IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S334 of 2012

BETWEEN:

SZOQQ
Appellant

and

Minister for Immigration and Citizenship
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION

1.1 These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2.1 **Issue 1:** Does an applicant who satisfies the definition of "refugee" in Article 1 of the *Refugees Convention* as amended by the *Refugees Protocol* (**the Refugees Convention**) thereby satisfy the criterion in s 36(2)(a) of the *Migration Act 1958* (Cth) (**the Act**) of being a person in respect of whom Australia has "protection obligations" under the Refugees Convention?

2.2 **Issue 2:** If Issue 1 is answered in the affirmative, was the first respondent then bound by s 65(1)(a)(iii) to consider whether the grant of a visa to the appellant was not otherwise prevented by s 501 of the Act? If so bound, was the first respondent required to exercise any discretion under s 501 and what factors were relevant to the exercise of that discretion? Was that discretion informed by a principle of proportionality?

Filed for the appellant by

21 December 2012

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2.3 **Issue 3:** If Issue 1 is answered in the negative, was the first respondent, when deciding to refuse the appellant a Protection (Class XA) visa pursuant to ss 36(2)(a) and 65 of the Act, required by Article 33(2) of the Refugees Convention to weigh the consequences to the appellant of refoulement against the danger that the appellant constitutes to the Australian community?

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

3.1 The appellant has considered whether any notice should be given to the Attorneys General in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice should be given.

PART IV: CITATION OF REASONS FOR JUDGMENT

4.1 The reasons of the Administrative Appeals Tribunal comprised of Deputy President Handley and Member Connolly delivered on 2 September 2010 have not been published in any report. The medium neutral citation is *Re BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010).

4.2 The reasons for the judgment of Stone J in the Federal Court of Australia delivered on 4 November 2011 are reported as *SZOQQ v Minister for Immigration and Citizenship* (2011) 124 ALD 18.

4.3 The reasons for the judgment of the Full Federal Court of Australia comprised of Flick J and Jagot and Barker JJ delivered on 23 March 2012 are reported as *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174.

PART V: STATEMENT OF FACTS

5.1 The appellant is a 57 year old national of Indonesia from the West Papuan province of Irian Jaya. From a young age the appellant was active in the Free Papua Movement (Organisasi Papua Merdeka, or OPM). In 1973 he was arrested, detained and tortured by Indonesian officials and, in March 1975, he

was shot and seriously injured by the Indonesian military.[1]

5.2 In June 1985 the appellant travelled from Papua New Guinea to Australia by canoe and was granted temporary entry. In November 1993 he was granted a Domestic Protection (Temporary) Entry Permit which, in September 1994, was converted to a Transitional (Permanent) visa.[2]

5.3 On 22 January 1996 the appellant was granted a protection visa.[3]

5.4 In September 1996 the appellant returned to Irian Jaya to visit his father who, he was told, was in prison. On arrival he was arrested by the Indonesian military and physically assaulted. He escaped and returned to Australia, arriving on 22 July 1997.[4]

5.5 On 27 May 2000, whilst living in Australia, the appellant was arrested and detained after assaulting his de facto spouse, who died in hospital four days later. The appellant subsequently pleaded guilty to a charge of manslaughter for which he was sentenced on 17 September 2001 to seven years' imprisonment with a non-parole period of two years and six months.[5]

5.6 On 5 March 2003 the first respondent cancelled the appellant's protection visa under the character provisions in s 501 of the Act.[6]

5.7 On 21 February 2005 and again on 13 July 2007 the appellant requested the first respondent to allow him to make a further application for a protection visa in accordance with s 48B of the Act. [7] However on each occasion his request was declined on the grounds that it did not meet the relevant guidelines.

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1 *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010) [3].
2 Ibid. Pursuant to reg 4(1) of the *Migration Reform (Transitional Provisions) Regulations* (Cth) a non-citizen in Australia who held a permanent entry permit immediately before 1 September 1994 was entitled to remain indefinitely in Australia as the holder of a Transitional (Permanent) visa.
3 *SZOQQ v Minister for Immigration and Citizenship* (2011) 124 ALD 18, 19 [1].
4 *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010) [4].
5 Ibid [7].
6 *SZOQQ v Minister for Immigration and Citizenship* (2011) 124 ALD 18, 19 [1].
7 Ibid 19 [2].

