajah's case to Al-Sallal's case. It then stated that "[r]elevantly, Section 36 of the [Act] had three new provisions added to it". It cited s 36(3), (4) and (5) and quoted from the Explanatory Memorandum to, and second reading speech on, the amending Bill. And it concluded:

> "[t]he aforementioned amendments to s 36 apply to the present applicant…

…[It]did not accept that he entered Syria illegally, but rather it found he entered Syria legally with the support of a sponsor.
18 The Tribunal found that:

> "the applicant, especially through his former legal entry into Syria and the significant connections he has there due to his association with Al Daawa, and the length of his own residence and that of his wife whom he married in Syria, has a right to re-enter Syria. Aforementioned country information indicates that he does not face a real chance of refoulement to Iraq. He is able to reside in Syria indefinitely.
>
> …

20 In the final three paragraphs of its reasons, the Tribunal stated:

> "The Tribunal notes in light of the amendments to section 36 of the Migration Act and the particular facts of this case that the applicant's departure from Syria to seek asylum in Australia is at odds with the spirit and clear parliamentary intention of those amendments. Those amendments are clearly aimed at preventing forum-shopping among asylum seekers.
>
> The Tribunal finds that "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 [viz. Syria] where he will not be under any risk of being refouled to his original country [Iraq](per MIMA v Al-Sallal, op. cit.). It also concludes that the applicant has not demonstrated any valid reason based on a well-founded fear of persecution, or otherwise, as to why he has not taken all possible steps to avail himself of the protection that is available to him in Syria.

> In considering all the circumstances of this case the Tribunal finds that the applicant has a right to return to Syria where he enjoys effective protection. He does not face any real chance of refoulement to Iraq or of persecution for any Convention reason in Syria. Accordingly, Australia's protection obligations are not invoked in the present case."

…

The Applicant's challenges

21 The first, and in my view only substantial, challenge to the Tribunal's decision is in essence that which was successful in Applicant C's case. It is that the Tribunal applied s 36(3) to the applicant but without any evidence that he had a legally enforceable right to enter Syria, or, in the alternative, without correctly appreciating that (inter alia) such a legally enforceable right was required before s 36(3) could be invoked against him.
22 Related to this challenge is the proposition, as in Applicant C's case, that the Tribunal did not, and did not purport to, apply the effective protection principle to the applicant, absent a legally enforceable right capable of attracting s 36(3).
23 The respondent's contrary contentions on this matter are twofold. The first is that, fairly analysed, the Tribunal's reasons are consistent with its having considered the application both of s 36(3) and the effective protection principle. The second is that even if it be found the Tribunal so intermixed s 36(3) and the effective protection principle as to have fallen into error, its findings in any event were such as to satisfy at least the effective protection principle so that it would be futile to remit the matter to the Tribunal for reconsideration.
24 For my own part, I do not consider that one can properly conclude either that the Tribunal separately considered the application both of s 36(3) and of the effective protection principle, or that it correctly comprehended the differing scope and application of the two. They have been seamlessly mixed with, in my view, s 36(3) ultimately being applied as in effect a crystallisation of the effective protection principle. In light of the Tribunal's own appreciation of the potential application of s 36(3) to the applicant (as expressed early in its reasons) and to the language of the last three paragraphs of the Tribunal's reasons (set out above), I am not satisfied that the Tribunal did other than apply s 36(3) to the applicant. It directed itself to, and answered, the questions raised by s 36(3), (4) and (5). And it erred in its failure to appreciate that the "right" referred to in s 36(3) was a "legally enforceable right".
25 There clearly was no evidence before the Tribunal of the applicant having such a right. On the contrary. For this reason, as in Applicant C's case, the applicant has made out his claim (i) under the no-evidence ground of s 476(1)(g) as elaborated upon in s 476(4)(b): "the decision [was] based on the existence of a particular fact ... that ... did not exist"; and (ii) under s 476(1)(e), there being an incorrect interpretation of the applicable law.

Carr J. ( the trial judge in Applicant C) said relevantly in Taiem v MIMA (2001) 186 ALR 361; [2001] FCA 611:

15 My second concern was in relation to the Tribunal's finding that the applicant had the right to re-enter Syria. In the respondent's supplementary submissions there was fairly extensive reference to s 36(3) of the Migration Act 1958 (Cth). That sub-section provides as follows:

> "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, 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."

16 Although the Tribunal did not refer to s 36(3) of the Act, it found that the applicant had the right to re-enter Syria. The evidence upon which that finding was made included the updated authentication of his UNRWA status, the fact that his family returned to Syria in 1994, the inclusion of his name on the family's registration and travel certificate and the independent country information. The Tribunal's finding that the applicant had a right to re-enter Syria was, in my opinion, quite clearly open to it.

17 The evidence before the Tribunal strongly supports the conclusion that this right of re-entry is a legal right in accordance with Syrian law. When the Tribunal referred to this as "the right to re-enter Syria", I think that it must (in the context of its findings) be taken to have been referring to a legal right. Foreign law is, of course, so far as this Court is concerned, a matter of fact, and the Tribunal's finding on this point is thus not open to challenge in what for this Court is a very narrow and statutorily-confined jurisdiction. Accordingly, there is no need for me to consider the respondent's submission that my decision in Applicant C v Minister for Immigration and Multicultural Affairs [2000] FCA 229 [that the "right" referred to in s 36(3) of the Act is a legally-enforceable right] "is erroneous and should not be followed".

18 The Tribunal appears, in my opinion, to have elided to some extent the two issues of, first, whether the applicant was a refugee under the Convention definition and, secondly, whether he would (regardless of being a refugee) have effective protection in Syria within Article 33 of the Convention. However, in this particular case, I do not think it has erred in law in doing so. The Tribunal's findings can be seen quite clearly to amount to a rejection of the applicant's claims to Convention-based grounds of persecution in Syria as his country of former habitual residence. They can also be seen, in particular in paragraph numbered 1 of its reasons set out above, to amount to a finding of effective protection in Syria (the Tribunal's term was "adequate protection") from harm or expulsion, even though the Tribunal made no reference to Article 33 of the Convention or s 36(3) of the Act anywhere in its reasons.

Applicant C and S115/00A v MIMA [2001] FCA 540 were applied and distinguished on the facts in Kola v MIMA [2001] FCA 630 at [6]-[7] [9] [10]-[13][26] [30[32]-[37] [39]-[47] and Bitani v MIMA [2001] FCA 631 [2] [5]-[7] [18]-[18][25]-[27] by Mansfield J.whose judgment was affirmed by the Full Court in Kola v MIMA [2002] FCA 265 FCAFC 59 (2002) 120 FCR 170 (Whitlam, Sackville and Kiefel JJ.):

The Court said dealing with both appeals:

29 The final way in which the Kolas contended that the RRT had erred in law was that the RRT had not correctly applied the expression in s 36(3) of the Migration Act of "a right to enter and reside in" an intermediate third country. Rather, so it was argued, the RRT had

wrongly equated a "right" with a capacity "as a matter of practical reality and fact" to enter and reside in Albania. His Honour held that:
* the concept of "effective protection" used by the authorities in relation to Art 33 of the Convention was different from "a right to enter and reside in" a third country as used in s 36(3) of the Migration Act;
* the introduction of s 36(3) of the Migration Act (by the Border Protection Legislation Amendment Act 1999 (Cth), commencing on 16 December 1999) did not change the existing operation of s 36(2);
* accordingly, the doctrine of effective protection remained intact;
* the authorities (notably the Full Court decision in Minister v Al Sallal, at 558-559, approving observations of Emmett J in Al-Zafiry v Minister for Immigration and Multicultural Affairs [1999] FCA 443) established the proposition that the issue of "effective protection" in a third country is to be determined "as a matter of practical reality and fact";
* the RRT had correctly applied the test expounded by the authorities in deciding that, by reason of the effective protection available to them in Albania, Australia did not owe protection obligations to the Kolas; and
* while the RRT did not "really address" the question posed by s 36(3), namely whether the Kolas had taken all possible steps to secure residency in Albania, there was no need for the RRT to do so since it had resolved the issue of "effective protection" against the Kolas.
30 The primary Judge rejected other submissions advanced on behalf of the Kolas. Given that these submissions were not pursued on the appeal, there is no need to refer to them.
….

THE EFFECTIVE PROTECTION QUESTION

61 Ms Maharaj fairly acknowledged that the RRT's reasoning on the effective protection question reflected some confusion on its part. There are passages in the RRT's reasons which appear to assume, incorrectly, that the test for determining whether an applicant for a protection visa has a "right to enter and reside in a [third country]" for the purposes of s 36(3) of the Migration Act is the same as the test for determining whether a third country can provide effective protection to the applicant such that Australia does not owe "protection obligations" to that applicant under s 36(2) of the Migration Act: see Minister v Applicant C, at [44]-[65], per Stone J (with whom Gray and Lee JJ agreed).
62 It does not follow that, because the RRT mistakenly assumed that the tests were the same, its decision "involved" an error of law. It is well settled, as Mason CJ said in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, at 353, that a decision does not involve an error of law

> "unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been different".

See also Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, at 576-577 (joint judgment); Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343, at 350 (joint judgment).
63 The following propositions relevant to the present case emerge from the authorities:
* Australia does not owe protection obligations to a person who has established residence and acquired effective protection (in the sense of protection that ensuring there is no breach of Art 33 of the Convention) in a third country: Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543, at 562, per von Doussa J (with whom Moore and Sackville JJ agreed); Minister v Applicant C, at [20], per Stone J.

* This principle does not apply only to the case where the person has a legally enforceable right to enter and reside in a third country. It is enough that, as a matter of practical reality and fact, the person is likely to be given effective protection in the third country by being permitted to enter and live there and is neither at risk of being refouled to his or her original country, nor of his or her life or freedom being threatened on account of race, religion, nationality, membership of a particular social group or political opinion: Al-Zafiri v Minister at [26], per Emmett J, approved in Minister v Al-Sallal, at 558, per curiam; Patto v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 119, at [37], per French J, cited with approval in Minister v Applicant C, at [21], per Stone J.
* In determining the likelihood of the person being afforded effective protection, it is necessary to abjure any rigid standard and rely on a judicial assessment of the practical realities and circumstances relevant to that person's position: Al-Rahal v Minister (at first instance) at [29], approved in Minister v Applicant C, at [23], per Stone J.
* The enactment of s 36(3) of the Migration Act has not changed the operation of s 36(2) and, in particular, the operation of the effective protection principle: Minister v Applicant C, at [63]-[64], per Stone J, approving the views expressed by the primary Judge in the present case: Kola at [37]. Accordingly, as was said in Minister v Applicant C, at [65], 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."

64 In our opinion, the primary Judge was correct in holding that the RRT applied the proper test for determining whether Albania would afford effective protection to the Kolas. The RRT specifically found that on the evidence, as a matter of practical reality and fact, the Kolas were permitted to enter Albania and reside there. The RRT also found that the Kolas would not face a real risk of persecution for any Convention reason in that country. (Insofar as the latter finding is concerned, von Doussa J (with whom Moore and Sackville JJ agreed) in Minister v Thiyagarajah, at 563-565, said that the standard to be applied in relation to Art 33 of the Convention was the same as that applicable in determining whether a person has a well-founded fear of persecution for a Convention reason for the purposes of Art 1A(2) of the Convention. No challenge was made in the present case to the formulation in Minister v Thiyagarajah: cf V856/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 1018, at [81], per Allsop J.) The questions posed and answered by the RRT accord with the approach taken by the authorities.
65 It is not to the point that the RRT may have mistakenly assumed that the test stated by s 36(3) of the Migration Act is the same as the test for effective protection under Art 33 of the Convention. As the primary Judge pointed out, the RRT did not need to address the matters referred to in s 36(3) of the Migration Act. Nor did the RRT address those matters, in particular whether the Kolas had a "right to enter and reside in" Albania. It is true that its findings, which were unfavourable to the Kolas, did encompass the matters referred to in s 36(4) and (5), since they overlap with the issues raised by Art 33. But it was unnecessary for the RRT to consider the application of s 36(3) of the Migration Act, since the Kolas failed in any event by reason of the effective protection doctrine.
66 There is no basis for the Kolas' contention that the RRT failed to make any inquiry, assessment or finding on the effective protection issue. As already noted, the RRT asked itself the correct questions. It had material before it, both in the form of country information and oral evidence, particularly by Mrs Kola, as to conditions in Albania and the policy of Albania with respect to granting refugee status to Kosovar Albanians

(including people such as the Kolas). The RRT assessed the evidence and concluded that, notwithstanding evidence of criminal conduct in Albania, including cases of rape in refugee camps, the Kolas would enjoy effective protection in Albania and would not be refouled to Serbia. The finding may or may not have been correct as a matter of fact. But the RRT did assess the evidence and make findings on the relevant issues.

Applicant C, S115/00A, Kola and Bitani (at first instance) were followed by French J. in W228 v MIMA [2001] FCA 860.

His Honour discussed the background to and the statutory provisions concerning the Safe third country principle at [32]-[37] then said:

38 The Refugees Convention does not confer a right of asylum - Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543; Rajendran v Minister for Immigration and Multicultural Affairs (1998) 166 ALR 619; SZ v Minister for Immigration and Multicultural Affairs (2000) 173 ALR 353 at 356. The relevant municipal law of Australia gives effect to protection obligations assumed by Australia as a contracting party to the Refugee Convention. The primary obligation arises out of the prohibition against refoulement in Article 33 which has two important elements:
1. It operates in respect of refugees.
2. It prohibits only their expulsion or return to the frontiers of territories where their lives or freedoms would be threatened for a Convention reason.
39 The question whether the return of a person seeking a protection visa in Australia to a country other than that person's country of origin is consistent with Australia's obligations under Article 33 will arise in a variety of circumstances. A person who has acquired the rights and obligations of a national of the third country and has the right to reside there is not covered by the Convention because of Article 1E. Article 1E apart, Article 33 would not extend to such a person because return to the third country would not involve a threat to his or her life or freedom for a Convention reason - Thiyagarajah at 555 (von Doussa J). A right of residence in a third country is not a condition of its characterisation as a safe third country if it be a party to the Convention which will honour its obligations thereunder. Nor is it necessary that the third country be a party to the Convention if it will otherwise afford effective protection to the person [French J. quoted from Al-Zafiry at [26] ].This was approved in Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 at 558-559. In Patto v Minister for Immigration & Multicultural Affairs [2000] FCA 1554, I observed that the following broad propositions may be drawn from these cases in relation to the protection obligations assumed by Australia under Article 33 in its application to persons who travel to Australia from the country in which they fear persecution via a third country in which they have stayed for a time:
1. Return of the person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.
2. Return of the person to the third country will not contravene Article 33 whether or not the person has a right of residence in that country if that country is a party to the Convention and can be expected to honour its obligations thereunder.
3. Return of the person to the third country will not contravene Article 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person

claiming asylum effective protection against threats to his life or freedom for a Convention reason.

40 The effect of s 36(3) as qualified by ss 36(4) and (5) is to identify a subset of the circumstances in which the return of a refugee to a third country will not involve a breach of Australia's obligations under Article 33. Carr J in Applicant C v Minister for Immigration & Multicultural Affairs [2001] FCA 229 read s 36(3) as confined to those circumstances in which the refugee had a legal right to enter the third country. That was a case in which the applicant, an Iraqi national, was on the evidence able to enter Syria if he were able to obtain sponsorship from within Syria. Then he would be permitted to enter Syria and remain there so long as he complied with Syrian laws. The effect of Carr J's decision was summarised by Finn J in S115/00A [French J. quoted FinnJ.'s tripartite analysis]

As Finn J put it himself:

> "...the denial of a protection visa because of a non-citizen's "connection" with a third country can result from either of two causes –
>
> (i) that s 36(3) applies to that person; or
>
> (ii) that the person nonetheless has effective protection in that third country."

His Honour drew attention to the importance of the decision-maker properly identifying which of the bases is relied upon as they embody differing tests. Both judgments were considered by Mansfield J in Bitani v Minister for Immigration & Multicultural Affairs [2001] FCA 631 who agreed with the propositions set out in Finn J's decision and thereby with the approach taken by Carr J in Applicant C. His Honour made the important point discussed in Kola v Minister for Immigration & Multicultural Affairs [2001] FCA 630, which was handed down on the same day as Bitani, that the introduction of s 36(3) - (5) did not alter or diminish the effect of s 36(2) of the Act. His Honour put it thus:

> "Section 36(2) has the effect that, if an applicant for a protection visa has, as a matter of practical reality and fact, the capacity to enter or re-enter an intermediate third country and to secure effective protection there without any real risk of being refouled to the country of nationality, then Australia does not owe protection obligations to that person." At [25].

I respectfully agree with his Honour's analysis.

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

Syria - A Safe Third Country?

42…The Tribunal was satisfied that the applicant and his family could return to Syria. This would, on the Tribunal's findings, require an assumption of the continuing availability of sponsorship, as a mode of entry, and that the applicant could seek and obtain such sponsorship. The Tribunal was satisfied that he was "...in a position to arrange a sponsorship or clearance to enable him to return".

43 Notwithstanding the Tribunal's explicit reference to s 36(3) in the earlier part of its reasons and the absence of reference to Article 33, I do not think that it follows that it assumed that the applicant had any legal right to re-enter Syria. It was, however, open on the basis of the findings about the history of entry to, exit from and return to Syria, and the continuing family connection there, to infer that sponsorship would be available to the applicant to enable his return. In that sense it was open to the Tribunal to form the view it

did that he "could" return. The case differs from Patto where the applicant had been an illegal immigrant in Greece and although his presence there was apparently tolerated for an extended period there was no basis for the inference that he would be allowed to return having once left the country. In Applicant C, the question was confined to the issue under s 36(3) namely whether the applicant, in that case an Iraqi citizen, had a legal right to re-enter Syria from which he had come. What the Tribunal found was open to it to find. It posed the right question and ground (b) therefore fails.

His Honour also observed:

44 In a sense the question whether the applicant "could" enter Syria is academic. It will be proven only if he successfully arranges sponsorship. If sponsorship turns out not to be available then any step by Australia to send him back to Iraq, having regard to the findings of the Tribunal that he is a refugee from that country, would be in clear breach of its non-refoulement obligation under Article 33. On the other hand, if there are steps that the applicant can take to secure his return to a safe third country, it seems a singularly unattractive proposition that he should be able to secure his place in Australia by refusing to take such steps.
45 In my opinion the position is analogous to that in which an applicant for a protection visa is found to be able, as a matter of practical reality, to re-enter a safe third country from which he came, albeit he may first have to apply for a visa. Provided Australia is prepared to return him to that country if a visa be granted, then it has discharged its obligations. If the applicant refuses to apply for a visa to enter the third country he has put himself in a position in which return to the country from which he is seeking refuge may be the only option available. In that event, a failure to co-operate in obtaining the necessary travel documents to the safe third country could properly be viewed as a constructive waiver of his claim to protection under the Convention. This is not to suggest that such a situation has or would occur in this case.
46 Of course, if the applicant does seek sponsorship and sponsorship is not forthcoming, or re-entry is refused in any event, there will have been no such waiver and Australia's non-refoulement obligation will continue in full force. On that basis he would be entitled to a protection visa.
47 It is submitted under ground (c) of the grounds for review, that the Tribunal should have been satisfied to a high degree of probability that Syria would accept the return of the applicant and his family and that inquiries should have been made for that purpose. The Act, however, does not prescribe nor does the law require, any particular standard of proof or disproof in what is an administrative and not judicial process, albeit it is a process which may be of life and death significance to those seeking protection visas. On the Tribunal's current finding, Australia has no protection obligations towards the applicant and his family which would be breached by their return to Syria. In my opinion therefore ground (c) fails. In a real sense of course, the question will not finally be resolved until it is determined whether Syria will accept the applicant's return. If sponsorship is not forthcoming and/or Syria does not accept his return, the protection obligation will be enlivened. Whether that obligation is met by a grant of a temporary protection visa or otherwise, is a matter which it is not necessary to address here.

In Tharmalingam the Court (Ryan, Tamberlin and Madgwick JJ.) said:

12 We accept that the approach taken by the Full Court in Thiyagarajah requires a finding that the applicant has a right to re-enter the third country before the Tribunal is relieved of

the necessity to consider the merits of the application. However, it is unnecessary for us to determine whether the primary Judge in the present case misapplied that principle because the evidence constituted by the Deputy Consul-General's memorandum of 18 August 1998 clearly permitted the Tribunal to infer the existence of the requisite right. That the Tribunal drew that inference in the present case is clear from its reasons…

The Court also discussed the implications of the Applicant no longer having a right of return to France at the time of the Court judgment (at [20]-[21]).

Applicant C was considered and followed in part by Allsop J. in V856/00A v MIMA [2001] FCA 1018; (2001) 114 FCR 408 :

14…, the Tribunal stated the following:

> In the circumstances, I am not satisfied that [the applicant] has taken all possible steps to avail himself of a right to enter and reside in Syria. I am satisfied that [the applicant] would be able to arrange to re-enter Syria through the person or organisation that previously sponsored him. I am satisfied that if he re-entered Syria, [the applicant] would be able to reside there on an indefinite basis and that the risk he would be refouled to Iraq is remote and insubstantial. Finally, there is no evidence before me to suggest that [the applicant] has a well-founded fear of persecution for a Convention reason in Syria. In the circumstances, I am satisfied that [the applicant] has effective protection in Syria and that in accordance with section 36(2) of the Act, Australia does not have protection obligations towards him.

15 This last quoted paragraph makes it plain, I think, that the reasoning and analysis leading to the conclusion of a lack of protection obligations were products of the purported application of subs 36(3) to (5). In this first sentence of the quoted paragraph set out in para [14] above the Tribunal dealt with the subject matter of the applicant taking all possible steps to avail himself of a right to enter and reside in Syria. That subject matter plainly finds its source in subs 36(3). The Tribunal was "not satisfied" that the applicant had taken all such steps. If the Tribunal were minded to apply subs 36(3) it was obliged to make a finding that in fact the applicant had not taken all such steps. I need not explore the question as to whether in the light of Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 and Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30 this alone would vitiate the attempted application of subs 36(3), since, for the reasons expressed below, I am of the view that the Tribunal otherwise misunderstood and misapplied subs 36(3). Also, the third and fourth sentences of the paragraph reflect an attention to the matters called for by subss 36(4) and (5).

His Honour set out the legislative provisions of s36, the arguments of the parties at [20] –[25]:

He then said:

26…The word "right" was used in the provision. The word was used by Senator Patterson, either in terms or in substantive effect… A practical capacity to bring about a lawful permission is in no sense a "right" to do what the permission allows to be done. It might be otherwise if it could be shown that a statute or piece of positive law of the country in question granted a permission on satisfaction of certain preconditions. It may be that in those circumstances, perhaps by reference to, and with the benefit of an understanding of, that country's system of law, the person had a right, albeit inchoate. However, the submission of the respondent was broader than that: it was put that practical capacity to bring about lawful entry was sufficient for the application of subs 36(3). The submission had to be so broad, because that is how the Tribunal approached the matter. In the paragraphs quoted in paras [10] and [14] above, the Tribunal expressed its reasons for concluding that steps had not been taken by the applicant to avail himself of the right to re-enter Syria, in terms of his ability to arrange to re-enter Syria.

…

28 I also reject the submission that subss 36(3) to (5) worked a codification of the pre-existing law concerning the existence of effective protection in a practical sense in a third country. In so doing I rely on and agree with, to that extent, the reasons for judgment of Finn J in S115/005A, supra, Mansfield J in Kola, supra, especially [36-37] and in Bitani, supra, especially [25] and French J in W228, supra.

29 Also, I agree with Finn J, Mansfield J and French J that subs 36(3) was and is not intended to detract from the operation, otherwise, of subs 36(2) and, through it, of the Convention, and, in particular, Article 33.

30 As I have noted earlier, it was not in contest that if I did not accept the respondent's arguments about the meaning of the word "right" (which I do not) there was no right (of whatever kind) possessed by the applicant to re-enter Syria.

31 I say "of whatever kind" because by rejecting the respondent's submissions that "right" means capability to bring about entry or capability to bring about a permission to enter and reside does not mean that I fully agree with the applicant's submissions. For my part, I do not see the need to construe "right" in subs 36(3) as a "legally enforceable right" as Carr J did in Applicant C, supra. Although I agree that "right" means something more than a capacity or capability lawfully to enter and reside in a particular country or to bring about a permission to enter and reside, I do not think that it follows that the subsection is only referring to what might be described as a right in the strict sense, having the Hohfeldian "jural correlative" of duty: Stone, The Province and Function of Law (Harvard University Press, 1950) pp 115-122, or to rights that can be said to be legally enforceable. Carr J in Applicant C, supra, at para [28] construed subs 36(3) as "consonant with Article 1E of the Convention". A right under Article 1E is one (arising from possession of nationality) that is embedded in the law of the country, with correlative obligations on the state in question. In my view, the text of subs 36(3) is more relevant and tends to the contrary. The phrase in subs 36(3) "howsoever that right arose or is expressed" assists in the recognition that the source and incidents of the right can be diverse. It also assists in the recognition that "right" is intended to be a wide conception. Especially in the light of the above phrase, I see no reason to restrict the meaning of the word "right" to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning a liberty or permission or privilege which does not give rise to any particular duty upon the state in question. Such a liberty, permission or privilege would obtain its effective substance from its grant and thereafter from the lack of any withdrawal of it and from the lack of any existing prohibition or law contrary to its exercise, rather than

from the existence within the positive law of the state in question of a correlative duty, justiciable and enforceable in law, to recognise the right. It may be that in many cases if the right is to survive outside, and divorced from residence in, the country in question it may well be a right in the strict sense, but I do not think that that conclusion follows as a matter of statutory construction.

…

33 However, that error is not the end of the matter. A consequence of my view that the insertion of subss 36(3) to (7) did not remove a consideration of the operation of Article 33 from the assessment as to whether Australia owes protection obligations for the purposes of subs 36(2) is that it is necessary to examine the Tribunal's decision and reasons to ascertain whether the decision can otherwise be supported by reference to the law on "effective protection" and Article 33: see Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343, 364-65 at para [59] and Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, 576-77.

34 The first submission put by the applicant was that for it to be able to be concluded that Australia did not owe protection obligations to someone who was otherwise a refugee because that person could be returned to a country which provided effective protection, without breach of Article 33, that person had to have a legally enforceable right or at least a right of some kind to enter that "safe" country.

35 After the hearing of the matter in Adelaide, my attention was drawn to the decision of the Full Court in Tharmalingam v Minister for Immigration and Multicultural Affairs [1999] FCA 1180…The Full Court found that the Tribunal had made a finding, which was open to it, that there was a right of re-entry: Tharmalingam, supra, para [12]. It is plain that were it not for this finding of the Tribunal, the Full Court would have allowed the appeal. At para [11] the Court referred to the following passage in the judgment of von Doussa J (with whom Moore and Sackville JJ agreed) in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 at page 562:

> 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.

36 The Full Court in Tharmalingam then said the following, at para [12]:

> We accept that the approach taken by the Full Court in Thiyagarajah requires a finding that the applicant has a right to re-enter the third country before the Tribunal is relieved of the necessity to consider the merits of the application. [emphasis in original]

37 I will deal with the question whether I am bound to follow this view later. Strictly speaking it was not, I think, part of the ratio of Tharmalingam, but it was unequivocally expressed.

38 If I am bound to follow these views then I must accede to the submission of the applicant referred to in para [34] above, at least to the extent that it accords with the view which I have expressed about the nature of the word "right". I do not see anything in Tharmalingam contrary to the views which I have expressed about the word "right" (albeit

in the context of subs 36(3)) which views I would apply to any need for a "right" in this context.
39 For my own part, I would respectfully disagree that this conclusion of the Full Court in Tharmalingam was mandated by the paragraph in Thiyagarajah referred to in para [35] above, or by anything in Thiyagarajah. My view, uninstructed by Tharmalingam, is that though a number of cases, including Thiyagarajah, displayed facts which included a right to enter, none of them had been decided on the basis of the need for the existence of such a right.
…

His Honour referred to the relevant cases (see above) Thiyagarajah Rajendran, Gnanapiragasam .As to the latter Allsop J. said:

43…By reason of the way this case was argued and dealt with it was unnecessary for Weinberg J to decide whether a right in the asylum seeker to enter the safe third country (as opposed to a capacity to bring about entry) was a necessary precondition to the invocation of Article 33 to deny the existence of protection obligations.

