ANNOTATED

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 334 of 2012

BETWEEN:

SZOQQ
Appellant

AND:

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MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION OF PUBLICATION

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1. These submissions are in a form suitable for publication on the Internet.

PART II: STATEMENT OF ISSUES

2. The first respondent agrees with the statement of issues 1 & 3 in the appellant's submissions (at [2.1], [2.3]). The first respondent contends that, if issue 1 is answered in the affirmative (namely, if this Court accepts that an applicant who satisfies the definition of "*refugee*" in Article 1 of the 1958 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees (**Refugees Convention**), thereby satisfies the criterion in s 36(2)(a) of the *Migration Act 1958* (Cth) (**the Act**)), then the decision of the Minister's delegate that the appellant is not a person in respect of whom Australia has "*protection obligations*" under s 36(2)(a) of the Act cannot stand. The first respondent accepts that the decision under review involved an acceptance that the appellant was a refugee within the meaning of Article 1A(2) of the Refugees Convention.[1]

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3. Issue 2 as identified by the appellant does not arise in the present appeal. To the extent that the appellant contends that the decision of the Minister's delegate not to grant the appellant a Protection (Class XA) visa was made under s 501 of the

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[1] Protection (Class XA) Visa Decision Record, p 8 **[Appeal Book (AB) 41.30].**

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1 Act, this is incorrect. The decision was clearly made under s 65 of the Act relying on s 36 and cl 866.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) **(the Regulations)**.[2] To the extent that the appellant contends that the Minister's delegate ought to have made a decision on the basis of s 501 of the Act, this is beyond the scope of this appeal, which is concerned with the decision that was actually made.

PART III: NOTICE UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

10 4. The first respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notice should be given.

PART IV: FACTUAL ISSUES IN CONTENTION

5. The first respondent accepts the statement of facts in the appellant's submissions and attached chronology (Annexure B), with one minor qualification. The matters set out at [5.1] and [5.4] represent the appellant's claims, rather than primary facts found by the courts below. However, those claims have been accepted by

20 delegates of the Minister (including as part of the process leading to the decision under review) as being at least broadly correct, and they are not in contest in the appeal.

PART V: APPLICABLE LEGISLATIVE MATERIAL

6. The appellant's reproduction of statutes and regulations, in Annexure A, is appropriate, with: (i) the qualification regarding the application of s 501 of the Act (as explained below); and (ii) the addition of s 91U of the Act, which, as at the time of the decision of the second respondent (2 September 2010), provided:

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(1) For the purposes of the application of this Act and the regulations to a particular person, Article 33(2) of the Refugees Convention as amended by the Refugees Protocol has effect as if a reference in that Article to a particularly serious crime included a reference to a crime that consists of the commission of:

(a) a serious Australian offence (as defined by subsection (2)); or
(b) a serious foreign offence (as defined by subsection (3)).

(2) For the purposes of this section, a ***serious Australian offence*** *is an offence against a law in force in Australia, where:*

(a) the offence:

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(i) involves violence against a person; or
(ii) is a serious drug offence; or
(iii) involves serious damage to property; or
(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

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2 Protection (Class XA) Visa Decision Record, p 17 **[AB 50.10]**.

1 *(b) the offence is punishable by:*
(i) imprisonment for life; or
(ii) imprisonment for a fixed term of not less than 3 years; or
(iii) imprisonment for a maximum term of not less than 3 years.

(3) For the purposes of this section, a ***serious foreign offence*** *is an offence against a law in force in a foreign country, where:*
(a) the offence:
(i) involves violence against a person; or
(ii) is a serious drug offence; or
(iii) involves serious damage to property; and

10 *(b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the Territory offence) against a law in force in that Territory, and the Territory offence would have been punishable by:*
(i) imprisonment for life; or
(ii) imprisonment for a fixed term of not less than 3 years; or
(iii) imprisonment for a maximum term of not less than 3 years."

PART VI: ARGUMENT

7. There are essentially two questions raised by this appeal:

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7.1. The first is whether reliance may be placed upon Article 33(2) of the Refugees Convention as the basis for a finding that a visa applicant does not meet the criterion for a protection visa in s 36(2)(a) of the Act (Ground 2 of the Notice of Appeal). If it cannot, the appeal should be allowed. The first respondent submits, however, that such reliance may be placed upon the "*particularly serious crime*" limb of Article 33(2).

7.2. If such reliance on Article 33(2) of the Refugees Convention is permitted, then the second question arises. That question is whether, in the application of that provision, there is occasion for the exercise of any discretion or balancing process (Ground 4 of the Notice of Appeal). The first respondent submits that Article 33(2) does not permit of any discretion.

