MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v QAAH OF 2004 and Another

HIGH COURT OF AUSTRALIA

GUMMOW ACJ, KIRBY, CALLINAN, HEYDON and CRENNAN JJ

19, 20 June, 15 November 2006 — Brisbane

[2006] HCA 53

Migration — Refugees — Whether previous grant of temporary protection visa entitles applicant to assert refugee status notwithstanding benign changes in home country — Whether minister bears onus of proof establishing benign changes are permanent at time of application — Whether municipal law prevails in case of conflict between it and Convention relating to Status of Refugees — Construction of Art 1 of Convention relating to Status of Refugees — (CTH) Migration Act 1958 ss 5(1), 36 — (CTH) Migration Regulations 1994 reg 2.01.

The first respondent, a citizen of Afghanistan, was, on 28 March 2000, granted a temporary protection visa to expire after 3 years. On 27 March 2003 he was granted another temporary protection visa pending a decision upon his entitlement to a permanent visa. Some months later an adverse decision was made by the minister's delegate. The Refugee Review Tribunal (the tribunal) affirmed the decision of the delegate, holding that the cessation provision (Art 1C(5) of the Convention relating to the Status of Refugees) applied so that the first respondent could no longer continue to refuse to avail himself of the protection of Afghanistan given that the Taliban, who would have persecuted the first respondent, had effectively been dislodged from power by late 2001.

The first respondent unsuccessfully appealed to the Federal Court (Dowsett J), which held that the tribunal did not err when it considered, at the time of the decision, whether the first respondent had a well-founded fear of persecution for a Convention reason. Alternatively, Dowsett J held that the cessation provision will be engaged if "the circumstances in connexion with which [QAAH] has been recognized as a refugee have ceased to exist".

A further appeal to the Full Court of the Federal Court was successful where Wilcox J (with whom Madgwick J agreed, Lander J dissenting) held that, in order to attract the operation of the cessation provision, the appellant had to advance positive evidence that there had occurred in Afghanistan changes in circumstances which were substantial, effective and durable, or profound and durable, and incompatible with a real chance of future Taliban persecution of the first respondent.

The appellant minister argued that: (a) there was precise symmetry between the tests imposed by Arts 1A(2) and 1C(5) of the Convention — namely, whether the protection visa applicant has a well-founded fear of being persecuted for a Convention reason and is unable, or, owing to such fear, is unwilling, to avail himself or herself of the protection of his country; (b) Art 1C(5) operates automatically according to its terms and is relevant whenever the question arises of whether a person is a refugee; and (c) neither the Convention nor the Migration Act 1958 (Cth) (the Act) imposes a burden of proof on the tribunal.

The first respondent submitted "that if an applicant has once been accepted as having held, at any time in the past, a relevant fear of persecution, Australia must either accept that he is a refugee for all times and all purposes, including an application for a permanent visa, or must effectively assume a burden of showing that the basis for the well-founded fear no longer exists". The first respondent further submitted that the "'symmetrical' approach urged by the minister would lead to a situation in which Australia's protection

obligations would be 'granted in instalments to be affirmed by the minister each time it is necessary for a recognised refugee to seek another visa'" and that this interpretation had no foundation either in the Act or in the Convention itself.

Held, allowing the appeal (by majority, Kirby J dissenting):

(i) The emphasis of the majority in the Federal Court upon the durability of benign changes in the "home district" of an applicant is "misconceived, because it tends to treat circumstances there as conclusive, and may foreclose consideration of the possibility of safe relocation": at [12].

(ii) It is the law of Australia which prevails in case of any conflict between it and the Convention: at [33].

(iii) "The Convention has not been enacted as part of the law of Australia, unlike, for example, the Hague Rules and the Warsaw Convention. Section 36 of the Act is the only section (apart from the interpretation section, s 5) which refers in terms to the Convention. That does not mean that thereby the whole of it is enacted into Australian law": at [34], contra Kirby J at [69]–[70].

(iv) "Neither the texts nor the histories of the Act and the Convention require that when the threat [of Convention harm] passes, protection should be regarded as necessary and continuing": at [36].

(v) "The words in s 36(3) 'whether temporarily or permanently' do no more than make it clear that any obligation of protection may or will not be assumed by Australia at any time, or from time to time, if a person has not taken all possible steps to avail himself or herself of residence in another country": at [37].

(vi) "The Act does not pose the question which the majority of the Full Court posed as a relevant question: whether, at the time of an application for a permanent protection visa, there have occurred in the applicant's country changes of a substantial, effective and durable kind": at [39].

(vii) "True it may be that if the non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in that other country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will in all probability continue to be one to whom Australia owes protection obligations": at [39].

(viii) There is no onus upon the appellant to establish the occurrence of substantial, effective and durable change: at [39], [46].

(ix) "No doubt the provision made by Art 1 is to be interpreted in good faith. However … the principle of good faith is not in itself a source of obligation where none otherwise would exist": at [42].

(x) "Both the opening words of Art 1C(5), 'He can *no longer*' [emphasis added], and the subsequent words, 'the circumstances … *have ceased to exist*' [emphasis added], make it clear that the circumstances … of a person permitted to reside in an asylum country may change as circumstances in the country which he has left change": at [43].

(xi) The appellant's submission that the cessation provision operates automatically should be accepted: at [44].

> *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063; [2005] 4 All ER 580, discussed and partly distinguished.

(xii) "Such consequential rights as flow from recognition as a refugee and give effect to the extent that they do to the Convention, are the subject, in part at least, of the Act under which conditions of residence can be imposed, and of other legislation, including social security and industrial legislation enacted from time to time": at [48].

(xiii) At footnote 21, their Honours in the majority questioned the validity of reg 866.511 in light of s 30(1) and (2)(a) of the Act without conclusively deciding the issue.

As noted, Kirby J disagreed with the majority of the High Court inter alia, holding:

> [72] By assuming that the provisions of the Act dealing with the temporariness of *protection* have some operation in relation to the *recognition* (or cessation) of a person's

> refugee status, the joint reasons confuse the distinct functions of recognition of refugee status and protection. With respect, this is a serious error of analysis. It is one which the majority in the Full Court avoided. The distinction between the two steps is central to the operation of Art 1 of the Convention. It is therefore vital to the operation of s 36 of the Act, which accepts the Convention in this respect, as part of the Australian law governing the entitlement to "refugee" status. It follows that I would reject the conclusion expressed in the joint reasons as to the supposed error of the majority in the Full Court in their approach to the legal questions presented by this appeal. There was no such error in the Full Court. [Footnotes omitted]

His Honour further held (at [71]) that:

> [71] … s 36 of the Act incorporates a distinction that is central to the operation of Art 1 of the Convention, namely, the distinction between *recognition* of a person as a refugee; and the conferral of Australia's *protection*. *Recognition*, as envisaged by the Convention, can only lapse in accordance with one of the cessation grounds set out in Art 1C. *Protection*, on the other hand, may lapse in accordance with the provisions of the Act. Because they are distinct processes, the lapse of *protection* does not necessarily have any causal effect on a person's *recognition* as a refugee. A person may remain "recognised" as a refugee notwithstanding the periodic lapse of a protection visa.

His Honour concluded that "the approach to the *grant* of 'refugee' status under Art 1A(2) cannot 'mirror' or be 'symmetrical to' the approach to *cessation* of refugee status under Art 1C(5)": at [101]. In so holding, his Honour referred to the two-stage approach affirmed by the Roundtable Meeting of Experts on the operation of the Convention, convened by UNHCR in Lisbon, Portugal: at [102].

His Honour was also of the view that "[i]n deciding an appeal such as this, due weight should therefore be given to the guidance provided by relevant UNHCR publications, including the UNHCR handbook and the guidelines. This does not mean that such sources are binding on this or any other court. But it does mean that, like other final courts, this court will often derive great assistance by having access to such materials": at [76].

S J Gageler SC and *S B Lloyd* instructed by *Clayton Utz* for the appellant.

B W Walker SC with *M O Plunkett* instructed by *Terry Fisher & Co* for the respondent.

S P Estcourt QC with *J A Gibson*, instructed by *Mallesons Stephen Jaques*, for the United Nations High Commissioner for Refugees as amicus curie.

[1] Gummow ACJ, Callinan, Heydon and Crennan JJ. The principal question in this appeal is whether an entrant to Australia, who has been granted a temporary protection visa, is, on its expiry, and notwithstanding benign changes in the conditions of the country from which he fled, entitled under Australian law to assert that he continues to be a person to whom Australia owes protection obligations. Other questions, as to the proper construction of the Convention relating to the Status of Refugees,[1] taken with the Protocol relating to the Status of Refugees[2] (together, the Convention), as they have been received into Australian law in the Migration Act 1958 (Cth) (the Act), and the nature and onus of proof in proceedings concerning refugees, arise for consideration. An application for special leave to appeal in *NBGM v Minister for Immigration and Multicultural Affairs*,[3] which raised similar questions, was argued at the same time as this one.

1. Done at Geneva on 28 July 1951.
2. Done at New York on 31 January 1967.
3. [2006] HCA 54.

[2] The Act is to be read against the consistent refusal of nation states to accept, apart from any limitations imposed by treaties to which they are parties, any abridgment of their authority to determine for themselves whether or not a right of entry and of permanent settlement should be afforded to any individual or group of individuals. Statements in this court to that effect have been adopted by the House of Lords in *R (European Roma Rights) v Prague Immigration Officer*[4] and *Januzi v Secretary of State for the Home Department*.[5]

Facts and proceedings

[3] The first respondent is a citizen of Afghanistan. He is of Hazara ethnicity, and is a Shi'a Muslim. He arrived in Australia on 27 September 1999. On 28 March 2000 he was granted, by a delegate of the appellant, a temporary protection visa to expire after 3 years. He applied on 17 April 2000 for a permanent protection visa. On 27 March 2003, another temporary protection visa was issued to him pending a decision upon his entitlement to a permanent visa. That decision was given some months later and was adverse to the first respondent.

[4] Under s 36(2)(a) of the Act, a criterion for the issue of a protection visa is that the applicant is a non-citizen, present in Australia, and a person to whom, the minister is satisfied, Australia owes protection obligations under the Convention.[6]

[5] Following the decision of the appellant's delegate, denying the first respondent a permanent protection visa, the first respondent applied to the Refugee Review Tribunal (the tribunal) for review.

[6] The tribunal affirmed the decision of the appellant's delegate. In doing so, the tribunal posed for itself two questions, to the first of which, as will appear, there was a dispute whether an answer was required in the circumstances. It was whether the cessation provision (Art 1C(5)) of the Convention applied. The second question was said to be whether there was new evidence, to suggest that the first respondent was currently a "refugee" for the purposes of the Act.

[7] The tribunal answered the first question by holding that the cessation provision did apply: the first respondent could no longer continue to refuse to avail himself of the protection of Afghanistan. The tribunal accepted that the extremist group, the Taliban, if it were still in power, would have persecuted the first respondent because of his Hazara ethnicity, and because he is a Shi'a Muslim. But, the tribunal observed, the Taliban had been effectively dislodged from power by late 2001: even though remnants of the Taliban remained active in some parts of the country, it had ceased to be a coherent political movement. Further, the tribunal did not accept that there was a real chance of the re-emergence of the Taliban as an effective authority in the reasonably foreseeable future: there was no satisfactory evidence to support the first respondent's assertion that in a neighbouring province the Taliban maintained a

4. [2005] 2 AC 1 at 27–8 [14]–[15], 31–2 [19]; [2005] 1 All ER 527 at 541–2, 544–5 (*European Roma Rights*) per Lord Bingham of Cornhill with whom Lord Hope of Craighead (at AC 47 [48]; All ER 560), Baroness Hale of Richmond (at AC 55 [72]; All ER 568) and Lord Carswell (at AC 66 [108]; All ER 578) agreed.
5. [2006] 2 AC 426 at 439 [4]; [2006] 2 WLR 397 at 402; [2006] 3 All ER 305 at 311 per Lord Bingham of Cornhill with whom Lord Nicholls of Birkenhead (at AC 450 [23]; WLR 413; All ER 322), Lord Carswell (at AC 461–2 [61]; WLR 424; All ER 332) and Lord Mance (at AC 464 [70]; WLR 427; All ER 335) agreed.
6. As per s 5(1) of the Act.

real power base. The first respondent had also claimed to fear harm from a number of other sources, all because of his ethnicity and religion. As to this claim, the tribunal found that he did not have a real chance of being persecuted by any of the people or groups whom he identified. The tribunal accordingly concluded that the first respondent did not have any well-founded fear of persecution.

[8] The first respondent unsuccessfully applied to the Federal Court of Australia (Dowsett J) for judicial review of the tribunal's decision.[7]

[9] Dowsett J was of the opinion that the tribunal did not need to consider both of the questions. He said:[8]

> [23] In my view, it follows that the question for the Tribunal in the present case was whether or not, at the time of the decision, the [first respondent] had a well-founded fear of persecution for a Convention reason. It was not strictly relevant that he had previously applied for and received temporary … visas. In other words it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan. The [first respondent's] argument to the contrary is that identified by Dawson J in *Chan* at 398,[9] which argument was, in my view, rejected by the High Court.