He dealt with Al-Zafiry at [44]-[45] and said:

45… It is clear authority for the proposition that no legally enforceable right to enter the country in question is necessary for an application of an Article 33 analysis. It is expressed in terms wide enough to support the wider proposition, and it is logically consistent with the wider proposition, that no right, of any kind, to enter the country in question is necessary for an application of an analysis based on Article 33 which would deny protection obligations.

Having quoted from Al-Sallal and Patto His Honour observed regarding the latter:

49 Both bases (right to enter and practical reality of being permitted to enter) suffered from a lack of evidence. I do not read his Honour's use of the word "critical" in the quotation referred to in para [47] above as intended to mean necessary, but rather as intended to mean important and central. His Honour's decision does not stand as authority for the necessity for there to be a right to enter the country where "effective protection" is available before it can be concluded that a person can be returned to that country without a breach of Article 33.

Allsop J. noted that Carr J did not discuss Article 33 in Applicant C, supra, beyond the brief discussion at para [19] and quoted (at [51]) FinnJ.'s three part analysis particularly (iii) about which he stated:

52 With respect, it is not clear to me that proposition (ii) referred to by Finn J flows from Applicant C, though it may be said to flow from the wider reading of Al-Zafiry and Al-Sallal together with Applicant C. Apart from, arguably, Al-Zafiry and Al-Sallal no case stated that it was not necessary to have a right to enter the country in question for an Article 33 analysis to apply; nor, apart from Tharmalingam, did any case decide that a right to

enter was required for the consequences of Article 33 to deny protection obligations arising.

….

55 Neither Kola nor Bitani stands as authority for the requirement for a right to enter or re-enter before an analysis based on Article 33 can operate to deny the existence of protection obligations.

56 In W228, supra, French J was dealing, as I am here, with an Iraqi national found to have protection available in Syria. . In W228 the Tribunal had focussed on the claimant's capacity to return to Syria and found that he had the capability or capacity to arrange sponsorship and to re-enter Syria. In those circumstances French J distinguished Patto where that body of fact finding had not been properly made by the Tribunal. It is plain from para [43] that French J expressly held that a right to return was unnecessary…[ His Honour quoted [43][44]-[45]]

…

58…I agree with French J in W228 that for an analysis based on Article 33 to deny protection obligations it is not necessary for there to be a right of entry into the safe third country.

At [59]-[63] His Honour discussed the meaning of the term non-refoulement in Article 33. He then said:

64…I do not see in the text of the Convention or Article 33 in the context of the surrounding material anything which would lead to the conclusion that it was intended that a Contracting State would be in breach of its international obligations by expelling or returning (in the sense of taking back to or expelling) a claimant to a country into which that person could gain entry (lawfully) and, in which, upon entry, that person would be safe, because he or she did not have some pre-existing right of entry or re-entry into that other country. I think that this conclusion is reinforced by the text and purpose of Articles 31(2) and 32(3) which contemplate efforts to bring about lawful entry, not pre-existing rights to enter.

65 In these circumstances one would need to understand whether, upon expulsion to or return to the country in question, that person could gain entry, that is one would need to understand whether that person could be returned to that country and if entry could be gained and return could be effected, whether that person would be safe in the relevant sense.

66 None of this is to say that a right of entry or re-entry is irrelevant to the analysis under Article 33. If there be such a right, then attention can be focussed at once upon the quality of the protection within the relevant country upon entry. If, however, there be no right of entry, the question of entry must form part of the factual analysis: will the refugee be placed at risk of refoulement to the country of persecution if he or she is returned to the country in question?

67 French J in W228, supra, approached the question in the circumstances before him, which are similar to those before me, as set out in paras [43], [44] and [45] of his judgment. (See paras [56] and [57] above.) By that approach, the compulsory nature or context of the return does not, of itself, pose any further framework of consideration (at least initially) beyond an examination of the claimant's own capacity to re-enter Syria. If, in the future, his entry was not permitted by Syria then his claim for asylum would have to be re-analysed by the Minister on the basis that he not only had no right, but also no capacity, to enter Syria.

French J was of the view (see para [45] in W228) that if a claimant had the capacity to bring about entry or re-entry that was a sufficient basis upon which to found the Article 33 analysis. I agree, as long as the Tribunal directs itself to the question of whether the claimant can, now, be returned to Syria.

68 It is for the Tribunal to decide, as part of an enquiry as to the availability of effective protection in Syria, whether the claimant can gain entry into Syria. If the claimant has it within his power or capacity, now, to gain entry into Syria and no issue arises before the Tribunal as to the unwillingness of the claimant to exercise that power or capacity, it is then open for the Tribunal to find that he can be returned to Syria where he could gain entry. If some issue arises before the Tribunal as to whether the claimant is willing to exercise that power or capacity, the Tribunal will have to assess this factually…

69 It is therefore the task of the Tribunal to assess and decide whether the claimant can be returned to Syria, in point of fact, and if returned, whether he will have effective protection there, and, thus, whether by returning him, Australia will be in breach of Article 33.

70 If the finding is that he can gain entry and so can be returned and that he would be safe upon entry into Syria, then Australia, it seems to me, does not now owe protection obligations to the claimant. I think this approach is also in accordance with the judgment of French J in W228 and the judgments of RD Nicholson J in Minister for Immigration and Multicultural Affairs v Kabail (1999) 93 FCR 498, Al-Rahal v Minister for Immigration and Multicultural Affairs [2000] FCA 1005 and Aluboodi v Minister for Immigration and Multicultural Affairs [2000] FCA 1498.

71…Any fact finding about either a right to enter or a capacity to enter might, in theory, be falsified by future events and circumstances. The Tribunal can only find the facts and assess Australia's protection obligations on the basis of those facts found to be existing at the time of decision and thrown up for consideration at that time.

72 For these reasons, uninstructed by Tharmalingam, I would have expressed the view that a right to enter Syria was not necessary to call into relevance an analysis under Article 33; but that it was sufficient, and indeed necessary, if there were no such right, for the Tribunal to assess whether the claimant could, as a factual matter, be returned to Syria to enjoy relevant protection.

74 In the light of the Full Court's approval in Al-Sallal of Emmett J's judgment in Al-Zafiry and even though in neither case was it strictly necessary to decide precisely this question, and though Tharmalingam was not referred to in either judgment, in my view there has been in Al-Sallal by adoption of the views of Emmett J in Al-Zafiry a sufficient rejection of the effect of what appears in para [12] of Tharmalingam for me not to be obliged to apply it. In these circumstances I propose to approach the question of entry into Syria for the purposes of Article 33 on the basis of Al-Sallal, Al-Zafiry and W228, to the effect that it is not a precondition for an analysis based on Article 33 to deny protection obligations that the claimant has a right to enter Syria; but, rather, the matter can be approached on the basis which I have set out in paras [58] to [72] above.

75 I turn then to examine further the reasons of the Tribunal. As I indicated earlier in para [15] the approach of the Tribunal was to utilise subs 36(3) in an assessment of the question as to the existence of protection obligations. The factual enquiry engaged in was directed to assessing whether, now, the applicant was able, as a matter of capability and capacity, to return to Syria. As I have indicated, that is the wrong question for subs 36(3), but it is a central question for an analysis based on Article 33. Article 33 was not identified specifically in any analysis expressed by the Tribunal. However, the Tribunal asked itself whether the applicant "has effective protection in Syria"…

76 For this task the Tribunal examined what the applicant could now do to re-enter Syria. I have already referred to these findings in paragraphs [7] to [11] and [14] above. In my

view, recognising the need to approach the written reasons for decision in the manner described by the High Court in Wu Shan Liang, supra at 271-2, the Tribunal has made findings that the applicant has it within his power to arrange for his re-entry into Syria and that he can return to Syria.

His Honour held:

77. It was said that the fact finding of the Tribunal did not direct itself to the question of re-acquisition of capacity to enter and remain in Syria; that the ability to arrange sponsorship was assumed because of a focus on the past brought about by the framework of analysis being set by subs 36(3): that is, the failure (in the past) to take all possible steps. I do not agree. Though the Tribunal was misguided in the legal framework adopted, it dealt with factual questions central to an analysis based on Article 33 from a perspective which was not such as to distort or otherwise make unreliable that fact finding. It found, in effect, that the applicant could, now, re-enter Syria.

…

79 The Tribunal has considered the relevant issues and made findings which permit of only one outcome under an analysis based on Article 33. In these circumstances, the fact that the Tribunal misconceived the meaning of subs 36(3) does not lead to the decision being set aside. I am able to adopt and ought adopt a course to give effect to the decision that should have been made on the facts in the light of further, or different, considerations: Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343, 364-65 at para [59] and Guo, supra at 576-7. Subsection 481(1) of the Act permits the declining of relief, even if there has been an error law. Finn J in S115/00A, supra at para [26] referred to cases which have discussed this course: Rahim v Minister for Immigration and Ethnic Affairs (1997) 78 FCR 223, 238; Morales v Minister for Immigration and Ethnic Affairs (1995) 60 FCR 550, 560-62; Nguyen v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 206, 213 -14; Carlos v Minister for Immigration and Multicultural Affairs [2001] FCA 301; and Santa Sabina College v Minister for Education (1985) 58 ALR 527, 540. (See also Yuk Shan Cheung v Minister for Immigration and Ethnic Affairs (1997) 49 ALD 609, 616; and Ranatora v Minister for Immigration and Multicultural Affairs (1998) 154 ALR 693, 697-98.) I do not see these cases as entitling or at least requiring me to remit the matter where the fact finding has been effected by the right question being asked (although for the wrong reason) merely because the facts are of a kind which might possibly be found differently on remitter. That is not, I think, the effect of what Beaumont J said in Santa Sabina, supra. If the facts have been found for an analysis based on Article 33 in a way which does not throw them into doubt, particularly because the correct question has been approached as a central and not peripheral matter, but bearing in mind the incorrect legal framework set, I am of the view that I should affirm the decision, even if a differently constituted Tribunal might find the facts differently because the factual question might be seen to be one about which minds could reasonably differ.

80…the correct question was asked - about the present capacity or ability of the applicant to enter Syria, because (wrongly) that was seen to answer the question as to whether he had a right (for subs 36(3)) to enter Syria. Thus, the focus of the enquiry was not just to the past but to a present capacity or ability.

His Honour also dealt with an important subsidiary point:

83 During the course of the hearing, I raised with counsel a construction of subs 36(3) and an approach to the facts which had not been dealt with in submissions. In the course of

argument, the respondent adopted this construction, which, if correct, would also lead inexorably to the application being dismissed.
84 The approach was as follows: that upon being granted a permission or liberty to enter Syria, the applicant was given a right to enter and reside in Syria such that it could be said, for the reasons which I expressed in para [31] above, that the applicant had a right (by way of permission or liberty granted at the border) to enter and reside in Syria. Once within Syria, the applicant's entitlement to reside in Syria was governed by, and found in, this permission or right which had been granted to him. By voluntarily leaving Syria and putting himself in a position where he no longer had a right to enter and reside in Syria (though retaining, as the Tribunal found, a capacity to bring about re-entry) the applicant could not be said to have taken all possible steps to avail himself of (that is, to have given himself the advantage of or to have made use of) the right which he had. This right was a composite right granted at the point of entry: the right to enter and reside in Syria.
85 Counsel for the applicant put to me that I should reject this approach because, he said, subs 36(3) contemplated a right presently existing at the time of decision making. Some support for that approach comes, perhaps, from the use of the perfect tense "has not taken" rather than the simple past tense "did not take" or "has not taken or did not take" in subs 36(3). I think that this question of tense is reflective more of style than substance and that "has not taken" is wide enough to cover past completed failures as well as continuing failures.
86 However, in the light of the speech of Senator Patterson and the text of Subdivision AK inserted into the Act at the same time and in particular s 91M referred to in para [22] above, I am of the view that the failure to take steps to avail oneself of the right to enter and reside somewhere requires that the right to enter not be availed of as well as its consequence - the right to reside. Here, the right given to the applicant to enter Syria was fully availed of - he entered and resided. His right to reside there, by the permission granted and continued by Syria, was voluntarily abandoned. On reflection, I do not think that that is or was a failure to take steps to avail himself of a right to enter and reside, but it was a failure to avail himself of a right to reside or to continue to reside.
87 The difference is fine, but I think meaningful. The difference would become important if the applicant had left Syria with a right to re-enter and reside, but had allowed that right to lapse prior to the delegate or Tribunal dealing with his application. In those circumstances, subs 36(3) would, I think, apply, even though the failure was completed in the past, in the sense that it was lost before the date of consideration of the claim by the delegate of the Tribunal.

Allsop J.'s judgment in V856/00A (and in V872/00A, V900/00A, V854/00A and V903/00A) was affirmed by the Full Court (Black CJ.,Hill and Tamberlin JJ.) in V872/00A, V900/00A, V854/00A, V856/00A and V903/00A v MIMA [2002] FCAFC 185; (2002) 122 FCR 57 190 ALR 268 69 ALD 615 essentially because two members of the Court were not satisfied that the line of authority standing for the principle that it was sufficient for the protection obligations of Australia to be satisfied that there be a practical likelihood of an applicant being given effective protection by being permitted to enter a third country, was plainly wrong, and Tamberlin J. reasoned that the test he had formulated in Al Rahal (slightly

modified) was the correct one. Both the Chief Justice and Hill J. adopted the statement of facts regarding each case set out by Tamberlin J.

Black CJ. said:

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.

Hill J. stated:

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…
…
18…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 s 36 of the Act…
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…There is no suggestion that Parliament in framing the subsections [(3)(4)(5)] 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 (emphasis added). 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.
40For 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.

Tamberlin J. approached the issue from a slightly different perspective. His Honour said:

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.

The length of time each applicant spent in Syria and the common country information was referred to at [[45][46] and the Tribunal findings in each matter at [48]. He stated the appeal issues to be:

(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?

Tamberlin J. set out the 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)

The core of the Appellant's argument was said to be:

58… 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.

(and at [59][60] referring to Al Zafiry standing for the principle (at [61])that:

it [is not] 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.

At [62] –[65] His Honour dealt with the relarionship between Thiyagarajah, Al-Zafiry and Al-Sallal on appeal and commented as to the last of these authorities:

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.

He continued:

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…, the language of s 36(3) does not affect the operation of Art 33 of the Convention….

72 Th[e) passage [at [65]]… 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.

Tamberlin J. stated his reasoning on appeal to be:

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:
Is there a safe third country where the applicant will not face a real chance of persecution for a Convention reason?
Can the person gain access to that safe third country?
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.

85Accordingly, 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

Carr J.'s judgment in Applicant C was affirmed by the Full Court in MIMA v Applicant C (2001) 116 FCR 154 66 ALD 1 [2001] FCA 1332 (Stone J. Gray and Lee JJ. agreeing) on the basis that the primary judge concluded correctly that the Tribunal based its decision on its interpretation of s 36(3) of the Act and, in particular, on the meaning of the word "right" as used therein, and additionally that it incorrectly interpreted s 36(3) such that the decision of the Tribunal involved an error of law and the ground of review provided by s 476(1)(e) of the Act was attracted.

Stone J. said in the context of considering the meaning of 'protection obligations', having that found that it was a proper element of the enquiry mandated by s 36(2) to consider whether Article 33(1) would be breached by refoulment to a third country.

20 It has been accepted that Australia does not owe protection to a person who has established residence and acquired effective protection in another country ("third country"). In Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 ("Thiyagarajah"), von Doussa J, with whom Moore and Sackville JJ agreed, expressed the principle thus (at 562):

> "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 [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."

21 The principle in Thiyagarajah is not restricted to cases where the protection available to the protection visa applicant arises from the grant of refugee status, but may also apply where he or she is entitled to permanent residence in the third country; Rajendran v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526; Minister for Immigration and Multicultural Affairs v Gnanapiragasam (1998) 88 FCR 1. In Al-Zafiry v Minister for Immigration & Multicultural Affairs [1999] FCA 443, Emmett J rejected the submission that in referring to "a right to reside, enter and re-enter" in relation to the third country, von Doussa J was intending to refer to a legally enforceable right.
[quote at [26]]
Emmett J's interpretation was adopted by the Full Court in Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 at [42]. In Patto v Minister for Immigration & Multicultural Affairs [2000] FCA 1554 ("Patto") at [37], French J summarised the position developed in these cases (noting that these propositions are not exhaustive):

> "One can draw from these cases broad propositions in relation to the protection obligations assumed by Australia under Article 33 of the Convention in its application to persons who travel to Australia from the country in which they fear persecution by a third country in which they have stopped or stayed for a time:
>
> 1. Return of the person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.
>
> 2. Return of the person to the third country will not contravene Article 33, whether or not the person has right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.
>
> 3. Return of the person to a third country will not contravene Article 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."

22 In judicial pronouncements concerning the concept of "effective protection", there is a common insistence on the necessity to consider the circumstances of each applicant and the practical result of sending that person to the proposed third country. In Thiyagarajah, von Doussa J spoke of the person having "a right to reside, enter and re-enter" (see [20] above), whereas Emmett J in Al- Zafiry spoke of it being "likely" that the applicant would be given effective protection by being permitted to live in the third country.

Having set out the nature of the Minister's task of being 'satisfied' for the purposes of s65 of the Act, she continued:

23…In referring to the "likelihood" of the applicant being given effective protection, I understand Emmett J to be focusing on the realities of administrative decision-making. I agree with the comment of R D Nicholson J in Al-Rahal v Minister for Immigration & Multicultural Affairs [2000] FCA 1005 at [29] that the effect of the authorities on this issue:

> "...is to abjure any rigid standard based on a check list and to rely on judicial assessment of the practical realities and relevant circumstances in relation to an applicant's position in a third country."

His Honour's decision was affirmed on appeal; see [2001] FCA 1141.

24 It was in the context of the jurisprudence on Article 33(1) that s 65 of the Border Protection Legislation Amendment Act 1999 (Cth) commenced on 16 December 1999. This legislation, among other things, added five new subsections to the existing s 36. The expanded section is as follows:

"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 non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act."

25 The amendments to s 36,and in particular the introduction of subs (3), raises the question of whether the judicially developed doctrine of effective protection, as outlined in [20] - [23] above, has been subsumed into s 36(3) or whether the operation of the subsection is more narrow. This issue is discussed below at [63] - [65].

TRIBUNAL'S DECISION

26 The Tribunal found that the applicant was a refugee from Iraq within the meaning of the Convention, that is, that the applicant had a well-founded fear of persecution in Iraq because the authorities would perceive him as politically suspect and opposed to the Iraqi government. The Tribunal, however, upheld the decision of the Minister's delegate that Australia did not owe protection obligations to the applicant because it held he would be able to enter Syria and remain there on an indefinite basis without persecution and without fear of return to Iraq.

At [27]-[37] Stone J. set out the salient parts of the decisions of the Tribunal and the primary judge then said:

40 The appeal raises three main issues, namely:

(a) the construction of s 36(3) of the Act;

(b) the no evidence ground of review in s 476(1)(g) together with pars 476(4)(a) and (b);

(c) error of law within s 476(1)(e).

CONSTRUCTION OF S 36(3)

41 The judicially developed doctrine of effective protection concerns a limitation to Australia's obligations under the Convention to provide protection. It is based on an assessment of the obligations imposed on Australia by the Convention and therefore involves interpretation of the Convention. For this reason it may avoid confusion to refer to the doctrine as the doctrine of effective protection omitting any reference to the common law. As indicated in [33] above, the primary judge found that the Tribunal did not base its decision on this test of effective protection but rather on the application of s 36(2) as qualified by subsections (3), (4) and (5). I agree with the primary judge on this point for the reasons that his Honour gave.

42 The appellant Minister alleges that the primary judge erred in holding that the word "right" in s 36(3) means a "legally enforceable right". submitted that subss 36(3) to (5):

(a) effect a codification of the pre-existing common law test dealing with effective protection; and

(b) impose a requirement, operating in addition to s 36(2), that must be met before Australia has protection obligations to a non-citizen, namely that he or she must have taken all possible steps to take advantage of any right to enter and reside in a third country.

In his submission the term, "right to enter and reside in" does not mean a legally enforceable right of entry and residence, but rather means the ability or capability legally to enter and reside in the relevant country. ..

Judicial consideration of s 36(3)

43 Since the primary judge's decision there have been a number of other first instance decisions of this Court that have considered the meaning of s 36(3) and have accepted the construction given by the primary judge; S115/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 540 ("S115/00A"); Kola v Minister for Immigration & Multicultural Affairs [2001] FCA 630 ("Kola"); Bitani v Minister for Immigration & Multicultural Affairs [2001] FCA 631; W228 v Minister for Immigration & Multicultural Affairs [2001] FCA 860 ("W228"); V1043/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 910. [Stone J. at [44]-[48] quoted from these decisions and from V856/00A v MIMA [2001]FCA 1018 in which]

49 Allsop J rejected the submission that subss 36(3)-(5) is a codification of the pre-existing law. He was of the view that s 36(3) was not intended to detract from the operation of s 36(2). In particular his Honour rejected the submission concerning the meaning of "right" in s 36(3), stating that the "practical capacity to bring about a lawful permission is in no sense a 'right' to do what the permission allows to be done". His Honour, however, also rejected the view expressed by the primary judge in this case, that "right" means a legally enforceable right. He stated (at [31]) that in the light of the phrase "however that right arose or is expressed" in s 36(3) there is no reason,

> "to restrict the meaning of the word 'right' to a right in the strict sense which is legally enforceable and which is found reflected in the positive law of the state in question or to exclude from the meaning the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement, or to exclude from the meaning a liberty or permission or privilege which does not give rise to any particular duty upon the state in question. Such a liberty, permission or privilege would obtain its effective substance from its grant and thereafter from the lack of any withdrawal of it and from the lack of an existing prohibition or law contrary to its exercise, rather than from the existence within the positive law of the state in question of a correlative duty, justiciable and enforceable in law, to recognise the right."

The Minister's submissions concerning S36(3) were summarised at [50] – [53]

Stone J. dealt then with the Court's conclusions concerning s36(3) citing the tabling speech at [54]-[55] to hold:

56 This exchange supports the primary judge's interpretation of s 36(3). If the term "right to enter and reside in" had the meaning pressed by the Minister, namely the practical capacity to bring about a lawful permission to enter and reside legally in the relevant country, then, in order for an applicant to take all possible steps to take advantage of such a right, it would be necessary for the applicant to apply at least to all countries where it could be reasonably expected that the applicant would be granted a visa for entry and temporary or permanent residence.

57 I do not regard the primary judge's interpretation as inconsistent with the meaning of the phrase advanced by Allsop J in V856/00A (see [49] above). Allsop J relied on the phrase "however that right arose or is expressed" to expand the meaning from what his Honour describes as "right in the strict sense, having the Hohfeldian 'jural correlative' of duty" to include "the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement" and not imposing "any particular duty upon the state in question". Allsop J also referred to the primary judge's

view that, properly construed, s 36(3) is "consonant with Article 1E of the Convention". In relation to this view, Allsop J commented, at [31], that,

> "A right under Article 1E is one (arising from the possession of nationality) that is embedded in the law of the country, with correlative obligations on the state in question. In my view, the text of subs 36(3) is more relevant and tends to the contrary."

58 To the extent that Allsop J suggests that the primary judge took a strict, Hohfeldian, view of "right" when the latter stated that "A literal construction of the word "right" in a statute must ... be that it is a legally enforceable right", I do not agree. A right may be "enforceable" even though it can be revoked without notice and even without reasons. For example, the Minister has extensive powers, listed in s 116 of the Act, to cancel visas. While that visa is extant, however, the non-citizen has, in my opinion, an enforceable right, namely the right not to be prevented from entering Australia. The non-citizen would be entitled to enforce his or her right of entry against, for example, an officious immigration officer who purported to deny entry despite the non-citizen having a valid visa for entry.

59 Undoubtedly the extent of the Minister's power may, as a practical matter, make the enforceability of the right appear illusory. This reflects the vulnerability of the right but does not, in my view, cast doubt on its existence. The analysis may well be different if, at the time the application for a protection visa is under consideration, the circumstances which permitted the grant of the right no longer exist or the factors warranting its revocation are established. Whether or not there could be said to be a right to enter the relevant country in such a case would depend on all the circumstances of that case. However, as this is not an issue in this proceeding, it is unnecessary to consider the point further.

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

61 Similarly I do not think that Carr J's reference to s 36(3) being "consonant" with Article 1E indicates that his Honour was adopting the narrow Hohfeldian view of right. To say that the provisions are "consonant" does not mean that the rights referred to in those provisions are identical in nature…

62 In my opinion the primary judge was correct in his interpretation of s 36(3). His interpretation is consistent with the way the provisions are referred to in the parliamentary debates and with the language of the section. Whether or not Senator Patterson's comments (see [50] above) are directly relevant to the section, it is true that it imposes a tough new hurdle that, since 16 December 1999, must be overcome by applicants who fall within the terms of the section. However, as French J has pointed out (see [44] above), the section only identifies a subset of the circumstances in which return of a putative refugee will not involve a breach of Australia's obligations under Article 33 of the Convention.

63 In Kola, Mansfield J expressed the opinion that s 36(3) does not purport to change the existing operation of s 36(2) of the Act. His Honour was of the opinion that the doctrine of effective protection is compatible with the effect of s 36(3) as explained above. As his Honour stated (at [37]),

> "It has been held in many decisions of the Court that, for the purposes of s 36(2) of the Act, Australia does not have protection obligations to an applicant for a protection visa if that person has 'effective protection' in an intermediate third country. That is because Australia would not be in breach of its obligations under

> Art 33 of the Convention by refouling the visa applicant to that intermediate third country. That conclusion as to the continued operation of s 36(2) of the Act as it has previously been interpreted, notwithstanding the introduction of s 36(3)-(5) of the Act, is consistent with the recent decision of Finn J in S115/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 540."

Stone J. concluded:

64 The circumstances in which one might be "satisfied" that effective protection is available in the absence of a right (in the sense in which I have explained in [23] above) would be rare but not impossible to imagine. For example, if the third country were to give an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, it might be possible to be so satisfied although the person could not be said to have thereby acquired a right. With that possibility in mind, I agree with the position put by Mansfield J in Kola.

65 The combination of the amendments to s 36 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.

It should be observed that this formulation of what is constituted by 'effective protection' is arguably closer to the approach of Lee J. in Al Rahal than the majority in that judgment.

In A v Minister for Immigration & Multicultural Affairs [1999] FCA 227 the Full Court, obiter , dealt with the meaning of the exclusionary formulation of Article 33(2)(which is now the subject of a specific statutory provision in the amending Act below) Burchett and Lee JJ. said;

3 In the view that the Court takes, it is not strictly necessary to pursue the interpretation of Article 33(2) of the Convention Relating to the Status of Refugees to which Australia acceded on 22 January 1954. Article 33(2) reads:

> "The benefit of the present provision [the provision against non-refoulement of a refugee] 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."

But we should state that we would not, as at present advised, construe this article as intending to make the conviction of any particularly serious crime the sole determinant of a deportation decision. The logic of the syntax of the provision moves in the opposite direction. The principal statement of exclusion is "who constitutes a danger to the

community". The phrase "having been convicted ... of a particularly serious crime" adds an additional element, but it is not expressed as if that additional element swallowed up the principal statement. This aspect of the drafting is perhaps made clearer when attention is directed to the first alternative contained in the provision, that "there are reasonable grounds for regarding [the person] as a danger to the security of the country in which he is". The whole provision is concerned with perils represented by the refugee, either because of a threat to the security of the country, or because of a danger to its community.
4 Nor would a view elevating the commission of a particularly serious crime to the position of the sole pivot on which a decision must turn sit comfortably with Australian authority. In Betkoshabeh v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 95 at 100, Finkelstein J made it clear that a crime will not necessarily "be characterised as particularly serious or not particularly serious merely by reference to the nature of the crime", although he thought it might be in a particular case. That was because its seriousness would depend on the circumstances surrounding its commission. If, then, it is necessary to examine the circumstances to determine the aspect of particular seriousness, the nature of the crime as defined in the law being insufficient, why should it be enough to decide the question of "danger to the community" without regard to the circumstances, simply by reference to the very same matter of the nature of the crime, or to its particular seriousness? If the one question requires an examination of the circumstances and their application to a specific test stated in the Convention, why not also the other? With respect, we do not read what Finkelstein J said at 100 as rejecting the logic of these rhetorical questions. His Honour said:

> "It must be 'particularly serious' as well as a crime that shows that the refugee is a danger to the community". (Emphasis added.)

