

Before The High Court

Minister for Immigration and Multicultural and Indigenous Affairs v QAAH: Cessation of Refugee Status

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1. Introduction

On 16 December 2005 the High Court granted the Minister for Immigration, Multicultural and Indigenous Affairs special leave to appeal from a decision of the Full Court of the Federal Court, *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (hereafter *QAAH*).¹ The Full Court in a majority decision held that the correct test for granting a *permanent* protection visa to a person who has already been recognised as a refugee pursuant to the grant of a *temporary* protection visa (TPV), is via application of the cessation clause in Article 1C(5) of the 1951 Refugee Convention (hereafter the Convention),² rather than considering the matter afresh under Article 1A(2) of the Convention. Importantly, the majority also found that it is for the decision maker attempting to argue cessation to present evidence that clearly demonstrates that the cessation requirements apply to the individual applicant. Put simply, in a decision concerning a person on a TPV applying for permanent protection the onus is on the decision maker to demonstrate that the person is no longer a refugee rather than on the applicant to demonstrate why they continue to be a refugee.

Although Article 1C(5) was inserted into the Convention when it was drafted, it has not to date been utilised by States in any significant way. The primary reason for this is that States (other than Australia) rarely grant temporary protection to those persons *individually* assessed as coming within the definition of refugee in the Convention. Thus, as a leading academic commentator, Joan Fitzpatrick pointed out there is a 'paucity of contemporary state practice of cessation of individual refugee status under 1951 Convention Article 1C(5)'.³

Indeed, even though Article 1C(5) is now being applied quite frequently to certain holders of TPVs, it has only been invoked by Australian decision-making bodies in recent years.⁴ As a result, this is the first time that the High Court will consider the application of Article 1C(5). It is therefore significant in the Australian context, but may also have some broader international importance

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1 (2005) 223 ALR 494. The leave to appeal transcript is available at: <<http://www.austlii.edu.au/au/other/HCATrans/2005/1033.html>> (accessed 7 May 2006).

2 1951 Convention relating to the Status of Refugees, 189 *UNTS* 150, supplemented by the 1967 Protocol relating to the Status of Refugees, 606 *UNTS* 267.

3 Joan Fitzpatrick, 'Current Issues in Cessation of Protection Under Article 1C' UNHCR Background Paper (2001) at [75].

given that the High Court's decision is likely to be influential in other refugee-receiving States. The application of Article 1C(5) is also particularly important in the light of the increasingly politicised nature of refugee policy and law, both in Australia and internationally. Against this background, it is obviously desirable that Australia's application of Article 1C(5) accord with a proper interpretation of the text, objects and purposes of the Convention.

In terms of the structure and focus of this paper, it should be noted that there are many legal issues arising from Article 1C(5). Some of these have been discussed in some length by the United Nations High Commissioner for Refugees (UNHCR) and in academic papers, including: the nature of the change in circumstances that must be demonstrated in order for Article 1C(5) to apply⁵ and the application of the so-called 'compelling circumstances' exception in Article 1C(5).⁶

Given that the above issues have already been canvassed to some extent in the literature, and given the nature of the disagreement in the Full Federal Court decision in *QAAH*, the focus of this paper will be on the following two legal issues:

- (a) was the decision of the majority of the Full Federal Court correct in relation to the burden of proof issue?
- (b) what effect does the grant and expiration of a temporary protection visa have on the status of an applicant under the Refugee Convention? In particular, if the procedural regime set down by the Migration Regulations 1994 requires a fresh application for a permanent protection visa to be made, does this necessarily require *de novo* consideration of the applicant's claim for protection under the Convention? How should section 36(2)⁷ of the *Migration Act 1958* (Cth) be interpreted in this regard?

2. *The Context of the Decision*

A. *Article 1C(5) of the Refugee Convention*

Article 1C of the Convention deals with cessation of refugee status on the basis of six recognised bases. Articles 1C(1) – (4) deal with voluntary acts of the refugee leading to cessation.⁸ The second group, Articles 1C(5)–(6), deal with a relevant change in the circumstances in the applicant's home country.⁹

4 It appears from Refugee Review Tribunal (RRT) decisions available to the public (at www.austlii.edu.au) that the RRT only began to consider Article 1C(5) from 2004 onwards and in relation to applications for further protection visas by Afghan and Iraq refugees who hold Subclass 785 TPVs. The writer was unable to obtain statistics from the Department as to the date at which it first commenced applying Article 1C(5).