His Honour went on to say:[10]

> [25] In my view, the [first respondent's] entitlement to a permanent visa depended upon the circumstances as they were at the time of the Tribunal's decision, meaning that it was necessary that he then hold a well-founded fear of persecution for a Convention reason. His argument to the contrary is without merit. If I am wrong in my understanding of the decision in *Chan*, nonetheless, the [first respondent's] argument would still fail. The cessation clause will be engaged if "*the circumstances in connexion with which* [the first respondent] *has been recognized as a refugee have ceased to exist*". It cannot be sensibly argued that Australia has ever recognized the applicant as a refugee other than in connection with circumstances as they existed in March 2000. As I understand it, the applicant accepts that those circumstances have ceased to exist. No recognizable legal basis has been advanced on behalf of the applicant to support the assertion that the grant of the temporary (XC) visa in 2003 raises a conclusive presumption that he was entitled to a visa on the basis of circumstances which then existed. Those circumstances were never identified or relied upon by the applicant and never considered by the Minister. The [first respondent's] argument is without merit.

[10] The first respondent appealed to the Full Court of the Federal Court, which, by majority, allowed the appeal (Wilcox and Madgwick JJ, Lander J dissenting).[11]

[11] Wilcox J (with whom Madgwick J agreed) took the view that the appellant bore an onus of proving that the first respondent was no longer a "refugee" for the purposes of the Act.[12] Wilcox J said that there was a real and significant difference between an obligation that might be imposed upon a refugee to prove that he remained a refugee, and an obligation upon the executive to establish the

7. *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1448 (*QAAH* (FCA)).
8. *QAAH* (FCA) at [23].
9. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 398; 87 ALR 412 at 424–5.
10. *QAAH* (FCA) at [25].
11. *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363; 223 ALR 494; [2005] FCAFC 136 (*QAAH*).
12. *QAAH* at FCR 381 [58], 383 [69]; ALR 511,513.

contrary under the cessation provision.[13] The majority held that in order to attract the operation of the cessation provision, the appellant had to advance positive evidence that there had occurred in Afghanistan changes in circumstances which were substantial, effective and durable, or profound and durable, and incompatible with a real chance of future Taliban persecution of the first respondent.[14]

[12] The majority of the Full Court concluded that the tribunal had made jurisdictional errors: first, in failing to investigate, and make findings about, the extent of Taliban activity in Afghanistan, in particular in the area of the first respondent's home, as well as any likely increases in that activity;[15] secondly, in failing to consider the stability of the Afghan government;[16] thirdly, in failing to express its findings in the context of the applicability or otherwise of the cessation clause;[17] and, fourthly, in determining the first respondent's claims in the absence of information about continuing problems. It was for the appellant to produce positive material demonstrating that a settled and durable state of affairs existed in the first respondent's former district: material, moreover, that was incompatible with a real chance of future Taliban persecution.[18] The emphasis placed upon the "home district" of an applicant is, it should be pointed out, misconceived, because it tends to treat circumstances there as conclusive, and may foreclose consideration of the possibility of safe relocation. Nothing further need be said about this, however, because the appellant has chosen to rely upon other errors on the part of the majority to contend, correctly, that this appeal should be upheld.

[13] It is unnecessary to examine the dissenting judgment of Lander J because, in substance, he agreed with the primary judge, and in any event, much of their Honours' reasoning is adopted in the arguments of this appellant.

The appeal to this court

[14] The appellant made the following four submissions as to the proper construction of the Act and the Convention:

(a) putting aside the position of refugees falling within Art 1A(1) of the Convention, there is a precise symmetry between the tests imposed by Arts 1A(2) and 1C(5), which form part of the one definitional provision;
(b) the test for both is whether the protection visa applicant has a well-founded fear of being persecuted for a Convention reason and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his country;
(c) neither Art 1C(5) nor any other part of the definition of refugee in Art 1 of the Convention needs to be invoked in order to have application to a person; rather it operates automatically according to its terms and is relevant whenever the question arises of whether a person is a refugee;
(d) neither the Convention nor the Migration Act imposes a burden of proof on the Tribunal in undertaking a review of a decision not to grant a protection visa.

13. *QAAH* at FCR 381 [58], 383 [69]; ALR 511,513.
14. *QAAH* at FCR 384 [71], 385 [78], 392 [110]; ALR 513, 515, 521.
15. *QAAH* at FCR 384 [74]; ALR 514.
16. *QAAH* at FCR 385 [77]; ALR 515–16.
17. *QAAH* at FCR 385 [78]; ALR 515.
18. *QAAH* at FCR 385 [78]; ALR 515.

[15] Before considering these submissions it will be necessary to refer to and comment on the relevant provisions of the Act and the regulations made under it, and the Convention.

[16] At the outset, however, it should be pointed out that there are many provisions in the Act and the regulations which distinguish between a visa valid for a period and a permanent visa. Section 29 of the Act empowers the minister, among other things, to grant a non-citizen a visa to "remain in Australia". Section 30 is a section which contemplates the issue of visas for different periods:

> 30 *Kinds of visas*
>
> (1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.
>
> (2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
>
> (a) during a specified period; or
>
> (b) until a specified event happens; or
>
> (c) while the holder has a specified status.

[17] Section 31 is concerned with classes of visas. Subsequent sections, 32, 33, 34, 35, 36, 37, 37A, 38 and 38A, make provision for the specific classes, namely, temporary special category visas, in respect of New Zealanders and certain others, special purpose visas, "absorbed person" visas, former citizens' visas, visas for persons owed protection, bridging visas, temporary safe haven visas, criminal justice visas and enforcement visas.

[18] Section 36, which governs protection visas, and which adopts the definition of a refugee in the Convention, should be set out in full:

> 36 *Protection visas*
>
> (1) There is a class of visas to be known as protection visas.
>
> Note: See also Subdivision AL.
>
> (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.
>
> 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.

[19] Section 41 makes provision for regulations to subject visas of the classes specified to conditions, for example, with respect to employment. A visa may only be issued on application for it by a non-citizen, and on payment of a charge: ss 45 and 45A.

[20] Section 65 is as follows:

65 *Decision to grant or refuse to grant visa*

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

[21] The Act, by s 68(3), further makes it clear that visas can have temporal limitations: "A visa can only be in effect during the visa period for the visa".

[22] Section 77 is to a similar effect, as is s 82(7). Section 77 provides:

77 *Visas held during visa period*

To avoid doubt, for the purposes of this Act, a non-citizen holds a visa at all times during the visa period for the visa.

And s 82(7) is as follows:

(7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.

[23] It is unnecessary to set them out, but we would also draw attention to ss 91R, 91S, 91T, 91U and 91V, which effectively define "persecution" for the purpose of the Act and, it follows, the application of the Convention in Australia. These sections, it may be noted, speak of persecution in the present tense.

[24] Visas are subject to cancellation under, among other sections, s 116(1)(a), which looks to the contemporaneity of the threat or otherwise:

116 *Power to cancel*

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

(a) any circumstances which permitted the grant of the visa no longer exist …

[25] Section 129 requires the minister to give notice of cancellation of a visa inviting its holder to show reason why the cancellation should not have occurred and seeking its revocation. There are other sections which make provision for the cancellation of various classes of visa but they need no further reference here.

[26] Regulation 2.01 of the Migration Regulations 1994 (Cth) (the regulations) describes classes of visas in terms of their duration:

> 2.01 *Classes of visas (Act, s 31)*
> For the purposes of section 31 of the Act, the prescribed classes of visas are:
> (a) such classes (other than those created by the Act) as are set out in the respective items in Schedule 1; and
> (b) the following classes:
> (i) transitional (permanent); and
> (ii) transitional (temporary).
> *Note* For the classes created by the Act, see ss 32 to 38.

[27] It is also the fact that Sch 2 to the regulations, which specifies criteria for every visa, repeatedly states that certain criteria must be satisfied at the "time of application"[19] or at the "time of decision".[20]

[28] It is convenient now to set out some provisions of the Convention. Article 1A(2) relevantly defines "refugee" as 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, 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[29] Because s 36 of the Act refers to protection obligations under the Convention it is legitimate, in deciding whether those obligations arise, to look to such other provisions of the Convention as bear upon that question.

[30] Article 1C is as follows:

> C. This Convention shall cease to apply to any person falling under the terms of section A if:
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
> (2) Having lost his nationality, he has voluntarily reacquired it; or
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
> (5) He can no longer, because the circumstances in connection with which he has been recognized 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 A(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;
> (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

19. See regs 010.21, 020.21, 030.21 and following.
20. See regs 010.22, 020.22, 030.22 and following.

> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

[31] Articles 32 and 33 may also need to be considered:

> Article 32. *Expulsion*
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.
>
> …
>
> Article 33. *Prohibition of expulsion or return ("refoulement")*
>
> 1. No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[32] Despite the emphasis that the Act and the regulations to which we have referred place upon the periodicity of all, or almost all, visas, unless and until a permanent visa[21] is granted, the first respondent submits that if an applicant has once been accepted as having held, at any time in the past, a relevant fear of persecution, Australia must either accept that he is a refugee for all times and all purposes, including an application for a permanent visa, or must effectively assume a burden of showing that the basis for the well-founded fear no longer exists. We summarise the submission in this way because that in substance was the way it was put in written submissions, although during argument the first respondent accepted that the role of the tribunal was an administrative one. The submission proceeds, that if the "status" of refugee or otherwise were governed entirely by Art 1A, the cessation provision (Art 1C(5)) would have no work to do.

21. Under cl 866.511 of Sch 2 of the regulations, a person holding a "permanent visa" is permitted "to travel to and enter Australia for a period of 5 years from the date of grant". That regulation may be of questionable validity under s 30(1) and (2)(a) of the Act, the former of which provides that a permanent visa is a visa "to remain indefinitely", and the latter of which provides that a temporary visa is one allowing the visa-holder to remain "during a specified period". Mansfield J noted the inconsistency in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522 at 531 [30]; 228 ALR 623 at 630; 90 ALD 493 at 500; [2006] FCAFC 60 (see also at FCR 540 [66]; ALR 638–9;ALD 508–9 per Stone J). The validity of reg 866.511 was not, however, called into question in this court. No matter what the duration of a "permanent visa" is, it appears to confer the important advantage upon a holder of it of being able, under s 5A(1)(bb) and s 13 of the Australian Citizenship Act 1948 (Cth), to apply for Australian citizenship, another matter which it is presently unnecessary to decide.

[33] The first respondent accepts, as he must, that it is the law of Australia which prevails in case of any conflict between it and the Convention. It is the law of Australia which must first be identified.

[34] The relevant law of Australia is found in the Act and in the regulations under it. It is Australian principles of statutory interpretation which must be applied to the Act and the regulations. One of those principles is s 15AA(1) of the Acts Interpretation Act 1901 (Cth).[22] Another is s 15AB(2)(d) of that Act. The Convention has not been enacted as part of the law of Australia, unlike, for example, the Hague Rules[23] and the Warsaw Convention.[24] Section 36 of the Act is the only section (apart from the interpretation section, s 5) which refers in terms to the Convention. That does not mean that thereby the whole of it is enacted into Australian law. As McHugh and Gummow JJ said in *Minister for Immigration and Multicultural Affairs v Khawar*:[25]

> [45] … [T]he Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.

Hence, by reason of s 15AB(2)(d) of the Acts Interpretation Act, the Convention may be considered for the purposes described in s 15AB(1). Further, Australian courts will endeavour to adopt a construction of the Act and the regulations, if that construction is available, which conforms to the Convention. And this court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into its domestic law.[26] The Convention will also be construed by reference to the principles stated in the Vienna Convention on the Law of Treaties (the Vienna Convention),[27] even though the Vienna Convention has not been enacted as part of the law of Australia. One of the principles stated in Art 31 of the Vienna Convention[28] requires that regard be had to the context, object and

22. Section 15AA(1) provides:

> (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.

23. See *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161 at 166 [3], 186 [70], 210 [132], 224 [163]; 158 ALR 1 at 3, 19, 38, 49; [1998] HCA 65 (*Great China Metal*).
24. See *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 428 [3], 451–2 [107]; 79 ALJR 1215 at 1217, 1233; [2005] HCA 33 (*Povey*).
25. (2002) 210 CLR 1 at 16 [45]; 187 ALR 574 at 584; 67 ALD 577 at 587; [2002] HCA 14.
26. *Great China Metal* at CLR 176 [38], 186–7 [71], 213 [137], 227–8 [179]–[180]; ALR 10–11, 19, 40–1, 52–3; *Povey* at ALR 433 [25], 456 [128]; ALJR 1220, 1236–7.
27. The Vienna Convention was ratified by Australia on 13 June 1974 and came into force on 27 January 1980: see Vienna Convention on the Law of Treaties [1974] ATS 2.
28. Article 31 provides:

> 31 *General rule of interpretation*
>
> 1. A treaty shall 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.

purpose of the Convention. Another, stated in Art 32,[29] permits recourse to the preparatory work of the Convention in the circumstances of its conclusion. But despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern.

[35] With that background in mind, we turn to the construction of s 36.

[36] Section 36, like the Convention itself, is not concerned with permanent residence in Australia or any other asylum country, or indeed entitlements to residence for any particular period at all. Its principal concern is with the protection of a person against a threat or threats of certain kinds in another country. Neither the texts nor the histories of the Act and the Convention require that when the threat passes, protection should be regarded as necessary and continuing.