That seems to us to be saying that both of two things are required, not that one of them negates the need to consider the other. Betkoshabeh, as we read it, is consistent with the decision of Davies J in Re Ceskovic (1979) 2 ALD 453 at 454. We note too that in The Law of Refugee Status (1991) by J C Hathaway at 226 the position is stated:

> "[I]t is not enough that the crime committed have been 'serious', but it must rather be 'particularly serious' and sustain the conclusion that the offender 'constitutes a danger to the community'." (Emphasis added.)

See also Immigration and Refugee Law in Australia (1998), by M Crock, at 157.
5 To the considerations we have mentioned may be added the consideration that article 33(2) is a qualification upon the principle of non-refoulement of a refugee stated in article 33(1), a principle concerned with some of the most precious of human rights, including life itself. In this context, it seems unlikely there was an intention to write the significant words "a danger to the community" out of the provision, thereby weakening the protection it offers to refugees. Especially is this so as article 33 operates with respect to persons who have already been found to be refugees.
6 It follows that we would not accord any automatic acceptance into Australian law to the North American authorities to which Katz J refers

Katz J. observed:

40…a further question arises of whether Art 33(2) applied to him at that time (in which case, of course, Art 33(1) did not). The application to A of Art 33(2) depended upon his being a person "who, having been convicted ... of a particularly serious crime, constitute[d] a danger to the [Australian] community". 41 As to whether A had been convicted of a

particularly serious crime within the meaning of Art 33(2), in Betkoshabeh v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 95 at 100 (Finkelstein J) held that, in order to determine whether a crime is a particularly serious one for present purposes, it is generally necessary to have regard to the circumstances in which it was committed, although he accepted the possibility that there can be crimes which are particularly serious per se. In Betkoshabeh v Minister for Immigration and Multicultural Affairs 1999] FCA 16 (unreported, 15 January 1999), a later case involving the same parties, Marshall J (at par 8 of his reasons for judgment) agreed with the approach of Finkelstein J. Accepting that it would be necessary, in order to determine whether A had been convicted of a particularly serious crime, to have regard to the circumstances in which he committed it, it would certainly have been open to the Tribunal here to conclude that the crime of which A had been convicted had been, in the circumstances, a particularly serious one. I say that because the crime had involved an attempt to introduce a substantial quantity of heroin into the Australian community, not for personal use by a person addicted to the drug, but for financial gain. Be that as it may, the Tribunal did not describe A's crime as being a "particularly serious" one, although it did describe it both as being "serious" and as being of such "gravity" that the Tribunal could not conclude that the risk of A's re-offending was sufficiently small to justify his continued presence in Australia.

42 If the Tribunal had considered the question of whether A's crime had been a "particularly serious" one within the meaning of Art 33(2) and had concluded that it had been, then an issue would have arisen as to whether the Tribunal was required to consider separately the question of whether A constituted a danger to the Australian community or whether, alternatively, satisfaction as to his crime's having been a particularly serious one gave rise to a conclusive presumption that he constituted a danger to the Australian community. The issue was not one addressed directly by Finkelstein J in the Betkoshabeh Case, although there may be a suggestion that his Honour favoured the conclusive presumption approach in his statement (at 100) that the crime committed "must be 'particularly serious' as well as a crime that shows that the refugee is a danger to the community". Certainly, the conclusive presumption approach has been taken by federal Courts of Appeals in numerous Circuits, when construing American domestic legislation both materially identical to and enacted to implement Art 33(2): see, for example, the annotation in 87 ALR Fed 646 at 651-53 (1988), and the October 1998 supplement thereto at 21; and see, for a similar Canadian approach, Hoang v Minister of Employment and Immigration (1990) 120 NR 193 at 197 (Federal Court of Appeal; Urie, MacGuigan and Linden JJA).

43 On the assumption, however, that the question of danger to the community is a question to be decided separately from the question of whether a crime is a particularly serious one, it is plain that the Tribunal did not in terms address the question of whether A constituted a danger to the Australian community. At the same time, however, it is impossible to doubt that the Tribunal's decision was predicated upon his being such a danger, as, for instance, when it expressed the view already referred to that the risk of A's re-offending was too great to justify his continued presence in Australia.

Note the particular treatment of the concept of effective protection in Odhiambo v MIMA; Martizi v MIMA [2002] FCAFC 194 (2002) 69 ALD 312 122 FCR 29 (Black CJ, Moore and Wilcox JJ.). The Court said:

(ii) The risk of removal to Sudan

113 Mr Lindsay noted the Tribunal said it was satisfied that Mr Odhiambo "is a national of Kenya, albeit one without any documentation". On the other hand, Mr Odhiambo claimed to be Sudanese. Under these circumstances, he claimed, the Tribunal was under an obligation to consider "whether the Kenyan authorities might choose to accept the appellant's assertion as to his place of origin and return him to the Sudan" where he might face persecution on account of being Christian. Mr Lindsay referred to art. 33(1) of the Refugees' Convention. That sub-article 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."

114 Mr Basten supported this submission. He referred to a decision of the House of Lords, Bugdaycay v Secretary of State [1987] AC 514, which, he said, stated a principle later applied both by the Judicial Committee of the Privy Council (in Nguyen Tuan Cuong v Director of Immigration [1997] 1 WLR 68) and in this Court.

115 According to Mr Basten, a country contravenes its protection obligations under the Refugees' Convention if it returns a person to a safe third country but there is a real risk that country will return the person to a country of former habitual residence or nationality, where he or she may suffer persecution. That is a fair summary of the decision in Bugdaycay, insofar as it related to one of the four appellants in that case, one Musisi.

116 It appears from the speech of Lord Bridge of Harwich, effectively speaking for the whole House in Bugdaycay, that Musisi was a Ugandan national. His Lordship said at 525:

> "The decision to refuse him leave to enter was not based on the denial of his claim to refugee status quoad Uganda ... but on the conclusion by the Secretary of State that, even if he is properly to be treated as a refugee from Uganda ... this presents no obstacle to his return to Kenya whence he came to this country."

117 After discussing the facts at some length, at 532 Lord Bridge set out his understanding of the possible application of art. 33(1) of the Convention:

> "My Lords, I can well see that if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter. If the person is refused leave to enter the United Kingdom, he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it. This is, I take it, in accordance with the 'international practice' of which Mr McDowall speaks in his affidavit. The practice must rest upon the assumption that all countries which adhere to the Convention may be trusted to respect their obligations under it. Upon that hypothesis, it is an obviously sensible practice and nothing I say is intended to question it. It is not, however, difficult to imagine a case where reliance on the international practice would produce the very consequence which the Convention is designed to avoid, i.e. the return of refugees to the country where they will face the persecution they fear. Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B where are apprehended in country A following their escape cross the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a

> breach of article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return 'to the frontiers of territories where his life or freedom would be threatened.'
>
> For the sake of illustration, I have necessarily taken cases at opposite ends of a spectrum. In the ordinary case of a person arriving here, from a third country, and claiming asylum as a refugee from the country of his nationality, there will be no ground to apprehend that his removal to the third country when he comes would put him at risk. But at the other end of the spectrum, the risk may be obvious. Between these two extremes there may be varying degrees of danger that removal to a third country of a person claiming refugee status will result in his return to the country where he fears persecution. If there is some evidence of such a danger, it must be for the Secretary of State to decide as a matter of degree the question whether the danger is sufficiently substantial to involve a potential breach of article 33 of the Convention. If the secretary of State has asked himself that question and answered it negatively in the light of all relevant evidence, the court cannot interfere."

118 Nguyen concerned people of Chinese ethnicity who were expelled from Vietnam, where they formerly resided. They lived in China for some time before arriving in Hong Kong by sea and claiming refugee status on account of their experiences in Vietnam. The Privy Council's decision turned on the proper construction and application of the Hong Kong Immigration Ordinance. However, Lord Goff of Chieveley and Lord Hoffman, who dissented, discussed the operation of art. 33(1) of the Convention. After quoting its terms, they said at 79:

> "Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any contracting state. It is always a status relative to a particular country or countries. And the only obligations of contracting states are, first, not to punish a refugee who has entered directly from the country in which his life or freedom was threatened for a Convention reason and secondly, not to return him across the frontier of that country. In all other questions of immigration control: for example, punishment for illegal entry from a third country, or expulsion to a third country from which there is no danger of refoulement to a country falling within article 33, the question of whether a person has refugee status is simply irrelevant."

119 Their Lordships noted that the applicants had lived in China for at least five years before coming to Hong Kong, that it was proposed they be repatriated to China and that China had indicated it would accept them. Under those circumstances, they said, it was irrelevant whether or not they still had refugee status in relation to Vietnam.

120 Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 was a decision of a Full Court of this Court. It concerned a Sri Lankan national who had been granted refugee status in France and subsequently came to Australia. He applied in Australia for protection visas for himself, his wife and child. The Tribunal affirmed a decision to refuse the applications but the primary judge set aside that decision. The Full Court reversed the primary judge, holding that Australia did not owe protection obligations to the respondent as he had effective protection in France. Both Nguyen and Bugdaycay were referred to by von Doussa J (with whom Moore and Sackville JJ agreed). He pointed out (at 559) that the decision to deport Musisi was quashed "only because the Home Secretary had not given proper consideration to whether a danger existed that Kenya would return him to Uganda, a course which would effect indirectly what Art 33 prohibited". His

Honour held that, on the Tribunal's findings in the case before him, there was no risk of refoulement of Thiyagarajah to Sri Lanka.
121 Thiyagarajah has been considered in later Australian cases. It is not necessary to set them out. The principle is clear; art. 33(1) imposes on a Convention country an obligation to consider whether removal of a person to the country from whence that person came might lead indirectly to that person suffering persecution on a ground listed in art. 1A of the Refugees Convention as a result of a further removal to the country of nationality or previous residence.
122 The difficulty in applying this principle to Mr Odhiambo's case lies in the factual findings of the Tribunal. The Tribunal made a positive finding that Mr Odhiambo is a national of Kenya. The Tribunal expressly rejected the suggestion that he was Sudanese. So this case is unlike that of Musisi (in Bugdaycay) where the country of nationality was that of feared persecution. The refoulement argument must depend upon the supposition that Kenya, being the country of nationality, would decide to remove Mr Odhiambo to Sudan, and Sudan would agree to accept him, simply because he had (falsely) claimed to be Sudanese. Nothing was put before the Tribunal to support such a supposition;…

The Full Bench of the High Court in ***NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and IndigenousAffairs*** **[2005] HCA 6 (2005) 213 ALR 668** ( Gleeson CJ Mc Hugh Gummow Kirby Hayne Callinan and Heydon JJ.) allowied the appeal from NAGV v MIMIA [2003] FCAFC 144 (2003) 202 ALR 1 (2003) 77 ALD 699 130 FCR 46 affirming NAGV of 2002 v MIMIA [2002] FCA 1456 (Stone J.) The issue was the interpretation s 36(2) prior to inclusion of s36(3)-(5) . The RRT made a finding that the appellants had a well-founded fear in relation to their country of nationality – Rusian Federation - on grounds of race/political opinion but conclusded that Israel was a third country where appellants would have effective protection because of effect of Law of Return and therefore Australia did not owe them protection obligations . The father was a Jew. On appeal it was held there was an error in construction of s36(2) . The Joint reasons (Gleeson CJ Mc Hugh Gummow Hayne Callinan and Heydon JJ.) stated that the Refugees Convention was of determinative importance only insofar as its provisions drawn into municipal law by adoption as a criterion of operation of s36(2). It was held that the phrase ""to whom Australia has protection obligations under the Act" describes no more than a person who is a refugee within the meaning of Article 1. If that criterion is answered there was no superadded derogation from that criterion by reference to the operation of Article 33 upon Australia's international obligations . Furthermore Article 1 in the context of s36 to be seen as a whole . The flaw in the Minister's argument was as follows: there is a non sequitur in reasoning that while the obligation exists because of well-founded fear not to return the appellants to

their country of origin the fact that a non-refoulement obligation might not be breached by sending them to Israel does not mean that Australia has no protection obligations under the Convention. The adoption of the Minister's approach would have significant consequences (joint reasons) and render the Convention self-destructive (Kirby J.). Orders for certiorari and mandamus directed to the RRT were made.

The Joint Reasons:

1…The RRT found that the appellants have a genuine fear that if they returned to Russia they would be persecuted because they are Jews and because of the first appellant's political activities and opinions.

…

6 The RRT concluded that Israel was a third country in which the appellants would have effective protection. The RRT was satisfied that if the appellants had travelled to Israel they most probably would have been allowed to enter and reside there, that there was no evidence that there would be a risk of the appellants being returned from Israel to Russia, and that there was no evidence supporting a conclusion that they had a well-founded fear of persecution in Israel. Further, it was probable that the appellants would still have access to the effective protection of Israel if they now were to travel there.

…

10. It is necessary to begin with the provisions of the Act referred to above, namely ss 36 and 65. In doing so, it should be noted that the relevant form of the Act predates the changes made to s 36 with respect to "protection obligations" by Pt 6 of Sched 1 to the Border Protection Legislation Amendment Act 1999 (Cth) ("the 1999 Act")[11]. Part 6 (Items 65-70) is headed "Amendments to prevent forum shopping". The amendments made by the 1999 Act do not apply to applications for a visa made before 16 December 1999[12]. The application made by the appellants for protection visas was lodged on 16 July 1999.

11In its relevant form, s 36 stated:

> "(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 non-citizen in Australia to whom Australia has protection obligations under [the Convention]."

Section 65(1) obliges the Minister to grant the visa if satisfied that the criterion described by s 36(2) is met, along with other criteria identified in s 65(1). It has not been suggested that the appellants failed in the other criteria; the decision of the RRT turned upon its construction of s 36(2).

12 For the reasons later set out, the RRT erred in its construction of s 36(2).

<u>The Act and international law</u>

13 Something first should be said respecting the means by which consideration of the Convention has been drawn into Australian municipal law.

14 First, customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which that individual is not a national[13].

15 Secondly, the Convention is an example of a treaty which qualifies what under classical international law theory was the freedom of states in the treatment of their nationals[14]; but the Convention does not have the effect of conferring upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems[15].
16 Thirdly, the Convention was negotiated and agreed between the relevant Contracting States and obligations are owed between those states[16], not to refugees, so that it is at a state level that the Convention has to be understood[17]. Fourthly, the Convention has been construed by the House of Lords[18] and the Supreme Court of the United States[19] as not detracting from the right of a Contracting State to determine who should be allowed to enter its territory. Fifthly, the text of the Convention speaks, as Brennan J pointed out in Minister for Immigration and Ethnic Affairs v Mayer[20], indifferently of a person who is "considered a refugee" and of one to whom the "status of refugee [is] accorded" for the purposes of the Convention.
17 Sixthly, Gibbs CJ and Brennan J in Mayer[21] and Stephen J in Simsek v Macphee[22] pointed out that the determination of the status of refugee is a function left by the Convention to the competent authorities of the Contracting States which may select such procedures as they see fit for that purpose; as will appear, the procedures adopted by Australia have varied from time to time.
18 Other Contracting States in their migration laws have adopted in different ways criteria drawn from the Convention. The legislative methods adopted in New Zealand, Canada, the United Kingdom and the United States, which differ each from the others and from that of Australia, may be seen respectively from the reports of Attorney-General v Refugee Council of New Zealand Inc[23], Pushpanathan v Canada (Minister of Citizenship and Immigration)[24], T v Home Secretary[25] and Sale v Haitian Centers Council, Inc[26]. It appears that in at least some of these countries the legislation has been amended since the decisions in the above cases by specific provision respecting "safe third countries"[27].
19 Seventhly, as the title to the Convention suggests[28], the Convention details the status and civil rights to be afforded within Contracting States to those accorded the status of refugee. These matters are to be seen from the detail in Ch 2 (Arts 12-16, headed "Juridical Status"), Ch 3 (Arts 17-19, headed "Gainful Employment"), Ch 4 (Arts 20-24, headed "Welfare") and Ch 5 (Arts 25-34, headed "Administrative Measures"). Chapter 5 deals with such matters as the issue of identity papers (Art 27) and travel documents (Art 28).
20 However, the Contracting States accept significant obligations under Art 32 (headed "Expulsion") and Art 33 (headed "Prohibition of Expulsion or Return ('Refoulement')"). Article 32(1) states[29]:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

Article 33(1) states:

> "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."

21 In Sale[30], the Supreme Court of the United States construed Art 33(1) by reading "expulsion" as referring to a refugee already admitted into a Contracting State and "return" as referring to a refugee already within the territory of a Contracting State but not yet resident there. On the other hand, Professor Shearer has emphasised the distinction between the two articles, writing[31]:

> "These Articles are of a distinctly different character. The first assumes the prior admission of the refugee to a status of lawful residence, and refers to expulsion per se, and not to the institutionalised procedure of extradition. The second, however, not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened."

…

22 It is unnecessary for this appeal to determine all these matters of construction of the Convention. The Minister accepts that Australia has an international obligation under Art 33(1) not to expel or return the appellants in any manner whatsoever to the frontiers of the Russian Federation, being their country of nationality, or to the frontiers of any other territory where their life or freedom would be threatened in the sense spoken of in that Article.

23 Counsel for the Minister also accepts that there is implicit in that negative proposition drawn from Art 33(1) a positive obligation to permit the appellants to remain in Australia. The Minister thus adopts the proposition stated by a commentator[32]:

> "[I]f a State is bound by a non-refoulement obligation with respect to a given individual, and there is no place to which that individual can be removed without the obligation being breached, the State in question has no choice but to tolerate that individual's presence within its territory. In these circumstances, fulfillment of the non-refoulement obligation through time is functionally equivalent to a grant of asylum."

24 However, the Minister submits that this positive obligation to grant asylum is qualified in a fashion fatal to the appellants' case under the Act. The asserted qualification is that, if Australia assesses a third state, here Israel, as being one which will accept the appellants, allow them to enter and to remain, and not "refoule" them to a country of persecution, then there is no international obligation to permit the appellants to remain in Australia, even though they answer the definition of the term "refugee" in Art 1 of the Convention.

…

26 It is accepted that the appellants answer the definition in Art 1. The issue on this appeal does not turn immediately upon the content of Australia's international obligations respecting the appellants under Art 33(1) of the Convention. The Convention is of determinative importance for this appeal only insofar as it or its particular provisions are drawn into municipal law by adoption as a criterion of operation of s 36(2) of the Act.

Section 36(2) of the Act

27 Section 36(2) is awkwardly drawn. Australia owes obligations under the Convention to the other Contracting States, as indicated earlier in these reasons. Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals. Beginning with that false but legislatively required step, the appeal turns upon the meaning of the adjectival phrase "to whom Australia has protection obligations under [the Convention]".

28 Counsel for the Minister submits that the Minister has no "protection obligation" in the nature of providing asylum to the appellants because the implication of that positive obligation does not flow from Art 33(1); there is the availability of Israel as a safe and permanent destination in the sense discussed. This conclusion as to the operation of the Convention is then translated into the terms of s 36(2) by saying that Australia has no

"protection obligations" to the appellants because it would not be a breach of Australia's international obligations under the Convention to send the appellants to Israel.
29 Consideration of the use in s 36(2) of the plural "protection obligations" discloses a non sequitur in the reasoning for which the Minister contends. Australia owed an obligation in respect of the appellants not to return them to the Russian Federation or to the frontiers of any other territories where their life or freedom would be threatened in the manner identified in Art 33(1). That is not disputed. From the circumstance that Australia might not breach its international obligation under Art 33(1) by sending the appellants to Israel, it does not follow that Australia had no protection obligations under the Convention.
30 Acceptance of the Minister's submissions respecting the significance of the access of the appellants to Israel would have significant and curious consequences for the operation of the Convention, given the events in Europe which preceded its adoption. In NAEN v Minister for Immigration and Multicultural and Indigenous Affairs[34], Sackville J referred to the enactment by Israel of the Law of Return in 1950, before the adoption of the Convention in 1951; his Honour said it would be "an exquisite irony" if from the very commencement of the Convention it had not obliged Contracting States to afford protection to Jewish refugees because they might have gone to Israel instead.
31 Further, as Emmett J correctly emphasised in the Full Court[35], a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as "protection obligations". Free access to courts of law (Art 16(1)), temporary admission to refugee seamen (Art 11), and the measure of religious freedom provided by Art 4 are examples.
32 However, there is a more immediate answer to the Minister's case. Section 36(2) does not use the term "refugee". But the "protection obligations under [the Convention]" of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer "surrogate protection"[36] in the place of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself[37]. That directs attention to Art 1 and to the definition of the term "refugee".
33 Such a construction of s 36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of "refugee" spelled out in Art 1 of the Convention.
…

Conclusions

42 Having regard to the subject, scope and purpose of the Reform Act, the adjectival phrase in s 26B(2) (repeated in s 36(2)) "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention. That being so and the appellants answering that criterion, there was no superadded derogation from that criterion by reference to what was said to be the operation upon Australia's international obligations of Art 33(1) of the Convention.
43 The previous statutory definition of "refugee" that it had the same meaning as in Art 1 may have involved an ambiguity. If so, it is that ambiguity which was removed by the Reform Act. The possible ambiguity may have been that while s A of Art 1 identifies those to whom the term "refugee" applies, containing in sub-s (2) the well-known "Convention definition", it is the whole of Art 1 which is headed "Definition of the Term 'Refugee'". The reach of s A is qualified by what follows. In particular, s C states that the Convention in

certain circumstances "shall cease to apply to any person falling under the terms of section A". Sections D, E and F each state that the Convention or its provisions "shall not apply" to certain persons.

…

45 The possible ambiguity present in the previous statutory definition of "refugee" is apparent from this Court's decision in Chan v Minister for Immigration and Ethnic Affairs[54]. A question which arose in Chan was whether Art 1 requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination[55]. These distinct conclusions could only be understood to produce different results if s 6A(1)(c) of the Act required regard to be had to only s A of Art 1 of the Convention, and not the cessation provisions in s C. If this was not so, then the distinction held no meaning because an applicant who once fell within the terms of Art 1 would cease to do so by operation of s C of that Article and thus not be entitled to an entry permit under s 6A(1).

46 By contrast, in Minister for Immigration and Multicultural Affairs v Singh[56], the Court, in considering s 36(2) of the Act, proceeded on the footing that a decision-maker does not err in law in considering as a preliminary issue whether the applicant for a protection visa falls within an exception in Art 1F.

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

….

Subsequent legislation

54 The Migration Legislation Amendment Act (No 4) 1994 (Cth) added[63] subdiv AI (ss 91A-91F) which was originally headed "Certain non-citizens unable to apply for certain visas"[64]. One of the reasons stated in s 91A for the enactment of this subdivision was the legislative determination that certain non-citizens in relation to whom there was an agreement between Australia and countries including "a safe third country"[65] should not be allowed to apply in Australia for a protection visa. This legislation is an example of a specific response to "asylum shopping"[66]. Its later presence in the Act does not support the Minister's interpretation of the changes earlier made by the Reform Act. Reference must also be made to other changes to the Act.

55 As a result of changes to the Act initiated by the Migration (Offences and Undesirable Persons) Amendment Act 1992 (Cth)[67] and the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 (Cth)[68], and post-dating the passage of the Reform Act[69], at the material time for this litigation the Act contained provisions relating to the refusal or cancellation of protection visas "relying on one or more of the following Articles of [the Convention], namely, Article 1F, 32 or 33(2)"[70].

56 The text of Arts 1F and 32 has been set out earlier in these reasons. Article 33(2) states:

> "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."

The special provisions made in Art 32 and in Art 33(2) with respect to expulsion "on grounds of national security or public order" (Art 32) and to those who are a danger to security (Art 33(2)) attract comparison with the terms used in Art 1F to identify those to whom the Convention "shall not apply".

57 The reference to Arts 32 and 33(2) may have been included by the legislation identified above for more abundant caution or as epexegetical of Art 1F in its adoption by the Act, with operation both at the time of grant and later cancellation of protection visas. However that may be, the legislation did not go on expressly to adopt Art 33(1). It is upon a particular construction of Art 33(1), with the implied obligation to afford asylum and its qualification with respect to safe third states, that the Minister relies. Accordingly, while the attention of the Full Court in this case was not drawn to the presence in the Act of the references to Arts 32 and 33(2), nothing turns upon it. The presence of these references elsewhere in the Act does not detract from the construction of s 36(2) adopted in these reasons.

58 It would have been open to the Parliament to deal with the question of "asylum shopping" by explicit provisions qualifying what otherwise was the operation for statutory purposes of the Convention definition in Art 1. As indicated earlier in these reasons, such a step may have been taken with the changes to s 36 made by the 1999 Act. The primary change is indicated by sub-s (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."

There are qualifications expressed in sub-ss (4) and (5). However, the changes made by the 1999 Act were not achieved years earlier by the quite differently expressed alterations made by the Reform Act.

59 The grant of a protection visa to an otherwise unlawful non-citizen removes liability to further detention (s 191) and to removal from Australia (s 198). The adoption by the Act of the definition spelled out in Art 1 of the Convention may have given this benefit to refugees to whom in particular circumstances Australia may not, as a matter of international obligation under the Convention, and upon the proper construction of the Convention, have owed non-refoulement obligations under Art 33. But, at any rate before the changes made to s 36 by the 1999 Act, the extending of that benefit had not been foreclosed by the Parliament.

60 The interpretation of the revised s 36 does not arise on this appeal. Nor, as has been mentioned, is it necessary to decide whether the Minister ought to have succeeded in Thiyagarajah, not on the ground assigned by the Full Court, but by application of s E of Art 1 of the Convention, as picked up by s 36(2) of the Act.

[11] Sched 1, Item 65. See Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji (2004) 78 ALJR 1156 at 1159 [9]-[10], 1160-1161 [18]-[19]; 208 ALR 201 at 204, 206.

[12] Item 70.

[13] T v Home Secretary [1996] AC 742 at 754; Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 272-275; Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 4 [1], 45 [137], 72 [203].

[14] Menon, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine", (1992) 1 Journal of Transnational Law and Policy

151 at 154-156; Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 California Western International Law Journal 241 at 242-243.
[15] See Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 California Western International Law Journal 241 at 253-256.
[16] Article 38 provides for any dispute between parties to the Convention, which relates to its interpretation or application and cannot be settled by other means, to be referred to the International Court of Justice at the request of any one of the parties to the dispute.
[17] Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290 at 294; Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 508; Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 46-47 [139].
[18] T v Home Secretary [1996] AC 742 at 753-754.
[19] Sale v Haitian Centers Council, Inc 509 US 155 at 179-183 (1993).
[20] (1985) 157 CLR 290 at 305.
[21] (1985) 157 CLR 290 at 294, 305.
[22] (1982) 148 CLR 636 at 643.
[23] [2003] 2 NZLR 577 at 601-602.
[24] [1998] 1 SCR 982 at 997-1000.
[25] [1996] AC 742 at 759-760.
[26] 509 US 155 at 170-171 (1993).
[27] United States Code Annotated, Title 8, Aliens and Nationality, §1158(a)(2)(A); Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK), s 33.
[28] Convention Relating to the Status of Refugees.
[29] Articles 32(2) and 32(3) qualify and explain the procedures for that expulsion as follows:
"(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."[30]
[30] 509 US 155 at 182 (1993).
[31] "Extradition and Asylum", in Ryan (ed), International Law in Australia, 2nd ed (1984) 179 at 205.
[32] Taylor, "Australia's 'Safe Third Country' Provisions: Their Impact on Australia's Fulfillment of Its Non-Refoulement Obligations", (1996) 15 University of Tasmania Law Review 196 at 200-201.
…
[34] [2003] FCA 216 at [74].
[35] (2003) 130 FCR 46 at 60.
[36] See Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 78 ALJR 678 at 683 [20]; 205 ALR 487 at 492.
[37] Section A(2) states:
"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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it". (emphasis added

…

[54] (1989) 169 CLR 379.
[55] (1989) 169 CLR 379 at 398.
[56] (2002) 209 CLR 533.
….