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Reliance upon Article 33(2) of the Refugees Convention to deny "protection obligations" under s 36(2)(a)

8. The appellant submits (at [6.1.2], [6.1.4]) that, to the extent that the Full Court found that the "*protection obligations*" to which s 36(2) refers are to be found in Article 33(2) of the Refugees Convention,[3] the Full Court's construction of s 36(2)(a) is in conflict with the decision of this Court in *NAGV and NAGW of*

40 *2002 v Minister for Immigration and Multicultural and Indigenous Affairs & Anor*

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[3] *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [5] (Flick J); [45]-[49]. Justice Flick noted (at [10]) that it was "*accepted that the construction and content of the phrase employed in s 36(2), namely* "protection obligations", *was limited by the construction to be given to Article 33(2) ...*". **[AB 175, 177, 191-193]**

1 (2005) 222 CLR 161 (***NAGV***), which interpretation of s 36(2) is affirmed in *Plaintiff M47-2012 v Director-General of Security* (2012) 86 ALJR 1372 (***Plaintiff M47***).

The Full Court's construction does not disturb the decisions in *NAGV* and *Plaintiff M47*

9. The appellant's submission is wrong for two reasons. First, the conclusion of the Full Court in this matter is not in conflict with the *ratio decidendi* in *NAGV*. In that case, the applicants, citizens of the Russian Federation, were entitled to live in Israel, and, as such, Australia was not obliged to grant them asylum. However, 10 Australia had "*protection obligations*" in relation to the applicants in that, under Article 33(1) of the Refugees Convention, they could not be returned to the Russian Federation. Accordingly, the existence of "*effective protection*" in a country other than the person's country of nationality did not negate the existence of "*protection obligations*" under the Refugees Convention.[4] The Full Court's construction of s 36(2)(a) in the present matter is not inconsistent with that decision: by operation of Article 33(2), the present appellant was not the subject of a *non-refoulement* obligation of the kind that arose in relation to the applicants in *NAGV*. As French CJ noted in *Plaintiff M47* (at [32]), the Court in *NAGV* had 20 not discussed how Articles 32 and 33(2) could be invoked in relation to refusal or cancellation of a protection visa.

10. Secondly, neither *NAGV* nor *Plaintiff M47* was concerned (as the present case is) with a primary decision made pursuant to s 36(2)(a) of the Act in reliance upon the "*particularly serious crime*" limb of Article 33(2) of the Refugees Convention. The operation of that aspect of Article 33(2) is affected by the enactment of s 91U of the Act, which took effect after the decision under review in *NAGV*.

11. The prohibition of expulsion or return, which is found in Article 33 of the Refugees Convention, provides:

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> *"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.*
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> *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."*

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12. Article 33(2) applies, thus denying the benefit of *non-refoulement* in Article 33(1), in two distinct situations: (a) where there are reasonable grounds for regarding

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[4] See *NAGV* at [29] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ); [99] Kirby J).

1 the refugee as a danger to the security of the county in which he is (the "*security*" limb); and (b) where the refugee, having been convicted by a final judgment of a "*particularly serious crime*" constitutes a danger to the community of that country (the "*particularly serious crime*" limb). The issues and circumstances in *Plaintiff M47* raised for consideration only the first limb of Article 33(2) (the "*security*" limb) (in the context of a successful challenge to the validity of a regulation made under the Act, which requires that the Minister refuse to grant a protection visa if the Australian Security Intelligence Organisation assesses the refugee to be directly or indirectly a risk to security).

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Subsequent legislative enactment supersedes the reasoning in *NAGV*

13. The reasoning of the plurality in *NAGV*, which was taken to be correct by a majority of the Justices in *Plaintiff M47*,[5] does not apply equally to the second limb of Article 33(2) of the Refugees Convention by virtue of the operation of s 91U of the Act.

14. In *NAGV*, a delegate of the Minister refused to grant a protection visa on 3 September 1999, and that decision was affirmed by the Refugee Review Tribunal on 1 March 2002. The plurality held (at [42]) that, having regard to the

20 subject matter, scope and purpose of the *Migration Reform Act 1992* (Cth), which introduced the adjectival phrase "*to whom Australia has protection obligations under [the Convention]*" (in s 26B(2), later re-numbered as s 36(2)), that phrase describes no more than a person who is a refugee within the meaning of Article 1 of the Refugees Convention.

15. Section 91U was inserted into the Act by the *Migration Legislation Amendment Act (No 6) 2001* (Act no. 131) (the **2001 Amendment Act**), which commenced on 1 October 2001 (that is, after the delegate's decision in *NAGV*), and was not part of the Act as considered in that case. The 2001 Amendment Act also repealed

30 and re-enacted s 36(2) of the Act, with the terms of the original provision now appearing as s 36(2)(a).

