IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S334 of 2012

BETWEEN:

SZOQQ
Appellant

and

10 **Minister for Immigration and Citizenship**
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

1. The appellant certifies that this Reply is in a form suitable for publication on the internet.

20 ## PART II: REPLY TO THE ARGUMENT OF THE RESPONDENT

2. The first respondent submits[1], in substance, that *NAGV and NAGW v Minister for Immigration*[2] (***NAGV***) may be distinguished from the present case because *NAGV* and the decision of this Court in *Plaintiff M47/2012 v Director-General of Security*[3] (***Plaintiff M47***), in which a majority of this Court affirmed *NAGV*,[4] dealt with different provisions in Article 33 of the Refugees Convention; namely Article 33(1) in *NAGV* and the first limb of Article 33(2) in *Plaintiff M47*.

3. This submission ought to be rejected. The conclusion expressed by the plurality of this Court in *NAGV* – that the phrase *"to whom Australia owes protection obligations under* [the Convention]" in s 36(2) of the *Migration Act* 30 *1958* (Cth) (**the Act**) *"describes no more than a person who is a refugee within the meaning of Art 1 of the Convention"* without any *"superadded derogation"* from that criterion by Article 33(1) of the Convention[5] – is sufficiently broad to

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1 First respondent's submissions, [9]-[12].
2 (2005) 222 CLR 161.
3 (2012) 86 ALJR 1372.
4 (2012) 86 ALJR 1372, 1386 [23] (French CJ), 1405 [123] (Gummow J), 1415 [186]-[187] (Hayne J), 1426 [257] (Heydon J), 1469 [479] (Bell J).
5 *NAGV and NAGW v Minister for Immigration* (2005) 222 CLR 161, 176 [42] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); first respondent's submissions, [14].

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be directly applicable to the whole of Article 33, including the second limb of Article 33(2) which is presently in issue. The first respondent's submission that *Plaintiff M47* is relevantly distinguishable from the present case because that case only concerned the security limb of Article 33(2)[6] should also be rejected. Acceptance of that submission would lead to the anomalous outcome that, in cases where there are reasonable grounds for regarding a person as *"a danger to the security of the country"*, that person may still be a person to whom Australia owes *"protection obligations"* within the meaning of s 36(2)(a) of the Act notwithstanding that Article 33(2) applies, but in cases where a person has been convicted of a *"particularly serious crime"*[7] and *"constitutes a danger to the community"*, Article 33(2) operates to exclude that person from meeting the s 36(2)(a) criterion.[8]

4. Further, the first respondent has not given any reason as to why s 36(2)(a) of the Act – which is directed to the question of whether Australia owes protection obligations to a person – ought to be construed so as to import an Article which only arises if a person has already been found to be a refugee[9] (and therefore found to have been owed protection obligations). It follows then that Article 33(2) is not a definitional provision as to *who* is owed protection obligations, but is an exception to the non-*refoulement* obligation afforded to those who are refugees.

5. The first respondent's next submission,[10] that the subsequent enactment of s 91U supersedes the reasoning in *NAGV*, requires a closer consideration of the legislative history of s 91U and its accompanying provisions in the Act.

6. Sections 91A to 91Y contain four subdivisions relating to protection visas:

   6.1. Inserted in 1994,[11] Subdivision AI, ss 91A-91G, prohibits non-citizens from applying for a protection visa where they are covered by the Comprehensive Plan of Action or where there is a safe third country.

   6.2. Inserted in 1999,[12] Subdivision AJ, ss 91H-91L, prohibits non-citizens in Australia who hold or have held temporary safe haven visas from applying for a visa other than another temporary safe haven visa.