[63] To Div 3 of Pt 2 of the Act.
[64] The heading of subdiv AI (which now comprises ss 91A-91G) has since been changed to "Safe third countries".
[65] A term defined in s 91D.
[66] Further provision of this nature was made (after the appellants had lodged their applications on 16 July 1999) by the 1999 Act. This introduced subdiv AK of Div 3 of Pt 2 (ss 91M-91Q), headed "Non-citizens with access to protection from third countries".
[67] s 4.
[68] Sched 1, Item 20.
[69] However, s 4(1) of the Migration (Offences and Undesirable Persons) Amendment Act 1992 (Cth) commenced on 24 December 1992 while the relevant provisions of the Reform Act commenced on 1 September 1994.
[70] ss 500(1)(c), 500(4)(c), 502(1)(a)(iii), 503(1)(c).

Kirby J. said agreeiing with the orders proposed and for similar reasons:

64The joint reasons acknowledge that it is unnecessary for this appeal to determine all of the matters of construction of the Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees[73] (together "the Convention") that their Honours mention[74]. There are now so many cases in this Court and elsewhere concerning the Convention that it seems prudent to limit the elaboration of the Convention and the relevant provisions of the Migration Act 1958 (Cth) ("the Act") in this case to the issues that have to be decided to arrive at orders, and to those matters alone.
…

67 It is true, as stated in the joint reasons, that the Convention, like all other international treaties[77], represents a binding obligation as between the Contracting States. Australia is one such party. In terms of the Convention, Australia owes obligations to the other States that ratified, or acceded to, the Convention. Individual human beings are not, as such, parties to the Convention.
68 However, one of the most significant developments of international law in the past 50 years has been the growth of the recognition of the individual as a subject of international law[78]. The provisions of the Convention (and of other humanitarian and human rights treaties) help to explain the changes in the role of the individual in international law. The terms of the Convention, indeed its very subject matter, make it potentially misleading to deny the existence of protection obligations under the Convention owed to individuals[79]. They are not parties to the Convention; but they are certainly the subjects of the Convention provisions[80]. For my own part, therefore, I do not accept that the Parliament was mistaken (or that it took a "false" step) in describing the subjects of the Convention as "a non-citizen ... to whom Australia has protection obligations". Obligations may be owed, in international as in Australian law[81], otherwise than by and to the parties to a binding agreement.

69 However that may be, it is a side issue in this appeal. This is because s 36(2) of the Act is a valid law made by the Parliament under available heads of constitutional power[82]. The provision is not dependent for its constitutional validity solely upon the extent to which it implements the obligations of the Convention. This Court must therefore accept s 36(2) and give effect to it so as to achieve, so far as its language permits, the purposes the Parliament had in enacting it[83].

…

Reasons for rejecting the Minister's construction

78 Plain language of the Act: All that is required to enliven the entitlement to a "protection visa" is, relevantly, the three preconditions stated in s 36(2) of the Act. The applicant must be a "non-citizen" of Australia. He or she must be in Australia. And Australia must have "protection obligations" under the Convention towards the applicant.

79 Here, the appellants clearly satisfied the first and second preconditions. The Tribunal found that because, in Russia, the appellants were both regarded as Jewish and because of the first appellant's political activities and opinions, they had a genuine fear that they would be persecuted were they returned to Russia. Therefore, the "protection obligations" under the Convention are enlivened. There is nothing expressly stated in the Convention that puts the appellants outside the protections for which it provides. It is the Minister who must seek to import into the Convention, or into the terms of the Act, in a case such as the present, an exception to Australia's "protection obligations" that is not expressly spelt out.

80 Most specifically, there is imposed on Australia under the Convention the obligation not to expel a "refugee" lawfully in Australian territory, save on grounds not here relevant[96]. And not to expel or return a "refugee" in "any matter whatsoever to the frontiers of territories where his life or freedom would be threatened"[97]. It follows that, on the findings made by the Tribunal, both of these "protection obligations" have descended on Australia in respect of each of the appellants. There are many other duties imposed on Australia that answer to the description of "protection obligations", the formula chosen by s 36(2) of the Act.

81 I agree, for the reasons stated by the other members of the Court, that it is impossible to read the plural expression "protection obligations" so as to exclude the appellants from the ambit of the various Convention protections[98]. The mere fact that sending the appellants to Israel might not of itself breach Australia's obligations under Art 33(1) of the Convention does not relieve Australia of the many other "protection obligations" that remain to be fulfilled in respect of the appellants whilst they are in Australia, and whilst s 36(2) is engaged in their case.

82 The legislative history

…

84 This course of legislation makes it clear that the Parliament deliberately embarked on the adoption of a new criterion for refugee applicants seeking to remain in Australia. The three-fold test, now applicable in s 36(2) of the Act, was introduced. It was sufficient that the non-national in Australia should be a person who fitted into the class of someone to whom Australia owed "protection obligations". This is a very wide expression. Whatever negative implications might be added, as a gloss, to the definition of "refugee" in the Convention, none could cut back the wide class so defined. The existence of "protection obligations" was sufficient. And by the Convention, they are expressed in large and multiple forms. They applied to the appellants. They were not disapplied by the fact that other countries might or might not, under their several laws, be willing, or even bound, to receive them. The focus of the Act was shifted to Australia's "protection obligations". In this case, those obligations were enlivened.

85 Subsequent amendment of the Act: To reinforce the foregoing construction of s 36(2) of the Act, by reference to its history, regard may also be had to amendments to s 36 that have been added to the Act to spell out a specific withdrawal of "protection obligations" on the part of Australia in the case of certain non-citizens able to secure protection in "safe third countries"[102].
86 The idea expressly to withdraw "protection obligations" in such a case was first manifested with effect from 15 November 1994, with the insertion of subdiv AI in Pt 2, Div 3 of the Act[103]. This amendment introduced s 91E into the Act, preventing specified non-citizens, to whom the subdivision applied, from applying for a protection visa. The specific target of the amendments was persons covered by the Comprehensive Plan of Action approved by an international conference on Indo-Chinese refugees[104]. The amendments envisaged agreements relating to persons seeking asylum between Australia and another country or countries that fall in the category of a "safe third country".
87 With effect from 16 December 1999, s 36 of the Act was further amended by the addition of sub-ss (3)-(7)[105]. The added sub-sections have no application to the appellants. This is so because the amendments apply only to applications for visas made on or after their commencement. They do not affect the appellants' applications which were made on 16 July 1999. Nevertheless, it is worth noting the terms of the following sub-sections:
"Protection obligations

> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> (a) a country will return the non-citizen to another country; and
>
> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country."

88 Although the foregoing and other later amendments[106] to the Act do not control the interpretation of s 36(2) in the present case, they do demonstrate that legislative techniques are available which might have been used by the Parliament to limit the scope of the "protection obligations" owed by Australia. They had not been used, and were not in force, in relation to the appellants at the time of their applications. This Court should not strain itself to import such limitations or restrictions on Australia's "protection obligations" with respect to the appellants when the Parliament, with the power to do so, has not enacted them expressly.
89 Approach to construction: The foregoing considerations of statutory interpretation are reinforced by a final one. The Convention constitutes an important means of protection for the human rights and fundamental freedoms of refugees who claim such protection as non-citizens in Australia. The Parliament, by the terms of ss 36(2) and 65(1) of the Act, has given effect, in domestic law, to Australia's accession to the Convention. Ordinarily, this

Court would give a meaning to such a provision so as to ensure that Australia's international obligations were thereby carried into full effect[107]. As I stated in Coleman v Power[108], "where words of a statute are susceptible to an interpretation that is consistent with international law, that construction should prevail over one that is not". That, in my opinion, is how s 36(2) is to be construed.

90 Because there is nothing in the Convention, either expressly or by implication, to remove from Australia its protection obligations with respect to the appellants, as accepted there, in circumstances where, although the Convention is engaged in the State to which the applicant has had recourse, the applicant might have obtained protection elsewhere, such obligations continue to exist. But should a negative implication be read into the Convention in a case such as the present? I think not.

91 The notion can be tested this way. It would suggest that no Contracting State ever has "protection obligations" to a refugee who may (on whatever basis) be entitled by law to protection by another State. For example, the constitutions of numerous countries create rights to seek and obtain asylum[109]. Specifically, until 1993, the Grundgesetz (The Basic Law for the Federal Republic of Germany) provided that "[p]olitically persecuted individuals enjoy the right of asylum"[110]. This was an "absolute right"[111] and included the rights of entry and non-refoulement[112]. The Minister argued that the issue in this appeal was whether s 36 of the Act "conferred an entitlement to a protection visa upon persons who have a well-founded fear of being persecuted for a Convention reason in their country of nationality but who have the right to enter, and settle in, a third country in which they do not have a well-founded fear of persecution or of expulsion". If the Minister's argument were accepted, and if the Minister's argument with respect to the Law of Return were applied to the German Constitution as it stood before 1993, it would seem to follow that Australia would never have owed protection obligations to any person. All such persons would have had a right to asylum in Germany. It would be an absurd result if the generosity of other States' refugee laws meant that Australia was thereby relieved of international obligations that it voluntarily accepted with other nations. Such a result should not be reached by implication. It could not have been what was intended by Parliament when it enacted s 36(2).

92 I agree with the submission for the appellants that such a principle would render the Convention self-destructive. It would deprive the Convention of the practical effect that it was intended to have in the case of vulnerable persons such as the appellants who can establish that the Convention criteria apply in their case in the State where they have arrived and in which they claim the benefit of such protections.

93 The notion of an implied exclusion of "protection obligations" is one that would, if given effect as part of the Convention scheme, potentially send applicants for refugee status shuttling between multiple countries. Their entitlements under the Convention would be hostage to arrangements purportedly made affecting their nationality by countries with which they may have no real connection. It would shift obligations clearly imposed by international law to contingencies that, in some cases, may be imponderable. It would introduce a serious instability and uncertainty of "protection obligations" into the Convention's requirements. Without clear language in the Convention to support such a course, I would not introduce such relief from Convention "protection obligations" by a process of implication inimical to the Convention's objectives, terms and practical operation.

94 I leave aside a case where a refugee applicant has a clearly established entitlement to protection which has been exercised and engaged before resort to Australia, as in a case of transit. Such were the factual circumstances in Minister for Immigration and Multicultural Affairs v Thiyagarajah[113]. Those facts are quite different from the present case. Neither

of the appellants in this case has ever been to Israel. Neither has any personal connection with that country. Neither has ever claimed or exercised a "right of return" as provided by Israeli law. The notion that such a municipal law (which is not unique to Israel) could cut a swathe through the international obligations assumed under the Convention is not one that is easily reconciled either with the Convention's language or its purpose.

…

97 It would also be astonishing if the enactment by the State of Israel of the Law of Return, without more, meant that the Convention's "protection obligations", accepted by other countries, were thereby withdrawn throughout the world, by implication and not express terms, from application to all persons who were, or might be, classified as Jewish. This is especially so, given the role of Jewish organisations in drafting the Convention, and given that the definition of "refugee" was directly influenced by the Nazi persecution of Jews.

…

99. It may be that issues will arise in the future under exclusion provisions of Australian statutes, which will present questions of ambiguity. But so far as s 36(2) of the Act is concerned, as operating at the time of the appellants' application, there was no such ambiguity. It is clear. Australia had undoubted "protection obligations" to the appellants. By the findings of the Tribunal in their case, the appellants were therefore entitled to protection visas

…

[73] Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, [1954] Australian Treaty Series No 5; Protocol relating to the Status of Refugees, done at New York on 31 January 1967, [1973] Australian Treaty Series No 37.

[74] Joint reasons at [22].

…

[77] See Vienna Convention on the Law of Treaties, Art 26.

[78] See Brownlie, Principles of Public International Law, 6th ed (2003) at 529-557; Weeramantry, Universalising International Law, (2004) at 171-172, 178-179. See also Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States", (1982) 32 American University Law Review 1; Menon, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine", (1992) 1 Journal of Transnational Law and Policy 151; Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 California Western International Law Journal 241.

[79] cf joint reasons at [27].

[80] See, for example, the Convention, Art 2: "Every refugee has duties to the country in which he finds himself". See also Art 3: "The Contracting States shall apply the provisions of this Convention to refugees" (emphasis added).

[81] See, for example, Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107.

[82] Constitution, s 51(xix) ("naturalization and aliens"); (xxvii) ("immigration and emigration"); and (xxxix) ("incidental powers").

[83] Bropho v Western Australia (1990) 171 CLR 1 at 20; Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 381-382 [69]-[71]; Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1131 [167]; 208 ALR 124 at 167.

…

[96] National security or public order: the Convention, Art 32(1).

[97] The Convention, Art 33(1).

[98] Joint reasons at [27]-[31].
[99] Joint reasons at [35]-[38].
[100] See the Act, s 6A(1)(c), introduced by the Migration Amendment Act (No 2) 1980 (Cth), s 6. Set out in joint reasons at [36].
[101] The Act, ss 26B(2) and 26ZF (since renumbered).
[102] See Hunter Resources Ltd v Melville (1988) 164 CLR 234 at 254-255 per Dawson J (and authorities cited therein).
[103] Migration Legislation Amendment Act (No 4) 1994 (Cth).
[104] The Act, s 91B(1).
[105] Border Protection Legislation Amendment Act 1999 (Cth), Sched 1, Pt 6, Item 65.
[106] See Migration Legislation Amendment Act (No 6) 2001 (Cth), Sched 1, Pt 1, Item 2 (commenced 1 October 2001); Migration Legislation Amendment (Judicial Review) Act 2001 (Cth), Sched 1, Pt 1, Item 5 (commenced 2 October 2001).
[107] Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; Coleman v Power (2004) 78 ALJR 1166 at 1171-1173 [17]-[24] per Gleeson CJ, 1209-1212 [240]-[249] of my own reasons; 209 ALR 182 at 189-191, 241-245.
[108] (2004) 78 ALJR 1166 at 1209 [240]; 209 ALR 182 at 241. See also authorities cited in fn 230.
[109] See, for example, Constitution of the Republic of Albania, Art 40; Constitution of the Republic of Bulgaria, Art 27(2); Constitution of Georgia, Art 47; Constitution of the Republic of Hungary, Art 65; Constitution of the Italian Republic, Art 10; Constitution of the Republic of Namibia, Art 97; Constitution of the Slovak Republic, Art 53. See also Constitution of Finland, s 9. See Flanz (ed), Constitutions of the Countries of the World.
[110] The Basic Law for the Federal Republic of Germany, Art 16.
[111] Hailbronner, "Asylum Law Reform in the German Constitution", (1994) 9 American University Journal of International Law and Policy 159 at 159. Hailbronner notes that the amendments to Art 16 "maintain the individual right of asylum" but restrict "unfounded asylum applications and asylum seekers entering from safe third countries": at 160. Hailbronner further clarifies that "for German authorities to reject an asylum application under the safe third state clause, an asylum seeker must have had actual contact with the territory of the safe third country and must have had the opportunity to apply for asylum in that country": at 162.
[112] See "Review of Foreign Laws", (1982) 3 Michigan Yearbook of International Legal Studies 553 at 567.
[113] (1997) 80 FCR 543.

In NAFG v MIMIA [2003] FCAFC 152 (2003) 200 ALR 252 (2003) 75 ALD 456 131 FCR 57 the majority held that the Tribunal asked itself the correct question according to the line of authority represented by judgments concluding with V872/00A v MIMIA (2002) 190 ALR 268 122 FCR 57 but both Gray J. (dissenting on the issue of whether the Tribunal asked itself the wrong question) and Gyles J. doubted the correctness of that line of authority and approved the approach of Emmett J. on appeal in NAGV.

Gray J. dissenting said:

1…The basis for the Tribunal's decision was that the appellant had "effective protection" in India and that therefore Australia did not have protection obligations to him.
2 I have read the reasons for judgment of Ryan J and the separate reasons for judgment of Gyles J in draft form. I differ from their Honours about what should be the result of the appeal. It is only necessary for me to set out shortly the basis on which I do so.
3 At the time when the appellant applied for a protection visa, s 36(2) of the Migration Act 1958 (Cth) ("the Migration Act") expressed the criterion for a protection visa as being that the applicant for the visa was a non-citizen in Australia to whom the Minister was satisfied that Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol. The term "Refugees Convention" and the term "Refugees Protocol" were defined in s 5(1) of the Migration Act. The former means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951. The latter means the Protocol relating to the Status of Refugees done at New York on 31 January 1967. It is convenient to call these two instruments, taken together, the "Convention".
4 Under various provisions of the Convention, Australia, as one of the parties to the Convention, has obligations of various kinds, usually referred to as protection obligations, to a person who is a "refugee".
…

6 As well as accepting that the appellant was a citizen of Bangladesh, the Tribunal seems to have accepted that he had a well-founded fear of persecution for the reason of his religion, if he should return to Bangladesh. …it took the view that the appellant would be subject to persecution if he should return to Bangladesh….
7 The Tribunal found that the appellant had "effective protection" in India. In doing so, it did not rely on subss (3), (4) and (5) of s 36 of the Migration Act. Although those subsections had been inserted into the Migration Act by the time the Tribunal considered the appellant's case, they did not apply to that case, because his application for a protection visa had preceded the date of operation of the subsections. The Tribunal relied on Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543, Rajendran v Minister for Immigration & Multicultural Affairs (1998) 86 FCR 526 and Minister for Immigration & Multicultural Affairs v Gnanapiragasam (1998) 88 FCR 1. Those cases are authority for the proposition that Australia does not have protection obligations to a person who could be returned to a "safe third country", which would not return him or her to his or her country of origin, and that the Convention permits Australia so to return such a person without considering his or her need for protection.
8 As Gyles J points out in his reasons for judgment in the present case, the reasoning on which this line of authority rests appears flawed. Article 33 of the Convention, on which the reasoning rests, does not authorise a country party to the Convention to return a person to whom it otherwise owes protection obligations to any other country. Article 33 imposes a negative obligation. It is an obligation not to expel or return a refugee 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." If the only relevant statutory criterion for a protection visa was that Australia had protection obligations to a particular person, it is difficult to see how such a negative obligation could be construed as removing those obligations. It is even more difficult to see how it could be construed as removing the obligation to determine the question whether a particular person was a person to whom Australia had protection obligations. These questions were not argued in the present appeal, however, and I prefer not to express any final view about them in the absence of full argument.

Ryan J.said:

21 The evidence before the Tribunal was that the appellant had travelled extensively on the Indian passport. …The appellant has used the Indian passport to leave and re-enter India on three occasions, and has spent a total of seven months in India in the course of those visits.
…

28 Mr Justin Smith of Counsel, who appeared on the appeal for the respondent Minister, conceded that, in the light of the recent judgment of the High Court in Plaintiffs S157/2002 v Commonwealth of Australia (2003) 195 ALR 24, the approach taken by the learned primary Judge in reliance on NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) ALR 449 was incorrect.
29 That concession makes it necessary for this Court to examine for itself whether the Tribunal in the present case has made an error of law amounting to a failure to exercise its jurisdiction or an excess of jurisdiction. The error suggested by Mr Gnanakaran, who appeared for the appellant, is that the Tribunal misdirected itself in relation to the question of whether the appellant had effective protection from a third country, India, so as to relieve Australia of the obligations which it would otherwise have to him under the Convention Relating to the Status of Refugees 1951 done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees 1967 done at New York on 31 January 1967 ("the Convention").

At [30]-[43] Ryan J. dealt with the authorities on the concept of third country protection from Thiyagarajah to V872/00A and the parties contentions at [44]-[47] and continued:

Reasoning on the appeal.

48 It will be recalled that the Tribunal expressed itself as "satisfied that the applicant has the right to reside in and to re-enter India." In its context, that meant no more than that the appellant, as a matter of practical reality, can enter and re-enter India without interference by, or attracting adverse attention from, officials in that country. This interpretation is borne out by the statement in the Tribunal's reasons immediately after that just quoted that;

> 'I note that he has done so [ie enter India] on three occasions without difficulty. I am satisfied that he will be able to do so again in the future.'

The phrase "a right to re-enter" was used by Weinberg J in the extract from Gnanapiragasam quoted at [35] above. However, it is clear from the reasoning of the Full Court in Kola that the existence of the so-called "right" does not depend on an applicant's ability to invoke some enforceable provision of the law of the third country which entitles the applicant to re-enter and reside in that country. Of course, acceptance of evidence from an expert in foreign law, or gleaned from text books or statutes, is one way of establishing the requisite right. Another way might involve evidence from a consular official or diplomatic representative of the third country. Whether the third country is a party to the Convention may also be relevant to an assessment of the risk of that country's refouling an applicant to his or her country of nationality. However, the answer to that question is not determinative of whether there is a "right" to re-enter and remain in the third country. In Anavaratham v Minister for Immigration and Multicultural Affairs [2001] FCA 903 (17 July 2001) I observed at [24];

> 'The status of India as a non-signatory to the Convention was a piece of evidence or an existing fact relevant to the ultimate question of fact, which, I consider, the Tribunal correctly posed for itself, but was not determinative of that question. The failure of the Tribunal to refer to that anterior fact does not entail that it ignored it. The inference is, at least, equally open that the Tribunal considered India's status as a non-signatory to the Convention but did not regard it as outweighing the positive indications which it identified in the passages quoted at [5] and [6] above that the applicant was likely to be given effective protection if returned to India.'

The conclusion in Anavaratham was affirmed on appeal by a Full Court; [2002] FCAFC 22 (13 February 2002).

49 In this case, what was relied on was the applicant's possession of an authentic Indian passport, his use of it to enter India on three previous occasions and his apparently undisturbed residence in India after each of those entries. What evidence is accepted by the Tribunal as establishing a fact relevant to a matter which it has to determine is a matter for the Tribunal provided that it does not rely on evidence which is not probative of the matter in question.

50 The questions which the Tribunal was required, in the context of this case, to determine were whether the appellant had a right, as a matter of practical reality, to re-enter India and whether, once in India, he would be at risk of refoulement to Bangladesh without proper evaluation of his claim to be a refugee from that country. The Tribunal chose to answer those questions adversely to the appellant by attaching weight to his possession of an Indian passport and his three previous unchallenged entries to, and periods of residence in, India.

..

53…I am unable to conclude that the Tribunal asked itself a wrong question or failed to take into account a relevant consideration. The only apparently relevant consideration which it did not mention was that India is not a Convention country. However, I draw from the emphasis on the appellant's past experiences in India an inference, similar to that drawn in Anavaratham quoted at [48] above, that India's status as a non-signatory to the Convention could not have affected the Tribunal's assessment of the risk to him of refoulement to Bangladesh. Accordingly, I am unable to impute to the Tribunal any jurisdictional error in the sense in which that expression has been used in the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in Plaintiffs S157/2002 v Commonwealth of Australia (supra).

…

Gyles J. said:

56 I have had the benefit of reading the judgment of Ryan J in draft. This relieves me of the necessity to set out the issues and how they arise. I agree that the appeal ought to be dismissed, with costs.

57 The Refugee Review Tribunal ("the Tribunal") acted upon the basis that:

> '... generally speaking, Australia will not have protection obligations under the Refugees Convention where an applicant for refugee status has "effective protection" in a country other than that person's country of nationality, that is in a third country.'

The conclusion of the Tribunal was as follows:

'I am satisfied that the Applicant has "effective protection" in India. I am satisfied, therefore, that Australia does not have protection obligations to the applicant under the Refugees Convention.'

This was based upon the finding that:

'I am satisfied that the Applicant has the right to reside in, to enter and to re-enter India.'

58 The reasons of Ryan J demonstrate that the Tribunal asked itself the right question according to the line of authority to which his Honour refers. Those authorities establish that whether there is effective protection in a third country is a practical question of fact and degree. Minds could no doubt differ about whether the Tribunal arrived at the correct answer to that question in the present case. The result may be surprising. However, Sackville J in NAEN v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 216 at [45] analysed the reasoning of French J in Patto v Minister for Immigration & Multicultural Affairs (2000) 106 FCR 119 in a manner which is consistent with the decision of the Tribunal in the present case. It should be borne in mind that virtually the only reliable facts in the case were that the appellant was in possession of a genuine Indian passport, which he had utilised on various occasions to enter and remain in India. Even if it were concluded that the Tribunal arrived at the wrong answer to the (right) question, all that would be established would be an error of fact and degree within jurisdiction. On any view, this would not amount to error of the kind required to avoid the operation of s 474 of the Migration Act 1958 (Cth) ("the Act").

59 Any surprise as to the result in this case of the application of the test laid down by present authority would not be alone. The same could be said, for example, of the decisions of Tribunals which were affirmed in NAGV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1456, in NAEN and in V872/00A v Minister for Immigration & Multicultural Affairs (2002) 190 ALR 268. That is the inevitable result of the adoption of a broad and imprecise test of fact and degree which is not found in the legislation. This, to my mind, indicates that the test should be reconsidered. We were not invited to depart from the line of authority referred to by Ryan J and applied by the Tribunal, and no ground of appeal was directed to that issue. This is not surprising in view of the state of the authorities at the time of the appeal.

60 The statutory regime which governs this case is that which applied at the time of the decisions in Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 and Al-Rahal v Minister for Immigration & Multicultural Affairs (2001)110 FCR 73. If the minority view of Lee J in Al-Rahal is correct, the approach of the Tribunal in this matter was fundamentally flawed, to the disadvantage of this appellant. Shortly before argument on this appeal a special leave application in relation to the decision in V872/00A was referred to the Full Court of the High Court for argument as if on appeal. It is likely that the proper construction of s 36 of the Act will be reconsidered during that argument. I do not regard what was said by Gleeson CJ, McHugh, Gummow and Hayne JJ in Minister for Immigration & Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 at 349-350 as precluding that reconsideration, particularly in view of the subsequent amendments to the Act. It is possible that the opinion of Lee J in Al-Rahal will be held to be correct. In my opinion, the differences between the statutory regime applicable here and that to be considered by the High Court are not critical to the point at issue. Subsequently to the argument on this appeal, another Full Court was invited to reconsider the construction of s 36 when hearing an appeal from the decision in NAGV of 2002. That decision has now been delivered (NAGV v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 144). Emmett J concludes that Thiyagarajah was wrongly decided, and each

of Finn J and Conti J agree with that conclusion. Emmett J declined to follow Thiyagarajah. Finn J and Conti J elected (as it was put by Finn J) to treat the heterodox as the orthodox for the present.

61 I agree with the substance of the opinion of Emmett J. I will briefly explain my reasons for doing so, subject to the caveat that the issue was not argued in this appeal. The criterion laid down by s 36(2) of the Act to qualify for a protection visa is satisfaction that the applicant is a non-citizen to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ("the Convention"). The primary protection obligation under the Convention is that provided by Article 33(1), which is in the following terms:

> '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.' (emphasis added)

62 The obligation is expressed to be owed to "a refugee", a term which is defined in Article 1 of the Convention. Article 33 does not qualify or have any operation in relation to Article 1 but, rather, defines the protection obligation which is owed to the refugee. In my opinion, it follows that the question which should have been posed in order to satisfy the criterion laid down by s 36(2) of the Act was whether the applicant was a refugee as defined in Article 1 of the Convention. If the answer to that question is yes, then that criterion for a protection visa is satisfied. Put another way, whether protection obligations under the Convention are owed to a person is not to be judged by the content of the obligations which will be owed if the person qualifies.

