IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

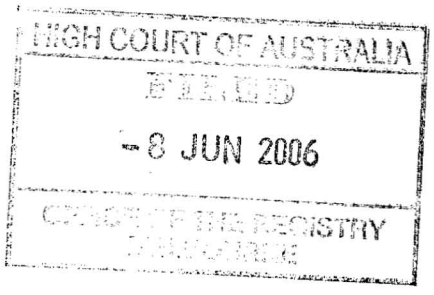
No. B2 of 2006

BETWEEN

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

Appellant

and



QAAH OF 2004

First Respondent

and

REFUGEE REVIEW TRIBUNAL

Second Respondent

OUTLINE OF SUBMISSIONS ON BEHALF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (AS AMICUS CURIAE)

UNHCR's Standing to Comment

1. Pursuant to its Statute[1] and the 1951 Convention relating to Status of Refugees ("**the Refugees Convention**"),[2] the competence of the United Nations High Commissioner for

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1 General Assembly Resolution 428(V), 14 December 1950: Statute of the Office of the United Nations High Commissioner for Refugees.

2 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

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Refugees ("**UNHCR**") to provide for the protection of refugees extends *inter alia*, to ensuring correct interpretation of the provisions of the Refugees Convention consistent with international refugee law and protection requirements. Art 35 of the Refugees Convention obligates State Parties to cooperate with UNHCR in its duty of supervising the application of the provisions of the Refugees Convention, which is also reflected in the Preamble to the Refugees Convention.

Statement of Issues

2. This appeal concerns the proper interpretation of Section C(5) of Article 1 of the Refugees Convention –

> *"C. This Convention shall cease to apply to any person falling under the terms of Section A if*
>
> ...
>
> *(5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality"*

and its operation in the statutory scheme of s 36(2) of the *Migration Act 1958 (Cth)* ("**the Act**"), s 36(3)-(5) of the Act and the Regulations made thereunder[3] setting out criteria for the grant of temporary and permanent protection visas.

3. The issue is the test to be applied in answering the question whether Australia has protection obligations under the Convention in circumstances where an applicant has already been recognised as someone who meets that criterion, has been recognised as a refugee within the terms of the Refugees Convention, has been granted a temporary protection visa and has then applied for a permanent protection visa.

Role of UNHCR in relation to the interpretation of the Refugees Convention

4. UNHCR has been entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees within its mandate, including a supervisory role which is explicitly recognised in Article 35 of the

Convention. Under its Statute, UNHCR also has power to declare that refugees emanating from a particular country no longer fall within its mandate. In the period 1973 to 1999, UNHCR has exercised this power on some 21 occasions.[4]

5. As a result of this extensive experience akin to the application of the Convention, and Art 1C in particular, UNHCR submits that the Court should accord due weight to its guidance with regard to the interpretation of the Convention, as set out in its *Handbook on Protection and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("**the Handbook**") and Guidelines on the Cessation of Refugee Status under Article 1C(5) and (6) ("**the Guidelines**").[5]

6. UNHCR also submits that the Convention should be interpreted in light of Article 31 of the Vienna Convention on the Law of Treaties,[6] which is to be regarded as an authoritative statement of customary international law.[7] The High Court has accepted that "*treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation.*"[8] This approach was also accepted and adopted by the majority below.[9]

UNHCR Standards

7. The Appellant contends that the test imposed for both Article 1A(2), when a person is first recognised as a refugee, and Article 1C(5), is whether the applicant has a well-founded fear of persecution for a Convention reason and is unable, or owing to such fear is unwilling to avail himself of the protection of his country.[10]

8. She seeks to find support for this position in some UNHCR material.[11] There is with respect no support for the Appellant's approach in that or any other UNHCR material.

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3 *Migration Regulations 1994* (Cth), Schedule 2, items 785.221 and 866.221.

4 See Bonoan, "When is International Protection No Longer Necessary? The 'Ceased Circumstances' Provision of the Cessation Clauses: Principles and UNHCR Practice 1973–1999", *Global Consultations*, 24 April 2001.

5 UNHCR, *Guidelines on International Protection - Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003.

6 Opened for signature 23 May 1969, 1155 UNTS 331 (entry into force 27 January 1980).

7 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 193-4; *Victrawl Pty Ltd v Telstra Corporation Limited* (1995) 183 CLR 595 at 622.

