Safe Third Countries in Australian Refugee Law: *NAGV v Minister for Immigration and Multicultural Affairs*

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1. **Introduction**

The Convention Relating to the Status of Refugees\(^1\) imposes obligations on signatories, the most important of which is the prohibition on *refoulement* under Article 33. Article 33 qualifies the absolute sovereignty of state parties to the *Convention* to deal with aliens in their jurisdiction. The concept of a ‘safe third country’, which has received much attention in recent times, is, ostensibly, a procedural means to reallocate efficiently the burden of determining refugee applications and of providing asylum. These measures have come under the scrutiny of the United Nations High Commissioner for Refugees (hereafter UNHCR) and others, who emphasise the responsibility of the receiving state under the *Convention* to protect refugees from both direct and indirect *refoulement*.

The Full Court of the Federal Court of Australia, in *Minister for Immigration and Multicultural Affairs v Thiyagarajah*\(^2\) and later cases,\(^3\) developed a concept of a safe third country in domestic law. This concept absolves Australia of substantively determining applications for asylum under the *Convention* where a person has effective protection in a safe third country. The recent decision of *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*\(^4\) allowed the High Court of Australia to reconsider the line of authority beginning with *Thiyagarajah*. The Court unanimously rejected the Minister’s submission that Australia does not owe any ‘protection obligations’ to the appellants under s36(2) of the *Migration Act 1958* (Cth) (hereafter the *Act*). It was held that s36(2), as it stood at the time of the appellants’ application, could not support the reasoning in *Thiyagarajah*, that Australia does not owe protection obligations to an asylum seeker where Article 33 is not breached by sending them to a safe third country.

However, the safe third country concept continues on in Australian refugee law. Section 36 of the *Act* was amended by the *Border Protection Legislation*

\(^1\) Done at Geneva on 28 July 1951, as amended by the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967 (together hereafter the *Convention*).
\(^2\) (1997) 80 FCR 543 (hereafter *Thiyagarajah*).
\(^4\) (2005) 213 ALR 668 (hereafter *NAGV*).
Amendment Act 1999 (Cth) to include subs 36(3) to 36(7). These subsections limit Australia’s obligations under the Convention to provide protection, codifying the safe third country concept to a certain extent. Sections 91M to 91Q, which deal with situations where an asylum seeker may have protection in a safe third country, were also inserted. The principle in Thiyagarajah has continued to coexist with the changes to s36.5 In light of the decision in NAGV, s36(3) has assumed a new importance and it is timely to consider how this provision has been interpreted and how closely it conforms to Australia’s international obligations.

2. The Facts

The appellants in NAGV are a father and son who entered Australia on 17 June 1999. They are Jewish citizens of the Russian Federation. The appellants fear persecution in the Russian Federation owing to their religious beliefs and the father’s political activities and opinions. The first appellant’s wife is not Jewish. The appellants have never been to Israel and the family have rejected the option of moving there. They do not speak Hebrew and they apprehend that families of mixed marriages are subject to discrimination in Israel. They also have a strong desire to avoid compulsory military service, which would conflict with the pacifist upbringing of the children.

The appellants lodged an application for protection visas on 16 July 1999. A delegate of the Minister refused to grant the appellants protection visas under the Act on 3 September 1999.

3. The Refugee Review Tribunal

On 1 March 2002, the Refugee Review Tribunal (hereafter RRT) affirmed the decision of the Minister’s delegate. The RRT was satisfied that the appellants have a well-founded fear of persecution should they return to Russia, by reason of their religion and the father’s political activities and opinions. However, the appellants were refused protection visas under the Act. Following the reasoning of the decision of the Full Federal Court in Thiyagarajah, the RRT found that Australia owed no protection obligations to the appellants, as they have ‘effective protection’ in a third country, in this case Israel. Israel’s Law of Return provides that every Jew has a right to immigrate as an ‘oleh’, a Jew immigrating to Israel. The RRT found that there was no evidence to suggest a risk that the appellants would be returned from Israel to Russia, nor that the appellants have a well-founded fear of persecution in Israel. The RRT was satisfied that, if the appellants travelled to Israel, they would be entitled to enter and reside there under the Law of Return. Therefore, the RRT held that Australia owed no protection obligations to the appellants so as to enliven the provision of s36(2) of the Act to grant protection visas. The RRT held that it was not inconsistent with Australia’s obligations under the Convention (and specifically Article 33) to send the appellants to Israel without determining the substantive merits of their claim for refugee status.