16. Section 91U provides that Article 33(2) "*has effect*" on the basis that the phrase "*particularly serious crime*" has a specified meaning. The language of the provision evinces a legislative intention, as at 2001, that the "*particularly serious crime*" limb of Article 33(2) was to have an "*effect*" for the purpose of the Act. This expression of intention coincided with a repeal and re-enactment of s 36(2) in the form that it took at the time of the protection visa application in the present case.

17. The only sensible understanding of the intended effect of Article 33(2), provided

40 for in s 91U, is that it was to apply as part of the consideration of whether Australia has "*protection obligations*" in relation to a person for the purposes of s 36(2) of the Act. As such, and contrary to the submission of the appellant

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5 See Appellant's Submissions at [6.1.4].

1 (at [6.1.6]), s 91U operates as a modification of s 36(2) of the Act, so as to bring the "*particularly serious crime*" limb of Article 33(2) into effect.

18. This understanding is consistent with the placement of s 91U in Subdivision AL of Division 3 of Part 2 of the Act, along with provisions such as ss 91R, 91S and 91T, which expressly deal with various aspects of the test for the existence of "*protection obligations*" for the purposes of s 36(2), and operate to deny the existence of such obligations in particular cases.

19. The legislative intention which is expressed in s 91U of the Act is confirmed by
10 the Minister's Second Reading Speech for the Bill for the 2001 Amendment Act, where it is stated that the amendments to the Act were intended to meet the challenge of "*increasingly broad interpretations being given by the courts to Australia's protection obligations under the refugees convention and protocol ... well beyond the bounds originally envisaged by the convention*".[6] The intended operation of s 91U has also been confirmed by the Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, which provides that s 91U is to be considered "*with respect to Article 33(2) when assessing whether a non-citizen who has applied for a protection visa on the basis of*
20 *protection obligations under the Refugees Convention is ineligible for the grant of a protection visa*" (para 39). These statements identify the mischief to which s 91U was directed[7] – namely, an unduly broad approach taken to the question of whether "*protection obligations*" existed, for the purposes of s 36 – and support a construction of the provision which gives it some operation in the determination of that question. Such statements may also be relied upon, under s 15AB of the *Acts Interpretation Act 1901* (Cth), as confirmatory of the ordinary meaning of the provision.

20. The legislative intention is also evident by virtue of the fact that s 91U is otiose or
30 "*idle*" if Article 33(2) of the Refugees Convention is not relevant to the criterion of "*protection obligations*" in s 36(2) of the Act. Such a result is to be avoided where there is an available construction that does so.[8] This principle of construction is especially compelling in the present case, where the central feature of the scheme (s 36(2)) was repealed and re-enacted, and is now accompanied by various provisions defining its operation in more detail. New s 36(2)(a) is to be read in conjunction with those provisions, including s 91U, which clarify or modify its operation, and are not controlled by previous understandings of how the former s 36(2) operated.

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40 [6] Migration Legislation Amendment Bill (No 6) 2001. Second Reading Speech (Ruddock), 28 August 2001, p 30420.

[7] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 38 at 408 (Brennan, Dawson, Toohey and Gummow JJ).

[8] See, for example, *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh , Gummow, Kirby and Hayne JJ). See also *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 86 (Dixon J).

1 21. The subsequent enactment of s 91U distinguishes it from other provisions in which reference to Article 33(2) is made; namely, ss 500(1)(c), 502(1)(a)(iii), and 503(1)(c) of the Act, which provisions were inserted into the Act by the *Migration (Offences and Undesirable Persons) Amendment Act 1992*, and which were discussed in *Plaintiff M47*.

22. The reasoning of the plurality in *NAGV*, directed at the Act as it stood at the relevant time for that decision, cannot be mechanically applied to the Act as amended by the insertion of s 91U. Accordingly, the enactment of s 91U
10 supersedes the reasoning in *NAGV* in so far as such reasoning would prevent the "*particularly serious crime*" limb of Article 33(2) forming a ground for the refusal of a protection visa under s 36(2)(a). (This is so even though, as the Minister accepted in *Plaintiff M47*, the reasoning in *NAGV* is applicable to the "*security*" limb, which was relevant in the former case).

23. Section 91U was not in issue, and did not need to be addressed, in *Plaintiff M47*.[9] Naturally, the curial statements in *Plaintiff M47* regarding the relationship between Article 33(2) and the application of the criterion in s 36(2)[10] are to be read as a response to a submission that related only to the "*security*" limb of Article 33(2),
20 and which took no account (and did not need to take account) of the operation of s 91U. Furthermore, it is evident that those statements regarding the relationship between Article 33(2) and s 36(2) were not essential to their Honours' conclusions,[11] and, as such, form no part of the *ratio* of that case. Accordingly, there is no contradiction between a construction of s 36(2)(a) that includes the operation of the "*particularly serious crime*" limb of Article 33(2) as an element of the criterion it imposes, and the reasoning of this Court in *NAGV* and *Plaintiff M47*.