8 *Morrison v Peacock* (2002) 210 CLR 274 at 279, [16].

9 per Wilcox J at [82] and Madgwick J at [91]–[96]. See also per Alsop J in *NBGM* at [156]–[163].

10 Appellant's Outline of Submissions, para 15(a) and (b) (page 8, lines 1-7).

11 Appellant's Outline of Submissions, para 26 (page 11, lines 6-20).

9. In fact, the cited reference to the note published in the *Refugee Survey Quarterly* ("**the UNHCR Note**") is misleading.[12] As its introduction states, the UNHCR Note:

> *"highlights key points from the Handbook and in addition discusses various topics that have become prominent in refugee law...Some of these issues will also be considered in four expert roundtables that will take place in the context of the UNHCR Global Consultations...results of these roundtables will help refine or develop further the views of UNHCR..."*

Accordingly, UNHCR submits that the Guidelines, which emanated from the Global Consultations,[13] are a much more recent and appropriate statement of UNHCR's position. The Guidelines are referred to below.

10. The position of UNHCR, exemplified in the range of documents it has produced relating to the interpretation of Article 1C and Cessation of Refugee Status,[14] has consistently been that the test is different for Article 1A(2) and Article 1C(5). UNHCR has always argued that the refugee status determination process and the cessation procedures are separate and distinct. This is set out in paragraph 112 of the Handbook as well as in the Summary Conclusions of the Lisbon Roundtable Meeting of Experts in May 2001 as part of the Global Consultations.[15]

11. Sections A2 and C5 of Article 1 involve a similar issue but they do not precisely mirror each other.[16] In *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* ("*NBGM*") Allsop J, in the course of his dissenting judgment, explained this in the following way:[17]

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12 UNHCR, "The International Protection of Refugees: Interpreting Art 1 of the Convention relating to the Status of Refugees" (2001) 20 *Refugee Studies Quarterly* 77.

13 The Global Consultations on International Protection is a process initiated by UNHCR seeking to examine ways to rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches. The first substantive meeting in 2001 involved the 56 governments that at that time made up the Executive Committee of UNHCR as well as a further 35 governments in an observer capacity and fifteen major international organisations including the European Commission, Council of Europe, Organization of African Unity, League of Arab States and Organization of American States, along with some 40 non-governmental organisations which, as a group, had the right to address the meeting.

14 See UNHCR's List of Authorities.

15 Global Consultations Lisbon Expert Roundtable, "Summary Conclusions – Cessation of Refugee Status", 3-4 May 2001, paragraph 26: "In principle, refugee status determination and cessation procedures should be seen as separate and distinct processes, and which should not be confused."

16 *R (Hoxha) v Secretary of State* [2005] 1 WLR 1063 at [65] per Lord Brown of Eaton-Under-Heywood.

17 At [202] of his Honour's judgment. See also [182].

> *"The important thing to understand, however, is that the similar issue is to be approached by answering different questions in different circumstances. The question under Section C (5) is as to whether protection should cease in the context of a previous and existing recognition that the applicant is or was a refugee."*

12. Determining that for Article 1C (5) to be applicable one merely needs to negate Article 1A (2) is tantamount to introducing an additional cessation clause which is at odds with the exhaustiveness of those that are contained in the Refugees Convention.

13. The focus of the Article 1C question must be upon the extent of the change in circumstances in a person's country of origin such that it can be said that the circumstances which previously gave rise to a person's recognition as a refugee have ceased, or no longer exist, so he or she can not continue to refuse to avail himself or herself of his or her country's protection. The focus is not upon the circumstances as they currently exist with a view to asking whether the person still has a well-founded fear of persecution,[18] nor is it correct to say, as the Appellant submits, that "*to ask whether those circumstances have ceased to exist is simply to ask whether or not the person continues to have a well-founded fear of persecution for a Convention reason*".[19]

14. The Handbook makes this clear at [115]–[116] noting that the cessation clauses are negative in character and are therefore to be interpreted restrictively. It states (at [135]) that:

> *"'Circumstances' refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security which international protection is intended to provide"*

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18 Contra per Stone J in *NBGM* at [139]; Appellant's Outline of Submissions para 49 (page 18, line 21-25).