5 Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154 (hereafter Applicant C).
4. On Appeal to the Federal Court

On 27 November 2002, Stone J dismissed an appeal to the Federal Court of Australia. An appeal by the appellants to the Full Federal Court was heard by Finn, Emmett and Conti JJ and was dismissed by a majority on 27 June 2003.

Emmett J, in dissent, concluded that the decision of Thiyagarajah was not only wrongly decided, but that it could not be distinguished and should not be followed. Under ss36 and 65 of the Act, the Minister is required to grant a protection visa if he or she is satisfied that Australia owes protection obligations under the Convention to the asylum seeker. Emmett J held that the conclusion in Thiyagarajah that, because Australia is not precluded by Article 33 of the Convention from expelling or returning an applicant for a protection visa to a safe third country, Australia has no protection obligations under the Convention to that person, is a non sequitur. Under s36, as it stood at the time of the appellants’ application, Australia owed protection obligations under the Convention to persons who satisfied the definition of refugee under Article 1 of the Convention. The RRT had found that the appellants satisfied the Convention definition. Therefore, Emmett J concluded that the appeal should be allowed.

Emmett J also discussed the changes made to s36 by the Border Protection Legislation Amendment Act 1999 (Cth). His Honour held that the significance of the reasoning in Thiyagarajah has been diminished to some extent by these amendments. However, following the decision of the Full Court in Minister for Immigration and Multicultural Affairs v Applicant C, the principle of effective protection in Thiyagarajah continues to coexist with s36(3).

Finally, Emmett J held that the decision of the RRT is not a privative clause decision within s472(2) of the Act. He held that the RRT took an erroneous view of the meaning of s36(2) by following the decision of Thiyagarajah. Therefore the Tribunal did not turn its mind to the question about which it has to be satisfied under s65. This amounts to a jurisdictional error and is, therefore, no decision at all.

Finn and Conti J J agreed, for the reasons given by Emmett J, that the decision of Thiyagarajah was wrongly decided. However, they felt bound to apply it to the present case as it had been considered and/or applied in at least ten decisions of the Full Federal Court. Finn J also agreed with Emmett J that the jurisprudence on ‘effective protection’, beginning with the Thiyagarajah case, continued to have significance beyond the concept of a safe third country codified in s36(3) of the Act, an amendment subsequent to the appellants’ applications and the decision in Thiyagarajah.

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8 Id at 62–65 (Emmett J).
9 Id at 62 [62] (Emmett J).
10 Id at 64–65 [75]–[77] (Emmett J).
11 Applicant C, above n5.
12 NAGV and NAGW, above n7 at 65–67 [78]–[86] (Emmett J).
13 Id at 48–49 [2]–[4] (Finn J) and 68 [92] (Conti J).
5. **The Decision of the High Court**

The High Court reviewed the construction of s36(2) of the *Act in Thiyagarajah* and subsequent cases and unanimously held that the interpretation was incorrect. Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ delivered a judgment (hereafter the joint reasons) ordering certiorari to quash the decision of the RRT and mandamus to require the RRT to determine, according to law, the application for review of the decision of the delegate of the Minister. Kirby J delivered a separate judgment agreeing with the orders proposed by the joint reasons.

The decision of the Court rests upon a construction of s36(2) of the *Act*. The joint reasons stated that the *Convention* is important only in so far as it has been adopted ‘as a criterion of operation of s36(2) of the Act’. Thus, the Court was not called upon to determine Australia’s international obligations under the *Convention* except in so far as they determine whether protection obligations are owed to the appellants. Section 36(2), as it stood when the applications for protection visas were made, stated:

> A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the *Convention*].

Under s65(1) of the *Act*, if the Minister is satisfied that the criterion in s36(2) and those contained in s65(1) are met, the Minister must grant the visa. The most important protection obligation under the *Convention* is Article 33, the prohibition on *refoulement*. Article 33(1) states:

> 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.

It was common ground in the appeal that Article 33(1) prevents Australia from returning the appellants to the Russian Federation where they fear persecution. The Minister also agreed that this negative obligation compels Australia, under international law, to allow the appellants to remain in Australia. The Minister, however, submitted that Article 33 does not prohibit, and therefore allows, a Contracting State to return a refugee to a safe third country. A safe third country is a country, other than the country of nationality, where the refugee does not fear persecution and where the refugee will not be sent to another territory where they fear persecution. The Minister argued that, as it was permissible under Article 33 for Australia to send the appellants to a safe third country without determining their asylum claim, Australia owed no protection obligations to the appellant, so as to enliven the provisions of ss36 and 65.