63 The Act does not directly incorporate the Convention into domestic law, and, in particular, does not so incorporate the protection obligation in Article 33. Indeed, the Act goes beyond the Convention by providing for the right to stay in Australia upon receipt of a protection visa. In other words, ultimately the protection obligations owed to a refugee are those expressly provided for by the Act. At the relevant time, the question of protection in a safe third country was only relevant under the Act in relation to subdiv AI of Div 3 of Pt 2 of the Act. The reason for that subdivision is set out in s 91A as follows:

'91A Reason for Subdivision

> This Subdivision is enacted because the Parliament considers that certain non-citizens ... [including those] in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.'

64 The definition of "refugee" in Article 1A(2) of the Convention deals with both persons with nationality and those without (stateless persons). There is no suggestion that the appellant is in the latter category. On this view, he therefore had to satisfy the Minister (and the Tribunal on review) that he was outside the country of his nationality and, for the appropriate reason, was unwilling to avail himself of the protection of that country. In the present case, the appellant claimed Bangladeshi nationality and claimed that he was unable or unwilling to avail himself of the protection of that country because of his fear of persecution for a reason within Article 1A(2). In my opinion, it was those claims which had to be judged in order to determine whether he was a "refugee" and therefore entitled to protection. Those questions were not addressed as such by the Tribunal as it was diverted into the issue of third country protection. If (as seems likely on the findings which were made) a favourable answer had been given, there may have been an issue as to the

application of subdiv AI. If the same issue arose under the present regime, a question might also arise as to application of subdiv AK of Div 2 of Pt 3 of the Act, which is headed "Non-citizens with access to protection from third countries".

At the time of delivering judgment in NAEN v Minister [2003] FCA 216 Sackville J. followed the prevailing line of authority which was the first instance decision in NAGV of 2002 . His Honour said:

INTRODUCTION

1 This is an application for relief under s 39B(1) of the Judiciary Act 1903 (Cth). The applicant challenges a decision of the Refugee Review Tribunal ("RRT") given on 29 October 2002. The RRT affirmed a decision of a delegate of the respondent ("the Minister") to refuse to grant a protection visa to the applicant. The challenge raises the question of the limits of what is often described in the literature as the concept of the "safe third country": see, for example, A Achermann and M Gattiker, "Safe Third Countries: European Developments" (1995) 7 Int J Ref Law 19.

2 The applicant is a national of the Russian Federation. She is Jewish. Her husband adheres to the Russian Orthodox faith. The RRT accepted the applicant's claim that she suffered from anti-semitism in Russia and that she had a well-founded fear of persecution in Russia based on her religion and ethnicity.

3 The RRT nonetheless found that neither the applicant nor her husband was a person to whom Australia had protection obligations under the Convention Relating to the Status of Refugees. The reason was that both were entitled to enter and remain in Israel pursuant to that country's Law of Return. According to the RRT, the right of "aliya" conferred by the Law of Return entitled every Jew and the spouse of every Jew (whether or not Jewish) to come to Israel as an "oleh". Since neither the applicant nor her husband would be at any risk of being refouled to Russia from Israel, the RRT was satisfied that they would have effective protection in Israel. It was not the point that they had had no prior contact with Israel and had no desire to live there. It followed that Australia did not owe the applicant or her husband protection obligations and they were not entitled to protection visas.

…

8 It should be noted that s 36(3) of the Migration Act, provides that 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 or reside in any country apart from Australia. That provision, however, came into force after the applicant sought a protection visa. That being so, neither party suggested that s 36(3) applies to the present case. In any event, it appears that s 36(3) does not detract from the doctrine of effective protection discussed later in this judgment: see Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154, at 171-172.

….

THE RRT'S REASONS

14 The RRT noted that the husband considered "aliya" to be unacceptable because of his Russian Orthodox faith. He did not wish to be subjected to Jewish law, as he considered would be the case if he went to Israel…

…

17 The RRT accepted that there had been an increase in discrimination against Jewish citizens of Russia and that the applicant had suffered from that discrimination. The RRT was satisfied that the applicant and her family had suffered

> "cumulative discrimination for her religion and ethnicity amounting to persecution. I am satisfied that, if she were to return to Russia, she would continue to face that discrimination for her religion and Jewish ethnicity. I am satisfied that there is a real chance that the discrimination amounting to persecution including acts of violence would, if she and her husband returned to Russia, again manifest itself".

18 The RRT further found that it would not be reasonable, in the circumstances of the case, to expect the applicant and her family to relocate elsewhere in Russia. The independent evidence did not suggest that there were places in Russia where attitudes towards Jews were different from the attitudes experienced by the applicant in Khabarovsk. Accordingly, the RRT accepted that the applicant had a well-founded fear of persecution in Russia based on her religion and ethnicity.

…

20 The RRT then quoted from material contained on the official website of the Israeli Immigration and Absorption Department. This stated that essentially all Jews everywhere are Israeli citizens by right, except for certain dangerous criminals. Since 1970, Israel had granted automatic citizenship not only to Jews but to non-Jewish members of their families including non-Jewish spouses.

…

22 The RRT then referred to Israel's Law of Return, 5710-1950. It summarised the position as follows:

> "The right of 'aliya' is enshrined in Israeli legislation. According to the Law of Return...[e]very Jew has the right to come to this country as an oleh. According to paragraph 3, a Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may, while in Israel receive an oleh's certificate. According to paragraph 4A(a) the rights of a Jew under this Law and the rights of an oleh under the Nationality Law, as well as the rights of an oleh under any other enactment are also vested in a child and a grandchild of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion: paragraph 4B. For the purposes of this Law 'Jew' means a person who was born of a Jewish mother or has become converted to Judaism and who is not of another religion. The Israeli authorities issue these emigrants actual Israeli citizenship, not merely the right to acquire it".

23 The RRT was satisfied that both the applicant, being Jewish, and her husband, being married to a Jewish person, would be granted aliya….

…

THE APPLICANT'S CONTENTIONS

25 The applicant acknowledged that Australia's "protection obligations" (as that expression is used in s 36(2) of the Migration Act) centre on the obligation of non-refoulement imposed on Contracting States by Art 33(1) of the Convention. She also acknowledged that
(i) Australia's obligations under the Convention are not triggered if an applicant has "effective protection" in another country; and
(ii) effective protection is to be determined as a matter of "practical reality and fact".

26 Nonetheless, Mr Karp, who appeared on behalf of the applicant, submitted that, except for one decision of a single Judge, this case was different from all others in which the effective protection principle had been applied in Australia. The difference was that in this case neither the applicant nor her husband had any prior connection whatsoever to Israel.

They had neither sought nor acquired citizenship in Israel. They had not resided in Israel, whether temporarily or permanently. Indeed, they had not even passed through Israel on their way to Australia, the country in which they have sought refuge. According to Mr Karp, the authorities assume that the only territory to which the host country (that is, the country in which refuge is sought) can expel a refugee is one with which the refugee has a prior connection.

27 Mr Karp argued that "law and practice" require a connection or attachment between the asylum seeker and the safe third country. That connection or attachment may take the form of a grant of refugee status in the third country, citizenship of that country, residency or even a transient geographical connection en route to the host country. But there is no relevant connection or attachment simply because an applicant is entitled, if he or she wishes, to reside in and obtain citizenship of that country.

28 Mr Karp accepted that the decision of Stone J in Applicant NAGV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1456, is squarely against his submissions. Mr Karp submitted, however, that I should not follow this decision, because (so he argued) it was clearly wrong.

29 Mr Karp argued that to uphold the approach taken in NAGV v Minister, in effect, would close the Convention to Jews who are among the very groups that the Convention was designed to protect. Moreover it would create the danger of "buck-passing" in the sense that a host country might expel a refugee to another country in the expectation that it would grant asylum or residency to the refugee, yet that expectation might not be met.

….

APPLICANT NAGV OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

33 The facts of NAGV v Minister were in substance identical to those of the present case. Mr Karp, at one point, suggested that there might be a difference in the findings made by the RRT in relation to the procedure for making aliya. In the end, however, as I understood him, he did not press the point. I think Mr Karp was right to accept that NAGV v Minister is precisely in point. Accordingly, as Mr Karp also accepted, the applicant can succeed in these proceedings only if she establishes that the decision in NAGV v Minister was clearly wrong: Bank of Western Australia v Commissioner of Taxation (1994) 55 FCR 233, at 255.

34 Stone J identified the relevant principle as follows (at [13]):

> "Australia does not owe protection obligations to a person who has acquired effective protection from persecution for a Convention reason in a third country and who is not at risk of being sent from that country to the country in respect of which a fear of such persecution is well-founded".

Her Honour pointed out that this principle had been applied in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543. There it was proposed to return the asylum seeker to France, which had already recognised that person's status as a refugee and had accorded him effective protection, including a right to reside, enter and re-enter the country. Stone J continued as follows:

> "[t]he principle may apply where the visa applicant is entitled to residence in the third country for reasons other than the grant of refugee status: Rajendran [v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526]; Minister for Immigration and Multicultural Affairs v Gnanapiragasam (1998) 88 FCR 1. It also applies where as a matter of practical reality, he or she is likely to be given effective protection even in the absence of a legally enforceable right to enter and live in the third country: [Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154, at 161]; Kola [v Minister for Immigration and

> Multicultural Affairs [2002] FCAFC 59, at [63]]. Effective protection involves the person not only being permitted to remain in the third country without risk of persecution for a Convention reason but also not being at risk of being refouled to his or her country of origin. In deciding whether the principle applies it is necessary to abjure any rigid standard of applicability and concentrate on the circumstances of each applicant and the practical consequences of sending that person to the third country: Applicant C, at [22]; Kola, at [63]; see also [Al-Zafiry] v Minister for Immigration and Multicultural Affairs [1999] FCA 443, at [26], per Emmett J, approved in Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549, at 558".

35 Stone J recorded a submission on behalf of the applicants that the principle of effective protection does not apply if the applicant has never been to the third country, has never made any attempt to obtain effective protection there and does not wish to go there. The applicants' counsel contended that, unless the principle was limited to cases where the applicant had arrived directly or indirectly from the relevant third country, decisions about refugee applications "would become an exercise in buck-passing".

36 Stone J accepted that, as a matter of fact, the cases in which effective protection had been determinative of an application for a protection visa involved applicants who had an established connection with the third country, having come from there or having passed through. Her Honour did not consider, however, that it followed that a connection established in this way was necessary for the principle to apply. The emphasis was on the practicalities of the matter, and the task of the RRT was to decide on the facts before it whether Australia had protection obligations to the particular case.

37 The evidence before the RRT included independent information concerning Israel's attitude to granting resident status to Jews and the non-Jewish members of their families. There was nothing before the RRT to suggest that the information obtained from Israeli government sources did not reflect the true position. Her Honour considered that:

> "[c]ontrary to the applicants' submission, accepting that the applicants can obtain effective protection in Israel does not imply that Australia would be able to avoid any Convention obligations merely by referring an applicant's claim to another Convention country. It cannot have been intended under the Convention that refugees could be shunted from one Convention country to another in the absence of any special connection with that other. I agree that it would be absurd to adopt such a construction and that the principle of effective protection does not require it.
>
> As is so often the case the question of whether a principle governing earlier cases applies depends on the level of generality with which that principle is expressed. The principle of effective protection requires that the applicant has a connection with the third country in the sense that one can be satisfied that the country in question will accord him or her effective protection either because it has already recognised that person's status as a refugee or for some other reason. Stated at that level of generality the fact that a person has never been to the third country is not a distinguishing feature".

…

THE EFFECTIVE PROTECTION PRINCIPLE

39 Mr Karp submitted that Stone J had erred in formulating the effective protection principle at too high a level of generality. He contended that the "connection" with the third country must at least include a prior association, whether by way of citizenship, residence or at least temporary physical presence en route to the host country. When asked to

articulate an underlying principle or rationale to justify such a requirement, I think it fair to say that Mr Karp found some difficulty in doing so.
40 In my view, Stone J did not misinterpret the authorities upon which she relied. For present purposes, the critical point to emerge from Thiyagarajah is that the question posed by s 36(2) of the Migration Act is not whether an asylum seeker, to the satisfaction of the Minister, has the status of a "refugee". The question is whether the Minister is satisfied that the applicant is a person to whom Australia presently owes protection obligations: Thiyagarajah, at 552-553, per von Doussa J, with whom Moore J and I agreed.
41 The latter question is to be determined by reference to Art 33, which imposes the principal obligation required by the Convention on a Contracting State (Thiyagarajah, at 557). Thus, as was confirmed by the High Court on the appeal in Thiyagarajah (on a different issue), even if a person is a refugee within the definition in Art 1A(2) of the Convention, Australia does not owe protection obligations to that person if Art 33 applies: Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343, at 349-350, per Gleeson CJ, McHugh, Gummow and Hayne JJ. That is, if Art 33 does not prevent Australia expelling or returning a refugee to the frontiers of another territory, Australia owes no protection obligations to that person.
42 In Thiyagarajah, the asylum seeker had already been granted refugee status in France. It was held that Australia did not owe protection obligations to him, since France had already accorded him effective protection, including the right to reside in and re-enter the country. von Doussa J was careful not to chart the outer boundaries of the principle of international law which permits a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim to refugee status (at 562).
43 Later authorities have, however, carried the principle applied in Thiyagarajah considerably further. In Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549, a Full Court held that Art 33 of the Convention can be satisfied where the "safe third country" is not a signatory to the Convention. In that case, a stateless Bedoon, who had been born in Kuwait and claimed to fear persecution in that country, fled to Jordan, via Iraq. The RRT was satisfied that Jordan would not refoul the applicant to Kuwait and that he had the right to reside and re-enter Jordan. The Court held (at 559) that the question of whether Jordan offered effective protection was to be determined as a matter of "practical reality and fact". Whether Jordan was a party to the Convention was relevant, but not determinative. Any other view represented a substantial gloss on the plain language of Art 33 and was subversive of the purpose of the Convention.
44 In Al-Rahal v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 73, the same principle was applied to an Iraqi national living in Syria. The RRT found that the applicant could re-enter Syria and reside there and was not at risk of deportation to Iraq. According to Spender J (at 75), the application of Art 33 of the Convention was a question of fact which did not necessarily require that the third country had already accepted an obligation to protect the applicant for a protection visa. Tamberlin J (at 97) took a similar approach.
45 In Patto v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 119, the applicant was an Iraqi national who had fled to Greece, but had been refused refugee status in that country. Nonetheless, he remained in Greece as an illegal immigrant for some years, before travelling to Australia on a forged Greek passport. French J cited (at 130-131), with apparent approval, the observation of Weinberg J in Gnanapiragasam, at 13, that there is no reason in principle why Art 33 "should rest upon nothing less than an entitlement to 'permanent residence' in the third country". French J ultimately set aside the RRT's decision refusing the applicant a protection visa, on the ground that there was no evidence to support the RRT's finding that the applicant could return to Greece. Had there been such evidence,

however, it would seem that French J would not have regarded the applicant's illegal status in Greece as necessarily fatal to the contention that Australia did not owe him protection obligations.

46 In Kola v Minister for Immigration and Multicultural Affairs [2002] FCAFC 59, the Full Court derived these propositions from the authorities (at [63]):

> ". Australia does not owe protection obligations to a person who has established residence and acquired effective protection (in the sense of protection that ensuring there is no breach of Art 33 of the Convention) in a third country.
>
> * This principle does not apply only to the case where the person has a legally enforceable right to enter and reside in a third country. It is enough that, as a matter of practical reality and fact, the person is likely to be given effective protection in the third country by being permitted to enter and live there and is neither at risk of being refouled to his or her original country, nor of his or her life or freedom being threatened on account of race, religion, nationality, membership of a particular social group or political opinion.
>
> * In determining the likelihood of the person being afforded effective protection, it is necessary to abjure any rigid standard and rely on a judicial assessment of the practical realities and circumstances relevant to that person's position". (Citations omitted.)

47 In V872/00A v Minister for Immigration and Multicultural Affairs (2002) 190 ALR 268, the appellants were Iraqi citizens who applied for protection visas in Australia. Each had travelled to Australia via Syria. The RRT was satisfied, largely on the basis of country information, that the appellants could re-enter and remain in Syria indefinitely and would not be at risk of being returned to Iraq unless they engaged in illegal activities or were a threat to Syria's security.

48 The issue in the case, as stated by Black CJ (at 269) was this:

> "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 (that is, 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 Art 33 of the Convention."

The appellants argued that Australia would cease to have protection obligations to a person who would otherwise be a refugee only if that person had a legally enforceable right of entry or re-entry to a safe third country.

49 The Full Court rejected the argument. Tamberlin J (at 286) said that in applying Art 33 of the Convention there were 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?"

His Honour thought that the appropriate question was whether there was a real risk that the applicant would not be able to gain access to that country so as to secure its protection.

50 Hill J considered that the effect of principles of international law, taken together with Art 33 of the Convention, was clearly that (at 274) 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."

The next question was whether the RRT could find that Australia's Convention obligations are satisfied where the refugee is to be removed to a safe third country and it is likely as a practical matter that the refugee would be accepted by that country but he or she has no legally enforceable right to enter and there is no evidence that the third country consents to the refugee's admission. His Honour answered that question in the affirmative. He did not think, however, that the test is whether there is a real chance that the third country would refuse admission to the refugee. In his view, the RRT 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. Any doubt would be resolved in favour of the applicant. Accordingly (at 276), the RRT

> "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."

51 Black CJ held that the Court should follow the line of authority represented by Al-Rahal. His Honour did not address the differences between Tamberlin and Hill JJ as to the appropriate test.

52 V872/00A v Minister was decided before NAGV v Minister, but was apparently not cited to Stone J. However, that decision and the others to which she referred support the proposition that the question of effective protection is to be determined as a matter of fact and is not dependent upon whether the asylum seeker has previously been resident in the third country. There is no obvious reason why, on the approach taken on those cases, Art 33 should be read as precluding expulsion or removal of an asylum seeker from Australia to a third country which in fact offers effective protection, even though the asylum seeker has had no prior geographical or other connection with that country. Indeed the approach taken by Hill and Tamberlin JJ in V872/00A v Minister suggests that no such connection is required.

53 Nor is there anything in the language of Art 33 itself to suggest otherwise. It requires a Contracting State not to expel or return a refugee to the frontiers of territories where he or she is at risk (in effect) of persecution for a Convention reason. Article 33(1) is framed as a prohibition on the entitlement that a Contracting State might otherwise have to expel or return a refugee to the frontiers of "territories": see V872/00A v Minister, at 273-274, per Hill J. It has been construed in Australia, however, as marking out the limits of the Contracting States obligations so far as removal of refugees is concerned (subject to any other specific restrictions contained in the Convention, such as Art 32 (which Australia has not adopted)). Read this way, Art 33 appears to contemplate that a Contracting State can remove a refugee to the frontier of a territory, provided that the refugee is not at risk of persecution in that territory for a Convention reason. There is nothing in the language of Art 33 to suggest that a Contracting State is limited to removing a refugee to a safe third country with which the refugee has had a prior connection. If, for example, an asylum seeker in Australia was removed from this country to New Zealand, the latter having agreed to accept the asylum seeker as a permanent resident, it is difficult to see how Australia would be in breach of its protection obligations to that person.

54 The difference of opinion in V872/00A v Minister as to the test to apply has to be considered against the consequences of a decision to remove a refugee to a third country which, while nominally adhering to the Convention or otherwise promising effective protection, in fact refoules the refugee to his or her country of nationality. That the consequences of an incorrect judgment can be disastrous for refugees caught up in the application of the effective protection principle is shown by experience: R Dunstan, "Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office 'Safe Third Country' Practice" (1995) 7 Int J Ref Law 606; Azemoudeh v Minister for Immigration and Ethnic Affairs (1985) 8 ALD 281, discussed in J Crawford and P Hyndman, "Three Heresies in the Application of the Refugee Convention" 1 Int J Reg Law 155, at 168-169.

55 Mr Karp referred to the Dublin Convention (Convention Determining the State Responsible for Examining Application for Asylum Lodged in One of the Member States of the European Communities (1990)) as an illustration of an international agreement for regularising safe third country practices and burden sharing on the basis of an asylum seeker's prior association with the third country. He did so, as I understood his argument, to support the proposition that a safe country in international law is one with which the refugee has a prior association, whether by way of citizenship or physical connection.

56 The Dublin Convention, signed by all twelve European Union States, is designed to lay down criteria to determine which State is responsible for examining an application for asylum: A Achermann and M Gattiker, above, at 20. It is based on the notion that one State and only one State is responsible for determining an asylum application. That State will normally be the one that first issues a residence permit to the asylum seeker or whose borders are first crossed by the asylum seeker (Arts 5, 6). The responsible State is obliged to determine the application. The other side of the coin, however, is that a State which is not responsible may expel or send back asylum seekers to the responsible State. As French J remarked in Patto, at 129, the Dublin Convention and similar multilateral and bilateral arrangements have had a significant impact on the processing of asylum claims in Western Europe. According to Achermann and Gattiker, at 23, in practice

> "[t]he principle of the responsible State has ... been turned upside down: expulsion to a third State is no longer the exception but the rule".

57 It is important for present purposes to note that the Dublin Convention (Art 3(5)) preserves to each Member State

> "the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the [Convention]".

Article 3(5) appears to assume that the Convention permits asylum seekers to be expelled to a third country even though that country has not necessarily accepted "responsibility" for processing an application under the Convention. It leaves open the circumstances in which expulsion is permissible under Art 33 of the Convention.

58 In Abdi v Home Secretary [1996] 1 All ER 641, the House of Lords considered rules made pursuant to the Asylum and Immigration Appeals Act 1993 (UK). The Statement of Changes in Immigration Rules provided as follows:

> "180D The Secretary of State may decide not to consider the substance of a person's claim to refugee status if he is satisfied that the person's removal to a third country does not raise any issue as to the United Kingdom's obligations under the Convention and Protocol. More details are given in paragraphs 180K and 180M.
>
> ...

> 180K. If the Secretary of State is satisfied that there is a safe country to which an asylum applicant can be sent his application will normally be refused without substantive consideration of his claim to refugee status. A safe country is one in which the life or freedom of the asylum applicant would not be threatened (within the meaning of Art 33 of the Convention) and the government of which would not send the applicant elsewhere in a manner contrary to the principles of the Convention and Protocol. The Secretary of State shall not remove an asylum applicant without substantive consideration of his claim unless: (a) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity, at the border or within the territory of a third country, to make contact with that country's authorities in order to seek their protection; or (b) there is other clear evidence of his admissibility to a third country. Provided that he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of a third country before the removal of an asylum applicant." (Emphasis added.)

The terms of par 180K are consistent with the London Resolutions of 1992, which seek to advance the object of harmonised European asylum policies. The Resolutions contemplate that a safe country can either be one where the asylum applicant has already been granted protection or has had an opportunity to do so or one in respect of which there is clear evidence that the asylum seeker will be admitted: see R Byrne and A Shacknove, "The Safe Country Notion in European Asylum Law" (1996) 9 Harv Human Rights J 185, at 191-192.

59 The significant point for present purposes is that it was not disputed in Abdi that par 180K, if properly invoked, complied with the United Kingdom's obligations under the Convention. Since sub-par (b) of par 180K is framed in broad terms and is not subject to any requirement that the asylum applicant have a prior connection with the third country, Abdi appears to assume that removal of an asylum applicant to a safe third country does not infringe the Convention even if the applicant has no prior connection with that country.

60 I should mention that I was not referred to any decisions in other jurisdictions which support the applicant's submissions. In Canada, the significance of Israel's Law of Return has been addressed in the context of the reference in Art 1A(2) of the Convention to the applicant's country of nationality: see Katkova v Minister of Citizenship and Immigration (1997) 130 FTR 192. No reliance appears to have been placed on Art 33 of the Convention. In the United States, the Supreme Court seems to have acknowledged that Art 33 does not necessarily prevent a nation from sending a refugee to a country where he or she has never been: Sale v Haitian Centers Council Inc 509 US 155 (1993), at 182, n 39 (the word "not" seems to have been omitted from the last part of the first sentence).

61 In my opinion, no basis has been shown for holding that NAGV v Minister is clearly wrong…

THE TEST OF EFFECTIVE PROTECTION

…

64 The RRT did not advert to the difference in the opinion expressed in V872/00A as to the appropriate standard to apply in determining whether a third country offers safe protection to a refugee. I think, however, that a fair reading of the RRT's reasons indicates that it considered that there was no real chance that the applicant or her husband would be denied entry to Israel or that they would be refouled to Russia. The critical finding was expressed in terms of them having a "right" of aliya to Israel. The RRT expressly stated that, apart from the claim that the applicant had converted to Christianity (which it rejected as a fabrication), no suggestion had been made that she or her husband would not be permitted to enter and live in Israel. Their claim before the RRT was different, namely that they would be harassed in Israel.

65 The RRT was clearly aware of the fact that the applicant had never been to Israel and had no familial or other connection with that country (except for being Jewish). Equally clearly, the RRT took the view that that fact was immaterial given the terms of the Law of Return.
66 The RRT was also clearly aware that any right the applicant or her husband had to Israeli citizenship was dependent on their arriving in the country and expressing a desire to settle in Israel. The RRT made a finding to that effect by reference to par 3 of the Law of Return. The RRT obviously took the view that the question of effective protection is to be assessed on the assumption that the refugee is prepared to enter and remain in the third country, in this case Israel. As a matter of principle that must be right. Otherwise a refugee could defeat a claim that a third country will provide effective protection simply by declining to go to that country or to remain there. It is axiomatic that no person seeking the protection of the Convention in Australia wishes to take advantage of the protection offered by a third country, unless forced to do so…
….

Note His Honour's comments:

74 I have concluded that the RRT did not commit any jurisdictional error in finding that the applicant is not owed protection obligations by Australia. It must be said, however, that there are some troubling consequences that seem to flow from the proposition that Art 33 of the Convention is not infringed where an asylum seeker is removed from the country of refuge to a third country offering effective protection notwithstanding that the asylum seeker has no prior connection with the third country. The consequences include the following:
1. So long as Israel maintains the Law of Return, a Contracting State is not obliged to afford protection under the Convention to a Jewish refugee. Indeed, it appears that this has been the case since 1950, the date of enactment of the Law of Return. Having regard to the historical origins of the Convention, which was adopted in the aftermath of the Holocaust, this must be regarded as an exquisite irony.
2. It is open to a decision-maker to inquire as to whether an applicant for a protection visa is Jewish, regardless of whether the applicant's claim is based on persecution by reason of his or her Jewish faith or origins. The point of the inquiry would be to ascertain whether the applicant can be removed to Israel consistently with Art 33 of the Convention. When I asked Mr Lloyd whether it would be open for the RRT, for example, to make such an inquiry because a particular applicant had a Jewish-sounding name, he did not demur. The implications of this, to put it mildly, are not pleasant.
3. To give effect to the effective protection principle, every application for a protection visa should be scrutinised to ascertain whether there is any country in the world that might provide effective protection to the applicant. In Al-Rahal, for example, the RRT found that Syria permits all nationals of the Arab States to enter at any time without entry visa requirements, with the exception of Iraqis and Somalis (see at 98). The RRT also found that all nationals of Arab countries are able to remain in Syria as long as they wish provided they do not get involved in activities incompatible with law and order. Assuming this finding to be correct and that the same position continues to apply, it would presumably follow that Australia owes no protection obligations to any refugee from an Arab country except possibly Iraqis and Somalis. (Even Iraqis and Somalis, as V872/00A shows, may receive effective protection in Syria.) There may be many other examples of nationals of particular countries, or perhaps persons of particular ethnic origin, who can receive

effective protection in a third country and who are therefore excluded from the protection of the Convention.
4. In practice, there would seem to be a significant danger of inconsistent and, perhaps, discriminatory application of the effective protection principle. Some nationals or members of particular ethnic or religious groups may be much more vulnerable to exclusion than others, depending on what procedures are followed by the Minister's delegates and the RRT to identify supposedly safe third countries.
…

The Full Court in NAEN v MIMIA [2004] FCAFC 6 (2004) 135 FCR 410 dismissed the appeal from NAEN v Minister [2003] FCA 216 (Sackville J.) and rejected the approach and reasoning of the Full Court in NAGV to the authority of Thiyagarajah .The appeal concerned a pre-December 16 1999 arrival so S36(3) could have no application. The Court (Whitlam Moore and Kiefel JJ.) stated:

1 This appeal concerns the criterion specified in the Migration Act 1958 (Cth) for the grant of a protection visa to a person who comes within the definition of a refugee under the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees, where that person has a right to enter and reside in a third country where that country would not expel or return that person to a country where they might suffer persecution. The issue arises in this case because the appellant, a Russian national, is Jewish and Israel's Law of Return confers upon every Jew the right to enter and remain in Israel. The right is extended by the Law to spouses, regardless of whether they are Jewish. The appellant's husband is of the Russian Orthodox faith. There would be no prospect that they would be returned to Russia from Israel. Nevertheless the appellant and her husband, who have not had any connexion with Israel, do not wish to live there.
2 That issue has been authoritatively determined by a Full Court of this Court in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543. Justice von Doussa, with whom Moore and Sackville JJ agreed, there held that as a matter of domestic and international law Australia does not owe protection obligations to a person who has 'effective protection' in another country. In the recent decision of NAGV v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 202 ALR 1 Emmett J held that Thiyagarajah was wrongly decided. The other members of the Court, Finn and Conti JJ, while in agreement, did not consider that the Court should depart from the jurisprudence which had developed since Thiyagarajah was decided and did not allow the appeal.
3 The appellant invites the Court to follow the reasoning of Emmett J in NAGV and to hold to the contrary of Thiyagarajah.
….
8 On 16 December 1999 Part 6 of Schedule 1 to the Border Protection Legislation Amendment Act 1999 (Cth) commenced. The following provisions were added to s 36:

'(3) ….