19 Appellant's Outline of Submissions, para 25 (page 10, line 24-27).

15. The statement from the Handbook has wider implications for the nature of the inquiry that must be conducted, and lends support to the proposition (acknowledged at [103] in *NBGM* by Stone J) that:

> *"...the legislative scheme, whereby a fresh application is required for a visa to continue protection after the expiry of the temporary visa, does not sit comfortably with the framework of the Convention".*

16. It also undermines any support for the approach derived from the UNHCR Note on which the Appellant relies at [26] of her Outline of Submissions.[20]

17. Indeed the specific reference cited by the Appellant omits reference to the suggested focus of the inquiry concerning the interpretation of Article 1, that:

> *"the cessation ground relates to changes in circumstances in the country of origin such that the reasons for which refugee protection was required no longer exist...UNHCR has identified a number of factors...which may need to be taken into account in assessing in a general way and for the purposes of group cessation whether there has been such a fundamental change...Where there is a determination that the changed circumstances cessation clause applies to a particular refugee group any individual affected by the declaration of cessation must have an adequate opportunity to have his or he case reviewed and determined individually".*[21]

18. The reference to group determination in no way affects the applicability of the approach to individual determinations. The concentration on the need for structural change manifested in a variety of ways reinforces the notion which infuses the judgment of Allsop J in *NBGM* (with whom three judges on the Full Court agree)[22] that the lasting nature of the change in circumstances be demonstrated with clarity.[23]

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20 UNHCR, "The International Protection of Refugees: Interpreting Art 1 of the Convention relating to the Status of Refugees" (2001) 20 *Refugee Studies Quarterly* 77 at 92-93; Appellant's Outline of Submissions para 26 (page 11, line 6-20).

21 UNHCR, "The International Protection of Refugees: Interpreting Art 1 of the Convention relating to the Status of Refugees" (2001) 20 *Refugee Studies Quarterly* 77 at 92-93.

22 Marshall J agreed with Allsop J; Black CJ said (at [23]) that like Mansfield J, he agreed with the analysis of the Convention obligations undertaken by Allsop J and with his conclusions about the operation and effect of Art 1A(2) and Art 1C(5) (and see too His Honour' judgment at [22]). Mansfield J stated (at [57]) that he did not regard his conclusion as departing from the reasoning of the majority of the Full Court in *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363. His Honour also

19. Moreover there is a quite fundamental difference between an approach which of necessity involves a prospective or future looking[24] test and one that requires an assessment of the extent or degree to which past circumstances have materially changed. The language of a prospective test is simply not part of the discourse concerning the interpretation of Article 1C (5).

20. Further, there is no place within the scheme of the Refugees Convention as interpreted by UNHCR that a person recognised as a refugee be required to re-assert a claim for recognition under Article 1A(2) or, on any view, for that recognition to lapse. As Allsop J observes in *NBGM*, a two-stage approach to the operation of Sections A(2) and C(5):

> *"...does not contemplate, within in its terms, multiple determinations of the application of Section A (2)".*[25]

21. The core principles which must guide the interpretation of Article 1C are set out in the judgment of Wilcox J below, at paragraphs [37]–[38][26] drawing upon the Guidelines.[27] These include

(a) the change in circumstances must be effective, durable and substantial and/or fundamental;

(b) conditions within the country of origin must have changed in a profound and enduring way before cessation can be applied; and

(c) when interpreting the cessation clauses it is important to bear in mind the purpose of securing durable solutions in the context of refugee protection.

22. As Allsop J in *NBGM* states:[28]

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agreed (at [41]) with the views of Allsop J for the reasons his Honour gave, that it was necessary for the Tribunal to have particular regard to Art 1A(2) and 1C(5) of the Convention in the way his Honour had indicated and that the Tribunal erred in its consideration of the application of the Convention.

23 At paragraph [172] of his Honour's judgment.

24 Note the Appellant's Outline of Submissions at para 26 fn 42.

25 At paragraph [174].

26 AB 251 (line 20) – AB 253 (line 28).

27 Paragraphs [6] and [10]-[16] of the Guidelines.

28 At paragraph [172].

"The use of language by the UNHCR in the Handbook and the Guidelines that the change in circumstances must be "fundamental and durable" or "enduring" reflect those elements that arise from the text and purpose of the Convention."