5 For instance, James Hathaway has stated that the change must be of 'substantial political significance', 'truly effective' and 'durable': James Hathaway, *The Law of Refugee Status*, (1991) at 200–03. See also James Hathaway, *The Rights of Refugees under International Law* (2005) at 922–941; Guy Goodwin-Gill, *The Refugee in International Law*, (2nd ed, 1996) 84.

6 See eg, Hathaway (1991), id at 203–04; Hathaway (2005), id at 941–944.

7 Section 36(2)(a) states that the criterion for a protection visa is that the applicant for the visa is a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention'

The focus of this paper is Article 1C(5) which provides that the Refugee Convention ceases to apply to a refugee if:

... he can no longer, because the circumstances in connection 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; Provided that this paragraph shall not apply to a refugee falling under Section 1A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the *protection* of the country of nationality...' [Emphasis added.]

There are a number of things to note about the wording of Article 1C(5). Firstly, the 'change in circumstances' is not premised on any act by the applicant. Rather, it is based on some change in circumstances in the applicant's country on the basis of which the asylum State may determine that it no longer owes protection obligations to that person. Secondly, as explicitly stated in Article 1C(5), it applies only to those persons who have been 'recognised' as refugees. Thirdly, it speaks explicitly and directly of the 'protection' of the country of the applicant's nationality. These words are all central to the legal questions raised by the appeal in *QAAH*.

B. The Temporary Protection Regime in Australia

The operation of Article 1C(5) in Australia can only be fully understood in light of Australia's temporary protection visa (TPV) regime. This is so for a number of reasons. Firstly, Australia's use of temporary protection is different from most other countries.¹⁰ Secondly, as Alice Edwards has noted, Australia's temporary protection system 'institutionalises' the application of Article 1C of the Convention by 'requiring all recognised refugees having arrived without authorisation to be subject to systematic and periodic review.'¹¹ The need for Article 1C(5) to be properly applied in line with the Convention is therefore of utmost importance for refugees in Australia.

The legal and procedural requirements for the grant of protection visas in Australia are provided under the *Migration Act* 1958 (Cth) (hereafter the Act) and *Migration Regulations* 1994 (hereafter the Regulations). Migration law in Australia

8 For instance, Article 1C(1) may apply where the refugee has voluntarily re-availed him or herself of the protection of the country of nationality.

9 Article 1C (5) deals with applicants with a nationality and (6) with applicants who have no nationality (so called 'stateless persons').

10 This is because it requires that certain non-citizens can only apply for a TPV at first instance, and are only eligible to apply for a permanent protection visa after grant of that TPV. Currently, Australia is the only Contracting State to the Convention which routinely grants only temporary protection to those applicants who show that they have an individualised well founded fear of persecution under the Convention. This is significant as 'temporary protection' in international refugee law discourse denotes protection granted in mass influx situations when individual status determination is not possible.

11 Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 *International Journal of Refugee Law* 192 at 201.

is a highly complex and rapidly changing area of law which does not lend itself easily to a concise summary. However, for the purposes of this paper, the following salient facts should be noted. In October 1999, a differentiated regime of visas was created in Australia. Protection visas were divided into permanent and temporary, based on whether the asylum seeker had entered Australia lawfully. This represented a major change to the law, as previously all those recognised as refugees under the Convention had been able to apply for a *permanent* protection visa.

In particular, the TPV regime upon which the visa decisions in *QAAH* were based rely on the following provisions of the Act and Regulations:

(i) *Migration Act 1958*

Section 30 provides that a visa may be either temporary or permanent. Importantly, section 36(2)(a) directly states that the criterion for a protection visa is that the applicant for the visa is 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention'.

(ii) *Migration Regulations 1994*

At the time at which the applicant in *QAAH* applied for protection (in 2000), two classes of visa were available to him:

- Subclass 785 (Temporary Protection) visa (Class XA).¹²
- Subclass 866 (Permanent Protection) (Class XA) visa.¹³

It is significant that these two classes of visas share common criteria that must be satisfied at the time of decision, namely that '[t]he Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention'.¹⁴ Further, a new class of visa, Temporary Protection (Class XC) visa, was introduced in November 2002.¹⁵

3. *The Decisions Leading up to the Full Federal Court Appeal*

The applicant for refugee status in *QAAH* is a male citizen of Afghanistan, of the Hazara ethnic group, and a Shi'a Muslim. The applicant was granted a temporary protection (XA) subclass 785 visa in March 2000 by the Department on the basis that he faced a real chance of 'being captured by the Taliban and forced to fight or be killed by them'.¹⁶ The applicant also applied for a permanent protection subclass 866 visa on 17 April 2000.

