HIGH COURT OF AUSTRALIA

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v QAAH OF 2004 AND REFUGEE REVIEW TRIBUNAL

The holder of a temporary protection visa is not entitled to further protection in Australia if they are no longer in danger in the country from which they fled, the High Court of Australia held today.

QAAH, a Shi'a Muslim of Hazara ethnicity, arrived in Australia from Afghanistan in 1999. In 2000 he was granted a three-year temporary protection visa. He was granted a second temporary protection visa in 2003 pending a decision on his application for a permanent visa. QAAH's application was refused, a decision affirmed by the Refugee Review Tribunal. The RRT held that the Refugees Convention cessation provision applied and that QAAH no longer had a well-founded fear of persecution. Article 1C(5) states that the Convention shall cease to apply if the person refuses to avail themselves of the protection of their country of nationality when the circumstances in connection with which they had been recognised as a refugee have ceased to exist. The RRT noted that the Taliban was effectively dislodged from power by late 2001 and was no longer a coherent political movement. It also found that QAAH was unlikely to be persecuted for his ethnicity and religion by other groups he identified.

The Federal Court of Australia dismissed QAAH's application for judicial review of the RRT decision. The Full Court, by majority, allowed an appeal. It held that the Minister bore the onus of proving that QAAH was no longer a refugee under the *Migration Act* and, to attract the Convention's cessation provision, must show changes in Afghanistan were substantial, effective and durable, with no real chance of Taliban persecution. The majority held that the RRT had made jurisdictional errors, including failure to establish the extent of Taliban activity, particularly around QAAH's home; failure to consider the stability of the Afghan government; and failure to express findings on the cessation clause. The Minister then appealed to the High Court.

The Court, by a 4-1 majority, allowed the appeal. The majority held that Australian law prevails if it conflicts with the Convention, which has not been enacted as domestic law, apart from a reference in section 36 of the *Migration Act*. Courts will however endeavour to adopt a construction of the Act which conforms to the Convention. The majority held that neither the Act nor the Convention require that when a threat passes protection should be regarded as necessary and continuing. The status of a person permitted to reside in an asylum country may change as circumstances in the country which he has left change. Under the Act, when a visa expires the holder must apply for another visa. In the case of an application for a protection visa section 36 applies. Whether Australia has protection obligations under section 36 depends upon whether a person satisfies the definition of a refugee in Article 1A of the Convention in the context of other articles, none of which say anything about the period of residence or permanent residence. Section 36 is couched in the present tense and does not refer to past obligations Australia may have had but only to current obligations. The Act does not pose the question posed by the Full Court – whether changes in the applicant's country are substantial, effective and durable – and does not put the onus upon the Minister to show such changes have occurred. If an applicant has been accepted as fearing persecution and has been granted a protection visa for a certain period, Australia is not then treated as either having accepted the applicant for a new visa is a refugee for all times and all purposes or assuming the burden of showing that the basis for a well-founded fear no longer exists.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au