HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

SZOQQ APPELLANT

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR RESPONDENTS

SZOQQ v Minister for Immigration and Citizenship
[2013] HCA 12
10 April 2013
S334/2012

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia dated 23 March 2012 and, in their place, order that:*

   (a) the appeal to that Court be allowed;

   (b) the order of the Federal Court dated 4 November 2011 be set aside and, in its place, order that:

      (i) a writ of certiorari issue directed to the second respondent quashing its decision dated 2 September 2010;

      (ii) a writ of mandamus issue directed to the second respondent requiring it to review, according to law, the decision made by a delegate of the first respondent on 26 May 2009 to refuse the appellant a Protection (Class XA) visa; and

(iii) the first respondent pay the appellant's costs in the Federal Court; and

(c) the first respondent pay the appellant's costs in the Full Court of the Federal Court.

3. First respondent to pay the appellant's costs in this Court.

On appeal from the Federal Court of Australia

Representation

T A Game SC with N C Poynder for the appellant (instructed by Gilbert + Tobin Lawyers)

G R Kennett SC with H Younan for the first respondent (instructed by DLA Piper Australia)

Submitting appearance for the second respondent

CATCHWORDS

SZOQQ v Minister for Immigration and Citizenship

Immigration – Refugees – Judicial review – Minister's delegate found appellant had well-founded fear of political persecution if returned to Indonesia – Minister's delegate concluded Australia owed no "protection obligations" to appellant because appellant convicted of "particularly serious crime" – Whether "protection obligations" in s 36(2)(a) of *Migration Act* 1958 (Cth) ("Act") limited to non-refoulement obligation in Art 33(1) of Convention relating to the Status of Refugees as amended by Protocol relating to the Status of Refugees – Whether s 91U of Act confines scope of Australia's "protection obligations" in s 36(2)(a) of Act – Whether Minister bound to consider if grant of visa not prevented by s 501 of Act.

Words and phrases – "non-refoulement", "particularly serious crime", "protection obligations".

Migration Act 1958 (Cth), ss 36, 91U, 501.
Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees, Arts 1, 33.

1 FRENCH CJ. I agree with the orders proposed by Keane J for the reasons given by his Honour.

2 HAYNE J. I agree with Keane J.

3 CRENNAN J. I agree with the orders proposed by Keane J for the reasons given by his Honour.

4 KIEFEL J. I agree with the orders proposed by Keane J for the reasons given by his Honour.

BELL J. I agree with Keane J.

6 GAGELER J. I agree with Keane J.

7 KEANE J. The appellant is an Indonesian national from the West Papuan province of Irian Jaya who was active in the Free Papua Movement from a young age. In 1973 he was detained and tortured by Indonesian officials. In March 1975, he suffered serious injury after being shot by members of the Indonesian military.

8 In June 1985 the appellant was granted temporary entry into Australia. In November 1993 he was granted a Domestic Protection (Temporary) Entry Permit. On 22 January 1996 he was granted a protection visa. The appellant returned to Irian Jaya in September 1996 in order to visit his father, whom he believed to be in prison. On arrival, he was detained and physically assaulted by the Indonesian military. He escaped and returned to Australia on 22 July 1997.

9 Back in Australia, the appellant was arrested on 27 May 2000 on a charge of having assaulted his de facto spouse. She died four days after the assault as a result of injuries inflicted by the appellant. The appellant subsequently pleaded guilty to a charge of manslaughter and was sentenced to seven years' imprisonment with a non-parole period of two years and six months.

10 On 5 March 2003, pursuant to the "character test" provisions of s 501 of the *Migration Act* 1958 (Cth) ("the Act"), the first respondent cancelled the appellant's protection visa.

11 On 12 December 2008, after a number of requests by the appellant, the first respondent determined in accordance with s 48B of the Act that it was in the public interest to allow the appellant to make a further application for a protection visa. An application in that regard was lodged on 19 December 2008.

12 On 26 May 2009 a delegate of the first respondent determined that the appellant had a well-founded fear of political persecution within the meaning of Art 1A(2) of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees, referred to in the Act ("the Refugees Convention"), should he be returned to Indonesia. However, the delegate determined that the appellant was not a person to whom Australia owed "protection obligations" under the Refugees Convention. The delegate took this position because the appellant, having been convicted of a "particularly serious crime", constituted a danger to the community, and was not a person to whom Australia had protection obligations under the Refugees Convention for the purposes of the criterion for a protection visa prescribed by s 36(2)(a) of the Act. Accordingly, the delegate decided that the appellant was precluded from obtaining a protection visa.

13 The delegate's decision was affirmed by the Administrative Appeals Tribunal ("the Tribunal"), the primary judge[1] and the Full Court of the Federal Court[2]. The only argument advanced for the appellant in the Tribunal and in the courts below was that Art 33(2) of the Refugees Convention, by which the non-refoulement obligation in Art 33(1) may be defeated, required a balancing of the danger faced by the appellant should he be returned to Indonesia against the danger he poses to the Australian community. This argument proceeded on the assumption that the "only protection obligation" owed to the appellant by Australia was the non-refoulement obligation in Art 33(1) of the Refugees Convention. The argument was resolved against the appellant on the footing that Art 33(2) of the Refugees Convention does not contemplate a balancing exercise of the kind for which he contended.