5.8 On 12 December 2008 the first respondent decided 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, and the appellant lodged this application on 19 December 2008.[8]

5.9 On 26 May 2009 a delegate of the first respondent found that the appellant faced a real chance of being persecuted for political reasons by the Indonesian military or police, and that he had a well-founded fear of political persecution as defined by Article 1A(2) of the Refugees Convention. However the delegate found that the appellant was not a person to whom Australia owed "protection obligations" for the purposes of s 36 of the Act and criteria 866.221 of the regulations because, having been convicted of a particularly serious crime and constituting a danger to the Australian community, the applicant was excluded by Article 33(2) of the Refugees Convention.[9]

5.10 On 2 September 2010 the second respondent affirmed the delegate's decision. The second respondent found that there was a real risk of the appellant reoffending and of consequent harm to members of the Australian community;[10] however it rejected the appellant's argument that it was required to balance the danger represented by the appellant against the consequences of returning him to Indonesia, finding that *"this is a matter for the Minister"*.[11]

5.11 The primary Judge found no error in the Tribunal's approach, concluding that there is *"no support for the submission that in the context of the Migration Act Art 33(2) should be construed as requiring the balancing exercise advocated by the* [appellant]*"*.[12]

5.12 The Full Federal Court agreed with the primary judge, dismissing the appeal.[13]

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8 Ibid.
9 Ibid 19 [3].
10 *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010) [55].
11 Ibid [56].
12 *SZOQQ v Minister for Immigration and Citizenship* (2011) 124 ALD 18, 25 [34].
13 *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174, 184 [29] (Flick J), 190 [57] (Jagot and Barker JJ).

PART VI: ARGUMENT

6.1 *Section 36(2) does not import Article 33(2) of the Refugees Convention (Notice of Appeal para 2):*

6.1.1 The Full Federal Court considered that s 36(2)(a) of the Act imported the exception to non-refoulement in Article 33(2) of the Refugees Convention.[14] This would mean that the question posed by s 36(2)(a) - namely, whether the appellant is a person in respect of whom Australia has protection obligations under the Refugees Convention - will potentially be answered in the negative by reason of the appellant coming within the second "leg" of Article 33(2), as a person who, having committed a serious crime, constitutes a danger to the community of Australia.

6.1.2 The Full Federal Court's construction of s 36(2)(a) is in conflict with the decision of this Court in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[15] (***NAGV***). In *NAGV* the plurality said that the phrase *"to whom Australia owes protection obligations"* in s 36(2):

> *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]

6.1.3 *NAGV* was concerned with the relationship between the Article 33(1) non-refoulement obligation and s 36(2). However, the reasoning of the plurality in *NAGV* applies equally to Article 33(2).[17] In particular, the fact that Australia may not breach its international obligations under Article 33 by sending a visa applicant to another country does not mean that the applicant is not a person

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14 See ibid 176-7 [5]-[10] (Flick J) and 188 [45]-[49] (Jagot and Barker JJ).

15 (2005) 222 CLR 161.

16 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 176 [42] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also 173-4 [32]-[33].

17 See especially *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 173-6 [29]-[42].

to whom Australia owes protection obligations within the meaning of s 36(2).[18] Although s 36(2) has since been amended,[19] s 36(1) and (2)(a) are in "*relevantly the same terms*" as were ss 36(1) and (2) when those provisions were considered in *NAGV*.[20]

6.1.4 In *Plaintiff M47/2012 v Director-General of Security*[21] (***Plaintiff M47***) a majority of this Court affirmed the interpretation of s 36(2) of the Act expressed in *NAGV*; namely, that the criterion in s 36(2) of the Act is only concerned with whether the applicant answers the definition of "refugee" spelt out in Article 1 of the Refugees Convention.[22] Relevantly, French CJ also emphasised that Articles 32 and 33 do not qualify the reach of Article 1 of the Convention, since the protection they provide is premised upon a person first falling within the definition of a refugee under Article 1.[23] Those Articles therefore do not play a part in the application of s 36(2)(a).[24] As Bell J said: *"A decision to refuse to grant a protection visa because an applicant is not a person to whom Australia has protection obligations is not one made relying on Arts 32 or 33(2)."*[25]

6.1.5 In *Plaintiff M47* this Court affirmed *NAGV* notwithstanding s 91U of the Act which specifically provides, for the purposes of the application of the Act and the regulations to a particular person, for the effect of the term "particularly serious crime" as it appears in Article 33(2). This Court was referred to s 91U

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18 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 173 [29].