Due to a change in the TPV regime in the Regulations,¹⁷ the applicant was deemed to have applied for and was granted a temporary visa (Class (XC)) on 27 March 2003, which was around the time that his Class (XA) visa expired. The grant of this visa became the subject of much legal debate in subsequent Federal

12 The criteria is set out in Schedule 2, Item 785, Migration Regulations 1994.

13 The criteria is set out in Schedule 2, Item 866, Migration Regulations 1994

14 Item 785.22 and Item 866.22, Schedule 2, Migration Regulations 1994

15 See Regulation 2.08F and Item 1403 of Schedule 1, Migration Regulations 1994.

16 DIMIA Decision of March 2000, *QAAH*, above n1 (Wilcox J) at [4].

17 See above n15.

Court litigation.¹⁸ It is significant to note at this point that although the delegate did not consider any new material relating to the applicant's claim to protection as of March 2003,¹⁹ the delegate did explicitly state in the reasons for decision that he was 'satisfied that the applicant is a person to whom Australia has protection obligations'.²⁰ Ultimately, however, the applicant's claim for a permanent protection visa was refused on 21 November 2003, on the basis that the applicant did not have a well-founded fear of persecution under the Refugee Convention.

The applicant appealed on the merits to the RRT, which affirmed the delegate's decision on 3 May 2004. In doing so, the RRT applied the cessation provisions of Article 1C(5) *in addition* to Article 1A(2). It also examined the circumstances under which the applicant was first recognised as a refugee as that relating to the grant of temporary protection in 2000 (rather than the second grant in 2003). The RRT therefore found that the circumstances in connection with which the applicant was originally recognised as a refugee in 2000 had changed.²¹

The applicant attempted to challenge the RRT decision via a judicial review application to the Federal Court. However, Dowsett J ultimately found that the RRT decision did not disclose a jurisdictional error.²² The matter then went on appeal to the Full Federal Court.

4. *The Decision of the Full Federal Court and the Legal Issues Arising*

The majority of the Full Court held that the correct test for granting a *permanent* protection visa to a person who has already been recognised as a refugee pursuant to the grant of a *temporary* protection visa is via application of the cessation clause in Article 1C(5), rather than considering the matter afresh under Article 1A(2) of the Convention. The findings of the various judges are discussed in the analysis of the key points from the judgement below. However, putting the matter simply, the issues upon which the judges diverged related to their approach to the burden of proof and their interpretation of section 36(2) of the Migration Act. These are also the issues which are likely to provoke considerable discussion by the High Court.

A. *Burden of Proof*

The majority in *QAAH* indicated that the RRT has the evidential 'burden of proof' in relation to demonstrating the existence of a change in circumstances in Article 1C(5).²³ Wilcox J explained that for Article 1C(5) to be made out, the RRT:

... would need to be satisfied of much more than the fact that there is no real chance of the Taliban re-emerging as a governing authority or exercising the same

18 See eg, (Wilcox J) at [32–35]; (Lander J) at [196–97].

19 This is important because by March 2003, the Taliban had been (arguably) removed from its position of the governing force in Afghanistan.

20 DIMIA Decision, as cited (Wilcox J), *QAAH* at [11].

21 RRT Decision, as cited in *QAAH* (Wilcox J) at [18–23].

22 *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1448.

23 *QAAH*, above n1 (Wilcox J) at [69].

type of control as it did in 1999. The Tribunal would need to investigate, and make findings about, the extent of Taliban activity in the Afghan countryside, especially in the appellant's home district.²⁴

The standard of proof required by both the majority judges also seems to be quite high. For instance, Wilcox J suggests the State must make a 'confident finding' about the applicability of cessation for changed circumstances.²⁵ He goes on to say:

... an acceptable Article 1C(5) decision could not be based on an *absence* of information about problems; there would have to be positive information demonstrating a settled and durable situation in that district that was incompatible with a real chance of future Taliban persecution of the appellant.²⁶

The question is whether the above approach is in line with UNCHR and academic interpretations of Article 1C(5) and international jurisprudence.