9 These provisions may well have relevance to the facts of this case, but they were not in force at the time the applications for protection visas were made, and it is not suggested that they have application.

10 The Minister also referred to certain other sections of the Migration Act which were said to militate against the construction placed on s 36(2) in NAGV. It is not necessary to set them out. Sections 500(1)(c) and 502(1)(a) refer to decisions to refuse to grant a protection visa, or to cancel a protection visa, relying on Articles 1F, 32 or 33(2) of the Refugees Convention. Section 503(1) provides that a person who has been refused a protection visa or has had such a visa cancelled relying on those Articles is not entitled to enter Australia or be in Australia at any time during the period determined under the regulations.

…

11 The preamble to the Refugees Convention recites that it is desirable to revise and consolidate previous international agreements 'relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement', amongst other things. The protection of refugees was recognised as depending upon the cooperation of the Contracting States with the United Nations High Commissioner for Refugees.

12 Whilst it is the whole of Art 1 which determines who is a 'refugee' it is sufficient for present purposes to refer to the definition in Art 1A(2): ..

13 The Articles which follow refer to refugees generally, refugees 'lawfully staying' in a territory, and refugees having 'habitual residence' and certain other descriptions of refugees. Included amongst what a Contracting State is to accord them are the freedom to practise their religion and undertake religious education (Article 4); the same treatment as is given to aliens (Article 7); rights to engage in employment (Articles 17 and 18); rights to property (Articles 13 and 14); access to the Courts (Article 16); and to education (Article 22). Contracting States are also obliged to issue identity papers to any refugee who does not have a valid travel document and to issue documents for the purpose of travel outside its territory (Articles 27 and 28).

14 Article 31 provides that a Contracting State is not to impose penalties on account of refugees' illegal entry and presence whether they come directly from a territory where their life or freedom was threatened. Articles 32 and 33 deal with 'Expulsion' and 'Prohibition of expulsion or return (refoulement)'.

….

THE DECISION IN THIYAGARAJAH

15 The respondent in Thiyagarajah had been afforded refugee status and granted a right of residence in France after his departure from Sri Lanka and prior to his arrival in Australia. He had been issued with travel documents which contained a right of re-entry to France.

16 As von Doussa J observed, the appeal in Thiyagarajah illustrated the significance of the changes effected by the 1992 amendments. When asylum is claimed a person seeking protection does so by applying for a protection visa. The existence of protection obligations under the Refugees Convention then became the criterion for the grant of such a visa. His Honour said, with respect to such an application (at p 552):

> '...In considering that claim the central question for determination must be the criterion for a protection visa prescribed in s 36(2) of the Act: is the applicant a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention? This is a question posed by the domestic law of Australia, but the content of the question must be gauged by reference to the protection obligations owed by Australia under the Refugees Convention as a matter of international law.'

17 His Honour considered that under the Refugees Convention even if a person was a refugee as defined in Art 1, there remained questions concerning the obligations of Australia as a Contracting State. That most relevant to this appeal was stated by his Honour (at p 556).

> '...It is whether under the Refugees Convention, Australia is obliged not to deport a non-citizen asylum seeker from Australia to the third country from whence he or she came if that person falls within the definition of 'refugee' in Art 1.'

18 His Honour turned to what he considered to be the primary obligations imposed on a Contracting State in relation to a refugee, Arts 31, 32 and 33. Article 31 had no application to the circumstances of the case in his Honour's view. There is no suggestion that it is directly relevant to this appeal. Article 32 applies only to refugees 'lawfully' in a Contracting State's territory. It may not have applied, his Honour observed, because the claim for asylum was made after the expiry of the respondent's entry permit. In the event that it did apply it would oblige Australia to extend due process of law. In any event it is to be read with Art 33 which imposes the principal obligation on a Contracting State.

19 His Honour noted that the prohibition in Art 33 on expulsion or return of a refugee to a place where they would suffer persecution was not just to the country of the refugee's nationality but was expressed to be to 'territories' generally (at p 557). His Honour then considered international practices relating to the return of asylum seekers to third countries where they would have effective protection, recent developments in case law and legislative amendments in the United Kingdom and Canada on that topic. It is not necessary to refer to the discussion in any detail in these reasons. His Honour observed that 'the notion that the Refugees Convention permits a country to whom a claim for asylum is made to remove the asylum seeker to a safe third country', whilst considered permissible by the United Nations High Commissioner for Refugees had been criticised by others (at p 561). His Honour said:

> '... 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.' (at p 562).

His Honour concluded that as the respondent had effective protection in France he was not a person to whom Australia owed protection obligations. The additional feature, that the applicant held travel documents entitling him to return to France as a refugee, whilst not essential to that finding at least served to illustrate that his claim for protection was removed from the object and purposes of the Refugees Convention (at p 565).

20 The principle in Thiyagarajah has been applied and developed in a number of decisions of this Court: Rajendran v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526; Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549; Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67; Minister for Immigration and Multicultural Affairs v Sameh [2000] FCA 578; Al-Rahal v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 73; Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154; Al Toubi v Minister for Immigration and Multicultural Affairs [2001] FCA 1381; Sivasubramaniam v Minister for Immigration and Multicultural Affairs [2002] FCAFC 98; Kola v Minister for

Immigration and Multicultural Affairs (2002) 120 FCR 170; V872/00A v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 57; Odhiambo v Minister for Immigration and Multicultural Affairs (2002) 172 FCR 29; and SPKB v Minister for Immigration and Multicultural Affairs [2003] FCAFC 296. The additional matters dealt with by those cases do not arise for consideration in this appeal.

21 The appeal to the High Court, Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 did not concern the issue presently under consideration. The majority judgment did however contain a reference to the Full Court's view of the requirements of Art 33. In relation to issues arising in the Full Court as to Art 1E, their Honours said at (349-350 [15]-[16]):

> '...The Full Court did not go on to hold, as would appear to follow, that in this respect the Tribunal had erred in law. This course was not taken because of the view of the Full Court that, by reason of the operation of Art 33, Australia did not owe the respondent protection obligations ...
>
> In the Full Court, von Doussa J correctly emphasised two aspects of the case. The first was that the effect of ss 36 and 65 of the Act and subclass 866 of Schedule 2 of the Migration Regulations was that the case turned upon the question whether an error of law was involved in the decision of the Tribunal that the respondent, his wife and child were not 'persons to whom Australia has protection obligations under the [Refugees Convention]'. In its applicable form, the legislation obliged the Minister to grant a protection visa if this criterion were met and to refuse the visa if it were not met. The second aspect was that, under the legislation, the inquiry was not confined (as it had been under the earlier legislation [See Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 273-275; Minister for Immigration, Ethnic and Multicultural Affairs v Guo (1997) 191 CLR 559 at 563] to the question whether the asylum seeker had the 'status' of a 'refugee'. Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied.'

NAGV v MINISTER

22 The facts in NAGV were in relevant respects identical with those in this case. The Refugee Review Tribunal there determined that Australia did not have protection obligations to the appellants under the Refugees Convention, despite their well-founded fear of persecution in the Russian Federation, because they would probably obtain 'effective protection' in Israel if they were prepared to go there.

23 In the Full Court Emmett J was of the view that s 36 of the Migration Act simply identifies the non-citizens to whom the Minister is required to grant protection visas. It and other sections such as s 65 do not require the Minister to take steps that would satisfy Australia's obligations under the Refugees Convention (at [35]). It was, in his Honour's view, the existence of protection obligations which was central to s 65 (at [57]). Section 36(2) speaks simply in terms of 'protection obligations under the Refugees Convention' as amended by the Protocol (at [53]). Whilst accepting that the Refugees Convention does not impose an obligation to provide even temporary asylum, nevertheless Australia has some obligations to all refugees and some of them can be characterised as 'protection obligations'. His Honour had earlier listed a number of the Refugees Convention's articles and their subject matter. The protection obligations included at least Arts 31 and 33(at [58]-[60]).

24 His Honour said (at [36]-[37]):

> ‘Thus, it will be necessary, in relation to any applicant for a protection visa, to enquire and ascertain whether Australia has protection obligations to that applicant. Once the Minister is satisfied that the applicant is a person to whom Australia has protection obligations, as that term is to be understood when used in s 36(2) of the Act, that person is entitled to the grant of a protection visa, whether or not the protection obligations imposed on Australia under the Refugees Convention require the grant of asylum or some other benefit falling short of the grant of asylum.
>
> Thus, the grant of a protection visa to a non-citizen may well confer on that citizen greater rights than the "protection obligations" that Australia has under the Refugees Convention would require Australia to confer on that person. However, that is not to the point. Whatever the content of the "protection obligations" that Australia has under the Refugees Convention, if a non-citizen is a person to whom Australia has such protection obligations, the relevant criterion for the grant of a protection visa is satisfied.’

25 In his Honour’s view the Minister’s contention, that Australia has protection obligations to a person only where it cannot, consistently with its obligations under international law, expel or return that person to a place where they would have ‘effective protection’ could not be accepted:

> ‘...That contention as to the construction of s 36(2) involves the implication into the Refugees Convention of an obligation that is certainly not expressed in the Refugees Convention. The Minister’s construction means that Art 33 is to be understood as providing that Australia will not expel or return a refugee to the frontiers of any country or territory unless the refugee can enter and reside in that country or territory and will have effective protection there. Thus, so the argument would run, a refugee who has effective protection in a third country, because the refugee can enter and reside in such a place, will not be a person to whom Australia has a protection obligation under the Refugees Convention. But that is not what s 36(2) says.
>
> It may be a rule of international law that a country on whose territory a refugee is found will not expel or return that refugee to any country unless the refugee can enter and reside in that country. However, that is not an obligation that Contracting Parties have under the Refugees Convention. Further, having regard to Australia’s reservation of Art 32, it is difficult to see how it could be an obligation implied under the Refugees Convention. The obligation of Australia under the Refugees Convention not to return or expel is limited to that arising from Art 33’ (at [39] and [40]).

26 In his Honour’s view the Court in Thiyagarajah had regard to the wrong question (at [48]). The enquiry under s 36(2) is as to Australia’s obligations under the Refugees Convention, and does not concern other obligations which might arise under international law. Section 36(2) does not speak of an obligation under international law to grant asylum nor of an obligation under the Refugees Convention to grant asylum. It speaks simply of ‘protection obligations under the Refugees Convention’ (at [48] and [53]).

27 Emmett J in NAGV also considered it to be of some significance that Australia’s protection obligations did not include the obligation in Art 32. His Honour observed that in Thiyagarajah von Doussa J’s attention was not drawn to the fact that Australia had reserved Art 32. Emmett J went on to hold that: ‘The reasoning entails a conclusion that, because Australia is not precluded by international law from expelling or returning an applicant for

a protection visa, Australia has no protection obligations under the Refugees Convention to that person'. His Honour considered such a process of reasoning not to be compelling. We should add at this point that it is not plain to us that von Doussa J's reasoning contained the assumption mentioned. In any event, as an addendum to the reasons in NAGV later explained, Australia's reservation of Article 32 was in fact withdrawn in a communication to the Secretary-General of the United Nations received on 1 December 1967: the United Nations Treaty Series, Refugees Convention Relating to the Status of Refugees, note 15. Emmett J said that that fact did not affect his conclusion about the reasoning in Thiyagarajah.

…

30 The Tribunal then turned to consider Israel's 'Law of Return' and held that it provided a right of immigration (Aliya) to all Jews. According to information before it these immigrants are issued with Israeli citizenship. It rejected the appellant's claim to have converted to Christianity and her claims that she was not sufficiently religious to be in a position to claim that right and that her husband would be unable to do so. Applying Thiyagarajah it held that Australia did not have protection obligations towards the appellant since she and her family were afforded 'effective protection' in Israel, by being permitted to enter and live there without risk of being returned to their original country. In accordance with Art 33, Australia could return such a person to that third country without considering whether he or she is a refugee: Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549. REASONING OF THE PRIMARY JUDGE

31 At the time Sackville J heard this matter the appeal in NAGV had not been determined. His Honour referred with approval to the decision of the primary Judge in NAGV, Stone J. Her Honour had correctly applied the principles in Thiyagarajah and following cases, his Honour considered.

32 The critical point to emerge from Thiyagarajah, in his Honour's view, is that the question posed by s 36(2) is not whether an asylum seeker, to the satisfaction of the Minister, has the status of a refugee. It is whether the Minister is satisfied that the applicant is a person to whom Australia presently owes protection obligations. That question is determined by reference to Art 33. If Art 33 does not prevent Australia expelling or returning a refugee to the frontiers of another territory, Australia owes no protection obligations to that person (at [40] and [41]).

33 Before his Honour the appellant argued that an asylum seeker could not be removed to a third country with which they had had no prior connexion. Stone J had determined the question as a matter of fact and considered that the principle of effective protection was not dependent upon whether the asylum seeker had previously been resident in the third country. In his Honour's view (at [52] and [53]) there was nothing in the language or Art 33 to suggest that a Contracting State was limited to removal to a third country with which the asylum seeker had a prior connexion and no obvious reason why it should be read in such a way. The approach taken in V872/00A v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 57 suggested that no such connexion was required. The decision in Abdi v Home Secretary [1996] 1 All ER 641 also appeared to assume that removal to a safe third country did not infringe the Refugees Convention even if the applicant had no prior connexion with the country.

34 The Tribunal was also clearly aware, in his Honour's view, that any right to Israeli citizenship was dependent upon the appellant and her husband arriving in the country and expressing a desire to settle in Israel. His Honour considered (at [66]) that the Refugee Review Tribunal must have taken the view that the question of effective protection is to be assessed on the assumption that the appellant would enter and remain in the third country

and, as a matter of principle, that must be right. Were it otherwise a refugee could defeat a claim that a third country can provide effective protection.

…

THE APPEAL

36 The appeal raises two issues: whether the reasoning of the Full Court in NAGV as to the operation to be given to s 36(2) should be adopted; and whether the effective protection principle applies where an asylum seeker has no connexion with the safe third country and does not desire to go there.

37 Each of the judgments in Thiyagarajah and NAGV accept that the question posed by Australian domestic law, by s 36(2) of the Migration Act, is to be answered by reference to the Refugees Convention. They differ as to the extent of the enquiry posed by Art 33. Indeed the reasoning in NAGV proceeds upon the basis that there is no enquiry necessary. It is sufficient to recognise that the Convention created protection obligations.

38 On a broader approach Emmett J considered that there were a number of Articles of the Refugees Convention which involved obligations of that kind. We are unable, with respect, to agree. For the most part the Articles to which he referred give rise to obligations concerning the treatment a refugee is to receive where a Contracting State is in the process of considering, or has granted, an application for asylum.

39 Article 33 might give rise to an obligation to protect, which is to say not to return or expel a refugee to the frontiers of a territory where they would face persecution for a Convention reason. Further enquiry is however necessary to determine whether Australia is unable to return an asylum seeker to another country in a particular case. NAGV denies the need for such an enquiry.

40 The effect of NAGV's approach to Art 33 is that the criteria of s 36(2) will be met in any case where a person is a refugee to whom Art 33 applies. Emmett J conceded that the construction adopted in NAGV might have the effect of granting protection visas to non-citizens to whom Australia was not required to provide protection under the Refugees Convention (at [37]). This would not, in our respectful view, be consistent with the aim of s 36(2), which is to give effect to Australia's obligations under the Convention: Plaintiff S157 v Minister for Immigration and Multicultural Affairs (2003) 211 CLR 476 at 491-492 [27].

41 Further, that approach to s 36(2) does not recognise the different statutory regime effected by the 1994 amendments to the Migration Act. NAGV did not refer to the observations of the High Court in the appeal in Thiyagarajah. It was there confirmed that a person may be a refugee but not be a person to whom protection obligations are owed, when regard is had to Art 33.

42 It was an important aspect of the reasoning in NAGV that Art 33 is not expressed to refer to considerations of effective protection in third countries. It does however contain reference to 'territories' generally, as von Doussa J observed. It may be that it was written with the prospect of safe third countries in mind. It is not necessary to determine whether that was the case. International law now gives such a meaning to Art 33. Emmett J observed that Thiyagarajah imports those standards into an interpretation of Art 33. In our view it was correct in doing so.

43 International treaties are not drawn with the precision of a domestic statute and often in general terms: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 240 (Dawson J) and at 255-256 (McHugh J). As McHugh J there observed this is sometimes the price paid for multinational political comity. As a result no technical common law approach is appropriate to their interpretation.

44 Article 31 of the Vienna Convention on the Law of Treaties has been described as the 'leading general rule of interpretation of treaties': McHugh J in Applicant A at 252, referring to Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 265. The terms of that Convention would not render it applicable to the Refugees Convention and Protocol. Article 4 of the Vienna Convention provides that it applies to treaties which are concluded by States after its entry into force. The Vienna Convention came into force after the Refugees Convention and Protocol, as Katz J pointed out in Minister for Immigration and Multicultural Affairs v Savvin (2000) 98 FCR 168 at 187. It has however been held to constitute 'an authoritative statement of customary international law": Victrawl Pty Ltd v Telstra Corporation Ltd (1995) 183 CLR 595 at 622. Katz J considered that it was for that reason that the Vienna Convention has been referred to on occasions by Australian Courts as if it were applicable in construing the Convention: and see Applicant A at 255 and 277, fn (189).
45 Article 31 cl 3 of the Vienna Convention provides:

> '3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.'

46 It would seem to us that the course undertaken in Thiyagarajah was to give effect to par (b) in particular.
47 The Minister also submitted that the decision in NAGV would cut across provisions such as ss 500(1), 502(1) and 503(1) etc. There is substance to the contention. If, under s 36(2), all persons who are refugees are entitled to a grant of a protection visa, that would be so notwithstanding that they come within the exceptions permitting expulsion under Arts 32 and 33(2). The sections assume that reliance can be placed on those Articles to refuse the grant of or to allow the cancellation of a protection visa.
48 In relation to the issue whether a person can be returned to a country with which they have had no prior connexion, Art 33 does not contain such a condition and we can detect no error in Sackville J's approach to the question. The Tribunal found as a fact that the appellant had access to effective protection in Israel. That she may not desire at present to go there is not a matter relevant to Australia's obligations under Art 33.
CONCLUSION
49 The critical points in Thiyagarajah were those summarised by Sackville J in this case. The question posed by s 36(2) is determined by reference to the operation of Art 33. If Art 33 does not prevent Australia from expelling or returning a refugee to the frontiers of another territory, Australia does not owe protection obligations to that person. In our view that was a correct approach and one permitted by the rules of construction of treaties. So understood Art 33 is not to be taken as prohibiting return to a country unless the refugee has a prior connexion with it.
…

See too NAHF v MIMIA [2004[ FCAFC 7 (Whitlam Moore and Kiefel JJ.) again applying Thiyagarajah (but also a post-16 December 1999 case):

3 At the time the applications were made s 36(2) was further conditioned by the following subsections:

> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
> (a) a country will return the non-citizen to another country; and
> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country."

4 The appellant claimed that he and his family had been subject to harassment by Maoists in Nepal and the Tribunal appears to have accepted this. The Tribunal however found that the appellant and his family could obtain effective protection in India by reason of the Treaty of Peace and Friendship between the two countries which was ratified in July 1950. Pursuant to it each government agreed to grant rights equal to those of its own citizens to the nationals of the other residing in its territory. The Tribunal did not accept that the appellant and his family would be subject to treatment amounting to persecution in India. It found that they would be safe from return to Nepal from India. We take these findings as indicating that the Tribunal accepted the appellant could be removed from Australia to India.

5 This approach raises two questions: whether the principle of effective protection in a safe third country as explained in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543, is wrong; and whether a Contracting State to the Refugees Convention is prohibited from returning a person to a country to which they have had no former connexion. The first issue requires consideration of the judgment of a Full Court of this Court in NAGV v Minister for Immigration and Multicultural Affairs (2003) 202 ALR 1, 202 ALR 1, where it was held that Thiyagarajah was wrongly decided. Both issues were raised in the appeal in NAEN v Minister for Immigration and Multicultural Affairs [2004] FCAFC 6 which was heard by the members of this Court. Judgment in that appeal was delivered today.

6 There is another aspect to this appeal. The appeals in NAGV and NAEN did not involve considerations of subsections (3) to (5) of s 36, which was inserted by the Border Protection Legislation Amendment Act 1999 (Cth) on 16 December 1999. The Minister contends that these provisions show that an appeal is futile.

7 The two principal issues in this appeal have been dealt with in NAEN. That judgment follows the reasoning in Thiyagarajah, which it holds to be correct and upholds the finding of the primary judge in NAEN that Art 33 of the Refugees Convention was not conditioned in such a way as to prevent return of an asylum seeker to a country where they had no prior connexion. It follows that this appeal must also be dismissed with costs. It is not necessary to consider the remaining question, as to the operation of the other subsections. The

enactment of s 36(3) did not alter the operation of s 36(2): Kola v Minister for Immigration and Multicultural Affairs (2002) 120 FCR 170.

The Full Court in Applicant A106 of 2003 v MIMIA [2004] FCAFC 279 (1 November 2004)(Cooper Marshall and Mansfield J.) dismissed the appeal from Applicant A106/2003 v MIMIA [2004] FCA 538 ( Finn J. ) in essence because on a fair reading of the RRT's decision it considered that the appellant had not taken all possible steps to avail himself of a right to enter India and reside there: see s 36(3) not ny an application of s36(2) and the Thiyagarajah "effective protection" principle. The Court said:

4 The RRT accepted the claim of the male appellant that he had a genuine subjective fear of persecution from Maoists in Nepal on account of his political opinion and his membership of a particular social group. It found him to be a credible witness and his claims to be consistent with country information. At p 17 of its reasons for decision the RRT said:

> "There is abundant evidence before the Tribunal that there is a real chance that the applicant, as a member of the Nepali Congress Party and ruling elite, would be seriously harmed by the Maoists should he return to Nepal now or in the reasonably foreseeable future."

….

6…it considered that the male appellant had effective protection available to him in India. It found that the male appellant, as a citizen of Nepal, was able to enter, re-enter and live in India, with all the rights and privileges of an Indian national and without any fear of being forcibly returned to Nepal. It found that the male appellant had property in India and that his family had connections with Calcutta, going back to 1948.

7 The RRT noted the male appellant's claim that the porous border between India and Nepal could result in him being at risk from Maoists in India. In response the RRT concluded that the country information before it showed that Maoist activities are restricted to Nepal.

The reasoning of the primary judge

8 Finn J observed that the appellants were refused protection visas because the male appellant "had effective protection available to him in India", and that "(i)n consequence the Tribunal found that he did not satisfy the criterion set out in s 36(2) of the Migration Act (Cth) ...".

…

10 His Honour noted that the RRT had applied Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543, in considering the meaning of "effective protection" and to that end had noted that the relevant considerations applicable were:

- whether there is an enforceable right to enter and reside in India, whether temporarily or permanently;
- whether the male appellant had taken all possible steps to avail himself of that right;
- whether there was a well founded fear of persecution for a Convention reason in India; and
- whether there was a risk that Indian authorities would return the male appellant to Nepal.

11 At [7] of his reasons for judgment, Finn J said:

> "The applicant now concedes that according to decided case law binding upon me I would be obliged to conclude that the Tribunal's decision on the issue of effective protection is unimpeachable."

….

15 Like the primary judge we do not consider it appropriate to refrain from giving our judgment in this matter, pending the outcome of NAGV. It cannot be known with any certainty when judgment in NAGV will be delivered by the High Court. It is the duty of this Court to apply the law as it stands. Our view is fortified by the judgment of a Full Court of this Court in Applicants A105 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 239 where, at [43], the Court said:

> "Inevitably, this appeal must be dismissed because this Court is constrained to follow its earlier decisions in Minister for Immigration and Multicultural Affairs v Thiyagarajah and those cases that have followed it...The appellant can take other steps to protect his position on this ground pending the determination of the appeals in the High Court".

16 Counsel for the appellants did not seek to submit that Thiyagarajah should not be followed in this appeal. We consider that we should follow Thiyagarajah unless it can be demonstrated that it is clearly wrong. We decline to embark on such a task in the absence of full argument on the issue. In any event, we accept the submission of counsel for the respondent that NAGV concerned the proper interpretation of s 36(2) of the Act, while the RRT applied the provisions of s 36(3) to (5) in this case, in addition to considering s 36(2). Sub-sections (3) to (5) of s 36 were enacted after the occurrence of the facts that gave rise to the judgment in Thiyagarajah. A fair reading of the RRT's decision in this case reveals that it considered that the appellant had not taken all possible steps to avail himself of a right to enter India and reside there: see s 36(3). The appellant had a right to return to India but had not attempted to go back there, preferring instead to try to remain in Australia, as the RRT recognized at p 11 of its reasons for decision. Counsel for the appellant acknowledged that the RRT's use of the expression "effective protection" comprehended a proper understanding of the question posed by s 36(4).

….

In WAGH v Refugee Review Tribunal [2003] FCA 8 French J. found no error in the Tribunal's understanding of the effective protection principle under Article 36 when it held that possession of a valid visa to the USA, to which country the applicant had travelled previously, was enough to make it a safe third country not withstanding that she had not passed through that country on the way to Australia.

The Full Court (Lee Hill and Carr allowed the appeal from the judgment of French J. in WAGH v MIMIA [2003] FCAFC 194 (2003) 131 FCR 269 75 ALD 651. Each of the judges delivered separate reasons (Hill and Carr JJ did not adopt Lee J.'s reasoning )Lee J. commented that it was not sufficient to find capacity to enter and as a matter of practical fact and reality access to a refugee determination system. The decision however seems to be grounded in the fact that the Applicants only had a limited right to enter the USA if they were travelling there for the purpose of tourism or business which did not encompass the making of a refugee claim if they were to be sent there by Australia (which would not entitle them to be admitted on arrival)

6 At the relevant time subs 36(2) of the Act provided that it was a criterion for a protection visa that the applicant be a non-citizen in Australia to whom Australia has "protection obligations" under the "Refugees Convention as amended by the Refugees Protocol". The international instruments referred to are defined in s 5 of the Act as the "Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and the "Protocol relating to the Status of Refugees done at New York on 31 January 1967." The treaties are referred to collectively hereafter as the Convention. Australia is a Contracting State under the Convention.

7 The term "protection obligations" is not used in the Convention and is not defined in the Act. It may be accepted that, generally, and subject to the qualification upon its meaning effected by s 36(3) discussed later in these reasons, the expression means the responsibilities Australia has undertaken as a Contracting State with the respect to a person who is a "refugee" as defined in the Convention, namely, a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, ("a Convention reason"), is outside the country of his or her nationality and unable, or, owing to such fear, unwilling to avail himself or herself of the protection of that country, not being a person excluded from the operation of the protective provisions of the Convention by other provisions therein.