[37] Whether under s 36(2) Australia has protection obligations depends upon whether a person satisfies the definition of a refugee in Art 1A of the Convention, in the context of other relevant articles, none of which say anything about the period of residence or permanent residence. If they did, they would have to yield in any event to the provisions of the Act which do. There is nothing in s 36(3) of the Act which points to a different conclusion. The words in s 36(3) "whether temporarily or permanently" do no more than make it clear that any obligation of protection may or will not be assumed by Australia at any time, or from time to time, if a person has not taken all possible steps to avail himself or herself of residence in another country.

[38] Having regard to the sections of the Act and regulations under it to which we have referred, and which are concerned with the duration of visas, these conclusions follow. A visa subsists for only the period of it, or until an event, if any, specified in it occurs: ss 28, 29(3), 67, 68(3) and 116. When the visa expires, the holder of it must make a fresh application for another visa, in this case, another protection visa, because otherwise that person would have no entitlement to remain in Australia: and a, or the, relevant criterion for the grant of a protection visa at that time is that the non-citizen, the applicant, is a person to whom

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2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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.

4. A special meaning shall be given to a term if it is established that the parties so intended.

29. Article 32 provides:

32 *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Australia has (not, it may be observed, "in the past had, or owed") protection obligations under the Convention: s 36(2) and (4).

[39] The Act does not pose the question which the majority of the Full Court posed as a relevant question: whether, at the time of an application for a permanent protection visa, there have occurred in the applicant's country changes of a substantial, effective and durable kind. True it may be that if the non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in that other country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will in all probability continue to be one to whom Australia owes protection obligations, but to put the question in the way in which the majority of the Full Court did, and to hold that there was, in effect, an onus upon the appellant to establish the occurrence of substantial, effective and durable change, was to fail to give effect to the rule of Australian law that the Act, and the holdings of this court that the proceedings under it in the tribunal, are not adversarial.

[40] This court has repeatedly said that the proceedings of the tribunal are administrative in nature, or inquisitorial,[30] and that there is an onus upon neither an applicant nor the minister.[31] It may be that the minister will sometimes, perhaps often, have a greater capacity to ascertain and speak to conditions existing in another country, but that does not mean that the minister is to bear a legal onus, just as, in those cases in which an applicant is the better informed, that applicant is not to be so burdened. This is so, even though, pursuant to s 91V of the Act, the minister may require an applicant to make or verify a statement on oath or affirmation, and may draw an adverse inference against an applicant if the minister has reason to believe that "the applicant was not sincere" in complying with the request.

[41] What we have said is sufficient to dispose of the appeal. But in view of the arguments addressed to it, we should say something about the operation of the whole of Art 1, and such other of the provisions of it as require consideration under the Act.

[42] No doubt the provision made by Art 1 is to be interpreted in good faith. However, as the House of Lords recently emphasised,[32] the principle of good faith is not in itself a source of obligation where none otherwise would exist.

[43] Both the opening words of Art 1C(5), "He can *no longer*" [emphasis added], and the subsequent words, "the circumstances … *have ceased to exist*" [emphasis added], make it clear that the circumstances from time to time and not merely as a matter of history are the relevant circumstances; that is, that the

30. See, for example, *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 625 [98]; 76 ALJR 966 at 985; 68 ALD 257 at 281; [2002] HCA 30 per McHugh J (citing, among others, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76]; 176 ALR 219 at 242; 62 ALD 285 at 307–8; [2000] HCA 57 per Gaudron and Gummow JJ), ALR 648 [208];ALD 304; ALJR 1001 per Kirby J, ALR 658 [246];ALD 313; ALJR 1008 per Hayne J, ALR 666 [287];ALD 322; ALJR 1014 per Callinan J.
31. See, for example, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 573–4; 144 ALR 567 at 577–8; 48 ALD 481 at 490–1; [1997] HCA 22 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow J; *Abebe v Commonwealth* (1999) 197 CLR 510 at 544–5 [83]; 162 ALR 1 at 25; [1999] HCA 14 per Gleeson CJ and McHugh J; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 673; 162 ALR 577 at 624 [195]; 54 ALD 289 at 336; [1999] HCA 21 per Callinan J.
32. *European Roma Rights* at AC 31–2 [19]; All ER 544–5 per Lord Bingham of Cornhill, AC 50–3 [57]–[64]; All ER 563–5 per Lord Hope of Craighead.

"status", as the Convention has it, of a person permitted to reside in an asylum country may change as circumstances in the country which he has left change.

[44] The opening words of Art 1C state that the "Convention shall cease to apply to any person falling under the terms of [Art 1A]" if any of the following paras (1)–(6) apply. Accordingly, the language of Art 1C(5) is unambiguous and compels the same conclusion as the Act. The appellant's submission, that the cessation provision operates automatically according to its terms, and need not for its application be triggered by a request for a, or any, particular kind of visa, although in practice such a request will ordinarily be the occasion for a visa consideration of a person's right or otherwise to continuing protection, should be accepted. This is the operation that Art 1C(5) has, and is the work that it has to do and for which Art 1A does not make provision.

[45] In *R (Hoxha) v Special Adjudicator*[33] the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood) considered the relevant articles of the Convention without reference to any legislative framework for them in the United Kingdom.[34] The argument for the appellant in *Hoxha* went a step beyond that accepted by the Full Court in the present case. The argument was that if, albeit without any formal determination of refugee status made at an earlier time, the applicant subsequently was shown to have fulfilled the criteria under Art 1A(2) at that earlier time, the applicant was to be treated as having been "recognised" for the purposes of Art 1C(5). That argument was rejected by the House of Lords unanimously.

[46] Lord Brown's view that "[Art] 1C(5), a cessation clause, simply has no application … at any stage 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] is not inconsistent with the conclusion to which we have come. The authority of this court[36] is, however, to a different effect on the question of onus, as to which Lord Brown adopted[37] a statement made at the Lisbon Conference:[38] "the asylum authorities should bear the burden of proof that such [benign] changes [of circumstances in the country of departure] are indeed fundamental and durable". The jurisprudence of this court is that no burden of proof lies upon either party in tribunal proceedings.

33. [2005] 1 WLR 1063; [2005] 4 All ER 580 (*Hoxha*).
34. It appears that while various provisions of the United Kingdom legislation operate by reference to the obligations of that country under the Convention (for example, ss 18 and 113 of the Nationality, Immigration and Asylum Act 2002 (UK); Sch 3, Item 1 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK)), the Convention has not been enacted into the domestic law and that in some respects the statute law is more narrowly drawn than the Convention: *R (on application of Pepushi) v Crown Prosecution Service* [2004] Imm AR 549, a decision of Thomas LJ and Silber J. See also *European Roma Rights* at AC 25–6 [8]; All ER 539 per Lord Bingham of Cornhill, AC 44–5 [41]–[42]; All ER 557–8 per Lord Steyn, AC 47–8 [49]–[51]; All ER 560–1 per Lord Hope of Craighead, where somewhat differing views were expressed as to the extent and mode of incorporation of the Convention by the law as it stood in July 2001, the critical date for that case.
35. *Hoxha* at WLR 1082 [60]; All ER 600.
36. See fns 21 and 22, above.
37. *Hoxha* at WLR 1082 [63]; All ER 601.
38. The United Nations High Commission for Refugees Lisbon Roundtable Meeting of Experts held in May 2001: see *Hoxha* at WLR 1082 [61]; All ER 601.

[47] The first respondent argued that articles of the Convention other than those so far referred to support his submission that once he has been accepted as a refugee he must be taken to be a refugee for all times and purposes, stressing that Chs II, III and IV, which are concerned with juridical status, employment and welfare in the country of asylum, and which confer upon a refugee many of the other Conventional benefits of citizenship, including rights to hold property (albeit as an alien),[39] of association,[40] of access to the courts,[41] to work for remuneration[42] and to welfare,[43] imply that a person, once recognised as being entitled to protection, effectively ceases to be a refugee, acquires a "status" as an ordinary citizen and may not be treated otherwise, or removed from Australia, or at least not removed unless and until the appellant establish relevantly changed circumstances in the first respondent's own or former country of residence.

[48] The argument would fail even if the Act left open unqualified recourse to the articles upon which the first respondent seeks to rely for the implication. Those articles do not purport to define a refugee either for all times or purposes or at all. Nor do they touch upon how a refugee is to be defined or accorded recognition as such, or to be entitled to continue to avail himself of protection. These matters are expressly and exhaustively the subject of Art 1 of Ch I. Such consequential rights as flow from recognition as a refugee and give effect to the extent that they do to the Convention, are the subject, in part at least, of the Act under which conditions of residence can be imposed, and of other legislation, including social security and industrial legislation enacted from time to time.

[49] Nor do Arts 32 and 33, which are concerned with expulsion, assist the first respondent. To discontinue protection upon the lapsing of a need for it, and to refuse to grant a visa, whether permanent or temporary in those circumstances, in consequence of which a person may be liable to be removed from an asylum country, is not to expel that person. Article 33(1) if anything argues to the contrary of the first respondent's submissions. It speaks prospectively and not historically by prohibiting expulsion to any frontier "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].

[50] A further basis for allowing the appeal is that the tribunal did not, as the Full Court held, fail to make the inquiries which the Full Court said that it was bound, in the proper exercise of its jurisdiction, to make. The tribunal did make findings with respect to Taliban activity generally in Afghanistan, what the future held in that regard, for example, sporadic but containable threats to security, and the applicant's susceptibility, if any, to threats from the Taliban and other sources.

[51] The appeal should be allowed. The orders made by the Full Court of the Federal Court on 27 July 2005, save in respect of costs, should be set aside. In place thereof the appeal to the Full Court should be dismissed. By consent the appellant should pay the first respondent's costs of the appeal to this court.

39. Article 13.
40. Article 15.
41. Article 16.
42. Article 17. Note, however, s 41 of the Act, which particularly permits qualification of this right.
43. Articles 20–24.

[52] **Kirby J.** This appeal from the Full Court of the Federal Court of Australia[44] concerns the meaning of Art 1 of the Refugees Convention (the Convention),[45] and its relationship to the system of temporary protection established by the Migration Act 1958 (Cth) (the Act).[46] It is a relationship that has been described as uncomfortable;[47] and it raises a question of construction that is made more difficult by the absence of settled state practice on the application of the provisions of the Convention to individual cases.[48]

[53] This court must decide whether a person recognised as a "refugee" for the purposes of Art 1A(2) of the Convention can lose that status at any time if he or she ceases, on the facts, to fall within the definition of "refugee". In resolving that question, the court must first decide whether it is necessary, under Australian law, to have regard to the Convention, and if so, to what extent. If the Convention is legally relevant, the court must determine a number of issues relating to its interpretation, including the extent of any change in circumstances necessary to ground a cessation claim, and whether the minister bears an evidentiary, or at least forensic, burden of proving the cessation of refugee status.

[54] Subject to any peculiarities of Australian law, in the absence of established state practice on the interpretation of Art 1C(5) of the Convention, the decision of this court has the potential to influence the interpretation of the Convention beyond Australian law. Experience demonstrates that courts in many countries, including Australia, pay close regard to court decisions in other countries grappling with the meaning and application of the Convention. This is such a decision.

[55] For the reasons that follow, it is my view that the majority of the Full Court came to the correct conclusion and, basically, for the correct reasons. The appeal from the Full Court's judgment should be dismissed.

The facts and decisional history

[56] *The grant and refusal of visas*: QAAH is a national of Afghanistan. He is a Shi'a Muslim of Hazara ethnicity. He arrived in Australia in September 1999. On 28 March 2000 he was granted a "temporary protection visa" by a delegate

44. *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363; 223 ALR 494; [2005] FCAFC 136 (*QAAH*).
45. Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150; 1954 ATS 5 (entered into force 22 April 1954), read with the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267; 1973 ATS 37 (entered into force 4 October 1967) (together, "the Convention").
46. The relationship was recently considered by this court in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; 213 ALR 668; [2005] HCA 6 (*NAGV*). In the Federal Court, see *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543; 151 ALR 685.
47. *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 84 ALD 40 at 54–5 [61]; [2004] FCA 1373; *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522 at 548 [103]; 228 ALR 623 at 646–7; 90 ALD 493 at 516–17; [2006] FCAFC 60 (*NBGM* (2006)).
48. J Fitzpatrick, "The End of Protection: Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection", (1999) 13 *Georgetown Immigration Law Journal* 343, pp 356–63; J Fitzpatrick and R Bonoan, "Cessation of Refugee Protection", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed E Feller, V Türk and F Nicholson), Cambridge Universtiy Press, Cambridge 2003, pp 512–13; M O'Sullivan, "Before The High Court: *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH*: Cessation of Refugee Status", (2006) 28 *Syd LR* 359, pp 359, 361.

of the appellant, the Minister for Immigration and Multicultural and Indigenous Affairs (the minister). In accordance with its terms, the visa would expire after 3 years. In granting the visa, the delegate made the following findings affirming that QAAH was entitled to protection as a "refugee", within the Convention definition:

> I accept that the applicant is a male from the Hazara ethnic group in Afghanistan. I also accept that if he returns to Afghanistan he has a real chance of being captured by the Taliban and forced to fight or be killed by them. I accept that the Taliban control large areas in Afghanistan, and there are no areas that the applicant could be safe in Afghanistan, as he is readily identifiable as an ethnic Hazara from his physical appearance and his language.

[57] In April 2000, QAAH applied for a permanent protection visa. On 27 March 2003, he was issued a further temporary protection visa. By its terms, this second visa remained in force for an indefinite time, pending a decision upon his application for permanent protection.