Both the UNHCR and the majority of academic opinion on Article 1C(5) appear to accord with the Full Court's findings in *QAAH*.

UNHCR has specifically said that if the government decision maker is seeking to apply the cessation clauses to an applicant, the 'onus is on them to establish the reasons justifying exclusion or cessation'.²⁷ The UNHCR Lisbon Roundtable Meeting of Experts in 2001 also held that 'the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable'.²⁸

The Department of Immigration has itself recognised publicly that in relation to Articles 1C(5) and (6), '[t]he burden of proof should be on the authorities concerned, not the refugee'.²⁹

The approach of leading academic commentators on this point also appears to endorse the majority approach in *QAAH*. For instance, Guy Goodwin-Gill states that where the refugee decision maker seeks to show that a *previously recognised refugee* should no longer be considered a refugee, the burden is on *that decision maker* and the standard of proof is on the balance of probabilities.³⁰ Joan Fitzpatrick has also clearly stated that the burden of proof in relation to the

24 *QAAH*, above n1 (Wilcox J) at [74].

25 'If the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognized as a refugee' (Wilcox J) id at [69].

26 *QAAH*, above n1 (Wilcox J) at [78] [Emphasis added]. See also Madgwick J at [104].

27 UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', UNHCR (April 2001) at [10]: <<http://www.refugeelawreader.org>>.

28 UNHCR Lisbon Roundtable Meeting of Experts, Summary Conclusions, May 2001, published in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 550 at [27].

29 DIMIA, Refugee and Humanitarian Division, 'The Cessation Clauses (Article 1C): An Australian Perspective: A Paper Prepared as a Contribution to the UNHCR's Expert Roundtable Series' (October 2001) at 16.

30 The question being: 'is the nature of the changes such that it is more likely than not that the pre-existing basis for fear of persecution has been removed?': see Goodwin Gill, above n5 at 86–87.

application of changed circumstances to a recognised refugee ‘is on the authorities’.³¹

The limited international legislation and jurisprudence on Article 1C(5) also appears to accord with the approach taken by the majority in QAAH.

(i) *United States and Canada*

Firstly, legislation in the United States (US) and Canada which sets out principles either similar or identical to Article 1C(5) places the burden of proof as to cessation on the governmental decision-making body. In the US, Section 208(c)(2)(d) of the *Immigration and Nationality Act* provides that the Attorney-General can terminate a grant of asylum if he or she determines (amongst other things) that the individual no longer meets the definition of refugee in that Act ‘owing to a fundamental change in circumstances’.³² US Immigration Regulations also explicitly state where an applicant can demonstrate past persecution, the decision maker³³ bears the evidential burden of establishing by a ‘preponderance of the evidence’ that there has been a relevant change in circumstances.³⁴

Canada’s *Immigration and Refugee Protection Act* 2001 also incorporates cessation principles similar to those in Article 1C.³⁵ Section 108 is particularly important as it sets out a procedure that only allows consideration of cessation by the Refugee Protection Division on application by the Minister.³⁶

Although both Canada and the US have legislation incorporating cessation principles into domestic law, the jurisprudence deals primarily with application of cessation as part of a decision on an *initial* application for refugee status (that is, changed circumstances after departure but before the asylum claim is determined) rather than to a *recognised* refugee.³⁷

Having said that, that jurisprudence does indicate that the relevant decision maker is required to bear the burden of proof in relation to showing a change in circumstances.³⁸ For instance, in the Canadian case of *Mahmoud*, Nadon J of the Federal Court Trial Division held that where the Minister seeks a determination that a person’s status as a Convention refugee has ceased, ‘the Minister bears the

31 Joan Fitzpatrick, above n3, at [54], citing Goodwin-Gill at 87.

32 US *Immigration and Nationality Act* 1952 (as amended), 8 USC 1158, Section 208 (c)(2)(A).

33 In the US context, the Immigration and Naturalisation Service.

34 US Codes of Federal Regulations, 8 CFR (revised as of 1.1.06), section 208.13(b)(1)(ii).

35 *Immigration and Refugee Protection Act* 2001, Canada. Section 108(1) sets out the test for cessation somewhat differently from Article 1C(5) in that it provides that a claim for refugee protection shall be rejected where ‘(e) the reasons for which the person *sought* refugee protection have ceased to exist’ (emphasis added). Compare wording of Article 1C(5) set out above at page 361.