19 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), sch 1 item 5. Section 36(2) as considered in *NAGV* provided that "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protections obligations under [the Convention]." The current s 36(2)(a) requires the applicant to be a person "in respect of whom the Minister is satisfied Australia has protection obligations under [the Convention]".

20 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243; (2012) 86 ALJR 1372; [2012] HCA 46 at 252 [23] (French CJ).

21 (2012) 292 ALR 243.

22 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 252 [23] (French CJ), 278 [123] (Gummow J), 293 [186]-[187] (Hayne J), 309 [257] (Heydon J), 367 [479] (Bell J). In addition to the Article 1A(2) definition of refugee, the other sections of Article 1 relevantly include Article 1C (cessation clauses), Article 1D (exclusion where person already receiving protection or assistance); Article 1E (exclusion where person already has rights and obligations in the receiving country) and Article 1F (exclusion for certain crimes and acts contrary to the purposes and principles of the United Nations).

23 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 253 [24] (French CJ).

24 Ibid 258 [38] (French CJ).

25 Ibid 367 [479].

by the plaintiff in *Plaintiff M47* in both written and oral submissions[26] and two members of this Court expressly considered the section in their judgments[27].

6.1.6 Section 91U provides no basis for distinguishing *NAGV* from the present case nor for construing Article 33(2) as a limitation on the scope of the s 36(2)(a) "protection obligations" criterion. Section 36(2)(a) does not refer to Article 33(2) nor use the term "particularly serious crime." In *Plaintiff M47* several members of this Court recognised the significant overlap between Article 33(2) and the first respondent's discretion to refuse a visa on character grounds under s 501.[28] To read s 36(2)(a) as subject to Article 33(2) would effectively render s 501 superfluous in cases where the applicant falls within Article 33(2), since the applicant would be excluded by s 36(2)(a) from the grant of a visa under s 65(1)(a)(ii) without s 65(1)(iii) and s 501 being engaged.

6.1.7 Correctly interpreted in light of *Plaintiff M47* and *NAGV*, the scheme for the considering an application for a protection visa is therefore as follows:

6.1.8 First, the Minister must consider any valid application for a visa: see ss 47 and 65(1) of the Act.

6.1.9 Second, the Minister must consider whether any health criteria are satisfied: see s 65(1)(a)(i) of the Act.[29]

6.1.10 Third, the Minister must consider whether the other criteria prescribed by the Act or the regulations are satisfied: see s 65(1)(a)(ii) of the Act. These criteria are, relevantly, that at time of application the Minister is satisfied that the

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26 Plaintiff M47, 'Revised Written Submissions', 'Submission in *Plaintiff M47/2012 v Director-General of Security*, M47/2012, 12 June 2012, 3 f/n 20; Transcript of Proceedings, *Plaintiff M47/2012 v Director-General of Security* [2012] HCATrans 149 (21 June 2012) [5225].

27 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 272 [96] (Gummow J), 354 [425] (Kiefel J).

28 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 259 [40]-[42] (French CJ), 294 [193] (Hayne J), 346 [389] (Crennan J).

29 The relevant health criteria for a subclass 886 Protection visa in sched 2 to *Migration Regulations 1994* were relatively straightforward, requiring the applicant to have undergone a medical examination (sub-cl 866.223), a chest x-ray examination unless exempted (sub-cl 866.224), and consideration had been given to whether the applicant is or may be a threat to public health in Australia or a danger to the Australian community and appropriate action had been taken (sub-cls 866.224A and 866.224B).

applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and makes specific claims under the Refugees Convention[30], and at the time of decision that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.[31]

6.1.11 Thus a finding that the applicant is a "refugee" within the meaning of Article 1A of the Refugees Conventions satisfies these criteria. However, as was made clear by Heydon J in *Plaintiff M47*[32] this does not give the applicant any entitlement to a visa. This can only be achieved by satisfaction of the next two stages under s 65 of the Act; principally, stage four.

6.1.12 Fourth, the Minister must consider whether the grant of a protection visa is not prevented by s 40 (circumstances when granted), s 500A (refusal or cancellation of temporary safe haven visas), s 501 (special power to refuse or cancel), or any other provision of the Act or of any other law of the Commonwealth: see s 65(1)(a)(iii) of the Act. It is under this provision - in particular s 501 - that the Minister is to consider whether, having failed the character test in s 501(6),[33] the applicant ought to be denied a protection visa for reasons including those in Article 33(2).