[58] During an interview with the minister's delegate in respect of his application, QAAH claimed that he feared remnants of the Taliban still operating in his district of Afghanistan. He argued that refusal of his application would involve the cessation of his refugee status. This course was said to be unjustified because any changes in the country circumstances in Afghanistan were slight. On 21 November 2003, the delegate refused QAAH's application for a permanent protection visa.

[59] *In the Refugee Review Tribunal*: QAAH then applied to the Refugee Review Tribunal (the tribunal) for review of that decision. The tribunal affirmed the delegate's decision. In doing so, the tribunal asked itself two questions. The first was whether the cessation provision in Art 1C(5) of the Convention applied in the circumstances of the case, where the applicant had previously applied for, and had been granted, a protection visa on the ground of refugee status. The second question was whether there was new evidence supporting the proposition that QAAH was currently a "refugee" for the purposes of the Act and the protection visas for which it provided.

[60] In answer to the first question, the tribunal held that the cessation provision in Art 1C(5) did apply and was fulfilled. As a result, it concluded that QAAH could no longer continue to refuse to avail himself of the protection of his country of nationality, Afghanistan. The tribunal accepted that the Taliban, if they were still in power, would have persecuted QAAH because of his Hazara ethnicity, and because he was a Shi'a Muslim. However, the tribunal concluded that, whilst remnants of the Taliban remained active in some parts of Afghanistan, by late 2001 they had ceased to be a coherent political movement. In the tribunal's opinion, there was no real chance of the Taliban re-emerging as an effective authority in the foreseeable future. QAAH made separate claims of persecution on account of his ethnicity and religion. Those claims were rejected on the basis that there was no real chance that he would be persecuted by any of the nominated causes or groups, if he were returned to Afghanistan. The tribunal therefore concluded that QAAH did not have a well-founded fear of persecution sufficient to attract Australia's protection obligations. It was on this basis that the application for a permanent protection visa was refused.

[61] *In the Federal Court*: QAAH then applied to the Federal Court of Australia for judicial review of the tribunal's decision. In that court, the primary judge (Dowsett J) dismissed the application. He concluded that the tribunal was not required to consider both of the questions identified above:[49]

> … [T]he question for the Tribunal in the present case was whether or not, at the time of the decision, [QAAH] had a well-founded fear of persecution for a Convention reason. It was not strictly relevant that he had previously applied for and received temporary … visas. In other words it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan.

[62] On appeal to the Full Court of the Federal Court, that court (Wilcox and Madgwick JJ; Lander J dissenting) concluded that the tribunal's failure to address the cessation issue properly, together with other mistakes, constituted jurisdictional errors. QAAH's appeal was therefore allowed and a rehearing was ordered in the tribunal. It is from those orders that the appellant, by special leave, now appeals to this court.

[63] *Contested approaches*: The minister argued that, in the course of their reasoning, the Full Court majority reached a number of conclusions which she contested. Among these was said to be a conclusion that a state party to the Convention, such as Australia, that had previously recognised the refugee status of the person concerned, bears a burden of proving that such a person has ceased to have that status before withdrawing it; that the approach to the grant of refugee status under Art 1A(2) of the Convention does not precisely mirror the approach to the cessation of refugee status under Art 1C(5); and that, in order for cessation to be established, so as to warrant a withdrawal of refugee status, there must be positive evidence that changes in circumstances in the country of nationality have been fundamental, stable and durable. The minister argued that these conclusions were not consistent with the applicable Australian law, including its reference to the language of the Convention.

The issues

[64] Six issues arise for decision by this court:

(1) *The Australian law issue*: Is it erroneous to decide this appeal by reference to the Convention provisions on the meaning of "refugee" and the circumstances in which status as a "refugee" has ceased? Is the answer to the appeal found exclusively in the Act's scheme for temporary visas? Or, reading the Act's provisions in light of the scheme of temporary visas, does Australian law oblige the decision-maker to approach arguments concerning refugee status and loss of that status by reference to the provisions of the Convention, including those provisions that apply to cessation of a previously accepted refugee status?

(2) *The United Nations High Commission for Refugees (UNHCR) assistance issue*: In answering the issues in this appeal, should this Court pay any regard to the submissions offered to it by and on behalf of the UNHCR? In construing the Convention and provisions of the Act referring to the Convention, should the court take into account opinions

49. *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1448 at [23] per Dowsett J, cited in *QAAH* at FCR 420 [305]; ALR 549.

expressed in the UNHCR handbook,[50] guidelines[51] and reports of expert meetings concerning the meaning of the Convention and its intended operation?

(3) *The Art 1C(5) test issue*: Do Arts 1A(2) and 1C(5) of the Convention impose an "identical" test, namely, whether or not the applicant has a well-founded fear of persecution for a Convention reason? Or do they impose two "separate and distinct" tests, which are applied at different times, and which are not "mirrored" precisely in one another?

(4) *The extent of change issue*: When making a decision to which Art 1C(5) of the Convention is relevant, is the decision-maker required to consider whether the purported change in country circumstances in the country of nationality is "fundamental", "stable" and "durable", as distinct from temporary and transient? Or does *any* change of circumstances, of whatever degree and duration, attract the operation of Art 1C(5) of the Convention?

(5) *The burden of proof issue*: Does the state party to the Convention which earlier recognised a person as a "refugee" bear a burden of proving changed circumstances warranting cessation of refugee status? Or does Australia's inquisitorial refugee determination process mean that a burden of proof, as such, may not be imposed? If a burden of a legal kind is not imposed, is a forensic obligation nonetheless applicable to the Australian decision-maker's reasoning?

(6) *The tribunal decision issue*: Whatever the resolution of the foregoing issues, did the tribunal approach its decision in the correct way? Is a rehearing futile because the country information on Afghanistan, provided to the tribunal, already convinced it of a material change of circumstances between the original grant to QAAH of a temporary visa as a refugee and the time of the tribunal's decision on his application for a permanent protection visa?

The Australian law issue

[65] *The provisions of municipal law*: In their joint reasons, the majority in this court state that Australian law is determinative of the issues in this appeal.[52] They conclude that, in the face of the many provisions of the Act that deal with the temporariness and "periodicity" of Australia's protection regime, the provisions of the Convention have no effect,[53] or at least must take second place to the operation of the applicable municipal law.

[66] I entirely agree that it is necessary to begin the resolution of the issues before this court with the provisions of Australian law under consideration. In case of any conflict, that domestic law prevails over the requirements of the Convention.[54] I also agree that relevant provisions of Australian law offer the framework for the resolution of the issues under consideration; and that Australian law is ultimately determinative of the questions in this appeal.

50. UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", 1979 (rev ed 1992).
51. 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", 2003.
52. Joint reasons at [34].
53. Joint reasons at [32]–[34].
54. *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 414 [136]; 206 ALR 130 at 164; 77 ALD 640 at 674; [2004] HCA 20.

[67] The central provision of Australian law in issue is s 36(2) of the Act. Because the language and structure of that section are critical to my conclusions, I will reproduce it here. 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 …

[68] From the language of its provisions, it is clear that s 36(2) points directly back to the Convention. It does this because it grants "protection" to a person to whom the minister is satisfied[55] Australia has protection obligations "under the Refugees Convention as amended by the Refugees Protocol". It follows that it is only when a person satisfies the requirements of Art 1 of the Convention that he or she becomes a person to whom Australia owes "protection obligations" under the Convention; that is, a "refugee".[56] Before that, by Australian law, no such obligations exist.

[69] *Incorporation of treaty definition*: Thus, as this court has noted on several occasions, s 36(2) directly incorporates into Australian municipal law the legal criteria for determining who is entitled to protection, thereby enlivening the minister's satisfaction.[57] In enacting s 36(2), the parliament's intention was to give effect to the "definition in Art 1 of the Convention as the criterion of the operation of the protection visa system".[58] Because, in this way, Art 1 is incorporated into Australian law, it cannot be said that having recourse to the requirements, object, scope and purpose of that article amounts to the subordination of municipal law to the demands of the Convention, as the joint reasons in this court would suggest. On the contrary, any other approach would involve a departure from the letter of Australian law.

[70] Nor are the specific requirements of Art 1 of the Convention, incorporated into Australian law by s 36(2) of the Act, altered by those general provisions of the Act that establish temporary visas, or emphasise "limited periods" or the

55. In its previous form, s 36(2) did not require the minister to be "satisfied" that the applicant was a person entitled to Australia's protection. The subjective criterion was introduced by Pt 1(5) of the Migration Legislation Amendment (Judicial Review) Act 2001 (Cth). The pre-existing form of the legislation does not apply in these proceedings.
56. A Grahl-Madsen, *The Status of Refugees in International Law*, Sijthoff, Leyden, 1966, vol 1, pp 399–401. Because this court has stated on numerous occasions that the whole of Art 1 is relevant to determining whether or not a person is a "refugee" within the meaning of the Convention and protocol, s 36(2) necessarily accepts into Australian law the whole of Art 1. See, for example, *NAGV* at CLR 176 [43]; ALR 677–8.
57. In its previous form, Div 1AA of Pt 2 of the Act was headed "Refugees". It contained s 22AA, which stated that "[i]f the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee". The term "refugee" was defined in s 4 as having "the same meaning as it has in Art 1 of the Refugees Convention". The Migration Reform Act 1992 (Cth) repealed s 22AA, deleted the word "refugees" and introduced the predecessor to s 36 (drawn in substantially similar terms). The explanatory memorandum accompanying the Bill stated that the change was a "technical" one designed to increase administrative efficiency by combining in one process the application for recognition as a refugee and the application for the grant of a protection visa. The purpose behind these reforms was not to limit the incorporation, into Australian municipal law, of Art 1 of the Convention. If anything, the reform had the effect of extending the incorporation, to include additional provisions of the Convention, by broadening the original, limited reference to "Article 1 of the Refugees Convention" to the more general "Refugees Convention and Protocol".
58. *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45]; 187 ALR 574 at 584; 67 ALD 577 at 587; [2002] HCA 14.

"effluxion of time".[59] First, only a limited number of the sections referred to in the joint reasons are actually addressed to Australia's protection regime. The remainder includes sections addressed to general powers (to issue visas (s 29), to impose conditions or restrictions on visas (s 41), to grant or refuse visas (s 65) and to cancel visas (116(1)). They also include sections establishing various classes of visa unrelated to Australia's protection obligations, including special visas for citizens of New Zealand (s 32), persons who are of a "prescribed status" (s 33), "absorbed persons" (s 34), former citizens of Australia (s 35) and persons who are subject to criminal justice and enforcement proceedings (ss 38 and 38A respectively). Whether or not these sections evince "periodicity" or impose temporal limitations on the right to enter and reside in Australia, they do not relate to Australia's protection regime. These general provisions may not be used to override the clear requirements of s 36(2).

[71] *Distinguishing recognition and protection*: Secondly, as I will explain in more detail below,[60] s 36 of the Act incorporates a distinction that is central to the operation of Art 1 of the Convention, namely, the distinction between *recognition* of a person as a refugee; and the conferral of Australia's *protection. Recognition*, as envisaged by the Convention, can only lapse in accordance with one of the cessation grounds set out in Art 1C. *Protection*, on the other hand, may lapse in accordance with the provisions of the Act. Because they are distinct processes, the lapse of *protection* does not necessarily have any causal effect on a person's *recognition* as a refugee. A person may remain "recognised" as a refugee notwithstanding the periodic lapse of a protection visa. In this sense, the Act does nothing more than establish a system of temporary *protection*. The periodicity of Australia's protection regime cannot be used to infer the existence of a regime of temporary *recognition.*

[72] By assuming that the provisions of the Act dealing with the temporariness of *protection* have some operation in relation to the *recognition* (or cessation) of a person's refugee status, the joint reasons confuse the distinct functions of recognition of refugee status and protection. With respect, this is a serious error of analysis. It is one which the majority in the Full Court avoided. The distinction between the two steps is central to the operation of Art 1 of the Convention. It is therefore vital to the operation of s 36 of the Act, which accepts the Convention in this respect, as part of the Australian law governing the entitlement to "refugee" status.[61] It follows that I would reject the conclusion expressed in the joint reasons[62] as to the supposed error of the majority in the Full Court in their approach to the legal questions presented by this appeal. There was no such error in the Full Court.

59. [2006] HCATrans 340 at 56.
60. These reasons below at [97]–[98].
61. Because s 36 incorporates Art 1 into Australian law, it can be assumed that the parliament intended it to be "… construed in accordance with the meaning to be attributed to the treaty provision in international law": *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 239; 142 ALR 331 at 339; [1997] HCA 4 per Dawson J; cf CLR 240; ALR 339–40 per Dawson J, CLR 251–2; ALR 349 per McHugh J (*Applicant A*); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265; 39 ALR 417 at 491–2; *Morrison v Peacock* (2002) 210 CLR 274 at 278–9 [15]; 192 ALR 173 at 176; 69 ALD 545 at 548; [2002] HCA 44 (*Morrison*).
62. Joint reasons at [37]–[38].

The UNHCR assistance issue

[73] *UNHCR guidelines and handbook*: Accepting, as I do, that s 36(2) of the Act requires consideration of the meaning and operation of Art 1 of the Convention, incorporated by reference as part of Australian law, it is necessary next to consider a threshold question that arose in this court, and in the courts below, about the use that might be made of the guidelines and other UNHCR material in the interpretation of Art 1. In her submissions, the minister expresses misgivings about the use of UNHCR material in aid of the interpretation of the law applicable in this case. I do not support those concerns.