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6 First respondent's submissions, [12].
7 Including an offence punishable by a maximum 3 years imprisonment: s 91U(2)(b)(iii).
8 Following from this is the further anomaly that only in the former case would a protection visa applicant have the benefit of the wide-ranging discretion in s 501(1) afforded to other applicants.
9 Article 33(1) provides *"No Contracting State shall expel or return ("refouler") a* ***refugee****..."*. That is, to enter the field of Article 33 at all presumes the pre-existence of protection obligations.
10 First respondent's submissions, [13]-[24].
11 *Migration Legislation Amendment Act (No 4) 1994* (Cth) (No 136, 1994).
12 *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999* (Cth) (No 34, 1999).

6.3. Also inserted in 1999,[13] Subdivision AK, ss 91M-91Q, prohibits non-citizens who can avail themselves of the protection of a third country from making a valid application for a protection visa in Australia.

6.4. Inserted in 2001,[14] Subdivision AL, ss 91R-91Y, contains interpretation provisions relating to the meaning of certain terms in the Refugees Convention in ss 91R-91U, and provisions relating to the processing of protection visa applications in ss 91V-91Y.

7. In *NAGV* the first respondent had maintained that the applicants, Russian citizens, could have availed themselves of the protection of a third country, Israel. This might have brought them within the prohibition in Subdivision AK, ss 91M-91Q, except that that provision did not come into effect until after the delegate's decision in that case.[15]

8. Section 91M expressly states that the reason for Subdivision AK was to limit the right of a non-citizen to apply for a *"protection visa"* where that person had access to protection from a third country. In the same amending legislation the scope of Australia's protection obligations was correspondingly limited by the insertion of s 36(3) in the Act, which removed Australia's *"protection obligations"* where the non-citizen had protection from a third country.

9. In contrast, Parliament did not provide any legislative statement of the reason for Subdivision AL, which is a miscellany of interpretation and processing provisions. Of the interpretation provisions, ss 91R, 91S and 91T relate directly to words or phrases found in the definition of *"refugee"* in Article 1 of the Convention,[16] but s 91U relates to a phrase found elsewhere; namely Article 33(2) (*"particularly serious crime"*).

10. In contrast to ss 91M and 36(3), in s 91U there is no express reference to *"protection visas"* or *"protection obligations"*, nor is there any accompanying amendment to s 36 of the Act to suggest that s 91U was intended to derogate from Australia's protection obligations. In the context of this history, this difference in drafting is significant.

11. The first respondent's suggestion[17] that the legislative intention behind s 91U may be confirmed by the second reading speech to the 2001 Amendment Act

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13 *Border Protection Legislation Amendment Act 1999* (Cth) (No 160, 1999).

14 *Migration Legislation Amendment Act (No. 6) 2001* (Cth) (No 131, 2001) (**2001 Amending Act**).

15 The delegate's decision was made on 3/9/1999 and Subdivision AK came into effect on 16/12/1999: *Border Protection Legislation Amendment Act 1999*, s 2(6), *Gazette* 1999, No S624. That is, although the legislative amendments were made before this Court's decision in *NAGV*, *NAGV* considered the law as it stood at the time of the delegate's decision.

16 Being *"persecution"*, *"membership of a particular social group"* and *"non-political crime"*.

17 First respondent's submissions, [19].

and the Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011* (**Complementary Protection Bill**) is misplaced. Second reading speeches provide limited assistance in ascertaining the meaning of a provision.[18] The Complementary Protection Bill was also drafted some ten years after the 2001 Amendment Act, and s 15AB(2)(e) of the *Acts Interpretation Act 1901* (Cth) limits the use of explanatory memoranda to such documents laid before Parliament prior to the enactment of the provision.