23. In this context it is important to bear in mind that Article 1C envisions cessation based both on individual acts of recognized refugees (sub-paragraphs 1-4) and also on a general change in conditions in the country of origin (sub-paragraph 5). This means the trigger for cessation of status is therefore either based on change in personal circumstances of refugees or changed circumstances in the country of origin; that is, objectively verifiable facts that are set out in some detail in Article 1C.[29]

10 24. The Guidelines[30] also relevantly state:

"D Individual Cessation

A strict interpretation of Article 1C (5) and (6) would allow their application on an individual basis...Yet Article 1C (5) and (6) have rarely been invoked in individual cases. States have not generally undertaken periodic reviews of individual cases on the basis of fundamental changes in the country of origin. These practices acknowledge that a refugee's sense of stability should be preserved as much as possible. They are also consistent with Article 34 of the Convention which urges States "as far as possible [to] facilitate the assimilation and naturalisation of refugees" Where the cessation clauses are applied on an
20 *individual basis, it should not be done for the purposes of a re-hearing de novo".*

25. UNHCR Executive Committee ("**EXCOM**") Conclusions on the subject of cessation[31] to which Australia as a State party subscribes, emphasise:

"...the possibility of use of the cessation clauses in Article 1C(5) and (6)... in situations where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country can no longer continue to refuse to avail themselves of the protection of their country...".

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29 Australia has itself recommended that the cessation of refugee status should only be considered when developments in the country of origin are substantial, effective and durable – see Refugee and Humanitarian Division, DIMA, "The Cessation Clause (Art 1C), An Australian Perspective", Oct 2001 p. 16, as cited by Fitzpatrick and Bonoan, *Refugee Protection in International Law*, p 498.

30 At paragraph [18].

31 EXCOM Conclusion No 65(XLII) - 1991 and No 69 (XLIII) - 1992 – Cessation of Status.

26. The most recent statement by UNHCR in relation to Article 1C(5)[32] reiterates this long-standing interpretation, and is of particular relevance relating as it does to the situation in Afghanistan:

> *"Under Article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee...or through fundamental changes in the objective circumstances in the country of origin upon which refugees status was based (subparagraphs 5 and 6). The latter are commonly referred to as the "ceased circumstances" or "general cessation" clauses. When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should not result in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner".*

27. In addition, the observations of Lord Brown of Eaton-under-Heywood (with whom Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead and Baroness Hale of Richmond agreed) in *R (Hoxha) v Secretary of State*[33] that the recognition stage under Article 1A (2) is distinct from the cessation stage under Article 1C (5) are noteworthy.[34] What His Lordship said about the cessation clause simply having no application, unless and until it is invoked by the State against the refugee *in order to deprive him of the refugee status previously accorded to him*,[35] reflects the basic approach which UNHCR would submit is correct, and the underlying status under the Refugees Convention (the crucial criterion of s 36(2) of the Act), which a visa holder possesses consequent upon the recognition of that status by the initial grant of a temporary (3 year) protection visa.

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32 "Considerations Relating to Cessation on the Basis of Article 1C(5) of the 1951 Convention With regard to Afghan Refugees and Persons Determined in Need of International Protection", UNHCR, Geneva, 29 January 2005.

33 [2005] 1 WLR 1063.

34 At paragraph [60] of His Lordship's judgment.

35 see also per Allsop J in *NBGM* at [168] and [173].

28. Paragraphs [60]-[65] of Lord Brown's judgment, quoted by Wilcox J at [57] of his Honour's judgment[36] and again drawing on UNHCR Guidelines, stress the strict approach that should apply to what is in reality a formal loss of refugee status,[37] involving what His Honour[38] described (characterising the approach taken by Lord Brown), as

> *"..the heavy burden resting on a State which contends that a person who has been recognised as a refugee has ceased to have that status".*

Burden of Proof

29. Due to the fact that cessation generates the withdrawal of rights, and the serious consequences that may have, a process is required for any determination. A determination of applicability of ceased circumstances cessation, it is argued, involves a formal process, as formal at least as the granting of refugee status. It is UNHCR's position that at the very least a practical or evidential burden of proof lies with the asylum State authorities.[39]

30. The notion of burden of proof may not sit easily with established administrative law practice and procedure in Australia or for that mater with the requirement of s 36, but in reality what is required in this process in order for the ceased circumstances cessation clause to operate is more than mere inconclusive evidence. As Wilcox J puts it:

> *"...if the facts are insufficiently elucidated for a confident finding to be made the claim of cessation will fail and the person will remain recognised as a refugee".*

31. The notion that there has to be positive information demonstrating a settled and durable situation incompatible with a real chance of persecution arising from the circumstances that produced the original grant of protection[40] is unobjectionable.