NAGV

14 In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[3] ("*NAGV*"), a decision published on 2 March 2005, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ held that s 36(2) of the Act, in referring to "a non-citizen in Australia to whom Australia has protection obligations under [the Refugees Convention]", does no more than describe a person who is a refugee within Art 1 of the Refugees Convention. On this approach, the fact that the non-refoulement obligation in Art 33(1) would not be breached by returning a refugee to his or her country of nationality does not mean that that obligation, and other obligations owed to refugees under the Refugees Convention, do not exist. Their Honours explained[4]:

> "Section 36(2) does not use the term 'refugee'. But the 'protection obligations under [the Convention]' of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer

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1 *SZOQQ v Minister for Immigration and Citizenship* (2011) 124 ALD 18.

2 *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174.

3 (2005) 222 CLR 161 at 173-174 [32]-[33], 176 [42], 187 [84]; [2005] HCA 6.

4 (2005) 222 CLR 161 at 173-174 [32]-[33]. See also *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1386 [23], 1390 [37]-[38], 1404-1405 [123], 1415 [186]-[187], 1426 [257], 1453-1454 [389], 1461-1462 [437], 1462 [441], 1469 [479]; 292 ALR 243 at 252-253, 258, 278, 293, 309, 346, 357, 358, 367; [2012] HCA 46.

'surrogate protection'[5] in the place of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself[6]. That directs attention to Art 1 and to the definition of the term 'refugee'.

Such a construction of s 36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of 'refugee' spelled out in Art 1 of the Convention."

15 Their Honours went on to say[7]:

"Having regard to the subject, scope and purpose of the Reform Act, the adjectival phrase in s 26B(2) (repeated in s 36(2)) 'to whom Australia has protection obligations under [the Convention]' describes no more than a person who is a refugee within the meaning of Art 1 of the Convention. That being so and the appellants answering that criterion, there was no superadded derogation from that criterion by reference to what was said to be the operation upon Australia's international obligations of Art 33(1) of the Convention."

16 This Court's decision in *NAGV* was not adverted to by the parties before the Tribunal or the courts below. Accordingly, its implications for the exercise of the discretion conferred by s 65 of the Act on the Minister to grant or refuse a protection visa were not addressed.

17 In this Court the appellant contended that all the proceedings below miscarried because, contrary to the assumption on which his case proceeded, the "protection obligations" referred to in s 36(2)(a) of the Act are not limited to the non-refoulement obligation in Art 33(1) of the Refugees Convention. The appellant submitted that the decision in *NAGV* means that he is a person in respect of whom Australia has "protection obligations" under the Refugees

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5 See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8-9 [20]; [2004] HCA 18.

6 Section A(2) states: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling *to avail himself of the protection of that country*; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it." (emphasis added)

7 (2005) 222 CLR 161 at 176 [42].

Convention. Further, it was said the first respondent was bound but failed to consider whether the grant of a visa to the appellant was not otherwise prevented by s 501 of the Act.

18 In this Court, the first respondent did not seek to dispute the correctness of the decision in *NAGV*. In an attempt to resist the conclusion that the proceedings in the Tribunal and the courts below did indeed miscarry, counsel for the first respondent argued that s 91U of the Act alters the operation of s 36(2) of the Act. It was said that the decision in *NAGV* is not determinative of this case because s 91U was not in force at the time relevant to the decision in *NAGV*. Counsel for the appellant countered that s 91U is concerned only to give content to the expression "particularly serious crime"; it does not, either expressly or impliedly, purport to alter the operation of s 36(2) of the Act.

19 The first respondent conceded that if the argument in relation to the effect of s 91U of the Act is resolved in the appellant's favour, the orders of the Tribunal and the courts below must be set aside and the appellant's application for a visa considered again by the Tribunal.

20 Before I turn to discuss the parties' arguments, I should set out those provisions of the Act and the Refugees Convention to which reference has been made and the other provisions which bear upon the arguments.

The Act and the Refugees Convention

21 At all material times s 36 of the Act relevantly provided:

"**Protection visas**

(1) There is a class of visas to be known as protection visas.

…

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) 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; …"

22 Article 33 of the Refugees Convention provided:

"**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."

23 Section 91U of the Act relevantly provided:

"**Particularly serious crime**

(1) For the purposes of the application of this Act and the regulations to a particular person, Art 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)); …

(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:

(i) involves violence against a person; ...

… and

(b) the offence is punishable by:

(i) imprisonment for life; …"

24 Section 65 of the Act relevantly provided:

"**Decision to grant or refuse to grant visa**

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

(a) if satisfied that:

…

(iii) the grant of the visa is not prevented by section … 501 (special power to refuse or cancel) or any other

provision of this Act or of any other law of the Commonwealth; …

is to grant the visa; or

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

..."