[74] Article 31 of the Vienna Convention on the Law of Treaties forms part of (and substantially re-expresses) customary international law.[63] It requires state parties to international treaties, such as the Refugees Convention, where relevant, to examine both the "ordinary meaning" and the "context … object and purpose" of a treaty where it is applicable to the facts in issue before them.[64] In *Applicant A*,[65] McHugh J explained the "general principle that international instruments should be interpreted in a more liberal manner than … exclusively domestic legislation". This approach presents consequences for the materials that may be used to assist in the interpretation of international instruments. In the same decision, Brennan CJ explained:[66]

> Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.

[75] The purpose of this "holistic" approach to understanding treaty provisions is to "enable a simultaneous consideration of the treaty text and useful and valid extrinsic materials elucidating it".[67] It follows that, in the interests of determining the "context, object and purpose" of Art 1C(5) of the Convention in this case, "a wider range of extrinsic sources may be referred to than in the case of domestic statutes".[68]

[76] This court has frequently resorted to the UNHCR guidelines and the handbook in construing and applying the Convention.[69] This has been done because of the expertise of the UNHCR in the application of the Convention.

63. *Thiel v FCT* (1990) 171 CLR 338 at 356; 94 ALR 647 at 658–9 (*Thiel*); cf *Commonwealth v Tasmania* (the Tasmanian Dam case) (1983) 158 CLR 1 at 193–4, 222; 46 ALR 625 at 749, 774.
64. *Thiel* at CLR 356; ALR 659.
65. At CLR 255; ALR 352.
66. At CLR 231; ALR 333.
67. *QAAH* at FCR 388 [95]; ALR 518 per Madgwick J; cf *Morrison* at CLR 279 [16]; ALR 176;ALD 548; *El Greco (Aust) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at 326–7 [142]; 209 ALR 448 at 475; [2004] FCAFC 202.
68. *QAAH* at FCR 388 [95]; ALR 518 per Madgwick J; cf *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117; 102 ALR 339 at 356–7; 24 ALD 67 at 680; *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 294–5; [1980] 2 All ER 696 at 715–16.
69. See, for example, *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392; 87 ALR 412 at 420 (*Chan*); *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at 20 [61]; 175 ALR 585 at 599–600; 62 ALD 1 at 15; [2000] HCA 55; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at 545 [21]; 186 ALR 393 at 400; 67 ALD 257 at 264; [2002] HCA 7; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 35–6 [80]–[82];

Pursuant to its statute,[70] "the competence of [the UNHCR] to provide for the protection of refugees extends … to ensuring [a] correct interpretation of the provisions of the Refugees Convention consistent with international refugee law and protection requirements".[71] Article 35 of the Convention obliges state parties to "co-operate with [UNHCR]" in its "duty of supervising the application of the provisions of [the] Convention". This principle is also reflected in the preamble to the Convention. The UNHCR's specific expertise in the application of Art 1C derives from one of its functions, which is to declare that refugees, emanating from a particular country, no longer fall within the UNHCR mandate.[72] The power to terminate particular mandates, in respect of nominated circumstances, was exercised some 21 times between 1973 and 1999.[73] In deciding an appeal such as this, due weight should therefore be given to the guidance provided by relevant UNHCR publications, including the UNHCR handbook and the guidelines. This does not mean that such sources are binding on this or any other court. But it does mean that, like other final courts, this court will often derive great assistance by having access to such materials.[74]

[77] *The UNHCR as amicus curiae*: In this appeal, the UNHCR exceptionally, and so far as I am aware, uniquely, sought to be heard as an *amicus curiae*. Counsel were retained for this purpose and travelled to the hearing to make the application. I would unhesitatingly have granted leave for the UNHCR to be heard in these proceedings. However, unrestricted leave for oral argument was withheld by the court. The UNHCR's participation was confined to written submissions.

[78] The intervention of the UNHCR is recorded in important proceedings in national courts overseas.[75] In my view, it should be welcomed, not resisted. Decisions of national courts play an important role in expressing the meaning of the Convention and deciding the application of such treaty law. In effect, in deciding cases such as the present, national courts are exercising a species of international jurisdiction.[76] The more assistance courts can receive from the relevant international agencies, in discharging such international functions, the better.

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78 ALJR 992 at 1008–9; 78 ALD 224 at 247–8; [2004] HCA 32; *Re Woolley; Ex parte Applicant M276/2003 (by their next friend G S)* (2004) 210 ALR 369 at 399 [107]; 79 ALJR 43 at 67; [2004] HCA 49.

70. Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428(v), Annex, 5 UNGAOR Supp (No 20) 46, 1950.
71. UNHCR written submissions, pp 1–2.
72. See, for example, the following formal declarations of general cessation: "Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique", 1996; "Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania", 1997; "Applicability of the Ceased Circumstances; Cessation Clauses to pre-1991 refugees from Ethiopia", 1999; and "Declaration of Cessation — Timor Leste", 2002.
73. Cf Fitzpatrick & Bonoan, 2003, pp 499–512.
74. *Immigration and Naturalization Service v Cardozo Fonseca* 480 US 421 (1987) at 439 n 22; *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477 at 500; [2001] 1 All ER 593 per Lord Woolf MR, AC 519–20; All ER 607–8 per Lord Steyn.
75. See, for example, *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629; [1999] 2 All ER 545.
76. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622 [168]; 208 ALR 124 at 167; 79 ALD 233 at 275–6; [2004] HCA 37, citing I Brownlie, *Principles of Public International Law*, 5th ed, Oxford University Press, Oxford, 1998, p 584.

[79] *Utilising UNHCR assistance*: The guidelines do not express rules of law. To the extent that they are inconsistent either with the Act or the Convention itself, they must be disregarded. The Full Court was fully aware of this.[77] Yet as McHugh J stated in *Chan*,[78] the UNHCR handbook is a document designed to "assist member States to carry out their obligations" under the Convention and the protocol. Having been prepared by experts, it is available for use by any decision-maker considering whether a person is a "refugee"; or whether a person who has previously been recognised as a "refugee" has ceased to be one.[79]

[80] It follows that the UNHCR guidelines and handbook constitute a useful source of expertise that can aid the interpretation of provisions in the Convention that are ambiguous or unclear. Specifically, they can assist in elucidating the purpose and object of the Convention and the way it is intended to operate, and does operate, in other countries.[80] They may therefore be used to assist courts such as this in the interpretation of Convention provisions such as Art 1C(5). Particularly is this so in the absence of clear national jurisprudence and relevant state practice, factors that can help, where available, to explain the meaning of provisions of any international treaty.[81]

[81] To the extent that this court cuts itself off from insights expressed in the UNHCR guidelines, the handbook and expert views, about the meaning and purposes of the Convention, it reduces its own capacity for accurate decision-making. It limits the value that its decisions may have for other countries that will have no such inhibitions.[82] It risks adopting interpretations of the Convention that put it at odds with the courts of other state parties engaged in the interpretation of the treaty. And it reveals a degree of parochialism that, unless clearly warranted by the peculiarities of domestic law, is inappropriate to the legal task of interpreting, and giving effect to, the provisions of an international treaty which Australia has opted to ratify and which it has incorporated by reference into its federal law.

The Art 1C(5) test issue

[82] *The recognition and cessation decisions*: Recognising, therefore, that s 36(2) of the Act requires a decision-maker to have regard to Art 1 of the Convention, as elucidated by the submissions of the parties and any persuasive UNHCR materials, it is necessary, next, to consider a number of issues relating to the interpretation of Art 1.

[83] Central to this appeal is a controversy about the appropriate test to be applied by a decision-maker in cases where it is alleged that a person's status as a "refugee" has ceased. Before the court this issue boiled down to whether or not

77. *QAAH* at FCR 376 [46]; ALR 506 per Wilcox J.
78. *Chan*at CLR 424;ALR 445. See *QAAH* at FCR 376 [46]; ALR 506.
79. *QAAH* at FCR 376–9 [46]–[54]; ALR 506–9 per Wilcox J.
80. Art 32 of the Vienna Convention on the Law of Treaties; opened for signature 23 May 1969, 1155 UNTS 331; 1974 ATS 2 (entered into force 27 January 1980).
81. There is very little state practice concerning the application of Art 1C(5) to individual cases. This appears to be because the provision tends to be invoked most clearly in mass influx situations, where it is not possible to conduct individual assessments; cf O'Sullivan, 2006, p 361; Fitzpatrick and Bonoan, 2003, pp 512–13; UNHCR guidelines, pp 2–3 [3]. On the standards to be applied in this context, see G Gilbert, "Current Issues in the Application of the Exclusion Clauses" in Feller et al, 2003, pp 467–8.
82. See, for example, *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 297–8.

a decision-maker is to apply the same test in respect of *cessation* under Art 1C(5) as he or she would apply in respect of an original application for *recognition* as a refugee under Art 1A(2).

[84] The minister argued that a precise symmetry exists between the tests imposed by Arts 1A(2) and 1C(5)[83] of the Convention. According to the minister, in each case the question is whether the person has a "well-founded fear of persecution" for a Convention reason, as a result of which the person is unwilling to avail himself or herself of the protection of the country of nationality.

[85] According to this view, in Australia, when a further protection visa is sought by a person previously found to be a "refugee", the minister is required by s 36(2)(a) of the Act to conduct the same inquiry as if the person were applying for protection for the first time. Thus, the minister would have to redetermine, on each occasion, whether or not the person fell within the definition of "refugee" contained in Art 1.[84] On this view, the minister would have to consider afresh the circumstances prevailing at the time of each decision. The question to be asked would be whether or not the visa applicant is a "refugee" at the date of each decision. Hence, refugee status could "come and go" according to changed conditions in a person's country of nationality".[85]

[86] QAAH submitted that Arts 1A(2) and 1C(5) involve "separate and distinct" tests. According to him, in cases where the minister has previously been satisfied that Convention obligations arise in respect of him, pursuant to Art 1A(2), the initial question for the tribunal is whether such obligations have ceased. That question demands that attention be given to Art 1C(5). Without this second stage in the test, QAAH submitted that Art 1C(5) would have no meaning additional to the test set out in Art 1A(2). In effect, it would be superfluous. Because such a conclusion would not readily be arrived at, in the structure and apparent scheme of the Convention, the provisions of Art 1C(5) need to be given work to do in a case where a person has already been found to be a "refugee" but is said no longer to warrant that status because of supervening events in the country of that person's nationality.

[87] In support of his interpretation of the Convention, QAAH referred to the UNHCR guidelines. He submitted that the "symmetrical" approach urged by the minister would lead to a situation in which Australia's protection obligations would be "granted in instalments to be affirmed by the minister each time it is necessary for a recognised refugee to seek another visa". QAAH argued that this interpretation had no foundation either in the Act or in the Convention itself. Especially was this so because, so far as the Convention was concerned, it established defined obligations on the part of the state party towards a person recognised as a "refugee". The language and purpose of the Convention suggested that, once recognised as a "refugee", that status could not be withdrawn and regranted, or granted and withheld, periodically. A threshold issue in this appeal is therefore whether the Convention, and the Act read in the light of the Convention, reflect the conception of "refugee" status urged by QAAH, or the contrary, periodic conception urged by the minister.

83. In the minister's words, the tribunal should ask itself an "Art1A(2)/1C(5) question": appellant's outline of submissions, p 20 [56].
84. Whether or not a person has previously been recognised as a refugee, the tribunal's function under the Act was said to be the same: to decide whether or not it is satisfied that the applicant is a refugee within the meaning of Art 1.
85. [2006] HCATrans 339 at 24.

[88] *Authority of this court*: In deciding this issue, something should first be said of the reliance that the minister placed on the decisions of this court concerning the appropriate test under Art 1C(5). The minister's submission, that refugee status could "come and go" with changed conditions in the country of nationality, was said to be supported by observations made in the decisions in *Chan*[86] and *Minister for Immigration and Ethnic Affairs v Mayer*.[87]

[89] *Chan* concerned an application for a protection visa by a Chinese national. He alleged that he faced persecution on the basis of his association with a faction of the Red Guards that had lost a struggle for power in his local district. This, he said, had resulted in his detention and condemnation as "anti-revolutionary", and ultimately, his exile to another district of China. By the time the matter came before this court, Mr Chan's application for protection had been refused twice.

[90] The court found in his favour, concluding that, in failing to recognise Mr Chan's well-founded fear of persecution, and refusing him a protection visa, the tribunal had acted so unreasonably as to warrant intervention. Relevantly, in the course of reaching this finding, Dawson J stated that:[88]

> Art 1C speaks of the circumstances in connection with which he has been recognized as a refugee having ceased to exist, suggesting that refugee status under the Convention may come and go according to changed conditions in a person's country of nationality and is to be determined according to existing circumstances whenever a determination is required.

Further, Toohey J stated that:[89]

> The structure of Art 1 implies that status as a refugee is to be determined when recognition by the State party is sought and that, if granted, the status may thereafter be lost because the circumstances giving rise to recognition have ceased to exist.

[91] The minister argued that these statements supported her submission that the test under Art 1C(5) of the Convention had to mirror the test under Art 1A(2). Accordingly, whether approached through Art 1A(2) or Art 1C(5), the result would be the same: cessation of the circumstances giving rise to refugee status would automatically result in a person's ceasing to fall within the Convention definition of "refugee". The person would no longer enjoy the entitlement to a protection visa under the Act.