24. It is not the case, as the appellant submits (at [6.1.6]), that s 501 would be
30 rendered superfluous (in cases where the applicant falls within Article 33(2)) if one were to read s 36(2)(a) as subject to Article 33(2) of the Refugees Convention. Section 501 of the Act encompasses many and varied bases upon which to refuse or cancel a visa on character grounds in the exercise of the Minister's discretion. An acknowledgement of overlap of subject-matter as between Article 33(2) and s 501(6)(d)(v) of the Act (which is not, in terms, identical to Article 33(2)),[12] and, on the basis of that overlap, the fact that the

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[9] Cf. Appellant's Submissions at [6.1.5]. The reference to s 91U by the plaintiff, and by certain members of the Court, in *Plaintiff M47*, does not alter the conclusion that the
40 application or operation of s 91U was not in issue.

[10] See *Plaintiff M47* at [38] (French CJ); [187] (Hayne J); [389] (Crennan J, who agreed with the reasons of the Chief Justice and Hayne J); [441] (Kiefel J); [479] (Bell J). Cf. [132] (Gummow J); [314] (Heydon J).

[11] See *Plaintiff M47* at [31] (French CJ); [187] (Hayne J); [389] (Crennan J, who agreed with the reasons of the Chief Justice and Hayne J).

[12] See *Plaintiff M47* at [40] (French CJ); [193] (Hayne J); [389] (Crennan J, who agreed with the reasons of the Chief Justice and Hayne J).

1 applicant may be denied a protection visa on the basis of one provision (which necessitates the grant or refusal of a visa) rather than another (which calls for the exercise of a discretion as to whether the visa is to be refused or cancelled), does not necessitate the conclusion of superfluity.

The exercise of discretion pursuant to s 501 of the Act is not the subject of this appeal

25. Ground 3 of the Notice of Appeal (Issue 2 in Statement of Issues) is misconceived, and the issue of the discretion to be exercised by way of s 501 of
10 the Act, in conjunction with s 65(1)(a)(iii), does not arise in this appeal.

26. The appellant contends that the Full Court ought to have found that the first respondent was bound by s 65(1)(a)(iii) to consider whether the grant of a visa to the appellant was not prevented by s 501 of the Act. The appellant outlines the statutory scheme for the consideration of an application for a protection visa (at [6.1.7] – [6.1.15]), indicating that the Minister must consider each of the criteria at s 65(1)(a)(i)-(iv).

27. However, this outline does not take account of the fact that s 65(1) involves
20 *cumulative* criteria, which, if all criteria are satisfied, dictates the grant of a visa, and if any criterion is *not* satisfied, dictates refusal. As such, if one criterion is not satisfied, it is not necessary to consider the remaining criteria. The Minister's delegate determined that s 65(1)(a)(ii) was not satisfied, on the basis of the application of s 36(2). On that basis, there was no cause to consider the remaining criteria. Accordingly, the scheme as outlined by the appellant does not substantiate the proposition that the first respondent was required "*to consider whether the appellant was disentitled to the grant of a protection visa under s 65(1)(a)(iii) of the Act, relevantly by reason of the power to refuse a visa under s 501 of the Act*" (Appellant's Submissions at [6.1.15]). Therefore, the appellant's
30 submissions at [6.2] do not fall for consideration.

28. In any event, the first respondent accepts that the decision to be made pursuant to s 501 of the Act is discretionary. Both the decision of the delegate in the present case and the decision of the second respondent on appeal proceeded on the basis that there was no discretion to be exercised, and did not engage in any weighing of the various factors which might be relevant to whether the visa *should* be refused. Accordingly the Minister does not seek to support the decision under review as an exercise of power under s 501; and if, as the appellant contends (at [6.2.1]), the (sole) source of the first respondent's power to refuse a protection
40 visa relying upon Article 33(2) of the Refugees Convention derives from s 65(1)(a)(iii) in combination with s 501 of the Act, the appeal must be allowed. On the other hand if, as the first respondent contends, there was no error in the

1 conclusion that the appellant was not a person in respect of whom Australia had "*protection obligations*", no issue as to s 501 arises.

Article 33(2) of the Refugees Convention does not call for the exercise of any discretion

29. The appellant maintains, in the alternative (that is, on the basis that this Court accepts that s 36(2)(a) of the Act imports the exception to *non-refoulement* in Article 33(2) of the Refugees Convention), that consideration of the application of Article 33(2) required the decision-maker to weigh the relative danger that the
10 appellant constituted to the Australian community against the consequences of any decision to return the applicant to the receiving country (Appellant's Submissions at [6.3.1]). The first respondent submits that that is incorrect.