6.1.13 Finally, the Minister must consider whether any amount of visa application charge payable in relation to the application has been paid: see s 65(1)(a)(iii) of the Act.[34]

6.1.14 The Full Federal Court erred in upholding the primary judge's construction of s 36(2)(a), namely that the meaning of "protection obligations" was limited by the

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30 *Migration Regulations 1994*, sched 2, sub-cl 866.211(a).

31 *Migration Regulations 1994*, sched 2, sub-cl 866.221(2).

32 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 310 [261] (Heydon J).

33 One of the bases for failing the character test is if there is a significant risk that the person represents 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: *Migration Act 1958* (Cth), s 501(6)(d)(v).

34 At the relevant time there was no application charge for an applicant in detention and there was an application charge of $30 for other applicants: *Migration Regulations 1994* (Cth), sched 1, item 1401(2)(a).

construction to be given to Article 33(2) of the Refugees Convention. Article 33 is not relevant to the application of s 36(2)(a) because s 36(2)(a) only imports Article 1 into the criteria for a protection visa. Once the appellant was determined to be a "refugee" within the meaning of Article 1, the Court ought to have found that he satisfied the criterion in s 36(2)(a) of being *"a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention"*.

6.1.15 From there, it fell to the decision-maker 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.

6.2 *First Respondent must properly exercise the discretion in s 501 of the Act (Notice of Appeal paras 3(a) and 3(b)):*

6.2.1 If, as the appellant contends, the source of the first respondent's power to refuse a protection visa because of Article 33(2) of the Refugees Convention derives from s 65(1)(a)(iii) in combination with s 501 of the Act, the power to refuse a protection visa requires more than a finding that the appellant has been convicted of a particularly serious crime and constitutes a danger to the community. The appellant contends that the first respondent is vested with a discretionary judgement under s 501 and that this will necessarily involve weighing the interests of the appellant against other relevant considerations.

6.2.2 It is not in issue that the appellant could not pass the character test because he had a *"substantial criminal record"* within the meaning of s 501(6)(a) and (7)(c) of the Act. The issue here is whether the delegate of the first respondent must also exercise a discretion under s 501(1) of the Act in deciding whether to refuse to grant the appellant a protection visa.[35] The delegate of the first respondent did not engage in any discretionary assessment in this case.

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[35] The decision in this case did not involve the exercise of the first respondent's personal discretion under s 501(3) of the Act.

6.2.3 The discretionary nature of the power to refuse a protection visa under s 501(1) of the Act is plain from the wording of that provision; namely, *"The Minister may refuse to grant a visa"*. Such a discretion *"must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously"*.[36] Where the decision-maker fails to give *"weight or sufficient weight"* to relevant considerations this may amount to a failure to exercise the discretion entrusted to the decision-maker.[37]

6.2.4 Further, the appellant contends that, in exercising the discretion to refuse to grant a visa to the appellant under s 501(1) of the Act, the delegate was required to take into account:

- the relative danger that the appellant constituted to the Australian community; and
- the consequences of any decision to exclude the appellant from protection.

6.2.5 The appellant also contends that the delegate was bound by s 499 of the Act to take into account the first respondent's written directions on the performance and exercise of the power under s 501(1), which at the time of the decision by the second respondent were set out in *Direction No. 41: Visa refusal and cancellation under section 501* (**Direction 41**).[38] This required the delegate to take into account:

- the seriousness and nature of the appellant's conduct[39];
- the risk that the conduct may be repeated[40];
- if Article 33(1) of the Refugees Convention applies, whether the benefit of that provision may not be claimed by the appellant because of Article

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36 *House v The King* (1936) 55 CLR 499, 503 (Starke J).
37 *Australian Coal and Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621, 627 (Kitto J).
38 Direction 41 was in force from 3 June 2009. The direction in force at the time of the decision by the delegate was *Direction No. 21: Visa refusal and cancellation under section 501*.
39 Direction 41, para 10.1(2)(a).
40 Direction 41, para 10.1(2)(b).