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36 AB 260 (line 7) – AB 261 (line 28).

37 See per Allsop J in *NBGM* at [238].

38 Paragraph [58] of his Honour's judgment, AB 261 (lines 33-35).

39 See Global Consultations Lisbon Expert Roundtable, "Summary Conclusions – Cessation of Refugee Status", 3-4 May 2001, paragraph 27: "If in the course of the asylum procedure there are fundamental changes in the country of origin, the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable."

40 Wilcox J at paragraph [78], AB 267 (lines 22–25).

32. Allsop J in *NBGM,* at [183], did not view the question of proof in assessing cessation as one strictly involving an onus or burden but, as describing the *"measure and nature of the task"*. Similarly, at [241] his Honour did not

> *"...see the clarity and durability of change required by Section C (5) to be a question of onus. It is a question of the Minister, the delegate or the Tribunal .recognising the nature of the decision-making task."*

33. In summary in *NBGM,* consistently with the approach to Section C(5) of Article 1 UNHCR would respectfully view as correct, Allsop J said (at [184]):

> *"The enquiry under Section C (5) is whether the circumstances in connection with which the applicant has been recognised as a refugee have ceased to exist. The approach is not to ask whether a claim of such a well-founded fear has been made out, but to ask whether, in respect of someone who has been recognised as a refugee (that is who has made out that claim), circumstances have so changed as to warrant the conclusion that the well-founded fear which previously existed can no longer be maintained as a basis for refusing to avail himself or herself of the protection of the country of nationality and, so, that the protection of the Convention should cease. A lack of demonstrable clarity in the reality and durability of the change in relevant circumstances will lead to the grounds for cessation not being established."*

Section 36 (3)-(5) of the Act

34. The proper construction of the Convention and its relationship to the domestic legislation is not assisted by reference to s 36(3). That section does not work any affect on the relationship between Article 1 A (2) and 1C (5), as was explained by Allsop J in *NBGM* at [210]–[212].

35. The approach taken by Allsop J (Marshall J agreeing) is with respect correct for all the reasons which His Honour gives. It should be accepted that :

> *"[t]he Act places the Convention at the fulcrum of its operation in relation to protection visas: ss 36 and 65, in particular by the use of the phrase "to whom Australia has protection obligations under [the Convention]" as referring to the whole of Article 1, and not merely Section A thereof:* NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 213 ALR 668 at [27], [32]-[33], [42]-[43] and [47].*[41]

35. At [198] of his Honour's judgment, his Honour states, consistently with UNHCR's view of how the Convention should operate in the statutory context, that:

> *"The whole of Article 1 was at the centre of both applications (for a temporary protection visa and a permanent protection visa) as providing the content for the phrase "a person to whom Australia has protection obligations under the Refugees Convention". At the time of the determination of his application for a permanent protection visa, the appellant had been recognised as a refugee. He was not a claimant seeking recognition of the application of Section A (2). He had that recognition. No provision of the Act or Regulations stated that that recognition ceased to have relevance to the operation of the Convention and to the question whether Australia had protection obligations to him under the Convention (though indirectly as obligations under international law as a host State) and under the Act and Regulations."*

36. His Honour also rejected the interpretation of the majority in *NBGM* mandating the re-application of the Article 1A (2) test in a situation such as the present. He said (at [201]):

> *"...the first of these two approaches [requiring that the Minister be satisfied that the Convention has ceased to apply by reason of Article 1C (5)] accords with the operation of the Convention. It is consistent with the terms of s 36(2) and the relevant Regulations. The second seems to me not to be in accordance with the Convention. It requires something contrary to the operation of the Convention: the lapsing of recognition of the applicant as a refugee, and the requirement upon the applicant to reassert a claim for recognition as a refugee under Section A (2), absent the operation of the cessation provisions in Section C. Not only is that*

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41 *NBGM* per Allsop J at [164]. See also at [171]–[176], [184], [197], [199], [201] and [204].

contrary to the Convention, it is inconsistent with the clear requirement of the Regulations themselves which is to assess whether Australia has protection obligations under the Convention (properly interpreted).