The Full Court's construction of Article 33(2) of the Refugees Convention

30. The Full Court unanimously held that Article 33(2) of the Refugees Convention did not require the second respondent to balance the likely consequence of returning the appellant to Indonesia against the danger he posed to the Australian community, on the basis that:

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30.1. Under s 65(1) of the Act, the Minister is vested with a fact-finding function, but not a discretion.[13]

30.2. Subsection 36(2) of the Act is a provision conferring rights. The principle against construing domestic legislation so as not to curtail fundamental rights has no scope to operate given the terms of s 36(2).[14]

30.3. The ordinary meaning of the terms of Article 33(2) is clear and does not require or permit any consideration to be given to the risks to be faced by a person upon his return to another country.[15]

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30.4. Considered in the statutory scheme as a whole, s 501J(1) of the Act supports a construction which recognises that any balancing exercise is provided for in s 501J(1), and not s 36(2).[16]

30.5. There is no reason why Article 1F(b) of the Refugees Convention should be construed as exclusive of any discretionary consideration and as

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[13] *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [14] (Flick J), [46] (Jagot & Barker JJ) **[AB 178-9; 192]**.

[14] *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [47] (Jagot & Barker JJ) **[AB 192]**.

[15] *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [14], [20], [27] (Flick J); [49] (Jagot & Barker JJ) **[AB 179, 181, 185; 192-3]**.

[16] *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [53] (Jagot & Barker JJ) **[AB 194]**.

1 being "*protective of the interests of the receiving State*"[17] and Article 33(2) construed in a different manner.[18]

31. As explained below, each of those propositions is, with respect, correct. The consequence is that neither Article 33(2) itself, nor the manner in which it is picked up by s 36(2), leaves any scope for implication of the balancing exercise proposed by the appellant.

Section 36(2) of the Act

10 32. Section 65(1) of the Act provides that, after considering a valid application for a visa, if the Minister is satisfied that the criteria for the visa prescribed by the Act or regulations have been satisfied, the Minister is to grant the visa. If not so satisfied, the Minister is not to grant the visa.

33. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. In this specific and limited way, the relevant provisions of the Convention are transposed into Australian domestic law.[19]

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34. Two points should be noted about that transposition. First, it is effected by the creation of a new right: the right of a non-citizen to be granted a protection visa if the Minister is satisfied that he or she meets relevant criteria. As the Full Court noted, s 36(2)(a) does not in any sense disturb existing rights, and there is no scope for an appeal to principles of statutory construction that protect fundamental common law rights.[20]

35. Secondly, the transposition of the Convention into domestic law occurs by way of what Hayne J in *Plaintiff M47* referred to as a binary outcome.[21] If "*protection obligations*" arise under the Convention (and other criteria are met), a visa is to be granted; if not, the visa is to be refused. Section 36(2)(a) requires a 'yes' or 'no' answer, which leaves no room for the weighing of competing considerations.

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36. The appellant appeals also to "*a similar balancing exercise*" in the construction of other human rights provisions.[22] However, to the extent that the appellant

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17 This is taken from the judgment of French J (as his Honour then was) in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 565F.

18 *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [25] (Flick J) **[AB 184]**.

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19 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [11] (Kirby J).

20 *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [47] (Jagot & Barker JJ) **[AB 192]**.

21 *Plaintiff M47* at [176]-[178].

22 Appellant's Submissions at [6.3.8].

1 espouses a general principle of statutory construction (that is, divorced from the specific statutory context), there is no support for such an approach. Furthermore, the authorities referred to by the appellant demonstrate that rights are commonly tempered or qualified by reference to competing values or considerations.[23] This is a different question from that raised in the present appeal, and does not support the construction advanced by the appellant.

37. The statutory scheme makes clear that any discretion to consider the gravity of the "*particularly serious crime*" as against the consequences of *refoulement* is reposed in the Minister pursuant to s 501J of the Act, rather than in the delegate who makes a decision under s 65. Section 501J(1) provides that, if the Minister thinks that it is in the public interest to do so, he or she may set aside a protection visa decision by the Tribunal and substitute another decision that is more favourable to the applicant in the review, whether or not the Tribunal had the power to make that other decision. As correctly affirmed by the Full Court,[24] the structure of the Act is consistent with an intention to reserve this issue for the Minister to decide on the basis of public interest.

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38. There is thus no scope in the statute for any discretionary or balancing exercise, following a determination as to whether Australia has "*protection obligations*" in relation to the visa applicant (other than the specific ministerial discretion in s 501J). Any such balancing exercise must therefore occur as an aspect of that determination, which involves the construction of the Refugees Convention and its application to the circumstances of the case.