12. In the Explanatory Memorandum to the 2001 Amendment Act the relevant introductory reference to s 91U does not suggest any intention to limit Australia's protection obligations or to amend the definition of *"refugee"* in Article 1 of the Convention. Rather, it is redolent of the character provisions in s 501 of the Act, referring to circumstances which have arisen *"...where the provisions within the Convention which exclude from protection people of serious character concern have been interpreted in a way which could lead to protection being provided to people who should not be entitled to this".*[19]

13. Nor is there any such suggestion in the particular reference to s 91U in the Explanatory Memorandum, which describes the provision as ensuring *"that core types of criminal offences which are viewed by the community as being particularly serious are treated as 'particularly serious crimes' for the purpose of Article 33(2) of the Refugees Convention".*

14. In short, the legislative history of s 91U suggests that the intention of Parliament was not to confine the scope of *"protection obligations"* in s 36(2)(a) of the Act, but to more closely define the term *"particularly serious crime"* in Article 33(2) as it applies to the character provisions which may arise in ss 65(1)(a)(iii) and 501[20] and in light of the reference to Article 33(2) in ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and 503(1)(c) of the Act. This is "the work" to be done by s 91U.

15. The appellant accepts the first respondent's submission on the exercise of the discretion in s 501 of the Act[21] that s 65(1) involves cumulative criteria. However this merely illustrates the anomalous situation which might arise, where on the first respondent's construction of ss 36 and 65 an applicant for a protection visa might require two assessments under Article 33(2); firstly in relation to ss 36(2)(a) and 65(1)(a)(ii) and then, if he or she satisfies the criterion, a second assessment under ss 65(1)(a)(iii) and 501 (in considering

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18 See e.g. *Harrison v Melhem* (2008) 72 NSWLR 380, 384 (Spigelman CJ); Pearce and Geddes, *Statutory Interpretation in Australia* (7th Ed), [3.26].

19 Explanatory Memorandum, Migration Legislation Amendment Bill (No. 6) 2001, [4].

20 Recalling that the Minister's direction under s 499 of the Act requires a consideration of Article 33(2) when deciding whether to refuse a visa under s 501: appellant's submissions, [6.2.5].

21 First respondent's submissions, [27].

whether Australia's non-*refoulement* obligations apply to the applicant).[22]

16. The correct approach is, firstly, to determine whether the applicant meets the criterion in s 36(2)(a), that he or she is owed protection obligations within the meaning of Article 1 of the Convention, and then consider whether he or she can be excluded by s 65(1)(a)(iii) and the character test in s 501. This better accords with the structure of the Convention, where a *"person"* is first recognised as a refugee under Article 1,[23] and then the *"refugee"* may be prevented from claiming the benefit of non-*refoulement* under Article 33(2).[24]

17. Finally, if the second limb of Article 33(2) is incorporated into s 36(2) of the Act, the appellant maintains that a discretion involving a balancing exercise arises from the relationship between Article 33(1), which provides protection against *refoulement*, and Article 33(2), which denies it where a person constitutes *"a danger to the community"*. *"A danger"* is not defined, and the contention that *"danger"* is given meaning by the pre-condition for a *"particularly serious crime"* is no answer.[25] The requirement for a *"particularly serious crime"* is an additional element; it does not *"swallow"* up the principal consideration of whether the person constitutes a danger to the community.[26] The requisite level of *"danger"* necessary to satisfy Article 33(2) remains a matter of discretion. To construe the Convention *"in good faith in accordance with the ordinary meaning* [of its terms]*...in their context and in light of its object and purpose"*,[27] a balancing test is required such that protection cannot be revoked unless the person represents *such* a danger to the community that the objective of protection is outweighed by the countervailing objective of state protection. This was the conclusion of Lord Staughton in *Chahal* on an interpretation of the Convention, independent of domestic UK immigration laws.[28]

Dated: 25 January 2013

Tim Game

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22 Arguably, this would place protection visa applicants in a worse position than other applicants, since the former would effectively undergo a "character test" at two points in the process.

23 Thus satisfying the criterion in ss 36(2)(a) and 65(1)(a)(ii) of the Act.

24 The applicant is thus unable to claim the benefit of Article 33 when the delegate considers whether a visa should be refused under ss 65(1)(a)(iii) and 501 of the Act.

25 First respondent's submissions, [46].

26 *A v Minister for Immigration* [1999] FCA 227, [3] (Burchett and Lee JJ).

27 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art 31(1).

28 *R v Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 WLR 526, 533A-D.