36 Section 108(2), *ibid*. Contrast Australia where the Department applies Article 1C(5) when determining a further protection visa by the holder of a TPV.

37 See eg, US case of *In re N-M-A Applicant*, US Board of Immigration Appeals, Interim Decision No 3368, 21 October, 1998. This can be explained by the fact that neither of these countries have a temporary protection regime similar to that of Australia. The US does have temporary protected status (TPS), but this applies to particular national groups designated as having a protection need, see eg, Jane McAdam ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’ *New Issues in Refugee Research* Working Paper No 118 (2005) 17.

burden of proof'.³⁹ Although those cases deal with a change of circumstances which have occurred prior to any initial status determination, they can be validly applied to the situation of a recognised refugee to support a finding on burden of proof, given that it is highly arguable that there is a *stronger* case for the burden to be on the decision maker where the applicant has already been formally recognised as a refugee by the relevant authorities.⁴⁰

(ii) UK

Jurisprudence and policy statements from the UK also appear to support the placement of the burden on the relevant decision maker in Article 1C(5) decisions. First, certain UK policy documents on applying cessation state that:

Withdrawing an individual's refugee status, curtailing their refugee leave and/or refusing their application for a further grant of leave on the basis of their refugee status are important decisions. The burden of proof is upon IND [Immigration and Nationality Directorate] to show that a person is no longer eligible for refugee status and clear evidence will be required to justify that decision.⁴¹

UK jurisprudence on cessation also suggests that the evidential burden of proof should be on the relevant decision maker. For instance, in *Arif v Secretary of State for the Home Department*, the UK Court of Appeal held that the burden of proving that the cessation clause applied fell on the Home Secretary.⁴² Brown LJ particularly focused in particular on the proof issue:

The sentence I would particularly emphasise there is "Proof that the circumstances of the persecution have ceased to exist would fall upon the receiving state". It is true that because of the notoriously long delays which attend our system of asylum hearings the appellant here was never granted refugee status ... It nevertheless seems to me that by analogy ... there is now an evidential burden on the Secretary of State to establish that this appellant could safely be returned home.⁴³

38 See *Re HBC*, Canadian Immigration and Refugee Board, CRDD M96-08650, M96-08702 (Duquette, Yassini & Roy JJ) 18 June 1997. The three member panel of the Board held that the Minister had the burden of proving the change in circumstances on the balance of probabilities at [51].

39 *Mahmoud v Canada (Minister for Employment and Immigration)* FCTD, 1999 ACWSJ LEXIS 46767 (Nadon J) 26 October 1993 at 46. See also *Youssef v Canada (Minister for Citizenship and Immigration)* FCTD, 1993 ACWSJ LEXIS 51344 (Teitelbaum J) 29 March 1999.

40 Conversely, it may be difficult to argue 'post-recognition' cases in support of burden of proof arguments in situations where there has been no formal recognition of refugee status.

41 UK Home Office, Immigration & Nationality Directorate, *Asylum Policy Instruction (API) on Refugee Leave*, undated, available at: <<http://www.ind.homeoffice.gov.uk>> (17 May 2006).

42 *Arif v Secretary of State for the Home Department* [1999] INLR 327. *Arif* was also referred to in *Fadilt Dyli v The Secretary of State for the Home Department* [2000] UKIAT 00001.

43 *Arif* id at 331. This has been cited with approval by Lord Phillips MR in *Saad, Diriye and Osorio v Sec of State for the Home Department* [2001] EWCA Civ 2008 at [54-55]. Brown LJ (now of the House of Lords) also endorsed his earlier approach in the recent House of Lords decision, *In re B (FC)(Appellant)(2002) Regina v Special Adjudicator ex parte Hoxha (FC)* [2005] 1 WLR 1063 at [66].