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39. Various provisions of the Act deal with aspects of how the Refugees Convention is to be taken to operate for the purposes of s 36(2). One of these is s 91U, which defines a "*particularly serious crime*" for the purposes of Article 33(2) to include a crime that consists of the commission of a "*serious Australian offence*" (which is, in turn, defined in s 5 of the Act). On the basis of the appellant's conviction of manslaughter, it is not in contention that the appellant has been convicted of a "*particularly serious crime*" within the meaning of Article 33(2),[25] and as such constitutes a danger to the Australian community.[26]

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23 That is, the reference to the characterisation of 'persecution' by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 (that is, conduct will not constitute persecution if it is appropriate and adapted to achieving some legitimate object of the country of the refugee), and the balancing of rights against other competing rights and values by the Full Court in *Bropho v Western Australia* (2008) 169 FCR 59 at [80]-[81], goes no further than to suggest that rights are not absolute and must be tempered by other competing considerations.

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24 *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [53] (Jagot & Barker JJ) **[AB 194]**.

25 The appellant was sentenced to seven years in prison, with a non-parole period of two and a half years, thus satisfying the definition of a "*serious Australian offence*": that is, one involving violence against a person, the offence for which is punishable by a maximum term of not less than three years. See *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 at [16] **[AB 7]**. See also *SZOQQ v Minister for*

1 The ordinary meaning of Article 33(2) of the Refugees Convention

40. Article 31 of the 1969 Vienna Convention on the Law of Treaties (**Vienna Convention**) governs the construction of treaty provisions, including those upon whose operation rights under Australian law depend.[27] Article 31(1) of the Vienna Convention provides that 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.

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41. The ordinary meaning of Article 33(2) is such that, once it is determined that the person constitutes a danger to the community of the country of refuge (having been convicted by a final judgment of a particularly serious crime), the protection afforded by Article 33(1) may not be claimed by that person. The protection is negated automatically (that is, upon satisfaction of the circumstance to which the provision refers); it does not permit the exercise of any discretion.

Text

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42. Primacy is to be given to the text of Article 33(2).[28] It is clear that there is no support in that text for the construction advanced by the appellant. There needs to be "*an express textual basis*" for requiring a discretionary, balancing exercise. If such an exercise is to be inferred, it must be inferred by reference to the text of the provision. That critical premise is absent from, and therefore fatal to, the appellant's proposed construction of the provision.

43. The appellant contends (at [6.3.4]) that if Article 33(2) were to be given a literal construction based only on its text, then any danger to the community would suffice to revoke "*this most fundamental right of protection*".

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44. To the extent that this submission is based on the premise that the Full Court's construction of the "*ordinary meaning*" of Article 33(2) was based on the text alone, it is incorrect.[29]

Immigration and Citizenship [2012] FCAFC 40 at [12] (Flick J) **[AB 178]**. It is also accepted by the appellant that he has a "*substantial criminal record*" as defined in s501(7)(c) of the Act (Appellant Submissions at [6.2.2]).

26 The Administrative Appeals Tribunal affirmed the decision of the delegate of the first respondent that the appellant constituted a danger to the Australian community in accordance with Article 33(2) of the Refugees Convention: *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 at [57] **[AB 18]**.

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27 See *NGBM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [61] (Callinan, Heydon and Crennan JJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-252 (McHugh J).

28 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 277 (Gummow J).

29 See *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [14]ff (Flick J); [44]ff (Jagot & Barker JJ) **[AB 178ff; 191ff]**.

1 45. The appellant's submission suffers from two further flaws. First, it ignores the operation of Article 33(2) itself as an express qualification of this "*fundamental right of protection*". The prohibition in Article 33(1) is not absolute.

46. Secondly, it ignores the very text of the provision, which denies the protection in Article 33(1) to a person who, "*having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*" It is not 'any' danger that triggers the operation of this provision: the danger that is posed is necessarily conditioned by the "*particularly serious crime*".

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47. The appellant seeks to infer a balancing exercise on the basis of the operation of "*established principles of statutory construction*", one of which imputes to Parliament an intention not to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language.[30] This appeal to the principles of construction of domestic statutes fails at two levels. In so far as this argument is directed at the relevant domestic statutory provision (s 36(2)(a)), it fails for the reasons outlined above. In so far as it is directed at Article 33(2) itself, the construction of that Article is not governed by principles of domestic statutory construction. Furthermore, Article 33(2)
20 presents in unambiguous language a qualification on the prohibition of *refoulement* in Article 33(1). The appellant's appeal to an imputed intention not to abrogate the "*right not to be refouled*" is thwarted by the very words of Article 33(2), which prescribe a limitation on that right.

<u>*Context*</u>

48. The context of Article 33(2) does not support any balancing exercise. Article 33(1) and (2) operate in sequence.[31] The second provision, if satisfied in its own terms, defeats the prohibition in the first. The construction advanced by the appellant
30 undermines that sequence.

