



HIGH COURT OF AUSTRALIA

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NBGM v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

A person could not remain a refugee under Australia's protection once conditions in their former country had improved, the High Court of Australia held today.

NBGM is a citizen of Afghanistan and a Shi'a Muslim of Hazara ethnicity. He arrived in Australia in October 1999 without a passport or visa and was granted a temporary protection visa in March 2000. His application for a permanent protection visa was refused. The Refugee Review Tribunal affirmed the decision in April 2004. It found that the Taliban had been removed from power in Afghanistan by November 2001 and no longer posed a threat to the civilian population as its targets were members of the government, security forces and international aid workers. The RRT found that the Taliban was unlikely to re-emerge as a viable political movement in the reasonably foreseeable future. It concluded that Article 1C(5) of the Refugees Convention applied to NBGM. This provides 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 held that, if Article 1C(5) was not applicable, section 36(3) of the *Migration Act* had the same effect and Australia had ceased to owe protection obligations to NBGM because of the changed circumstances in Afghanistan. The RRT also rejected claims that he feared persecution from other factions in Afghanistan as any discrimination against Hazara people fell short of persecution under the Convention and that the position of Shi'a Muslims was generally good.

The Federal Court of Australia refused NBGM's application to have the RRT decision quashed and held that it was open to the RRT to conclude that as at April 2004 NBGM did not have a well-founded fear of persecution if he returns to Afghanistan. After a three-member Full Court of the Federal Court had decided the appeal in QAAH of 2004 v Minister for Immigration and Multicultural Affairs, a differently constituted five-member Full Court heard NBGM's appeal. In a 3-2 decision, the Full Court dismissed the appeal and NBGM then sought special leave to appeal to the High Court.

The special leave application was heard at the same time as the Minister's appeal against the QAAH decision as they raised similar issues. The High Court's QAAH judgment is also handed down today and the NBGM judgment should be read in conjunction with it. The Court unanimously granted the application for special leave to appeal but, by a 4-1 majority, dismissed the appeal. The majority held section 36 of the *Migration Act* makes clear that a protection visa offers no promise or obligation to continue to afford protection or to grant residence in the event that circumstances change in the country from which the applicant fled.

- *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.*