25 Section 499 of the Act relevantly provided:

"**Minister may give directions**

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

..."

26 Section 500 of the Act relevantly provided:

"**Review of decision**

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

...

(b) decisions of a delegate of the Minister under section 501; or

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following

Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);

..."

27 Section 501 of the Act relevantly provided:

"**Refusal or cancellation of visa on character grounds**

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

...

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

…

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

...

(c) the person has been sentenced to a term of imprisonment of 12 months or more; …

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C."

Discussion

28 The first respondent argued that *NAGV* was not concerned (as this case is) with a decision based on the "particularly serious crime" limb of Art 33(2) of the Refugees Convention. The operation of that limb is said to be affected by the operation of s 91U of the Act, which was introduced into the Act by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth) ("the 2001 Amending Act") to define "particularly serious crime". The introduction of s 91U took effect after the decision under review in *NAGV* and, as a result, the reasoning in *NAGV* does not apply, so it is said, to the "particularly serious crime" limb of Art 33(2).

29 In support of this submission, the first respondent argued that the language of s 91U evinces a legislative intention that the "particularly serious crime" limb of Art 33(2) was to have a particular "effect" for the purposes of the Act.

According to the first respondent, that effect was that Art 33(2) was to apply to negative the existence of "protection obligations" to a person under s 36(2) of the Act. The first respondent urges this interpretation of s 91U for the following reasons:

- Section 91U would be otiose if it does not have the effect of applying Art 33(2) of the Refugees Convention to limit the persons to whom Australia has "protection obligations" in s 36(2).

- The Minister's Second Reading Speech for the Bill[8] for the 2001 Amending Act and the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth) (par 39) indicate that s 91U was intended to curtail the broad interpretation taken by the courts concerning the existence of "protection obligations".

30 The first respondent's contention that s 91U of the Act is apt to confine the scope of persons to whom Australia has "protection obligations" in s 36(2)(a) has no textual basis. Section 36(2)(a) of the Act does not refer to Art 33(2), or the expression "particularly serious crime". The text of s 91U gives content to the expression "particularly serious crime". It does not purport to affect the operation of s 36(2)(a).

31 Section 91U is not expressed in terms which are apt to translate into the terms of s 36(2) the operation of Art 33(2) of the Refugees Convention to provide for the extinguishment of the non-refoulement obligation in Art 33(1), much less all of Australia's other extant protection obligations.

32 It may also be said that the first respondent's argument, if accepted, would produce the odd outcome that the two limbs of Art 33(2) have different applications via s 36(2)(a). It is not apparent why such an outcome would have been intended.

33 I do not accept the first respondent's suggestion that, unless s 91U is understood as working an alteration of s 36(2)(a), it would be left with no work to do. The appellant argues that it might be considered for the purposes of s 65(1)(a)(iii) and s 501 of the Act. The first respondent disputes that s 91U is relevant for the purposes of s 501 because that section does not refer in terms to "particularly serious crime". However that may be, s 91U can readily be seen to be apt to aid the operation of s 499. And, bearing in mind the terms of s 499(2), it could also aid the making of regulations under s 31(3) of the Act.

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8 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30420.

34 In addition, pursuant to s 31(3) a regulation might prescribe, as an additional criterion for the grant of a protection visa of the class referred to in s 36 of the Act, that a person not be a person to whom the "particularly serious crime" limb of Art 33(2) of the Refugees Convention applies.

35 As to the first respondent's second point, the Minister's Second Reading Speech sheds no light on the problem of present concern. That is hardly surprising, given that it predates the decision in *NAGV*. And as I have noted, in this Court the first respondent did not seek to challenge the correctness of *NAGV*.

Conclusion and orders

36 The appellant's submission that the proceedings below miscarried must be accepted. The appeal must be allowed to enable the appellant's application for a protection visa to be considered according to law.

37 The appellant seeks his costs of the proceedings in the courts below and in this Court. Having regard to the failure of the parties to identify the point on which the appeal to this Court turns, and the arid exercise in which the parties have involved the courts before which this matter has come, I have given consideration to the possibility that there should be no order as to costs. I have, however, come to the conclusion that, bearing in mind that the parties were equally at fault in this regard, this consideration is not sufficient to displace the usual rule that costs should follow the event.

38 I would make the following orders:

1. Appeal allowed.

2. Set aside the orders of the Full Court of the Federal Court of Australia dated 23 March 2012 and, in their place, order that:

    (a) the appeal to that Court be allowed;

    (b) the order of the Federal Court dated 4 November 2011 be set aside and, in its place, order that:

        (i) a writ of certiorari issue directed to the second respondent quashing its decision dated 2 September 2010;

        (ii) a writ of mandamus issue directed to the second respondent requiring it to review, according to law, the decision made by a delegate of the first respondent on 26 May 2009 to refuse the appellant a Protection (Class XA) visa; and

        (iii) the first respondent pay the appellant's costs in the Federal Court; and

(c) the first respondent pay the appellant's costs in the Full Court of the Federal Court.

3. First respondent to pay the appellant's costs in this Court.