As is the case with Canadian and US jurisprudence, most if not all of the UK jurisprudence on cessation relate to changes ‘post-flight’ rather than ‘post-recognition’. However, for the reasons stated above, these cases can be cited in support of the majority finding in *QAAH* on burden of proof.⁴⁴

B. International Recognition of refugee status versus Domestic Protection: Incorporation of the Convention via section 36(2) of the Migration Act 1958

The Convention specifically states that Article 1C(5) only applies to persons who have been ‘recognised’ as refugees. ‘Recognition’ in this context is commonly accepted as referring to those determined as a refugee under the Convention by way of a domestic decision by a Contracting State.⁴⁵ Although the term ‘recognised’ used in Article 1C(5) refers to *domestic* recognition, it is generally accepted that recognition of refugee status is *declaratory* only — that is the applicant became a refugee upon fleeing his or her country for a Convention reason and later domestic recognition of refugee status declares him or her to be one.⁴⁶

Given this, how does Australia’s TPV regime fit into the Convention? More specifically, to what extent does the Migration Act and Regulations incorporate the Convention? In this light, is it correct to say as the majority do, that an applicant who applies for a fresh protection visa (pursuant to the procedures established by the Migration Regulations) should have that application dealt with as an Article 1C(5) issue? Alternatively, is Lander J correct in stating that the existence of a previously granted TPV is of no relevance to the decision to grant a permanent protection visa?

(i) The significance of the grant of a TPV – The effect of section 36(2)

At the Full Federal Court level, Wilcox J (with whom Madgwick agreed) recognised that there is a difference between recognition of a person as a refugee under the Convention and the grant of protection to that person under domestic law, noting that:

Recognition is a function of the Convention; protection is a function of the Act. Recognition is necessarily of indefinite duration; protection may be for a limited period, or until the happening of a particular event. A person may continue to have refugee status (because the person has successfully invoked Article 1A(2) and Article 1C(5) has not yet operated against him or her) *notwithstanding the expiration of a temporary protection visa*.⁴⁷ [Emphasis added.]

Lander J, in dissent, held that the question for the RRT in this case was whether the applicant had a well-founded fear of persecution for a Convention reason and, endorsing the approach taken at first instance by Dowsett J, that it ‘was not strictly relevant that the [applicant] had previously applied for and received a Subclass 785 (Temporary Protection) visa (Class XA) and a Subclass 785 (Temporary Protection) visa (Class XC).’⁴⁸ In other words, he held that it was not necessary to

⁴⁴ See above page 366.

⁴⁵ See eg, UNHCR, ‘Case for the Intervener’, submission in *Hoxha*, above n43, 5 January 2005 at [9.7] at: <<http://www.unhcr.org>> (17 May 2006).

⁴⁶ See eg, UNHCR id at [9.7].

⁴⁷ *QAAH*, above n1 (Wilcox J) at [83].

decide whether or not the cessation clause had been engaged as a result of any changed circumstances in Afghanistan. Wilcox J explicitly disagreed with the approach taken by Lander and Dowsett JJ to the relevance of the previous temporary visas, finding that that approach was incorrect and that '[o]n the contrary, that fact was of critical importance'.⁴⁹

At the centre of the divergence in the Federal Court on this point is the different approaches taken by the respective judges to the effect of s36(2) of the *Migration Act*.⁵⁰

(ii) *Analysis of the Federal Court Judgments re: Section 36(2)*

With respect, the approach taken by Lander and Dowsett JJ to this issue does not properly reflect the way in which section 36(2) incorporates Article 1 of the Convention. Unlike certain overseas jurisdictions⁵¹, Australia has decided not to specifically incorporate the text of Article 1C into domestic law. Instead, Australia has incorporated its obligations under the Convention by linking its protection obligations with a decision under section 36(2) *Migration Act*. Therefore, even though the *Migration Act* does not *specifically* set out any cessation provisions, they are *impliedly incorporated* via the reference in section 36(2) to Australia's 'protection obligations under the Refugees Convention'. Thus, the approach taken by Dowsett and Lander JJ to this issue fails to appreciate that the grant of a TPV does in fact constitute a recognition by Australia of its protection obligations under the Convention, via the operation of section 36(2).

Indeed, the High Court has already expressly alluded to a similar argument (although their Honours did not specifically mention Article 1C) when they said in *NAGV* that the 'protection obligations' under the Convention of which section 36(2) speaks:

...are best understood as a general expression of the precept to which the Convention does give 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 Article 1 and to the definition of the term 'refugee'.⁵²

Both the High Court in *NAGV* and UNCHR have noted that Article 1 of the Convention operates as a whole.⁵³ Thus, it can be argued that section 36(2) *does* incorporate the whole of Article 1 of the Convention, including Article 1C.⁵⁴

48 *QAAH*, above n1 (Lander J) at [305].

49 *QAAH*, above n1 (Wilcox J) at [69].