8 The Convention imposes numerous obligations on a Contracting State in respect of a refugee….The foregoing obligations imposed on a Contracting State by the Convention are beneficial provisions with respect to refugees and may come within a broad meaning of "protection obligations". However, for the purpose of construction of subs 36(2) it is enough to have regard to the direct obligations to protect refugees imposed on a Contracting State by Arts 31-33 of the Convention,….

9 The foregoing obligations imposed on a Contracting State by the Convention are beneficial provisions with respect to refugees and may come within a broad meaning of "protection obligations". However, for the purpose of construction of subs 36(2) it is enough to have regard to the direct obligations to protect refugees imposed on a Contracting State by Arts 31-33 of the Convention

…

11 Under Art 31(1) the Contracting State has an obligation to receive and deal with a refugee who enters that State without authorisation, and as long as that person presents to authorities without delay and shows good cause for that entry the Contracting State cannot

impose a penalty on that person by reason of that entry. It is unnecessary to determine the meaning of the words "until their status in the country has been regularised" as used in Art 31(2) but it may be postulated that the status of a person would be "regularised" for the purpose of Art 31(2) when the Contracting State is satisfied that the person is a refugee under the Convention, and that thereafter the person would be "lawfully staying in" or "lawfully in" that country for the purposes of the Convention.
12 Articles 32 and 33 protect a refugee by limiting the exercise of any power that a Contracting State may have to expel a refugee from that State.

…
14 Article 33 provides protection to a refugee in respect of whom a Contracting State seeks to exercise a power to expel or return that person to another country, including the limited power available in the circumstances to which Art 32 applies, by requiring a Contracting State not to expel or return a refugee in any manner where the life or freedom of the refugee would be threatened for a Convention reason. The obligations imposed by Art 33 on a Contracting State would apply to a person within that territory of that State to whom Art 31(1) refers. Article 33(2), however, provides that a refugee cannot claim the benefit of the Article if there are reasonable grounds for regarding the refugee as a danger to the security, or to the community, of the Contracting State.
…
16 The claims made by the wife in support of her application for a protection visa were that in the course of her employment as a petroleum engineer, a paramilitary force, apparently able to act beyond the control of Colombian government authorities, and which regarded the work being done by the wife as a threat to its interests or to the interests of parties associated with it, made threats against her life causing her to flee Colombia.
17 Each appellant held a passport that had been issued by the Republic of Colombia on 10 May 1999. In addition to being endorsed with the Australian visas issued on 19 October 1999, each passport was endorsed with a visa "Class B1/B2" that had been issued by the United States of America on 14 May 1999 valid until 11 May 2004. The wife stated that it was a requirement of her employment that she obtain such a visa pursuant to the policy of the Colombian government that petroleum companies based in the United States provide "technology transference" to Colombian personnel. A United States visa of the same class, issued on 6 May 1994 and valid until 5 May 1999, had been endorsed in the earlier Colombian passport that had been issued to the wife on 15 April 1994 and cancelled on 10 May 1999. The statement of reasons provided by the Tribunal recorded that the United States visas were "for the purpose of business and tourism and allow for a stay of up to 6 months with a capacity to apply for an extension of a further six months".
18 The Tribunal was informed by the wife that in June 1998 she had travelled through the United States as a passenger-in-transit from Colombia to Canada and that on return from Canada she had used the visa to enter the United States and remain there for a period of four days whilst visiting a friend. That had been the only occasion she had entered the United States.
19 The Tribunal determined that it was not satisfied that the appellants were persons to whom Australia had protection obligations under the Convention. It based that determination on a finding that the wife had "a capacity to enter the US where, as a matter of practical reality and fact, she has access to a refugee determination system that offers effective protection to applicants who are refugees and who do not face any prospect of refoulement to their country of origin." The Tribunal made no finding as to whether it was satisfied that the fear of persecution held by the wife was a well-founded fear for a Convention reason.

20 As at the date the wife lodged her application for a protection visa, s 36 of the Act, in relevant respects, read as follows:

'(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 non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.'

21 On 1 October 2001, subs 36(2) was amended by adding the words "the Minister is satisfied" after the word "whom", but, having regard to the terms of s 65, the amendment does not appear to alter the nature of the decision to be made under s 65.

22 Before 16 December 1999 s 36 was limited to subss 36(1) and 36(2). Those provisions received some amplification by the construction of subs 36(2) applied in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543. The 'ratio decidendi' in Thiyagarajah would appear to be as expressed by von Doussa J at 562, namely:

'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.'

23 A number of cases in this Court thereafter referred to a doctrine of "effective protection", said to have been applied in Thiyagarajah, as part of the construction of subs 36(2). Some of those cases appear to have expanded the "doctrine" beyond the elements identified in Thiyagarajah as set out above. As I stated in Al-Rahal v Minister for Immigration and Multicultural Affairs [2001] 184 ALR 698 (at [50]-[51]) international law provides a limited right of action for a State seeking to restrict the right of a refugee then in the territory of the State to choose that State as the place to seek protection from

persecution, and there is no principle of international law described as a doctrine of "effective protection" able to assist in the construction of subs 36(2).

24 If the argument were tenable that alternative constructions of subs 36(2) were available, a construction that avoided abnegation of the responsibilities undertaken by Australia under the Convention as a Contracting State would have to be preferred. In that regard I repeat what I said in Al-Rahal (at [49]-[57]) namely, that subs 36(2) does not contemplate that the Minister, or the Tribunal, may determine that it is not satisfied that Australia has protection obligations under the Convention merely because Australia may seek to exercise a power, or discretion, to expel that person to a third country. Under international law Australia may arrange with another country by treaty or accord, or may request another country to agree, to accept from Australia a person to whom the Convention applies and to whom Australia has protection obligations under the Convention, but such a power to deal with that person in that manner has no bearing on the proper construction of subs 36(2) which provides in, clear terms, that the criterion for the grant of a protection visa is that the applicant be a person to whom Australia has protection obligations under the Convention.

25 The Convention does not provide that the incurring of obligations to a refugee to whom the Convention applies is at the option or discretion of a Contracting State and nor does it provide that a Contracting State will not incur obligations to a refugee under the Convention if the refugee has had, or has, the opportunity to seek protection from another country or Contracting State. The obligations imposed by the Convention are of varying degrees of responsibility but all are attracted when a person to whom the Convention applies is within the territory of a Contracting State. A person does not become a refugee by an act of recognition or grant of status by a Contracting State. A person within the Contracting State who fulfils the Convention definition is, and at all times has been, a refugee. As Professor Goodwin-Gill states:

> "Like it or not, the rule that States have obligations towards all those within their territory or subject to their jurisdiction is one of the consequences of sovereignty." (See: Guy S Goodwin-Gill, "Refugees And Responsibility in the Twenty-First Century: More Lessons Learned From The South Pacific" (2003) 12 Pac. Rim L. & Pol'y J.23 at 25.)

26 The Convention, in Art 1E, provides that the Convention does not apply "to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country". That is to say, the Convention will not apply to a person who, before arriving in the territory of a Contracting State, has been accepted as a resident and as part of the body politic of a country other than his or her country of nationality. Furthermore, Art 1(C)(1)-(4) provide that the Convention will cease to apply to a person who, inter alia, re-avails himself of the protection of the country of his nationality or has acquired a new nationality and enjoys the protection of that country.

27 It is unnecessary to consider whether Thiyagarajah, or the "considerable jurisprudence" developed thereafter, was correctly decided. (See: NAGV v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 144 per Finn J at [1], Emmett J [61]-[62], [72], Conti J at [92]; NAFG v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 152 per Gray J at [8]; Gyles J at [60]-[64].) It is enough to say that whatever the proper construction of s 36 may be, on the facts of this case it does not permit the Minister, or the Tribunal, to determine that the wife, if she is a refugee to whom the Convention applies, is not a person to whom Australia has protection obligations under the Convention.

28 If doubt existed as to the foundation in the Act for the decision made in Thiyagarajah, that doubt was resolved by the introduction of subs 36(3). On 16 December 1999 significant amendments to the Act were effected by the Border Protection Legislation Amendment Act (1999) (Cth) which qualified the operation of subs 36(2) by, inter alia, introducing subss 36(3)-(5) and subdiv AK in Part 2. Qualification for the grant of a protection visa under subs 36(2) then became subject to the terms of subs 36(3) as well as to the terms of subdivs AI (Safe third countries), AJ (Temporary safe haven visas), AK (Non-citizens with access to protection from third countries) and AL (Other provisions about protection visas). It may be noted that as at this date the terms of subdiv AK, which prevent a valid application being made for a protection visa by a person "who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country", apply only to a non-citizen who is a national of two or more countries. The Minister has not made a declaration under s 91N(3) of the Act in respect of an "available country".
29 Section 91M in subdiv AK appears to be a statement of policy made by Parliament to assist construction of the subdivision. Save for the use of the word "re-enter" for the word "enter", subdiv AK, in relevant respects, uses similar terms to those used in subs 36(3) and, to that extent, the subdivision, particularly s 91M, should be taken to be part of the particular context in which subs 36(3) is to be construed. Section 91M reads as follows:

> 'This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.' (Emphasis added)

30 Again insofar as there is any ambiguity in the meaning of subs 36(3) and its effect upon subs 36(2), a meaning more favourable to a person to whom the beneficial provisions of the Convention apply, must be preferred. Given that subs 36(2) is a statement by Parliament that qualification for a protection visa turns on the satisfaction of the Minister as to whether Australia has obligations under the Convention to protect the applicant, it would not be consonant with that provision to apply a meaning to subs 36(3) that is inconsistent with Australia's obligations to a refugee under the Convention or international law.
31 It is for the foregoing reason that a Full Court of this Court in Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154 rejected the submission of the Minister that the phrase "a right to enter and reside" as used in subs 36(3) went beyond a legally enforceable right to enter and reside, and extended to a person who had a "capacity or ability" to enter and reside in a country other than Australia.
32 The 'ratio decidendi' expressed in the reasons of Stone J in Applicant C as to the proper construction of subs 36(3) reflected adoption of the reasoning of the learned primary Judge in that matter, who had held, correctly, that the words "a right to enter and reside" meant no less than an existing legally enforceable right. (See also: V872/00A et al v Minister for Immigration and Multicultural Affairs (2002) 190 ALR 268 per Hill J at [22].) In my reasons in Applicant C I expressly concurred with the reasons of Stone J limited to that ratio. Insofar as Stone J added remarks as to the construction of subs 36(2), in particular as to the accommodation within that subsection of a "doctrine of effective protection", those comments were not within that part of the reasons with which I concurred.
33 Upon arrival in Australia the appellants were "lawful non-citizens" pursuant to ss 13 and 14 of the Act. It was not submitted by the Minister that at material times thereafter the

appellants were other than lawfully in Australia. If the wife is a refugee under the Convention she is a refugee lawfully in Australia and any attempt to expel or remove her from Australia would be a step taken in the breach of the obligation imposed on Australia by Art 32 of the Convention. It was not contended that any exclusionary provision of the Convention applied to the wife, nor was it submitted that an obligation to protect the wife, reflected in a right to enter, re-enter and reside, and thereby receive protection whilst a resident of the United States, had been accepted by that country.

34 The words "right to enter and reside in, whether temporarily or permanently...any country...including countries of which the non-citizen is a national" mean an existing right which a person, who claims to be a person to whom the Convention applies, may exercise, being a right to enter, re-enter, and reside in a country other than Australia pursuant to a prior acceptance or acknowledgement by that country that it will accord that person protection from the risk of persecution that would exist if that person were returned to his or her country of nationality or habitual residence. The word "temporarily" is inserted to acknowledge that the right to reside in another country may not be permanent but the right to reside and receive protection in the other country, at least, will be co-extensive with the period in which protection equivalent to that to be provided by Australia as a Contracting State would be required.

…

36 It may be consonant with the terms of the Convention, or with international law, for Australia to provide that protection obligations under the Convention do not arise in respect of a refugee in Australia where that person has an established right to enter and reside in a country that has accepted that person as a person to whom protection is to be provided, equivalent to that required of a Contracting State under the Convention. However, it is the Minister's submission that subs 36(3) contemplates that a refugee within the territory of Australia is liable to be removed from Australia to another country without recognition by that country of that person's need for protection. Such a construction would purport to transfer to the other country Australia's duties and responsibilities under the Convention in respect of a refugee in its territory and would not meet Australia's obligations under international law and, in particular, as a Contracting State under the Convention.

37 The ordinary principles of statutory construction do not allow the words used by Parliament to be supplemented by judicial insertion of implied provisions such as a doctrine of "effective protection". (See: The Council of the City of Parramatta v Brickworks Limited (1972) 128 CLR 1 per Gibbs J at 12.) The doctrine enunciated and applied to the construction of s 36(2), namely, that protection obligations do not arise under the Convention when "as a matter of practical reality or fact a person is likely to receive effective protection" from a third country, (cf: Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 at [42]), would seem to infringe that rule. Furthermore, the doctrine so described is of uncertain dimension, the limits thereof being left to be developed by judicial elucidation.

38 The proper construction of the qualification upon the operation of subs 36(2) contained in subs 36(3) is that which meets Australia's obligations under international law, namely, that Australia is to be taken not to have protection obligations under the Convention to a putative refugee where that person has an existing enforceable right, recognized by a third country, to enter and reside in that country and be protected from persecution, thereby obviating the need for that person to seek protection from Australia pursuant to the obligations imposed by the Convention on Australia as a Contracting State.

…

40 If subs 36(3) had no application to the facts of the appellants' circumstances, the Tribunal erred by purporting to apply to subs 36(2) an erroneous construction.

41 The requirements of subs 36(3) are not satisfied by determining that a person has a "capacity" to enter another country and has as "a matter of practical reality and fact...access to a refugee determination system that offers effective protection to applicants who are refugees". Under subs 36(3) the right to enter and reside in another country that is to be taken to prevent protection obligations to a refugee arising under the Convention for the purpose of determining entitlement to a protection visa, is an existing right to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a Contracting State under the Convention.
42 The visa issued by the United States permits the wife to travel to the United States and, if she satisfies the relevant United States border authority that the purpose of her entry is consonant with the terms of the visa she holds, she may be admitted to the United States for the purpose of the visa. The right to enter and reside in the United States thus obtained would be a right to enter and to reside for the purpose of tourism or business, not a right to enter and reside in the United States for the purpose of receiving protection of some equivalence to that to be provided by a Contracting State under the Convention.
43 The facts of this case reveal the fallacy in the Minister's submissions. The wife has no connection with the United States and the United States has not accepted any obligation in respect of the wife, in particular, of her need for protection from persecution. As at this time the United States is not a third country willing to accept the wife and perform the obligations that would otherwise be required of Australia under the Convention if the wife is a refugee under the Convention. If the appellants were removed from Australia and transported to the United States, the appellants would not be persons received by the United States as persons whom the United States had undertaken to protect. The appellants would not be travelling to the United States for the purpose of tourism or business and would obtain no entitlement to be admitted into the United States upon arrival. Instead they may be subjected to summary deportation under the expedited removal provisions of United States law…
44 It would be most unlikely, and, indeed, improbable that Parliament intended that in circumstances such as the foregoing, it is deemed that Australia's international obligations under the Convention to a refugee then in Australia do not arise. The provisions in subs 36(3) are predicated upon there being another country willing to receive the refugee and, therefore, the application for a protection visa may be refused by the Minister for the reason that the person holds, and may exercise, a right to enter and reside in another country and receive from that country such protection as the refugee requires. If that were not so it would be difficult to discern the principle Parliament acted upon if the Minister's submission as to construction of subs 36(3) were accepted.
….

Hill J. emphasised a right to enter and reside . He said:

…
49 As the judgment of Lee J recognises the question for decision is whether the Tribunal erred in law in construing s 36(3) of the Migration Act 1958 ("the Act") so as to find that a person who holds a Class B1/B2 visa issued by the United States of America is a person to whom Australia is taken not to have protection obligations where the person does not seek to avail himself or herself of the right granted by the visa. The visa in question was one issued "for the purpose of business and tourism" and allowed the holder to enter and stay in the United States for a period of six months with a capacity for an extension of a further six months.
…

51 The subsection clearly was part of provisions having the policy that a non-citizen who could avail himself or herself of protection from a third country should be required to seek protection in that country, rather than be permitted to apply in Australia for a protection visa (cf s 91M of the Act).
52 It is no doubt correct to say that the provisions of s 36(3) and other provisions enacted at the same time should be read against the background of the provisions of the Refugees Convention as amended by the Refugees Protocol (both are identified in the judgment of Lee J) and on the assumption that Parliament should not be intended to enact legislation contrary to Australia's obligations under the Convention unless specific language is used or the construction is one that arises by necessary implication. It must also, however, be read against the background of the jurisprudence which has interpreted the Act and the Convention.
53 What s 36(3) requires before it operates to disentitle a person to be included in the class of persons to whom Australia has protection obligations is that the person be one who has "a right to enter and reside in" the other place. It is clear that the word "reside" is not used in the sense of reside permanently because s 36(3) makes it clear that the right to reside may be merely temporary. I shall refer to the meaning of the word "reside" later in these reasons.
54 The word "right" tends to suggest, prima facie, a legally enforceable right. However, it was held by a Full Court of this Court in V872/00A, V900/00A, V854/00A, V856/00A, and V903/00A v Minister for Immigration & Multicultural Affairs v Minister for Immigration and Multicultural Affairs (2002) 190 ALR 268 that "right" as used in the subsection did not mean legally enforceable right of entry and re-entry to a safe third country. The ratio of that decision in the narrowest sense is that s 36(3) will operate in a case where not only is there a legal right of entry but also where, absent a legally enforceable right of entry the person 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 Art 33 of the Convention: see per Black CJ at [5] and per Tamberlin J at [83], where his Honour said that the question is whether there was "any real risk that the applicant would not be able to secure access to that country so as to attract its protection". In the same case I suggested that s 36(3) would have no operation where the Tribunal was not comfortably satisfied that the applicant would practically be granted access, a view which might not be in complete accord with the majority in that case.
55 Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154 was another Full Court decision, prior to V872/00A which discussed the meaning of s 36(3). The leading judgment was given by Stone J with whom Lee J agreed. I do not read her Honour's judgment as differing in any significant relevant way from the decision of the Full Court in V872/00A.
56 In the course of her judgment her Honour said, in a passage quoted by the learned Primary Judge at [65]:

> "The combination of the amendments to s 36 and the doctrine of effective protection leads to his 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) 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."

57 It is true that the Court affirmed the decision of the learned Primary Judge in that case. I am not sure that the reference to "effective protection" can, however, be ignored. In any event, after V872/200A the comments of Stone J should, in my view, be read so as to include (if not already comprehended by (a)), a category of persons of whom it can be said that while they have not, in a strict sense, a legally enforceable right, the factual situation is that they are likely to be afforded entry to the third country and as a mater of practical reality, have effective protection there. If there is any conflict between Applicant C and 872/00A I would follow the latter and later case.
58 One reason why a strict construction can not be given to the word "right", so that it is to be read as "legally enforceable right" is that all countries retain as a matter of sovereignty a right to exclude persons from the country. It would be unlikely in many cases that a visa would give a legally enforceable right, although as a matter of practical reality it would be virtually certain that the person in question would be permitted entry.
59 The present is a case where the appellant held a visa, which on its face was valid and which on its face carried with it the right to enter and remain for a period of up to six months in the United States for, inter alia, purposes of tourism. I see no reason why within the principles discussed in V872/00A and Applicant C, it would not be open to the Tribunal to find that the appellant had a right to enter if the visa gave practically a right to reside, even if not permanently.
60 This was the view of the Tribunal which found the following facts:
* The appellant and her husband had been issue with entry visa which remained valid.
* The appellant and her husband had entered on one occasion the USA on a comparable visa.
* In the USA the appellant could access a properly functioning refugee determination process through which a significant number of Colombians and others had obtained refugee status.
* If the appellant were found to be a refugee in the USA she would not face refoulement to Colombia.
* The appellant was not at risk of persecution in the USA.
61 The Tribunal's conclusion, and it is a conclusion of fact, was:

> "The Tribunal finds that the applicant has a capacity to enter the USA where, as a matter of practical reality and fact, she has access to a refugee determination system that offers effective protection to applicants who are refugees and who do not face any prospect of refoulement to their country of origin. In such circumstances she is not owed protection obligations by Australia."

62 With respect to Lee J, s 36(3) does not require that it be shown that the third country acknowledge that it would accord the person protection from persecution if returned to the country of residence or nationality. There is nothing in the section which suggests the need for a prior recognition by the third country. If such prior acknowledgment or recognition is to be required then it would be necessary to add substantially to the words used in s 36(2). Accordingly I do not accept that s 36(3) requires that the Minister show that the applicant have an existing right to enter and reside and receive protection equivalent to that to be provided to that person by a Contracting State under the Convention.
63 In my view the question to be determined by the Tribunal is whether the appellant was a person who had what may be described as a right that was practically likely to be exercised, albeit not legally enforceable, to enter and reside even if only temporarily in the United States and in circumstances where it was practically likely that she would obtain effective protection there. It is not necessary that the Tribunal decide whether the "right" in that sense carries with it the right to receive protection in the third country.

64 I agree with Lee J, naturally, that not any visa, no matter how restrictive, would activate s 36(3) and thus result in the person not being a person to whom Australia owed protection obligations. The right, to which s 36(3) refers, is not merely a right to enter. It must be a right to enter and reside. A transit visa, for example, would, or could, be a right to enter, but clearly is not a right to enter and reside.
65 The fact that the residence of which the section speaks may be temporary is clear from the face of the section. Whether a visa to enter for tourist purposes is a visa which authorises both entry and (temporary) residence is a difficult question. "Reside" in its usual dictionary sense means "to dwell permanently or for a considerable time; have one's abode for a time" (see The Macquarie Dictionary (3rd ed)). It would be an unusual, although not impossible, use of the word to refer to a tourist. A tourist may stay overnight, or for a time in a country, but that country would not be his or her place of abode, even temporarily. The present is not a case where the appellant carried on any business, or indeed was employed by some other person in that person's business. If she were then it would be possible to argue that residence was necessary for business purposes.
66 In my view the error which the Tribunal committed was to ignore altogether the requirement in s 36 that an applicant have not merely a right of entry, but a right to reside, in the sense I have suggested. That more readily conforms with the policy to which Lee J refers. No doubt a person with a right to reside, even temporarily, in a country, will have the practical ability to access the refugee process in that country. Hence there is no need for that person to apply in Australia for a protection visa. He or she can avail himself or herself of protection from that third country.
67 I agree, therefore, although for different reasons than those enunciated by Lee J, that the Tribunal having erred in law has not made a decision under the Act ….

Carr J. said:

69 I agree that the appeal should be allowed. While not necessarily disagreeing with Lee J's reasoning, with due respect, I should not be taken as accepting by implication all of it. Accordingly, I shall give brief reasons for joining in the orders proposed.
70 The question in the appeal is whether the Tribunal erred in its construction and application of s 36(3) of the Migration Act 1958 (Cth) ("the Act") to the extent that its decision was not one made under the authority of the Act. That sub-section provides as follows:

> '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.'

71 In my opinion, for the purposes of this appeal, s 36(3) should be viewed as a clear expression of Parliament's intention to put limits on whatever obligations Australia might, having adopted the Convention, legislatively choose to accept as part of its municipal law.
….

74 In my view, Applicant C is authority for the proposition that the word "right" in s 36(3) means a legally enforceable right, albeit one that can be revoked - see Stone J at [57] and [58]. I do not see the subsequent Full Court decision of V872/00A v Minister for Immigration and Multicultural Affairs (2002) 190 ALR 268 as being inconsistent with Applicant C. It would appear that Applicant C was not cited to the Court in V872/00A.

75 I agree, respectfully, with Lee J's assessment that the Tribunal made its decision by relying upon an erroneous construction of s 36(3). In my view, the Tribunal erred in law by regarding the tourism or business visa held by the appellants as amounting to a right to enter and reside in the USA within the meaning of s 36(3). As Lee J points out, the appellants would not be travelling to that country for the purpose of tourism or business and would obtain no entitlement to be admitted into the USA upon arrival.
76 The learned primary judge concluded (in paragraph 45 of his Honour's reasons) that the Tribunal did not limit itself to applying s 36(3). His Honour's assessment in that regard was based on the Tribunal's references to Article 33 of the Convention and to the decisions in Patto v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 119, Al-Rahal v Minister for Immigration and Multicultural Affairs [2000] FCA 1141 and Applicant C.
77 I have a slight doubt about that. But, in any case, the Tribunal's conclusion that the female appellant would be given effective protection in the United States of America was expressly qualified by the condition that she be found to be a refugee in that country. At pp 10-11 of its reasons the Tribunal said this:

> 'It is apparent from the foregoing that the applicant has a capacity to re-enter the USA where she can access a properly functioning refugee determination process through which a significant number of Colombians and others have attained refugee status. If the applicant were found to be a refugee in the USA it is apparent that she would not face refoulement to Colombia.'

78 In my view, that is not how the doctrine of effective protection, developed by numerous decisions of this Court, is intended to work. That is, unless the third country is a party to the Convention. In Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 for example, the relevant country, France, was a party to the Convention. In Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 the relevant country, Jordan, though not a party to the Convention had a law (No 24 of 1973) which the Tribunal found, as a matter of fact, gave the applicant the right to reside in and re-enter Jordan.
79 In Al-Sallal at 559 the Full Court considered proposed refoulement direct to the asylum seeker's country of nationality (country A) or indirectly by means of refoulement to another country (country B) which would or might refoule him or her to A. In this appeal A is Colombia and B is the USA. The Court said this:

> '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.'

80 In my view, the Tribunal erred in law even if it did purport also to apply the doctrine of effective protection. It did this in two ways. First, by misconstruing s 36(3) and, secondly, by failing to apply the "real chance" alternative test explained by the Full Court in Al-Sallal.
81 As Stone J observed in Applicant C at [64]:

> 'The circumstances in which one might be "satisfied" that effective protection is available in the absence of a right (in the sense in which I have explained at [23] above) would be rare but not impossible to imagine. For example, if the third country were to give an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, it might be possible to be so satisfied although the person could not be said to have thereby acquired a right.'

Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] HCA 38 (Gleeson CJ(diss)Mc Hugh, Gummow (diss) Kirby (diss) Hayne Callinan and Heydon JJ. allowing appeal from Al Khafaji v MIMIA [2002] FCA 1369 ). Note the dictum of Gummow J. on the meaning of s36(3) given that the Respondent was an Iraqi national and the premise of the the appeal was his return to a third-State - Syria - of which he was not a national:

8…The delegate accepted that the respondent had a well-founded fear of persecution if he were to return to Iraq, by reason of his political opinion or political opinion imputed to him. However, the respondent failed to obtain a protection visa.

This was by reason of the operation given by the delegate to s 36(3) with respect to Syria. The sub-section was inserted by the 1999 Act in a Part headed "Amendments to prevent forum shopping". It stated:

> "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."

9 The question posed in the concluding words of s 36(3), the country of nationality of a non-citizen, is to be determined solely by reference to the law of that country (s 36(6)). Section 36(3) would not apply in relation to Syria if the respondent had a well-founded fear of persecution there (s 36(4)). Nor would it apply to Syria if the respondent had a well-founded fear that Syria would return him to Iraq and that he would be persecuted there (s 36(5)).

10 However, the delegate concluded that the respondent had effective protection in Syria, including the right to re-enter and reside in Syria without the risk of refoulement to Iraq and that he did not have a well-founded fear of persecution for any Convention reason if he were to return to Syria. Hence s 36(3) operated, Australia was to be taken not to have protection obligations to the respondent and, as a result, he did not meet the necessary criterion in s 36(2) for a protection visa.