49. Article 33 is predicated on the person concerned being a "*refugee*". The consequence of returning a non-citizen to the country from which he or she seeks refuge has therefore already been assessed by the time one considers the application of Article 33(2). The appellant's construction of Article 33(2) calls for another, secondary assessment of the consequence of return: one that considers

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[30] Appellant's Submissions at [6.3.3]. Contrary to the submission of the appellant, the obligation upon Contracting States of *non-refoulement* in Article 33(1) of the
40 Refugees Convention is not a 'right' that reposes in the appellant; it is an obligation vis-à-vis the State parties to the Convention. The citation of *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 at [5] (Burchett & Lee JJ) does no more than acknowledge that the "*principle*" (of *non-refoulement*) is "*concerned with*" (that is, operates in relation to) certain fundamental human rights.

[31] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [25] (Supreme Court of New Zealand), as referred to by Jagot & Barker JJ in *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [54] **[AB 194-5].**

1 the gravity of the crime as against the gravity of the possible persecution. As such, it promotes a gradation or hierarchy of refugees: namely, those for whom the gravity of possible persecution is greater or less than that for other refugees. Assuming, *arguendo*, that the protection in Article 33(1) is not negated automatically upon satisfaction of the circumstance to which the provision refers, the appellant's construction creates a dichotomy between persecution that is sufficiently grave to outweigh the gravity of the crime, on the one hand, and persecution that is not so grave, on the other. The Convention neither provides for, nor accommodates, such a dichotomy. The adoption of such an approach 10 would undermine the effective protection afforded by the Convention to those who claim a well-founded fear of persecution for Convention reasons, as distinct from the creation of a super-class of refugees who, in order to attract the Convention's protection, claim a well-founded fear of even greater persecution.

Objects and purpose

50. The appellant submits that an examination of the context, purpose and objects of the relevant treaty provision favours a construction of Article 33 that would include the balancing exercise.[32] First, no specific object or purpose is identified. 20 Secondly, the submission appears to proceed on the basis of the existence of an overarching humanitarian object or purpose, without limitation or qualification. This is evident in the appellant's reliance on the principle of construction that treaties incorporated into domestic law are to be construed in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation.[33] As Gummow J said in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 283:

> *"I have referred to those aspects of the background to the adoption of the Convention which show the danger in approaching it as designed, on a* 30 *broad front, to advance humanitarian concerns. Rather, the text of the Convention manifested a compromise between various interests perceived by the Contracting States. As Dawson J points out in his reasons for judgment, the demands of language and context should not be departed from by invoking the humanitarian objectives of the Convention, without an appreciation of the limits placed by the Convention upon achievement of such objectives."*[34]

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32 Appellant's Submissions at [6.3.7].

33 Citing as authority for the proposition: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J), 255 (McHugh J); *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 565 (French J, as his Honour then was).

34 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 (Dawson J).

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51. Article 33(2) represents one such limit or compromise between interests. It provides the means for States to expel or return refugees who have committed particularly serious crimes, even if they were to face persecution.

52. It is similar in purpose and complementary to Article 1F(b) of the Convention, which seeks to protect the community of a receiving State from the danger of admitting as a refugee a person who has committed a serious non-political crime. As French J (as his Honour then was) said of Article 1F in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 563G:

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> *"... once the non-political crime committed outside the country of refuge is properly characterised as 'serious' the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the state of origin."*

53. His Honour explained further (at 565E):

> *"The provisions of the Convention are beneficial and are not to be given a narrow construction. The exemption in Art 1F(b), however, is protective of the order and safety of the receiving State. It is not, in my opinion, to be construed so narrowly as to undercut its evident policy."*

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54. Just as the Refugees Convention does not require that a country of refuge should accord refugee status to a person where it has serious reasons for considering that person has committed a serious non-political crime outside that country (by way of Article 1F(b)), it also does not require the country of refuge to provide protection from *non-refoulement* to a person who, having committed a particularly serious crime within that country, constitutes a danger to its community (by way of Article 33(2)). The benefit of the prohibition of expulsion or return is removed in these strictly limited circumstances even though the person concerned may be, or is, a refugee.

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55. While the difference between Article 33(2) (an 'exit' provision) and Article 1F of the Refugees Convention (an 'entry' provision) may support the view advanced by commentators that the conditions for the *application* of Article 33(2) are more stringent than those which engage Article 1F,[35] it does not present a distinction of principle that has any bearing on whether either provision, once engaged, requires a balancing exercise. As held by the Court below, there is no reason why Article 1F(b) should be construed as exclusive of any discretionary consideration

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[35] See Gilbert, "Current issues in the application of the exclusion clauses" in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (2003); Hathaway, *The Rights of Refugees Under International Law* (2005), p 344.

1 while Article 33(2), which is underscored by the same protective purpose, is construed in a different manner.[36]

State practice and commentaries

56. While the particular question on appeal does not appear to have been addressed directly in any Australian case, the application of Article 33(2) in the Australian cases has proceeded on the basis that it applies when the criteria expressly set out therein are satisfied.[37] No discretion is involved.