50 See eg, *QAAH*, above n1 (Wilcox J) at [61–66], [84–87]; compare with (Lander J) at [161–64], [181–82], [254–78].

51 For example, Canada and the US, discussed above at page 365. See also Article 64 of Switzerland's *Asylum Act* 1998 which provides that the Federal Office can revoke asylum or deprive persons of refugee status for reasons falling under Article 1C of the Convention.

52 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 668 (Gleeson, McHugh, Gummow, Hayne, Callinan & Heydon JJ) at [32] (footnotes in original omitted).

53 *NAGV* above n52 at [43]. UNHCR has also said that 'in practice, the application of Article 1 should be looked at in a holistic manner in line with the complex system of defining and protecting refugees as envisaged by the 1951 Convention': UNHCR, 'Case for the Intervener', above n45, 2 at footnote 1.

Having said that, it should be noted that the High Court in *NAGV* also said that the reach of s1A is qualified by Articles 1C – 1F. Therefore, the Court found that the effect of section 36(2) is that when a decision maker determines whether a person is a refugee, regard is to be had to Article 1A only ‘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.’⁵⁵

At first glance, this goes against a finding that section 36(2) incorporates Article 1C(5) into Australian law. However, those comments should be interpreted in the light of the particular context of the decision in *NAGV*, which did not deal with a cessation situation, but rather whether the applicants could avail themselves of the ‘effective protection’ of a third country (and thus involved consideration of Article 1A(2) rather than 1C(5)). Thus, the reference in that part of the judgment to ‘whether a person *is* a refugee’ should be read as going to the decision-making process intended to take place as part of an *initial* grant of refugee status under section 36(2) (in which case, as the High Court said, regard is to be had to 1A only), rather than as limiting the extent to which Article 1C is *incorporated* by section 36(2).

(iii) *The Applicability of the Adan and Hoxha Cases in the Australian Context*

In discussing the operation of Article 1C(5), Justice Lander refers at some length to the judgment of the House of Lords in *Adan*.⁵⁶ In that case, Lord Lloyd contrasted Articles 1A(1) and 1A(2). His Lordship noted that article 1A(1) deals with *historic* persecution, that is those persons who qualified as refugees under previous refugee instruments, who may argue that they do not come under Article 1C(5) if they can show compelling reasons via the exception to 1C(5).⁵⁷

In contrast, he says that Article 1A(2) is concerned with *current* persecution and thus Article 1C(5) ‘would *take effect naturally* when owing to the change of circumstance the refugee ceases to have a fear of current persecution.’⁵⁸ This approach was also echoed in the later case of *Hoxha*.⁵⁹ However, the applicability of this test to restrict the operation of Article 1C(5) in *QAAH* is mistaken. The fact that Article 1A(2) is interpreted by many countries to require an applicant to demonstrate a *current* fear of persecution does not mean that an applicant in the position of the applicant in *QAAH*, who has already been recognised as a refugee pursuant to a TPV, must also demonstrate a current fear of persecution. The proper test to apply in the latter situation is that arising from Article 1C(5).

Section 36(2) of the Migration Act and the relevant provisions in the Regulations specifically require that the criteria for the granting of a protection

54 This, in turn, is central to the legal issues upon which *QAAH* turns, as once the section 36(2)–Article 1C(5) link is shown, it cannot logically or properly be argued that a decision to grant a TPV under section 36 has no relevance to a decision relating to a permanent protection visa.

55 *NAGV*, above n52 at [47].

56 *Adan v Secretary of State for the Home Department* [1999] 1 AC 293.

57 Lloyd in *Adan*, id at 306, cited by (Lander J) at [238].

58 Lord Lloyd in *Adan*, above n56 at 306, cited in *QAAH*, above n1 (Lander J) at [238].

59 *Hoxha* above n43 where Lord Hope of Craighead stated that Article 1C(5) ‘takes effect naturally when the refugee ceases to have a current well founded fear’ at [13], cited by (Lander J) in *QAAH*, above n1 at [241].

visa (both temporary and permanent) is that the Minister is satisfied that the applicant is a person 'to whom Australia has protection obligations under the Convention'. The effect of this is that when the Minister grants an applicant a TPV under section 36(2) and Regulation 785, he or she is according Australia's protection to that person, thereby declaring him or her to be a refugee under the Convention. Because of this, even though the procedural regime set up by the Regulations requires the applicant to lodge a fresh application to obtain a permanent protection visa, the applicant's status of refugee remains and thus Australia continues to have protection obligations towards that person in relation to that later application. This is discussed further below.