18 The chain of events narrated above indicates the odd, if not paradoxical, position in which both the respondent and the Minister found themselves. The application for a protection visa had failed because of the conclusion by the delegate and the Tribunal that the respondent still had "a right" within the meaning of s 36(3) to enter and reside in Syria but had not taken all possible steps to avail himself of that "right". Yet it thereafter became apparent that, while the respondent wished to avail himself of that right, by triggering the requirement under s 198(1) of the Act that he must be removed as soon as reasonably practicable, there was, as Mansfield J found, no real prospect of that return to Syria coming to pass in the reasonably foreseeable future. The result, on the construction of the Act for which the Minister still contends in this Court, is the continued mandatory detention of the respondent.

19 There must be a serious question as to whether there exists a "right" of the nature identified in s 36(3) where it is insusceptible of exercise within a reasonable time of its assertion. It has long been notorious that the term "right" has no definite or stable connotation and bears a variety of meanings according to the connection or context in

which it is used. Here, as s 36(3) emphasises, the entry and residence may be merely temporary and the right may have arisen or be expressed in various ways. Nevertheless, remarks of Professor Hohfeld, nearly a century ago, are on point[11] "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale Law Journal 16 at 31.

> "[E]ven those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative."

20 On the present facts, any correlative duty must be that of Syria. Presumably the duty is owed under its municipal law to the respondent personally and must be shown to exist by evidence in an acceptable form to the Australian decision-maker dealing with the protection visa application. It may also be that there is a duty owed to him, or to Australia, as an international obligation. These questions of the intersection between municipal and international law have not been explored in submissions.

21 It is enough for this appeal to note that the issues of construction that do arise respecting the application to this case of the duties to remove the respondent from Australia under s 198 should not be approached on the footing that, as a matter of international obligation to Australia, Syria is required to permit the respondent to re-enter that country and to reside there.

In ***NBLC ; NBLB v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 272** Wilcox (dissenting )Bennett and Graham JJ.) the Full Court dismissed an appeal from NBLB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1051 (Emmett J.) The Tribunal had found two North Korean applicants to have a well-founded fear of persecution on the basis of political opinion if returned to North Korea' it was common ground that each of the appellants had the right to enter and reside in South Korea . A claim was raised of 'psychological ' fears of harm by spies if forced to go to and reside in South Korea. On the issue of the proper construction of s 36(3) it was held per the bench that the words 'all possible steps' ought to be interpreted as meaning exactly what they say and should not be read down in any way ; in present case there was no evidence of any steps being taken by either of the Appellants to avail themselves of their respective rights to enter and reside in South Korea. It was not possible to conclude that Parliament intended the words to require decision-makers to take into account the consequences to the person of entering or residing in the relevant third country, except as specifically provided in subss (4) and (5) of s 36. Per Bennett J and Graham J. (in separate judgments and following different paths ) "persecution" in s 36(4) has the same (restricted) meaning as that defined in s 91R . Wilcox J dissenting on the issue said that s 91R had no application to the question, under s 36(4) under consideration in these cases - it followed that, in

treating the word 'persecuted' as being limited by the requirements of s 91R, the Tribunal erred in law . The appeal was dismissed. Wilcox J. said:

2 As Graham J points out, there are two issues common to both appeals and an additional issue in *NBLC*. It is convenient for me to say immediately that I agree with Graham J in respect of the first of the common issues. The words 'all possible steps' in s 36(3) of the *Migration Act 1948* (Cth) ('the Act') ought to be interpreted as meaning exactly what they say. Especially having regard to the context in which s 36(3) was enacted, as evidenced by the extrinsic materials, it is not possible to conclude that Parliament intended the words to require decision-makers to take into account the consequences to the person of entering or residing in the relevant third country, except as specifically provided in subss (4) and (5) of s 36. If the appellants' argument in relation to s 36(3) were correct, subss (4) and (5) would be otiose. Given that subs (4) commences with the word 'However', and subs (5) with 'Also', those subsections can hardly be regarded as insertions for more abundant caution.
3 However, I differ with Graham J in respect of the second common issue: whether the concept invoked by the word 'persecuted' in s 36(4) is limited to 'persecution', as defined in s 91R of the Act.
4 I find the extrinsic materials equivocal on this issue. As Graham J notes, the Minister's Second Reading Speech contains the sentence: 'The bill will define the fundamental convention term, persecution, as an appropriate test of serious harm.' However, that sentence was used in the context of the following statement of the bill's objective:

> *'The bill will also stop the refugees' convention being interpreted so broadly that people who were never envisaged to be refugees manage to obtain refugee protection in Australia.'*
>
> A little later, the Minister said:
>
> *'Persecution is a key concept in considering claims for refugee status and it is not defined in either the convention or Australian legislation.'*

5 It will be noted that both these passages evince a concern that people are being too readily accepted in Australia as refugees. In that context, it was logical for Parliamentary counsel to frame s 91R in such a manner as notionally to amend Article 1A(2) of the *Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees Protocol* (together "the Convention"), in relation to the application of the Act and Regulations to a particular person. Article 1A(2) of the Convention is the gateway through which all applicants for refugee recognition must pass. By raising the threshold of what constitutes 'persecution' within the meaning of Article 1A(2), as applied to that person, the amending legislation was achieving the Minister's stated purpose of weeding out unworthy applicants for recognition. However, that purpose has no relevance to s 36(3), a provision that is concerned with people who have already satisfied Article 1A(2), as notionally amended by s 91R, and whose only reason for not being entitled to an Australian visa is that they have a right of residence in another country.
6 Both the primary judge and Graham J have criticised what they call the inelegant drafting of s 91R. However, the defect is not merely one of elegance. Section s 91R(1) would simply be inadequate. In order to achieve the objective assumed by their Honours, it would not be enough notionally to amend Article 1A(2). That is because Article 1A(2) is irrelevant to a determination under s 36(4); the relevant person has already passed through the (s 91R(1) affected) Article 1A(2) gateway. In order to achieve the objective assumed by my colleagues, it would have been necessary for the drafter to reword s 91R(1) in such a way as to relate satisfaction of paras (a), (b) and (c) to **any** determination of 'persecution' for the purposes of the Act or Regulations.

7 Subsections (3), (4) and (5) of s 36 were inserted into the Act in 1999, some two years before s 91R was added to it. It would not be right to assume that the existence of these subsections was overlooked by Parliamentary counsel or that counsel would have been incapable of framing s 91R(1) in such a manner as to make it apply to an evaluation required for the purposes of s 36(4), if that had been the intention.
8 In s 91R, as in relation to s 36(3), I think Parliament should be taken to have meant what it said. In my opinion, s 91R had no application to the question, under s 36(4), that the Tribunal had under consideration in these cases. It follows that, in treating the word 'persecuted' as being limited by the requirements of s 91R, the Tribunal erred in law. As that error went to the heart of its decision, the error was one that attracts prerogative relief.
…

Bennett J. said:

…
12 I agree with Wilcox J and Graham J on the interpretation of "all possible steps" in s 36(3) of the *Migration Act 1958* (Cth) ('the Act'). I also agree with Graham J that "persecution" in s 36(4) of the Act has the same meaning as that defined in s 91R. However, I have come to this conclusion by a somewhat different approach to that of his Honour. I should add that I endorse the observations made by the primary judge and by Wilcox and Graham JJ about the difficulties that arise from the drafting of s 91R and the effect of its inclusion on s 36(4).
13 Section 36 of the Act relevantly provides:

*'(2) A criterion for a protection visa is that the applicant for the visa is:*

*(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*

*(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:*

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

*(ii) holds a protection visa.*

*(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* ('third party right').

*(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.'*

14 The effect of the section is that, in order to be eligible for a protection visa, the applicant for the visa:

- is a non-citizen in Australia
- to whom Australia has protection obligations under *the Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees Protocol* (together "the Convention").

The latter is owed to persons who have 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. The protection obligations owed to the non-citizen in Australia are owed under the Convention because, inter alia, the non-citizen is a refugee within the meaning of Article 1A(2) of the Convention.

15 In order to satisfy the criterion for protection obligations under the Act:

- the person must have taken all possible steps to avail himself of any third country right
- unless the person has '*a well-founded fear of being persecuted in* [that] *country for reasons of race, religion, nationality, membership of a particular social group or political opinion*'.

16 The coincidence of language in the Convention and in s 36(4) is worth noting.

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

18 That means that protection obligations under the Convention, including Article 1A(2), are only owed to a person who has the well-founded fear in his or her country of nationality **and** has taken all possible steps to avail himself or herself of any available third country right unless he or she has a well-founded fear in that third country.

19 Section 91R(1) provides:

> *'(1) For the purposes of the application of this Act and the 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:*
>
> > *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
> >
> > *(b) the persecution involves serious harm to the person; and*
> >
> > *(c) the persecution involves systematic and discriminatory conduct.'*

20 Turning to s 91R, it can be seen that, again, the object of the section is the '*particular person*', the applicant. Further, the section deals with the **application** of Article 1A(2) of the Convention **in relation to persecution**; s 91R does not merely define the term persecution within Article 1A(2).

21 When the effect of the sections are relevantly considered:

- Section 91R provides that for the purposes of the application of the Act, (including s 36(2) (3) and (4)) to a person, Article 1A(2) only applies to that person (ie. he or she is a refugee) in relation to persecution if, relevantly, that persecution involves serious harm.
- Section 36 provides that the applicant must establish a well-founded fear of persecution for Article 1A(2) of the Convention to apply so that protection obligations are owed under the Convention.
- The persecution that the applicant must establish is persecution in each of the country of nationality and the third country.

• The persecution to which the application of Article 1A(2) and the Convention relates is both the persecution feared in the country of nationality and the persecution feared in the third country.
• They are both persecution for one or more of the reasons mentioned in Article 1A(2).
• Accordingly, a person is not a refugee under Article 1A(2) unless he or she has a well-founded fear of persecution amounting to serious harm in his or her country of nationality and in the country in which he or she has a third party right.

22 The persecution relevant to each applicant before satisfying the test for application of the Convention is both persecution in the country of nationality and persecution in any available third country. They both precede the application of the Convention. They are both persecution to which the Convention, as applicable under the Act, relates.

23 In support of this interpretation I note the consistency of language of Article 1A(2) of the Convention and s 36(4). It would not be appropriate or at least it would be confusing, in describing the qualification for application of the Convention to a person, to describe what is feared in the third country as persecution for a Convention reason. Section 36(4) deals not with the granting of a protection visa under the Convention but with an exclusion from that grant. As set out by Graham J at [25], the Supplementary Explanatory memorandum states, with respect to the new subsections (3), (4) and (5) of s 36:

> *'3. New subsection 36(3) is an interpretative provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.*
>
> *4. Proposed subsection 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted, or of being returned to another country in which he or she has a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular group or political opinion (new subsections 36(4) and s 36(5)).*
>
> *5. The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection.'*

24 In the Minister's Second Reading Speech on the *Migration Legislation Amendment Bill (No 6) 2001* which inserted the new s 91R, he said '*Persecution is a key concept in considering claims for refugee status and it is not defined* ***in either the convention or Australian legislation****... Providing a definition of persecution in the legislation will ensure that the level of harm necessary to constitute persecution will be at a level intended by the refugees convention*'.

25 This is consistent with the intention to define persecution for all purposes in the Act. In particular, where the nature of persecution in the Act equates with the words of the Convention, it means that the level of harm necessary to constitute persecution in the third country will be at a level intended by the Convention.

26 Putting the sections together, for the purposes of determining whether Australia has protection obligations to each appellant, who has a third country right, he must establish a well-founded fear of persecution both in his country of nationality and the third country.

Both are relevant for the determination of the application of the Convention to him. In both cases, the persecution must involve serious harm.
27 The primary judge's conclusion was that the concept of persecution that is found in s 36 is '*a single and consistent concept*'. I respectfully agree with that conclusion.
…

Graham J. said:

30 These appeals, which were heard together, raise the following issues which are common to both matters:

> (a) What is meant by the expression "all possible steps to avail himself ... of a right to enter and reside in" another country in s 36(3) of the *Migration Act 1958* (Cth) ("the Act");
>
> (b) Does persecution to which the expression "well-founded fear of being persecuted ... for reasons of race, religion, nationality, membership of a particular social group or political opinion" in s 36(4) of the Act applies extend to include persecution to which Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply by dint of s 91R of the Act.

…
33 On 19 June 2000 NBLC was granted a Subclass 785 (Temporary Protection) Visa which was valid for 3 years or until an application by him for a permanent visa was finally determined, whichever happened sooner.
34 On 11 February 2003 he lodged an application with the Department of Immigration and Multicultural and Indigenous Affairs for a permanent Protection (Class XA) Visa.
35 On 10 June 2004 the Minister's Delegate refused that application.
…
39 On or about 10 January 2005 NBLB lodged an application with the Department of Immigration and Multicultural and Indigenous Affairs for a Protection (Class XA) Visa. That application was refused by the Minister's Delegate on 12 January 2005.
40 On 17 January 2005 he applied to the Tribunal for review of the Minister's Delegate's decision. By a decision dated 24 February 2005 the Tribunal affirmed the decision of the Minister's delegate not to grant a protection visa.
…
44 It is common ground that each Appellant is a person to whom the term "refugee" applies within the meaning of Article 1A(2) of the *Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees Protocol* (together "the Convention"), as modified in its application to Australia by s 91R of the Act. Each of them is "outside the country of his nationality", that is to say North Korea, and owing to "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is "unwilling to avail himself of the protection of that country"; the relevant reasons for the fear of persecution were the essential and significant reasons for the persecution, the relevant persecution involved serious harm to the Appellants and also involved systematic and discriminatory conduct.
45 It is common ground that, at all material times, each of the Appellants had the right to enter and reside in South Korea.
…
48 Whether Australia has protection obligations to any particular non-citizen will depend firstly upon whether that non-citizen comes within the reach of s 36(3) of the Act and, if not, whether Australia has protection obligations to that non-citizen under the Convention as modified in its application to Australia by s 91R of the Act.

49 In considering whether a non-citizen in Australia was a person to whom Australia had protection obligations under the Convention under a former s 36, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 668 ("*NAGV*") at 671-673:-

> *"[13] Something first should be said respecting the means by which consideration of the Convention has been drawn into Australian municipal law.*
>
> *[14] First, customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which that individual is not a national.*
>
> *[15] Secondly, the Convention is an example of a treaty which qualifies what under classical international law theory was the freedom of states in the treatment of their nationals; but the Convention does not have the effect of conferring upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems.*
>
> *[16] Thirdly, the Convention was negotiated and agreed between the relevant contracting states and obligations are owed between those states, not to refugees, so that it is at a state level that the Convention has to be understood. Fourthly, the Convention has been construed by the House of Lords and the Supreme Court of the United States as not detracting from the right of a contracting state to determine who should be allowed to enter its territory. Fifthly, the text of the Convention speaks, as Brennan J pointed out in* Minister for Immigration and Ethnic Affairs v Mayer*, indifferently of a person who is 'considered a refugee' and of one to whom the 'status of refugee [is] accorded' for the purposes of the Convention.*
>
> *[17] Sixthly, Gibbs CJ and Brennan J in* Mayer *and Stephen J in* Simsek v Macphee *pointed out that the determination of the status of refugee is a function left by the Convention to the competent authorities of the contracting states which may select such procedures as they see fit for that purpose; as will appear, the procedures adopted by Australia have varied from time to time.*
>
> *[18] Other contracting states in their migration laws have adopted in different ways criteria drawn from the Convention. The legislative methods adopted in New Zealand, Canada, the United Kingdom and the United States, which differ each from the others and from that of Australia, may be seen respectively from the reports of* Attorney-General v Refugee Council of New Zealand Inc, Pushpanathan v Canada (Minister for Citizenship and Immigration), T v Home Secretary *and* Sale v Haitian Centers Council, Inc. *It appears that in at least some of these countries the legislation has been amended since the decisions in the above cases by specific provision respecting 'safe third countries'.*
>
> *[19] Seventhly, as the title to the Convention suggests, the Convention details the status and civil rights to be afforded within contracting states to those accorded the status of refugee. These matters are to be seen from the detail in Ch 2 (Arts 12-16, headed 'Juridicial Status'), Ch 3 (Arts 17-19, headed 'Gainful Employment'), Ch 4 (Arts 20-24, headed 'Welfare') and Ch 5 (Arts 25-34, headed 'Administrative*

*Measures'). Chapter 5 deals with such matters as the issue of identity papers (Art 27) and travel documents (Art 28).*

*[20] However, the contracting states accept significant obligations under Art 32 (headed 'Expulsion') and Art 33 (headed 'Prohibition of Expulsion or Return ('Refoulement')'). Article 32(1) states:*

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 33(1) states:

> 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.

*[21] In* Sale, *the Supreme Court of the United States construed Art 33(1) by reading 'expulsion' as referring to a refugee already admitted into a contracting state and 'return' as referring to a refugee already within the territory of a contracting state but not yet resident there. On the other hand, Professor Shearer has emphasised the distinction between the two articles, writing:*

> These Articles are of a distinctly different character. The first assumes the prior admission of the refugee to a status of lawful residence, and refers to expulsion per se, and not to the institutionalised procedure of extradition. The second, however, not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened."

(See also the judgment of Emmett J in *NAGV* in the Full Court (2003) 202 ALR 1 at [56]-[61])

50 In *NAGV* Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said at 675:-

> *"[31] ... as Emmett J correctly emphasised in the Full Court, a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon contracting states with respect to refugees some of which can fairly be characterised as 'protection obligations'. Free access to courts of law (Art 16(1)), temporary admission to refugee seamen (Art 11), and the measure of religious freedom provided by Art 4 are examples.*
>
> *[32] ...Section 36(2) does not use the term 'refugee'. But the 'protection obligations under [the Convention]' of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for contracting states to offer 'surrogate protection' in the place of that of the country of nationality of which, in terms of Art 1A(2) the applicant is unwilling to avail himself. That directs attention to Art 1 and to the definition of the term 'refugee'.*
>
> *[33] Such a construction of s36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the*

*status of a refugee because that person answered the definition of 'refugee' spelled out in Art 1 of the Convention."*

51 After the applications for protection visas in *NAGV* were lodged, new subsections (3) – (7) of s 36 were inserted into the Act by the *Border Protection Legislation Amendment Act 1999* (Cth) (see, relevantly, paragraph 18 above), which in relation to the new subsections commenced on 16 December 1999. These subsections were included as part of "Part 6 – Amendments to prevent forum shopping". Another provision inserted into the Act as part of Part 6 was s 91M which formed part of a new "Subdivision AK – Non-citizens with access to protection from third countries". That section provided:-

> *"91M This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8."*

52 The legislative purpose recorded in s 91M is consistent with the legislative intention which is evident in s 36(3) of the Act i.e. to tighten up the circumstances in which non-citizens in Australia may become entitled to the grant of a protection visa.

53 When the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs introduced the amendments contained in Part 6 into the Parliament a "Supplementary Explanatory Memorandum" was tabled and a "tabling speech" was incorporated into Hansard.

54 The Supplementary Explanatory Memorandum contained the following provisions in respect of the introduction of the new subsections (3), (4) and (5) of s36 of the Act:-

> *"3 New subsection 36(3) is an interpretative provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.*
>
> *4 Proposed subsection 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted, or of being returned to another country in which he or she has a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular group or political opinion (new subsections 36(4) ands 36(5)).*
>
> *5. The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection"*

55 The tabling speech included the following:-

> *"The amendments that I place before the chamber today are part of a package of tough new measures that the Minister for Immigration and Multicultural Affairs announced on the 13th of October 1999.*

*These measures are aimed at curbing the growing number of people arriving illegally in Australia, often through people smuggling operations.*

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

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

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

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

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

*...*

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

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

56 Subsequent to the insertion into the Act of subsections (3) – (7) of s 36 a further relevant amendment to the Act was made by the *Migration Legislation Amendment Act (No 6) 2001* (Cth) which commenced on 1 October 2001. That Act inserted a new s 91R which provided as follows:-

> *"91R(1) For the purposes of the application of this Act and the 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:*

*(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*

*(b) the persecution involves serious harm to the person; and*

*(c) the persecution involves systematic and discriminatory conduct.*

> *(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of* **serious harm** *for the purposes of that paragraph:*

*(a) a threat to the person's life or liberty;*

*(b) significant physical harassment of the person;*

*(c) significant physical ill-treatment of the person;*

*(d) significant economic hardship that threatens the person's capacity to subsist;*

*(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;*

*(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*

> *(3) For the purposes of the application of this Act and the regulations to a particular person:*

*(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*

> *disregard any conduct engaged in by the person in Australia unless:*

*(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol."*

57 Some assistance as to the intended reach of s 91R is provided by the Minister's Second Reading Speech in the House of Representatives on 28 August 2001 and the Explanatory Memorandum circulated in respect of the *Migration Legislation Amendment Bill (No 6) 2001*.

58 In the Minister's Second Reading Speech he said:-

*"This bill is aimed at addressing two critical challenges facing Australia's refugee protection arrangements and our ability to effectively contribute to international efforts to protect refugees.*

*First, the continuing influx of unauthorised arrivals to this country is a tangible indicator of increasingly sophisticated attempts to undermine the integrity of Australia's refugee determination process.*

*...*
*The second major challenge lies in the increasingly broad interpretations being given by the courts to Australia's protection obligations under the refugees convention and protocol.*

*The convention does not define many of the key terms it uses.*

*In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention.*

*These generous interpretations of our obligations encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.*

*...*

*Our action in legislating on the application of the refugees convention is consistent with the principles recognised in international law that states have the right to define how they will implement their obligations under international treaties.*

*...*
*The bill will also stop the refugees convention being interpreted so broadly that people who were never envisaged to be refugees manage to obtain refugee protection in Australia.*

*The government has been concerned for some time that the refugees convention has become so widely interpreted that it is in danger of failing the very people that it was designed to protect.*

*...*
***The bill will define the fundamental convention term, persecution, as an appropriate test of serious harm.***

*...*
***Persecution is a key concept in considering claims for refugee status and it is not defined in either the convention or Australian legislation.***

*Our legislation should reinforce the basic principles of persecution under the convention – that for a person to require protection the persecution must be for a convention reason, and the persecution must constitute serious harm.*

*The legislation will also prevent people obtaining protection in particular circumstances where there is no real fear of persecution for a convention reason.*

*The fundamental intention of the convention is to provide protection to those who fear persecution so serious that they cannot return to their home country.*

*It was not intended to protect people facing discrimination or hardship in comparison to life enjoyed by us in Australia.*

*The legislation will define elements of serious harm as including a threat to the person's life or liberty, significant physical harassment or ill-treatment, and other events that threaten a person's capacity to subsist.*

***Providing a definition of persecution in the legislation will ensure that the level of harm necessary to constitute persecution will be at a level intended by the refugees convention.***

*The legislation will also provide that to invoke protection the convention reason must be the essential and significant reason for the persecution.*

*The convention was not designed to protect people who fear persecution for personal reasons that have little or nothing to do with the convention – for example, because they have failed to pay their family's debts.*

*...*
*The legislation will also prevent people from using elaborate constructs to claim that they are being persecuted as a member of a family and thus under the*

*convention ground of a particular social group, when there is no convention related reason for the persecution.*

*This will remove a potential avenue for criminal families to claim protection on the basis of gang wars – not those that the government would see as warranting international protection.*

*..."*

(emphasis added)

59 The Explanatory Memorandum contained the following in relation to the proposed new s 91R:-

> *"17. This item inserts new section 91R into the Act which deals with 'persecution'.*
> *...*
> *19. Claims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell short of the level of harm accepted by the parties to the Convention to constitute persecution. Persecution has also been interpreted to be for reason of the above Convention grounds where there have been a number of motivations for the harm feared and the Convention-based elements have not been the dominant reasons for that harm. Taken together these trends in Australian domestic law have widened the application of the Refugee Convention beyond the bounds intended.*
>
> *20.* ***New subsection 91R(1) contains a definition of 'persecution' for the purposes of the application of the Act or the regulations.*** *It provides the Refugees Convention will apply only to persecution for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention if it satisfies the requirements of new paragraph 91R(1)(a), 91R(1)(b) and 91R(1)(c).*
> *...*
> *23. The above* ***definition of persecution*** *reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serous that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.* ***Persecution must constitute serious harm****. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.*
>
> *..."*
> (emphasis added)

60 In NBLC's case the Tribunal found that he had not taken all possible steps to

avail himself of a right to enter and reside in South Korea. In NBLB's case the Tribunal made a similar finding. It also found that a shift in government policy in South Korea in respect of North Koreans that may have led to discrimination against North Koreans in terms of access to employment and exposure to social stigma and a further shift in policy that may have led to a reduction in financial aid to North Koreans living in South Korea did not "erode the right of the Applicant to enter and reside in South Korea".

61 The Appellants' submitted that "possible steps" should be construed as "reasonably available steps" or "reasonably practicable steps" or "reasonably possible steps" and that in this regard the Tribunal misconstrued s 36(3).

62 In dealing with this issue the primary judge said, in my view correctly, "Section 36(3) directs attention at taking steps **to avail oneself of a right to enter and reside in a country**. [It] is not directed to the consequences of entering and residing in a country".

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

64 I am disinclined to the view that "all possible steps" should be construed as "all steps reasonably practicable in the circumstances", "all reasonably available steps" or "all reasonably possible steps". Indeed, I would conclude, given the object underlying the Act, that "all possible steps" means what it says and should not, in the context, be read down in any way.

65 Section 15AA(1) of the Acts Interpretation Act 1901 (Cth) provides:-

> *"15AA(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."*

In s 4 of the Act which records the object of the Act it is indicated that the Parliament intended that it should be the only source of non-citizens' rights to enter or remain in Australia. Given the progressive tightening of the terms of the Act and the extrinsic material referred to above it is evident that a strict approach should be adopted to the construction of s 36(3).

66 If (say) a human variant of avian bird flu broke out in South Korea with the consequence that all possibilities of travelling to that country by sea or air were closed off one could well understand that inaction by a non-citizen in Australia may equate to having taken all possible steps to avail himself of a right to enter and reside in that country, but that is not the case here. Here there was no evidence of any steps being taken by either of the Appellants to avail themselves of their respective rights to enter and reside in South Korea.

67 This brings me to a consideration of whether a fear of being persecuted in a country, in this case South Korea, should be addressed under s 36(4) of the Act by giving the concept of persecution in that subsection a restricted meaning as required by s 91R of the Act in relation to persecution under Article 1A(2) of the Convention.

68 It is clear that in the Tribunal the view was taken that persecution would only amount to persecution for the purposes of s 36(4) if it satisfied the tests contained in s 91R. In the case of NBLC the Tribunal said:-

> *"... the Tribunal does not accept that his residing in South Korea will evoke psychological reactions of a degree or kind that could be classified as serious harm or that would lead the Applicant to jeopardise his security."*

In the case of NBLB the Tribunal said**:-**

*"The Tribunal notes the suggestion from the adviser post hearing 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. The Tribunal accepts this country information ... however the Tribunal does not accept that this level* [of] *discrimination is of a nature or degree that amounts to serious harm as indicated ... by section 91R of the Act ..."*

69 To the extent to which s 91R is intended to be a definition of "persecution" for all purposes, it is somewhat inelegantly expressed. In terms s 91R(1) provides direction as to how persecution is to be assessed for the purposes of Article 1A(2) of the Convention. However, when one has regard to the Minister's Second Reading Speech and to the Explanatory Memorandum and, in particular, to those passages to which emphasis has been added above, it seems clear that the legislature intended the "definition" to cover all situations where persecution fell to be considered under the Act.

70 Before the primary judge NBLB contended 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 Convention itself. He said 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, narrowed the concept of persecution, as that concept was picked up by s 36(2). NBLB submitted that there was no reason to narrow the term "being persecuted" in s 36(4) in the same way.

71 His Honour dealt with this submission in his reasons for judgment in NBLB as follows:

*"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."*

72 I respectfully agree with the primary judge's reasoning which is entirely consistent with the Minister's Second Reading Speech and the Explanatory Memorandum in relation to the *Migration Legislation Amendment Bill (No 6) 2001*.

73 In *NBLC* the primary judge adopted his reasoning in *NBLB* in deciding the proper meaning to be given to s 36(4).

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