[92] The second case upon which the minister placed reliance was *Mayer*.[90] The applicant there held a "temporary entry permit". He subsequently applied to the minister for "recognition" as a "refugee" within the terms of the Convention. He did so presumably in the expectation of satisfying one of the requirements for the grant of a permanent protection visa, namely, that he was a "refugee" within the meaning of the Convention. The application was refused. The appeal to this court turned on the question of whether the minister's decision to refuse the application constituted a "decision under an enactment" within the meaning of s 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth), capable of being reviewed within the terms of that Act. The court observed that, in order to

86. At CLR 398–9;ALR 425; [2006] HCATrans 339 at 24.
87. (1985) 157 CLR 290 at 302; 61 ALR 609 at 617–18 (*Mayer*); [2006] HCATrans 339 at 24.
88. *Chan* at CLR 398–9;ALR 425.
89. *Chan* at CLR 405;ALR 429.
90. *Mayer* (1985) 157 CLR 290; 61 ALR 609.

be eligible for the grant of a protection visa under the Act, a person had to be capable of fulfilling the requirements for the grant *at the time of* the grant:[91]

> … [T]he reference to a determination that an applicant for an entry permit "has" the status of refugee is a reference to a contemporaneous determination rather than to some past determination that the applicant had the "status of refugee" at the time when that past determination was made.

[93] The minister submitted that the cited passage in *Mayer* stood for a proposition similar to *Chan*. Because it was necessary for a person to meet the requirements at the time of the grant, the question to be asked would at all times be the same. It would be so irrespective of whether the person had previously been recognised as a "refugee" or not. The question would always be whether or not the person was a "refugee" within the meaning of the Convention at the time of the applicable decision.

[94] Neither of the cited decisions constitutes a binding determination of the issue that must now be decided. This court has not previously decided the application of Art 1C(5) in circumstances similar to the present case. Specifically, this court has not decided a cessation claim in circumstances where a person has previously applied for, and been granted, recognition as a "refugee", thereby having an entitlement to Australia's protection. Both *Mayer* and *Chan* dealt with claims under Art 1A(2), rather than under Art 1C(5). The applicants in those cases, unlike QAAH, had not previously been recognised as "refugees".[92] Any observations made by judges of this court in the earlier authorities must be read in the light of the different issues then under consideration. Although the earlier remarks must be read with respect for any assumptions that they express, they do not bind us in concluding the issue that now falls for determination.

[95] *The language and structure of Art 1*: Accepting that Australian law requires recourse to the Convention, specifically Art 1, it is necessary to consider closely the language and structure of that provision. Observations drawn from the language and structure of Art 1 are persuasive considerations against the "symmetrical" approach advocated by the minister. Article 1 relevantly provides:

> A. For the purposes of the present Convention, the term "refugee", shall apply to any person who:
>
> …
>
> (2) As a result of events occurring before 1 January 1951 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 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
>
> …

91. *Mayer* at CLR 302; ALR 618.
92. *QAAH* at FCR 383 [70]; ALR 513 per Wilcox J.

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 connection with which he has been recognized 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 A (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 …

[96] *Observations on Art 1*: Several features of Art 1 should be noticed. First, the provision establishes a process by which a person becomes "recognised" as a refugee. In using the language of "recognition", rather than "rendering", "becoming" or "constituting", the article connotes a process whereby a person who already is a refugee gains formal "recognition" as such within the country of refuge. Recognition does not render a person a "refugee". It simply recognises the status as one that preceded the recognition. This is why the process is commonly described as merely "declaratory".[93]

[97] Secondly, having established the process of "recognition", the article assumes that the cessation clauses contained in Art 1C of the Convention will only apply to a person who has been "recognised" as a refugee in accordance with Art 1A. Indeed Art 1C assumes that the person in question has previously been found to "fall under section A", and (in respect of Art 1C(5) specifically) that he or she has previously been "recognised as a refugee". Because Art 1C(5) presupposes the earlier "recognition" of a person under Art 1A(2), the language of Art 1C(5), on its face, can have no application to a person who has not already been "recognised as a refugee" under Art 1A(2).

[98] Thirdly, Art 1C(5) speaks of two discrete functions or processes. The first, as I have explained, is "recognition". The second is "protection".[94] Because Art 1C(5) applies to a person who has been "recognised" as a refugee, and who can no longer continue to refuse to avail himself or herself of the protection of the country of nationality, "recognition" is said to be a function of the Convention; and "protection" a function of municipal law (in the case of Australia, of the Act).[95]

[99] *Separate and distinct tests required*: This analysis of the language and structure of Art 1 indicates that what was intended was a two-stage approach to Arts 1A(2) and 1C(5). The provisions contemplate two separate inquiries, by inference occurring at different times. The first, performed in accordance with Art 1A(2) of the Convention, involves a determination of an applicant's "refugee" status. The question at that stage, the answer to which is merely "declaratory",[96] is whether or not the applicant is to be recognised as a refugee.

93. UNHCR, "Refugee Status Determination: Identifying who is a refugee", 2005, pp 4, 18. Before this court, the minister stated that she did not contest this conclusion. However, she submitted a qualification to this concession, to the effect that the recognition was declaratory only "as at a point in time" of the applicable assessment: [2006] HCATrans 340 at 86.
94. O'Sullivan, 2006, p 361.
95. *QAAH* at FCR 386 [83]; ALR 515.
96. These reasons above at [96].

[100] To this status determination, the language of Art 1C(5) adds an additional, distinct and subsequent process. It does so because it presupposes that "recognition" as a refugee has already happened. But, as explained,[97] this can only have occurred under Art 1A(2). The words "circumstances in connection with which he has been recognised as a refugee" are relatively clear. They indicate that the person concerned "has been recognised as a refugee". Had the drafters instead used the words "became a refugee" or "was a refugee", perhaps Art 1C(5) could be taken to apply, like Art 1A(2), to a person who *is* a refugee but who has not yet been *recognised* as such.[98] However, in this important respect, the language of the two sections, and the lines of inquiry they each prescribe, differ.

[101] Upon this analysis, Art 1C(5) of the Convention cannot apply to a person who has not previously been recognised as a refugee.[99] Nor can Art 1A(2) apply to a person who has already been so recognised. It follows that the approach to the *grant* of "refugee" status under Art 1A(2) cannot "mirror" or be "symmetrical to" the approach to *cessation* of refugee status under Art 1C(5). The language of the Convention, its structure and apparent scheme, deny such an interpretation.

[102] That Art 1 of the Convention contemplates separate and distinct tests is confirmed by UNHCR in its handbook.[100] The two-stage approach was also recently affirmed by the Roundtable Meeting of Experts on the operation of the Convention, convened by UNHCR in Lisbon, Portugal. The summary conclusions of that meeting state that "[i]n principle, refugee status determination and cessation procedures should be seen as separate and distinct processes, and should not be confused".[101] I agree with, and adopt, the opinion of the international experts. Their opinion and conclusions adopt the correct interpretation of the Convention. It is the scheme of refugee status to which, by its ratification of that treaty, Australia has agreed, and which, by s 36(2) of the Act,[102] the parliament has accepted and incorporated into Australian law.

[103] To the foregoing considerations, I would add an obvious point arising from the structure of Art 1 of the Convention itself. The inclusion of two separate provisions within Art 1 points against the creation of "symmetrical" or "identical" tests for recognition and cessation of "refugee" status for the purpose of the Convention. Had the drafters of the Convention intended, as the minister submits, that a single test applies, it is reasonable to ask why they would have included in Art 1 a separate and additional section dealing with cessation, framed in relevantly different terms. As QAAH argued, if the approach to the meaning of the Convention contended for by the minister were given effect, the cessation provision contained in Art 1C(5) would be effectively superfluous. It would have no purpose or meaning additional to that of Art 1A(2).

[104] Whilst not conclusive, this last consideration, when taken with those already mentioned, convinces me that this court should accept the meaning of the Convention explained in the UNHCR handbook. That meaning is reinforced by

97. These reasons above at [97]–[98].
98. See comments of Lord Brown of Eaton-under-Heywood in *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 at 1082 [61]–[62]; [2005] 4 All ER 580 at 601 (*Hoxha*).
99. Cf *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 302.
100. Para 112.
101. UNHCR Expert Roundtable, "Summary Conclusions: Cessation of Refugee Status", in Feller et al, 2003, p 550 [26].
102. These reasons above at [65]–[72].

the recent opinion of international experts. Moreover, it is expressed in the language of Art 1 of the Convention itself. To the extent that the minister submitted to the contrary, I would reject her submission.

[105] *Refugee status coming and going*? The difficulty with the minister's approach to the Act and the Convention is compounded by her submission that "refugee" status can "come and go".[103] This view conflates the discrete concepts of *recognition* and *protection*.[104] Because recognition is an action distinct from protection, unless cessation occurs, a person may, notwithstanding the withdrawal of *protection*,[105] none the less remain *recognised* as a "refugee" within the terms of the Convention. Speaking specifically of Art 1C(5), a person may remain so recognised unless and until the circumstances in connection with which he or she was recognised as a "refugee" in the first place cease to exist. This would be so notwithstanding any periodic lapse or renewal, or non-renewal, of national temporary protection visas,[106] because the Convention does not establish a system of "temporary recognition". In this light, as Allsop J correctly explained in *NBGM* (2006),[107] the minister's approach:

> … 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 [Art 1]A(2), absent the operation of the cessation provisions in [Art 1]C. Not only is that 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).

[106] I agree with Allsop J's analysis. In my view, both as a matter of international and municipal law, it is correct. In confirmation, in its official documentation, the UNHCR has repeatedly stated that the list of cessation grounds in Art 1C of the Convention is exhaustive. If it were accepted that *recognition* as a "refugee" under the Convention could lapse in accordance with the lapse of national *protection*, all of the instances in the Act in which protection visas may lapse or be cancelled would, of necessity, effectively become additional cessation grounds. By the text of the Convention, this is not the case and it may not be so. The introduction by individual state parties of additional cessation grounds into the exhaustive list contained in Art 1C of the Convention is a legally impermissible course.[108]

[107] *Consequences of the distinction*: The significance of the distinction between recognition and protection is that, at the time when cessation proceedings are commenced, a person who has previously been recognised as a "refugee" is still recognised as a refugee under the Convention. This is so whether or not he or she still has an Australian protection visa. Therefore, the answer to the question under Art 1A(2) of the Convention will necessarily be in the affirmative. The person will still have an established well-founded fear of persecution for a Convention reason. Under the Convention, this fact can be displaced once an available ground of cessation is made out. However, at the

103. [2006] HCATrans 339 at 24.
104. These reasons above at [98].
105. See, for example, Pt 2, Div 1, Subdivs C, D, E, F, G, GA and GC of the Act.
106. Especially is this so when a visa expires or is cancelled for reasons unrelated to ceased circumstances.
107. *NBGM* (2006) at FCR 572 [201];ALR 670;ALD 540.
108. Cf UNHCR guidelines, pp 5–6 [18]; UNHCR handbook, para 24.

commencement of any cessation proceedings, the applicant *is* still a "refugee" for Convention purposes and hence for the purposes of the Act. A de novo inquiry under Art 1A(2) is therefore redundant. Only by ignoring or misstating the significance of the distinction between recognition and protection could a de novo inquiry produce anything other than a legally irrelevant outcome. The minister's so-called "symmetrical" approach fails to appreciate this distinction.

[108] *Consequences for the tribunal's decision*: If, in the present case, the tribunal had conducted the inquiry required under s 36(2) of the Act, it would have concluded that QAAH, a person already recognised as a "refugee" within the terms of Art 1 of the Convention and s 36 of the Act, upon whose status the cessation provisions had not yet operated, was a person to whom "Australia has protection obligations under the … Convention". This conclusion could have been displaced had one of the cessation provisions operated against him. However, because cessation was not considered, the correct answer to an Art 1A(2) inquiry would have been that QAAH was a "refugee", because he had already been recognised as such by a state party to the Convention and no consideration had yet been given to whether cessation, within the terms of the Convention, had been established.

[109] To the extent that the minister's delegate and the tribunal approached the task required by the Act differently, they erred in law. To the extent that the primary judge failed to perceive that error as an error of jurisdiction, by which the administrators asked themselves the wrong question, he too erred. The Full Court majority were correct to detect that error and to provide relief against it.

The extent of change issue

[110] *Implication of fundamental change*: Accepting, as I do, that the two provisions contained in Art 1 of the Convention require the decision-maker to conduct distinct inquiries, what is the appropriate test to be applied in individual cases where cessation is alleged to have occurred? The test for recognition with respect to Art 1A(2) is accepted: whether or not the person has a well-founded fear of persecution for a Convention reason. But what does the cessation provision in the Convention require? How, conformably with the Convention, is the minister to satisfy herself that conditions that formerly sustained an affirmative determination of "refugee" status have ceased to exist?

[111] QAAH submitted that not all changes in country circumstances would meet the requirements of Art 1C(5) of the Convention or sustain a conclusion of cessation of "refugee" status. What was required was a "fundamental", "stable" and "durable" change in conditions. In the joint reasons, it is said that the words "fundamental", "stable" and "durable" have no textual basis either in the Convention or in the Act; and that the language, which has been drawn from the UNHCR guidelines on cessation, could only be useful in determining the refugee status of an entire *population*, not the status of *individuals*. In this respect, the joint reasons effectively adopt the minister's submissions. I disagree with their conclusion.