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57. In support of its construction, the appellant relies on commentary that espouses the principle of proportionality in relation to the interpretation and application of the "*security*" limb of Article 33(2);[38] not the "*particularly serious crime*" limb. These are two different exceptions to the prohibition on *refoulement* in Article 33(1), which rely on different criteria. Even if there is real disagreement among commentators,[39] that does not advance matters greatly in the light of the issues of construction canvassed above and the jurisprudence mentioned below.

58. The appellant also relies on the judgment of Staughton LJ in *R v Home Department State Secretary, Ex parte Chalal* [1995] 1 WLR 526 at 533D (***Chahal***), where his Lordship remarks that it is not surprising that international lawyers consider the doctrine of proportionality relevant, despite the literal meaning of Article 33, in relation to an assessment of danger to national security.[40] This case concerned the application of domestic immigration laws that required the public interest "*to be balanced against any compassionate circumstances of the case*", in considering "*whether deportation is the right course on the merits*".[41] The conclusion of the Court that a "*balancing exercise*" was required reflected these laws,[42] and, as such, does not inform the

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[36] See *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40 at [25] (Flick J) **[AB 184]**. See also *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [26], [28].

[37] See *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 at [3]-[5] (Burchett & Lee JJ), [40] (Katz J); *Betkoshabeh v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 463 at 467-469 (Finkelstein J).

[38] Appellant's Submissions at [6.3.5]. See Lauterpacht & Bethlehem, "The scope and content of the principle of *non-refoulement:* Opinion" in Feller, Turk & Nicholson (eds), *Refugee Protection in International Law* (2003), p 137 [177].

[39] See Appellant's Submissions at [6.3.6]. Professor Hathaway (*The Rights of Refugees Under International Law* (2005), pp 353-354) convincingly criticises the adoption of a 'balancing' test. However, it is not clear whether those who advocate 'proportionality' (such as Lauterpacht and Bethlehem) are addressing the construction of Article 33(2), or the approach that a State should take in deciding whether to use the power which it confers.

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[40] Appellant's Submissions at [6.3.5].

[41] [1995] 1 WLR 526 at 533E.

[42] [1995] 1 WLR 526 at 533E-534B (Staughton LJ), 538H-539C (Nolan LJ), 544G (Neill LJ).

1 construction of the "*particularly serious crime*" limb in Article 33(2) of the Refugees Convention.

59. Furthermore, the commentators referred to by Staughton LJ in *Chahal*[43] rely largely on a single comment of the British co-sponsor of the *refoulement* provision to the effect that it must be left to States to decide whether the danger entailed to refugees by expulsion outweighs the menace to public security that would arise if they were permitted to stay.[44] The reference to the importance of letting States weigh relative risks was actually an answer to a proposal to restrict States' margin

10 of appreciation, not an argument for a "*super added proportionality test*".[45]

60. In any event, as Gummow J observed in *Applicant A*,[46] recourse may be had to the preparatory work for the treaty, and the circumstances of its conclusion, in order to confirm the ordinary meaning or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results.[47] The application of Article 31 of the Vienna Convention does not leave the meaning of Article 33(2) of the Refugees Convention ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable. Recourse to the *travaux préparatoires* to determine the meaning of Article 33(2) is, therefore, not

20 warranted.

61. The only decision at appellate level in which the construction of Article 33(2) arose squarely for determination appears to be the decision of the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289.[48] In that case, the Supreme Court concluded that the assessment to be made under Article 33(2) is to be made in its own terms, and without any additional proportionality requirement.[49] That conclusion of a final appellate court, reached after detailed analysis of the ordinary meaning of Article 33, read in context and

30 by reference to its purpose (together with subsequent practice and the drafting

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43 See [1995] 1 WLR 526 at 533C.

44 Hathaway, *The Rights of Refugees under International Law* (2005), p 353, citing the Statement of Mr Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. See also *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at 307.

45 Hathaway, *The Rights of Refugees under International Law* (2005), p 353.

46 (1997) 190 CLR 225 at 277.

47 Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty

40 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.

48 See Appellant's Submissions at [6.3.6].

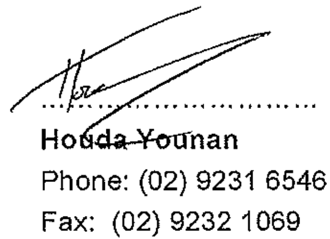
49 [2006] 1 NZLR 289 at 300-309. As noted by the appellant (at [6.3.6]), this position is also supported by Hathaway, *The Rights of Refugees under International Law* (2005), chp 4.1.4, p 342ff.

1 history of the Convention), should be afforded significant weight. Further, it is, with respect, clearly correct.

PART VII: ORAL ARGUMENT

62. The first respondent estimates that its presentation of oral argument will take approximately 2 to $2^{1/2}$ hours.

10 Dated: 17 January 2013



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