(iv) *The Relevance of the Requirement for a Fresh Application*

In *QAAH*, Lander J in dissent endorsed the earlier approach of Emmett J in *NBGM*,⁶⁰ in finding that the Migration Act clearly requires a fresh application for a protection visa following the expiration of a temporary protection visa, 'even if that does not necessarily sit comfortably with the framework of the Refugees Convention'.⁶¹ In *NBGM*, Emmett J had said that the RRT in that case was not considering the revocation of a protection visa or the extension of a temporary protection visa but a *fresh application* for a permanent protection visa so '[o]n one view, Article 1C(5) had no part to play in that question.'⁶²

Although the requirements of the 866 Permanent Protection Visa necessitate an applicant making a fresh application, this has to be read in the light of section 36(2) of the Act and the criteria for the 866 visa in the Regulations which clearly says that the Minister must be satisfied that the person is owed protection obligations under the Convention. If an applicant has already been recognised as being owed protection obligations by Australia pursuant to the grant of a TPV, then although *procedurally*, the applicant has to lodge a fresh application for refugee status, when the relevant decision maker decides whether an applicant falls within the *criteria* for grant of that visa, regard must be had to the fact that Australia has already recognised protection obligations towards that person. Thus, there is a significant distinction to be made here between the procedure to be followed for the *application* of a protection visa and the *criteria* upon which that visa is decided. Thus, on a holistic reading of the Migration Act and Regulations, the approach taken by Lander J is, with respect, an erroneous one.

5. *Conclusions: The Proper Approach to Article 1C(5)*

In light of above, the correct legal interpretation of Article 1C(5) in the Australian context appears to be the following.

Although the scheme governing the *application* process for protection visas (under the Migration Regulations) means that those on a TPV can only obtain a permanent protection visa by lodging a fresh application for that visa, this does not

60 *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373

61 *NBGM* (Emmett J) at [61], cited in *QAAH* (Lander J) at [259].

62 *NBGM* (Emmett J) at [63], cited in *QAAH* (Lander J), id at [259].

necessarily mean that the criteria governing the *granting* of that visa also require a *de novo* consideration of the applicant's case for protection. That is, the procedural requirements put in place by the Migration Regulations for the *application* for a protection visa must not be conflated with the *criteria upon which* those visas are granted.

Related to this, the grant of a TPV to an applicant demonstrates that Australia has recognised that it owes 'protection obligations' to him or her (pursuant to the criteria in section 36(2) of the Act and Items 785, Schedule 2 of the Regulations). Thus, the presumption at law is that person continues to be a refugee and to be owed protection obligations by Australia until the Department or RRT successfully applies one of the cessation clauses to that applicant.

The above argument is strengthened by the fact that the act of granting an applicant a TPV is understood to be declaratory of that applicant's status as a refugee under international law. Because of this, any expiration of a TPV or the existence of any procedural requirement in domestic law to apply for a fresh protection visa has no effect on the continuing status of that applicant as a refugee under international law – the protection of which Australia has undertaken by its grant of a protection visa to that person under section 36(2). The fact that this protection is stated in a TPV to expire after a certain period does not dilute in any way the acceptance by Australia of the protection needs of that person.

Given this, the author is of the view that the majority of the Full Federal Court were correct in their approach to Article 1C(5). The only proviso to this is that the Court should question whether the approach of the majority to the reference date for the change in circumstances (March 2000 or March 2003) was correct. There is a strong case to be made that the March 2003 decision, whilst made via a 'deemed' application, did result in the grant of a visa according to the criteria in section 36(2) and thus did in fact engage Australia's obligations under the Refugee Convention as part of that 2003 decision. Even though the delegate did not consider the applicant's current circumstances as they stood in 2003, arguably the explicit recognition by the delegate that Australia's protection obligations were enlivened in 2003 is sufficient at international law (via section 36(2)) to constitute a 'recognition' of protection for the purposes of Article 1C(5).

Given the above discussion, the majority decision of the Full Federal Court should be upheld on appeal and the findings on the key legal issues discussed above clarified in the terms suggested in this paper.

This case has wide ramifications for the thousands of refugees in Australia who have been granted temporary protection visas. The judgment of the High Court in this case will be significant to the way in which the Australian authorities approach refugee status determination as well as to the development of international jurisprudence on the cessation clause.