[112] *Significance of the decision*: At the outset, it is important to recognise, as Lord Brown of Eaton-under-Heywood did in *Hoxha*, that Art 1C(5) of the Convention is "calculated, if invoked, to redound to the refugee's disadvantage,

not his benefit".[109] If successfully invoked, that provision will have the effect of removing the substantial rights and entitlements that otherwise flow in international and national law from recognition as a "refugee", entitled to protection from state parties to the Convention.[110] Such serious, and in some cases life-threatening, consequences would not ordinarily be visited upon a person without strong and persuasive reasons justifying that course.

[113] A construction that would allow a change in circumstances to be construed too broadly does not evince a precautionary attitude on the part of a decision-maker whose decision potentially poses grave consequences for the subject of the decision. To say this is to say no more than is obvious and inherent in the language, structure and purpose of the Convention. Self-evidently, taking away a protection status that is contingent on a person's qualifying as a "refugee" within the Convention is a very serious step. For that step to be taken, the Convention provides criteria. They are expressed in the language of Art 1C(5) dealing with cessation.

[114] According to the language of Art 1C(5) it is not *any* change in country circumstances that will justify taking the step contemplated. The cessation provision is expressed negatively and exhaustively. According to ordinary principles of construction, it should be interpreted restrictively.[111] This means narrowly: that is, the clauses should not be taken to apply too easily. Reasons for this approach are convincingly explained in the UNHCR handbook:[112]

> 135. "Circumstances" [in Art 1C(5)] 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.

[115] *The language of Art 1C(5)*: The language of Art 1C(5) of the Convention makes it plain that for any change to be within that article it should be such that it goes to the root of "the circumstances in connection with which [the applicant] has been recognised as a refugee". It must be such that the person "can no longer … continue to refuse to avail himself of the protection of the country of nationality". I agree with QAAH's submissions:[113]

> … [T]he inquiry in [Art 1]C(5) is not simply about whether circumstances have ceased to exist. That is the pointy end of it. The inquiry is whether a person can no longer continue to refuse to avail himself of protection of that country because the [entitling] circumstances have ceased to exist … [T]hat is why transitory false dawns … in the violent or political nature of the country from which refuge has been sought will usually not suffice.

[116] Resolution of the issue presented by Art 1C(5) of the Convention must therefore focus upon the extent of the change in circumstances in a person's country of nationality, such that it can be said that the circumstances that

109. *Hoxha* at WLR 1082 [63]; All ER 601.
110. These include rights relating to housing (Art 21), social security (Art 24) and gainful employment (Ch III).
111. UNHCR handbook, paras 115–16; cf UNHCR Executive Committee Conclusion No 69 (XLIII), 1992.
112. UNHCR handbook, para 135.
113. [2006] HCATrans 340 at 63.

previously gave rise to recognition of the person as a refugee have ceased. Only then may that person continue to refuse to avail himself or herself of the protection of the country of nationality.

[117] If the language of Art 1C(5) of the Convention posited only a "change in circumstances", perhaps temporary, slight or superficial changes would satisfy the cessation test. However, the language and purpose of the article stand against that interpretation. As Professor Goodwin-Gill explains, the Convention requires a decision-maker to ask whether "the nature of the changes [is] such that it is more likely than not that the pre-existing basis for fear of persecution has been removed".[114] Temporary, superficial, insubstantial or ineffective changes will not satisfy this test. This is why the guidelines and other publications of UNHCR indicate that a decision-maker must consider whether the suggested change in circumstances is "fundamental",[115] "stable"[116] and "durable":[117]

> Cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1A(2). When those reasons disappear, in most cases so too will the need for international protection. Recognising this link, and exploiting it to understand whether the changes in circumstance are relevant and fundamental to the causes of flight, will serve to elucidate circumstances which should lead to cessation of status. This is particularly important with respect to individual cessation.

[118] To similar effect, the UNHCR Executive Committee conclusions on the subject of cessation state:[118]

> … [T]he possibility of use of the cessation clauses … in situations where a change of circumstances in a country is *of such a profound and enduring nature* that refugees from that country no longer require international protection, and can no longer continue to refuse to avail themselves of the protection of their country.

[119] *Principle of non-refoulement*: It is true that the words "fundamental", "stable" and "durable" do not, as such, appear in the Convention. But they are entirely appropriate to the context of cessation proceedings, including the serious step of taking away from a person recognition as an internationally protected "refugee". In the Full Court in *NBGM* (2006), the same idea was explained by reference to the need for "demonstration, with clarity, of the lasting nature of the changes in circumstances", which necessarily follows from the "gravity and likely permanence of the consequences of applying [Art 1C(5)] against the person hitherto recognised as a refugee".[119]

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114. G Goodwin-Gill, *The Refugee in International Law*, 2nd ed, Oxford University Press, Oxford, 1996, p 87.
115. UNHCR handbook, para 135.
116. UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", 2001, p 14 [54] [footnote omitted].
117. UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", 2001, p 14 [54]; cf UNHCR Executive Committee Conclusions No 29 (XXXIV), 1983; No 50 (XXXIX), 1988; No 58 (XL), 1989; No 79 (XLVII), 1996; No 81 (XLVIII), 1997; No 85 (XLIX), 1998; No 87 (L), 1999; No 89 (L), 2000; and No 90 (LII), 2001; UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", 2001, p 14 [54].
118. UNHCR Executive Committee Conclusions No 65 (XL11), 1991; No 69 (XLIII), 1992 (Cessation of Status) [emphasis added].
119. *NBGM* (2006) at FCR 567 [172];ALR 664–5;ALD 535–6 per Allsop J; cf *Hoxha* at WLR 1083 [65]; All ER 601–2.

[120] In effect, such requirements are inextricably linked, and reinforced by, the duty of non-refoulement, expressed as one of the central objectives of the Convention.[120] Where a change in circumstances is slight, impermanent, insubstantial or ineffective, a state party will run the risk of returning a person to a place where he or she may face persecution upon return. That risk is one against which the Convention has set its face. UNHCR has explained:[121]

> … [C]essation 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.

[121] The test which the minister advocates, now endorsed in the joint reasons in this court,[122] places no real qualifications on the substantiality, effectiveness or temporariness of the purported change in circumstances of the country of nationality. Yet by definition, these circumstances were earlier such that the person concerned was found to have a "well-founded fear of being persecuted" because of them, and was in need of protection from a country of refuge upon a Convention ground. The adoption of such insubstantial criteria risks departure from Australia's duty of non-refoulement. It is contrary to the language and purpose of the Convention to which the Act, by s 36(2), has given effect as part of Australian law.

[122] *Conclusion: requirement of significant change*: It follows that when the test in Art 1C(5) of the Convention is applied, the decision-maker is obliged to consider whether any purported change in circumstances of the country of nationality is fundamental, stable and durable. Before cessation can be said to have occurred, conditions in the country of nationality must have changed in a significant and enduring way. Anything less would not comply with the language and purpose of the applicable law. The fourth issue should be decided against the minister.

The "burden of proof" issue

[123] *The suggested error of the Full Court*: Having concluded that separate tests exist in respect of Arts 1A(2) and 1C(5) of the Convention; and that a decision-maker considering the Art 1C(5) test must decide whether any purported changes are fundamental, stable and durable in order to sustain a conclusion that "refugee" status, once accepted, has ceased in accordance with the Convention, it is now necessary to consider the fifth issue. This is whether the Full Court erred in suggesting (if it did) that the minister bears a burden of proving cessation in the sense explained.

[124] The minister argued that neither the Convention nor the Act imposes a burden of proof on the minister in undertaking a review of a decision not to grant a permanent protection visa. The minister relied on the language of Art 1 of the

120. The duty is supported by international treaties prohibiting torture and inhuman and degrading treatment, including Art 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85; 1989 ATS 21 (entered into force 26 June 1987); and Arts 7 and 17 of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171; 1980 ATS 23 (entered into force 23 March 1976).

121. UNHCR, "Considerations Relating to Cessation on the Basis of Art 1C(5) of the 1951 Convention With Regard to Afghan Refugees and Persons Determined in Need of International Protection", 2005, p 1.

122. Joint reasons at [39].

Convention, which, it was argued, says nothing about the determination process by which a person gains recognition as a "refugee" or any consequent entitlement of that person to Australia's protection. Upon this basis, the minister submitted that, if any burden of proof were to arise, it could only do so in accordance with municipal law; and that nothing in the Act or any other Australian law imposed a requirement on the minister to accept any burden of proof in applying Art 1 of the Convention to the facts of a case like the present. The court was referred to comments in *Abebe v Commonwealth* and other cases, in which the general inquisitorial character of proceedings before the tribunal was described.[123] That authority was said to stand for the proposition that no burden of proof could be applied in such proceedings, whether upon the minister, the applicant or anyone else.

[125] The minister's submission in this respect is accepted in the joint reasons.[124] Although those reasons agree that, in some cases, the minister's delegate or the applicant will have a greater capacity to provide evidence or information about country conditions, they conclude that this does not warrant imposing a "burden" on either party in the context of cessation proceedings.[125] For this reason, the joint reasons reject the approach of the majority in the Full Court.

[126] *No burden of proof was assigned*: On my reading of the reasons of the majority in the Full Court, their Honours did not express a view that there is a burden of proof "resting on a state that contends that a person who has been recognised as a refugee has ceased to have that status".[126] In citing those words, Wilcox J was merely referring to comments made by Lord Brown in *Hoxha* to that effect. Both judges in the majority in the Full Court would have been fully aware of the repeated indication by this court that proceedings before the tribunal are generally inquisitorial in character. Thus, Wilcox J explicitly acknowledged that "in a technical sense, no burden of proof rests on any party in relation to review of an administrative decision".[127] This was a correct statement. The majority below did not make the error which the minister asserted in this court and which the majority in this court have now accepted.

[127] *The necessity of distinct persuasion*: Lord Brown's statement was both understandable and correct in the context of the operation of the Convention as it applies in England. That a person who asserts a relevant change in circumstances must establish such a change in some appropriate way, if it is disputed, is an unremarkable proposition. It is supported in this context both by UNHCR material and by the majority of academic opinion on the interpretation of Art 1C(5) of the Convention. UNHCR has repeatedly stated that, when government decision-makers are seeking to apply the cessation clause to a refugee, "the onus is on them to establish the reasons justifying exclusion or cessation".[128] The UNHCR Lisbon Roundtable Meeting of Experts on the

123. *Abebe v Commonwealth* (1999) 197 CLR 510 at 576 [187]; 162 ALR 1 at 51; 55 ALD 1 at 51; [1999] HCA 14 (*Abebe*); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76]; 176 ALR 219 at 242; 62 ALD 285 at 307–8; [2000] HCA 57.
124. Joint reasons at [46].
125. Joint reasons at [40].
126. Appellant's outline of submissions, p 6 [13].
127. *QAAH* at FCR 383 [69]; ALR 513.
128. UNHCR, "Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees", 2001, p 3 [10].

Convention has also held that "the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".[129]

[128] In the context of Art 1C(5) of the Convention, the Australian Department of Immigration and Multicultural and Indigenous Affairs has itself accepted the stated principle in terms that are virtually identical to those used by Lord Brown in *Hoxha*. It accepted that, in proceedings relating to Art 1C(5) and (6) of the Convention, "[t]he burden of proof should be on the authorities concerned, not the refugee".[130] Leading scholars have repeatedly made the same point. Professor Goodwin-Gill, for instance, states that where the state seeks to show that a previously recognised refugee should no longer be considered a refugee, the burden is on that state, and the standard of proof is on the balance of probabilities.[131] Professor Fitzpatrick similarly states that the burden of proof in relation to the application of changed circumstances "rests with the asylum State authorities".[132]

[129] *State practice on persuasion of change*: Available state practice on the application of Art 1C(5) of the Convention — whilst limited — also appears to accord with this interpretation of the Convention. Thus, in the United States, s 208(c)(2)(A) of the Immigration and Nationality Act 1952 (US) provides that the Attorney-General may terminate a grant of asylum if he or she determines that the refugee no longer meets the definition of refugee in the Act "owing to a fundamental change in circumstances".[133] According to the United States Immigration Regulations, where an applicant has demonstrated past persecution, the decision-maker bears the evidential burden of establishing "by a preponderance of the evidence" that there has been a relevant change in circumstances.[134]

[130] In Canada, the Immigration and Refugee Protection Act 2001 (Can) also reflects cessation principles similar to those contained in Art 1C of the Convention. Section 108 of that Act sets out the procedure for cessation. Importantly, it authorises consideration of cessation by the Canadian Refugee Protection Division only upon the minister's application. Canadian jurisprudence indicates that it is the person who asserts a change of circumstances who bears the burden of proof in relation to changed circumstances. In the Canadian case of *Mahmoud v Canada (Minister for Employment and Immigration)*,[135] Nadon J held that, where the minister seeks a determination that a person's refugee status has ceased the "burden of proof" rests with the minister.[136]

129. UNHCR Expert Roundtable, "Summary Conclusions: cessation of refugee status", in Feller et al, 2003, p 550 [27].
130. Department of Immigration, Multicultural and Indigenous Affairs, "The Cessation Clauses (Article 1C): An Australian Perspective", paper delivered to the UNHCR's Expert Roundtable Series, October 2001, p 16.
131. Goodwin-Gill, 1996, p 87 [emphasis added].
132. Fitzpatrick and Bonoan, 2003, p 515.
133. 1952 8 USC 1158.
134. United States Code of Federal Regulations, 8 CFR (revised as of 1 January 2006), s 208.13(b)(1)(ii).
135. *Mahmoud v Canada (Minister for Employment and Immigration)* (1994) 69 FTR 100 (*Mahmoud*).
136. *Mahmoud*at 109 [43], quoting with approval L Waldman, *Immigration Law and Practice*, Butterworths, Markham, 1992, vol 1, paras 8.35–8.40; cf Fitzpatrick and Bonoan, 2003, p 515, citing Goodwin-Gill, 1996, p 87; Hoxha at WLR 1083; All ER 602.