37. In UNHCR's submission, Allsop J (at [211]–[212] and at [209]-[210]) was correct in holding that:

> *"Subsections 36(3) to (5) ...looked at individually (at the time of their insertion by the relevant amending Act) and the Act as a whole after their insertion, do not deal with the consequences of recognition of the application of Section A (2) or with the relationship between such recognition and cessation in Section C(5). Nothing that I have said undermines or detracts from the operation of sub-s 36(3), qualified as it is by sub-ss 36(4) and (5). There is no intractability of language to be overcome. By the operation of the Act and the Convention sub-s 36(4) is satisfied, thereby making sub-s 36(3) irrelevant.*
>
> *Thus, unless and until the Convention ceases to apply by operation of Section C (5), subs-s 36(3) does not operate in respect of the appellant because sub-s 36(4) makes it inapplicable, there being an existing recognition of the matters with which sub-s 36(4) is concerned."*

38. In any event s 36(3) does not operate at all in relation to a person who has already obtained a protection visa. It only applies to persons who come to Australia seeking protection, in circumstances where there are other countries where those persons could have sought protection.

39. It is clear that the amendments to the Act which added s 36(3)-(5) in 1999[42] were introduced for the sole purpose of preventing forum-shopping. That purpose is set out in the judgment in *NBGM* by Mansfield J.[43] Allsop J also adverted to the purpose and intent of the amending legislation as "*intended to deal with circumstances of attempts to choose Australia as a preferred place of asylum over other places in which, in the relevant sense, the applicant would have no well-founded fear*".[44]

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42 See *Border Protection Legislation Amendment Act 1999* (Cth).

43 At [53] of his Honour's judgment. See also per Stone J at [92], referring to the Supplementary Explanatory Memorandum to the *Border Protection Legislation Amendment Bill 1999* (Cth).

44 At [207] and [223], noting the learned Federal Magistrate's reference to that purpose.

40. The object of this sub-section and its neighbours was to prevent perceived misuse of Australia's asylum protection system by "forum shoppers". Textually and structurally this does not apply to a situation where a refugee claimant has already been accepted as a person in need of protection, has been recognised as a refugee and continues to possess the underlying status of someone to whom the Convention applies. Subsequent visa applications are simply not within the purview of s36(3) as they do not involve or produce the mischief which the amendments were designed to remedy.

41. The implications of the recognition by the Commonwealth of refugee status at the stage of the 3 year temporary protection visa stage were briefly canvassed at the special leave application. If, as UNHCR submits, the correct approach is that of the majority in the Full Court below, the 3 year temporary protection visa endures until the cessation provisions apply and thus automatically the enquiry as to whether Australia owes protection obligations to the applicant when he or she applies for a permanent, 5 year protection visa is answered in his or her favour unless the cessation provisions of the Convention or s 36 (3) are applicable. On this analysis if the Appellant wants to reserve to herself the right to require the applicant to demonstrate a well founded fear of persecution for a Convention reason at the permanent visa stage (as the Appellant clearly submits is the case) there would, as Kirby J observed on the special leave application, need to be a new category of holding visa that afforded no recognition of status through the application of the Article 1A(2) test at the initial stage.[45]

Conclusion

42. The majority judgments below are correct and should be upheld.

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[45] Out of 146 States Party to either one or both of the Convention and Protocol, Australia is the only Contracting State Party which routinely grants only temporary visas to those applicants who show that they have a well-founded fear of persecution. The provisions regarding Temporary Protection Visas (TPV) apply to all unauthorised arrivals and to those persons who are immigration cleared but who had false travel documents or a fraudulently obtained visa. The term TPV, as it applies in Australia, deviates from common international usage and therefore is potentially misleading. Generally, in international practice temporary protection has been conceived as a procedural tool in mass influx situations where individual refugee status determination is impracticable. In contrast, Australia has created a lesser (ie temporary) protection status in respect of persons recognized as Convention refugees which has the effect of undermining and even in parts contravening the 1951 Convention, eg Article 28 which requires Contracting States to issue travel documents to refuges lawfully staying in their territory.

Dated: 8 June 2006

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