33(2) of the Refugees Convention[41];

- with reference to the International Covenant on Civil and Political Rights (**ICCPR**), where as a necessary or foreseeable consequence of the appellant's removal from Australia, he would face a real risk of violation of his rights under Article 6 (right to life) or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment), or face the death penalty[42]; and
- with reference to Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), whether there were substantial grounds for believing the appellant would be in danger of being subjected to torture.[43]

6.2.6 In this context, para 10.4.3(c) of Direction 41 provided that:

> *The prohibition against refoulement under the ICCPR and CAT is absolute. There is no balancing of other factors if the removal of a person from Australia, including if that removal followed as a consequence of the refusal or cancellation of a visa, would amount to refoulement under the ICCPR or the CAT.*

In other words, far from there being no discretion in s 36(2) but to remove the appellant, there was a binding obligation on the delegate to consider (though not necessarily to act on) the absoluteness of Australia's obligations on non-refoulement.[44]

6.2.7 Further, the appellant contends that in exercising the discretion under s 501 the delegate ought to have done so in accordance with the principle of proportionality. That is, when exercising a statutory power which has the capacity to affect fundamental rights (such as s 501 of the Act), the decision-maker ought to consider whether there are alternative means available to

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41 Direction 41, para 10.4.2(2).
42 Direction 41, para 10.4.3(1)(a).
43 Direction 41, para 10.4.3(1)(b).
44 See *Minister for Immigration and Citizenship v Anochie* [2012] FCA 1440 (18 December 2012) [36] (Perram J).

achieve the legitimate aim of the statute (namely, the protection of the Australian community) which would not impair (or impair to the same extent) the appellant's human rights.[45] The appellant contends that this is a limitation to the discretion which arises from, or as an extension of, the legislature's assumed intent that a discretion is to be exercised reasonably and justly.[46]

6.3 *If Article 33(2) is incorporated into section 36(2), then a balancing exercise is required (Notice of Appeal para 4)*

10 6.3.1 As an alternative to the above two grounds the appellant continues to maintain that, even if s 36(2)(a) of the Act imports the exception to non-refoulement in Article 33(2) of the Refugees Convention, there was still a requirement for the first respondent to weigh the relative danger that the appellant constituted to the Australian community against the consequences of any decision to exclude the appellant from protection.

6.3.2 Contrary to the findings of the Federal Court and the Full Federal Court, the appellant maintains that a balancing exercise can be inferred by reference to established principles of statutory construction.

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6.3.3 First, Parliament is imputed not to intend to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language.[47] Here the fundamental human right which the first respondent seeks to abrogate is the appellant's right not to be *refouled* in Article 33(1) of the Refugees Convention, a right which has been recognised by members of the Federal Court as *"...a principle concerned with some of the*

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45 See, eg, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 253.

46 See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 645 [123] (Crennan and Bell JJ) where their Honours refer to *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [15] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36 (Brennan CJ).

47 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ). See also Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 33-6.

most precious of human rights, including life itself."[48] Other relevant human rights might also be found in other treaties to which Australia is a party, include the absolute and non-derogable prohibition against torture.[49]

6.3.4 Second, Article 33 itself ought to be construed as requiring the decision-maker to take into account the consequences of refoulement when deciding whether to expel a person in accordance with Article 33(2). 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. The phrase *'danger to the community'* in Article 33(2) necessarily involves an evaluation that sits on a continuum; from mere or trivial danger to grave or extreme danger. The appellant contends that a decision-maker when assessing whether to impose the expulsion provision in Article 33(2) must first consider the relative "dangerousness" of a person and weigh this against the risk faced if he or she is expelled. A decision-maker should be less prepared to withdraw protection where the persecution faced by the person upon return is of a relatively lower level of seriousness (for example, a systemic denial of educational or employment rights owing to a Convention ground) than where the persecution is of a very high level of seriousness (for example, torture or execution). To require a higher threshold of "dangerousness" to be satisfied where the risks of return are higher is to construe Article 33 in a manner which accords with its fundamental nature and purpose; to provide refugees with protection against persecution but not to the extent that it constitutes an unacceptable danger to the community relative to that risk of persecution.

6.3.5 The appellant's construction of Article 33(2) is supported by the academic commentators Lauterpacht and Bethlehem[50] and, most clearly, by Lord Justice Staughton in *R v Home Department State Secretary; Ex parte Chahal*[51] :

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48 *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 (16 March 1999) [5] (Burchett and Lett JJ).