[131] In the United Kingdom, policy documents relating to cessation reflect language similar to that used by Lord Brown,[137] cited by Wilcox J. The documents state that:[138]

> 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 on [the Department] to show that a person is no longer eligible for refugee status and clear evidence will be required to justify that decision.

[132] Apart from the statements of Lord Brown in *Hoxha*,[139] the English Court of Appeal in *Arif v Secretary of State for the Home Department* held that the burden of proof in respect of the cessation clause rested upon the Home Secretary:[140]

> The sentence I would particularly emphasise there is "proof that the circumstances 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.

[133] *Administrative law analogies*: Very serious consequences may flow from the withdrawal of recognition of a person as a "refugee", after that recognition has been accorded. Therefore, as the UNHCR argued in its written submissions in this court, "a determination of applicability of ceased circumstances [cessation must involve] a formal process, as formal at least as the granting of refugee status". This proposition is not dissimilar to the requirements of the rules of natural justice in Australian administrative law. Indeed, it only really amounts to common sense and basic fairness. The more serious the consequences for a person the subject of an administrative decision, the more rigorously the rules of procedural fairness will usually be applied.[141] This is why, in some administrative law proceedings, applicants engaged in what is otherwise a process inquisitorial in its general character have been afforded the opportunity to cross-examine important witnesses,[142] or to have legal representation in particular circumstances.[143] In relation to the "character" test,[144] which forms the

137. *Hoxha* at WLR 1083 [66]; All ER 602; cf *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008 at [54]–[55]; *Arif v Secretary of State for the Home Department* [1999] INLR 327.
138. United Kingdom Home Office, Immigration and Nationality Directorate, "Asylum Policy Instruction (API) on Refugee Leave", 2006, p 3–4.
139. [2005] 1 WLR 1063; [2005] 4 All ER 580.
140. [1999] IAR 271 at 276, quoted in *Dyli v Secretary of State for the Home Department* [2000] IAR 652.
141. The content of procedural fairness rules is flexible, and will vary depending on the circumstances of the case: *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118; *Kioa v West* (1985) 159 CLR 550 at 584; 62 ALR 321 at 346. Regarding the standards applicable in cessation proceedings, see UNHCR handbook, para 25; UNHCR Executive Committee Conclusion No 69 (XLIII), 1992.
142. *Harrison v Pattison* (1987) 14 ALD 570; *Mayor, Councillors and Citizens of the City of Brighton v Selpam Pty Ltd* [1987] VR 54; *R v King; Ex parte Westfield Corp (Victoria) Ltd* (1981) 64 LGRA 28.
143. *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183; 22 ALR 382; [1916] HCA 63; *McNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54 at 60–1.
144. Section 501E of the Act.

basis of a visa cancellation in Australia, the minister invariably accepts a forensic burden of establishing the disqualifying element. Why should it be different in this case?

[134] *Distinction between legal and forensic burdens*: There are several difficulties with the appellant's reliance on *Abebe*[145] to contradict the foregoing propositions of legal principle. First, *Abebe* dealt with the recognition of "refugee" status under Art 1A(2) of the Convention. It did not deal with cessation. It did not therefore address the meaning and application of Art 1C(5). The comments of the majority in *Abebe* merely indicate that a party before the tribunal does not bear a legal burden of proving that party's contentions. This is because the procedures of the tribunal are inquisitorial in character, not adversarial. So much is not contested in this appeal.

[135] In fact, the comments of Gummow and Hayne JJ in *Abebe*, referred to by the minister, acknowledge that it is for the party propounding a contention to "advance whatever evidence or argument"[146] it wishes in support of that contention, and, in accordance with the requirements of the inquisitorial process, it is then for the tribunal to decide whether or not the proposition is established.

[136] In an inquisitorial tribunal, the legal burden of proof typical of an adversarial trial may be missing. However, the forensic context still reflects the reality of a decision-making process. If a party that could be expected to present material in support of its case fails to do so, that party cannot then complain if the decision-maker decides that a basis for the relief claimed has not been established. A forensic burden could sometimes present procedural difficulties, particularly in the many cases where the minister or her delegate are not present at tribunal hearings. However, in my view, this difficulty could be resolved in the usual way. Where necessary, the tribunal may request that additional material be provided in support of the contested matter or resolve the issue on the basis that the suggested "cessation" has not been demonstrated in a convincing way.

[137] As this court knows from many cases, applications often fail before the tribunal because of the failure of the applicant to adduce proof of the matters asserted. The point in the present case is that, to establish cessation of a continued entitlement to the status of "refugee", previously granted, both under the Act and the Convention, a forensic obligation will rest with those who contend that this is so. Normally this will be officers of the minister's department who have convinced the minister's delegate of a change of circumstances in the country of nationality. This conclusion is not inconsistent with the general inquisitorial character of the tribunal. Nor does it question the fact that a burden of proof in the strict legal sense is not imposed on the tribunal, the minister, her delegate or a refugee. The comments in *Abebe* do not furnish support for the minister's approach to this issue in the appeal.

[138] *The correct approach for the tribunal*: Accepting that no legal burden of proof applies to cessation or any other proceedings before the tribunal, a question remains concerning the approach that the tribunal should take in accordance with Art 1C(5) of the Convention in cases where the evidence is ultimately limited or inconclusive. Of their nature, cessation proceedings often necessitate up-to-date information about conditions in remote parts of strife-torn countries, many of them far from Australia. It is not always possible to obtain substantial, current,

145. (1999) 197 CLR 510; 162 ALR 1; 55 ALD 1; [1999] HCA 14.
146. *Abebe* at CLR 576 [187]; ALR 51; ALD 51.

objective information about the prevailing conditions. It is quite common for the material on such a point to be inconclusive and imperfect. How then, in practice, should the tribunal approach such a situation?

[139] The answer to this question is not "technically" to apply notions of a legal burden of proof. Instead, the answer relates to "the measure and nature of the task",[147] or the proper question to be asked. Alternatively, as Wilcox J put it in the Full Court, "it matters to the parties which one of them fails if the evidence is inconclusive".[148] The question is thus whether, in the absence of convincing material, a change in country conditions, sufficient to terminate a person's refugee status under the Convention, is to be *assumed* or readily taken as established.

[140] Whether one explains the process as Lord Brown did in *Hoxha*, that a recognised refugee should not be stripped of that status "save for demonstrably good and sufficient reason";[149] or, as the UNHCR does, that "a practical or evidential burden of proof lies with the asylum State authorities",[150] the outcome is the same. Even if, in Australia, it is not appropriate to speak of a legal "burden of proof" in this context, what is still required is a rigorous satisfaction of the circumstances warranting the decision-maker's taking a step so potentially serious for the person affected. Wilcox J explained why a "confident finding" about the applicability of cessation must occur for changed circumstances to be upheld:[151]

> … [A]n acceptable Art 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.

[141] *Conclusion: No error in Full Court*: It follows from this analysis that the minister does not bear a legal burden of proving a requisite change in circumstances to attract Art 1C(5). However, as a matter of forensic practicalities, the minister's officials will usually be obliged to furnish affirmative evidence of a propounded change. The minister's proposition to the contrary in this appeal would effectively postulate a presumption in favour of cessation, simply because it was asserted. It would impose upon the person already recognised as a "refugee" an effective burden of negating any suggested change in circumstances. That course would not conform to the requirements of the tribunal's inquisitorial character any more than would the imposition of a legal burden upon the minister. The fifth issue should therefore, likewise, be decided against the minister.

The tribunal decision issue

[142] Finally, I agree with the majority of the Full Court that the tribunal needed to be satisfied of more than the simple fact that the Taliban were unlikely to re-emerge as a governing authority, or that the Taliban were unlikely to exercise control of the same nature or scale as they did in 1999. The tribunal would need to make informed findings about "the extent of Taliban activity in the

147. *NBGM* (2006) at FCR 569 [183]; ALR 667; ALD 537 per Allsop J.
148. *QAAH* at FCR 383 [69]; ALR 513.
149. *Hoxha* at WLR 1082–3 [65]; All ER 601.
150. UNHCR submissions, para [29].
151. *QAAH* at FCR 385 [78]; ALR 515 per Wilcox J [emphasis added].

Afghan countryside, especially in the appellant's home district".[152] It would then have to consider whether any changes so found amounted to enduring and significant ones. This the tribunal failed to do. The requirement that the tribunal rehear the application is neither futile nor pointless. Far from it. Doing so vindicates the correct exercise of the tribunal's jurisdiction. Moreover, a correct examination of the evidence by the application of the proper legal test could result in a decision favourable to QAAH.

[143] This is an answer to the sixth issue, which was raised defensively by the minister. The majority have concluded that (however unnecessarily in their view) the tribunal ultimately reached an opinion of the kind that QAAH says it was required to reach.[153] I disagree. The tribunal asked the wrong question. Unsurprisingly, it gave an imperfect answer.

Conclusions and order

[144] *Conclusion in the appeal*: The Act incorporates the elements of the definition of "refugee" contained in the Convention. To that extent, by specific reference, the Convention has been made part of Australian domestic law. In accordance with the Act, QAAH was duly *recognised* as a "refugee". He received a protection visa. There is no place in the Convention scheme for temporary, partial or provisional *recognition* of refugee status. QAAH thus enjoys "refugee" status under the Convention and also under the Act, whatever protection Australia has contingently given him from time to time under its temporary visa system.

[145] The temporary and permanent visas established by the Act cannot alter, unilaterally, the language and requirements of the Convention that forms part of Australian law. Specifically, they cannot change the provisions and structure of the Convention in so far as it provides for the cessation of "refugee" status, once that status has been accepted in the case of a person claiming surrogate protection from a country of refuge. Cessation of such status, once granted, is governed by Art 1C(5) of the Convention. In international and municipal law, there is a strong presumption that a state party to the Convention, which has not renounced obligations under it, complies in its law with the requirements of the Convention. This is the way in which the Act should be read so as to conform to the Convention.[154] The statutory language is not incompatible with the foregoing features of the Convention. Given the seriousness with which Australia typically complies with its treaty obligations, it would be surprising if there were discord between the Convention and the Act in this or any other respect. The Act should be interpreted as far as possible to avoid such discord and to uphold Australia's obligations under the Convention, freely accepted by the process of ratification and affirmed by the legislative reference to it in s 36(2) of the Act.[155]

[146] Reading the Act in this way, it is both proper and helpful to have regard to UNHCR materials on the intended meaning and operation of the cessation provisions in the Convention. Such materials confirm what the language and apparent purpose of the Convention in any case demonstrate. In order to conclude

152. *QAAH* at FCR 384 [74]; ALR 514 per Wilcox J.
153. Joint reasons at [50].
154. Cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; 128 ALR 353 at 361–2; 39 ALD 206 at 214; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; 110 ALR 97 at 122–3; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [29]; 195 ALR 24 at 34; 72 ALD 1 at 11; [2003] HCA 2 (*Plaintiff S157/2002*).
155. *Plaintiff S157/2002* at CLR 492 [29]; ALR 34; ALD 11 per Gleeson CJ.

that cessation of a recognised "refugee" status has been established, a forensic (although, in Australia, not a legal) burden of persuasion rests on whoever suggests a change of circumstances in the refugee's country of nationality. The majority in the Full Court did not mistake or confuse the nature of the proof of such changes. Their Honours were correct to conclude that the Convention language and purpose, imported by the Act, necessitated an affirmative conclusion that conditions had changed. Such demonstration, because of its consequences, will reflect the importance of the decision made. It will require a distinct satisfaction of a fundamental, stable and durable change in the conditions of the country of nationality that occasioned the refugee's flight.

[147] Neither the minister's delegate nor the tribunal approached their functions in this way. Each was diverted by the temporary visa system applicable under Australian law. It was a fundamental mistake to confuse national *protection* arrangements with national and international requirements following *recognition* of a person as a "refugee". The majority in the Full Court were correct to detect this error and to view it as a serious one. It was one that constituted a jurisdictional error on the part of the tribunal. The tribunal failed to ask itself the correct questions. Its answers cannot therefore stand. The matter must be returned to the tribunal so that it can exercise its jurisdiction correctly, according to law.

[148] Order: To give effect to this conclusion, the appeal should be dismissed with costs.

Orders

(1) Appeal allowed.
(2) Set aside Orders 1 and 2 (except para 3 of Order 2), of the orders made by the Full Court of the Federal Court of Australia on 27 July 2005 and in their place order that the appeal to that court be dismissed.
(3) Appellant to pay the costs of the first respondent of the application for special leave to appeal and the appeal.

JOHN AZZI
BARRISTER