49 See ICCPR, Article 7 (prohibition against torture) and Art 4(2) (rights non-derogable); CAT, Article 3.

50 Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-refoulement: Opinion", in Erika Feller, Voker Turk and Frances Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press, 2003) 87-177.

51 [1995] 1 WLR 526.

I do not find it at all surprising that international lawyers consider the doctrine of proportionality relevant. Despite the literal meaning of article 33, it would seem to me quite wrong that some trivial danger to national security should allow expulsion or return in a case where there was a present threat to the life of the refugee if that took place.[52]

6.3.6 On the other hand Professor Hathaway considers that once the "threshold" of danger to the safety of the community is passed, there is no additional proportionality requirement to be met under Article 33(2)[53], as did the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2).*[54]

6.3.7 In Australia there is support for an approach to the interpretation of international treaties which examines the context, purpose and objects of treaty provisions.[55] This favours a construction of Article 33 that would include the balancing exercise. This Court has recognised that treaties which have been incorporated into domestic law must be construed *"in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation"*[56] and disregarding technical principles of common law construction.[57]

6.3.8 A similar balancing exercise can also be found in the construction of other human rights provisions. For example, in determining what constitutes *"persecution"* for the purposes of the Refugees Convention, McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs*[58] said: *"Conduct will not constitute persecution ... if it is* ***appropriate and adapted*** *to achieving some legitimate object of the country of the refugee."*[59] Similarly, in relation to s 10 of the *Racial Discrimination Act 1975* (Cth) (which incorporates rights referred to in the Convention on the Elimination of all forms of Racial

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52 [1995] 1 WLR 526, 533. See also 537 (Nolan LJ) and 545 (Neill LJ).

53 James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) Chapter 4 'Rights of Refugees Physically Present'.

54 [2006] 1 NZLR 289, 309 [42]

55 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 255-6 (McHugh J).

56 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 255 (McHugh J). See also *Dhayakpa v Minister for Immigration* (1995) 62 FCR 556, 565 (French J).

57 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240 (Dawson J).

58 (1997) 190 CLR 225.

59 (1997) 190 CLR 225, 258 (emphasis added).

Discrimination and other international human rights treaties[60]), the Full Federal Court in *Bropho v Western Australia*[61] said:

> *It has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise.*[62]

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PART VII: LEGISLATION

7.1 The relevant provisions as they were in force at the time of the decision of the second respondent (2 September 2010) are attached as Annexure A. They are:

(a) *Migration Act 1958* (Cth), ss 36, 65, 499, 500, 501, 501J.

(b) *Migration Regulations 1994* (Cth), Schedule 2, Part 866, subclauses
20 866.111 and 866.221.

7.2 Also relevant will be:

(a) *Direction No. 41: Visa refusal and cancellation under section 501*, made under s 499(1) of the Act and binding on decision makers by reason of s 499(2A) of the Act.

(b) The *Refugees Convention* as amended by the *Refugees Protocol*, Articles 1A and 33.

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60 *Gehardy v Brown* (1985) 159 CLR 70 at 101 (Mason J). See also *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [2010] QCA 37; (2010) 265 ALR 536; (2010) 237 FLR 369 at [32]-[33] (McMurdo P), at [116] (Keane J), at [240] (Philippides J).

61 (2008) 169 FCR 59.

62 (2008) 169 FCR 59, 83 [81]. See also *Aurukun* at [61]-[63] (McMurdo P).

PART VIII: CHRONOLOGY

8.1 A Chronology is attached as Annexure B.

PART IX: ORDERS SOUGHT

9.1 The appellant seeks the following orders:

9.1.1 That the appeal be allowed.

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9.1.2 That the order of the Federal Court of Australia dated 23 March 2012 be set aside.

9.1.3 That a writ of certiorari issue directed to the second respondent quashing its decision dated 2 September 2010 and a writ of mandamus issue directed to the second respondent requiring it to review, according to law, the decision made by the first respondent to refuse the appellant a Protection (Class XA) visa.

20 9.1.4 The first respondent pay the appellant's costs in this Court.

9.1.5 The first respondent pay the appellant's costs of the proceedings in the Federal Court of Australia as agreed or assessed in accordance with Part 40 of the Federal Court Rules.

PART X: ORAL ARGUMENT

10.1 The appellant estimates that its oral argument will take 2-3 hours.

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Dated:

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