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14 Id at 49 [3] (Finn J).


16 Id at 677 [63] (Kirby J).

17 Id at 672 [26] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ).
The joint reasons, with Kirby J agreeing, dismissed this argument as disclosing a non sequitur. Australia owed an obligation to the appellants under Article 33 not to refouler them to the Russian Federation or to another country where their life or freedom would be threatened. The joint reasons concluded that Article 33 and the other protection obligations under the Convention are owed to any person that satisfies the definition of refugee under Article 1 of the Convention. Although sending the appellants to Israel may not be in breach of the obligation under Article 33, this does not relieve Australia of the other protection obligations owed to the appellants under the Convention, nor does it follow that no protections obligations are owed under the Convention.

The joint reasons examined the legislative history of s36 and concluded that the wording of the section does no more than require an applicant for a protection visa to satisfy the definition of refugee under the Convention. Prior to 1992, when the predecessors of ss36 and 65 were introduced, ‘refugee’ was defined in the Act as having the same meaning as in Article 1 of the Convention. The Migration Reform Act 1992 (Cth) removed the definition of ‘refugee’ from the Act and replaced it with the expression ‘protection obligations’ under the Convention. The joint reasons concluded that the 1992 changes were merely technical changes and that no qualification can be read into s36 so as to remove Australia’s protection obligations where there is a safe third country.

Both the joint reasons and Kirby J acknowledged that accepting the Minister’s submission would have significant consequences in excluding all Jewish asylum seekers. This result would be especially unattractive in light of the fact that the Convention was, in part, a response to the Holocaust and the situation of Jewish refugees during and after the Second World War.

The joint reasons also held that the 1992 changes to the Act make clear that it is to the whole of Article 1 which regard is to be had in determining whether a person is a refugee. This means that a refugee determination may consider whether the Convention does not apply to a person, or ceases to apply by reason of one of the qualifications in Article 1, such as Article 1F, where a refugee has committed a war crime. Finally, the joint reasons concluded that amendments subsequent to the 1992 changes, such as the inclusion of ss91A to 91F and 91M to 91Q, do not support the Minister’s interpretation of the 1992 changes.

Kirby J rejected the interpretation of s36 suggested by the Minister as a ‘strained one’. Firstly, on the plain language of s36(2), the appellants satisfy the

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18 Id at 672 [29] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ) and 679 [81] (Kirby J).
19 Id at 672–673 [27]–[33] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).
20 Id at [34]–[41].
21 Id at 674 [40]–[42].
22 Id at 672–673 [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ) and [95]–[97] (Kirby J).
23 Id at 675 [47] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ).
24 Id at 676 [54].
25 Id at 679 [77] (Kirby J).
preconditions for a protection visa. They are non-citizens of Australia, they are in Australia and protection obligations are owed under the Convention, as the appellants satisfy the Convention definition of a refugee. There is nothing expressly in the Convention to take the appellants outside the protection obligations owed by Contracting States.26

Secondly, the legislative history of the Act confirms this construction of s36. The concept of ‘protection obligations’ owed under the Convention, introduced in 1992, is a very wide expression which includes the appellants.27 Thirdly, subsequent amendments to the Act, including ss91E and 36(3) to 36(7), demonstrate that Parliament was able to limit expressly the scope of the protection obligations owed by Australia. This had not been done at the time of the appellants’ application and should not be imported into the section.28

Finally, ss36 and 65 incorporate Australia’s international obligations as a signatory to the Convention into domestic law. The Court should interpret these provisions to ensure that Australia’s international obligations are given full effect.29 Kirby J concluded by stating that, at the very least, the principle in Thiyagarajah was stated too broadly and requires correction by the Court.

6. Thiyagarajah and the Concept of a Safe Third Country

The Full Federal Court concluded in Thiyagarajah that:

As a matter of domestic and international law, Australia does not owe protection obligations to the respondent as he is a person who has effective protection in France which has accorded him refugee status.30

‘Effective protection’ means that there will not be a breach of Article 33 by the safe third country if the person is a refugee.31 Article 33(1) prohibits both direct and indirect refoulement.32 Thus, for protection to be effective, there must not be a risk of ‘chain refoulement’, so that the refugee is eventually refouled to his or her country of origin without substantive consideration of their claim for asylum. In Thiyagarajah the respondent was a Sri Lankan national of Tamil ethnicity. He was granted refugee status in France after leaving Sri Lanka and had been issued permanent residency and travel documents that allowed re-entry to France. Mr Thiyagarajah was eligible to apply for French citizenship. The Court concluded

26 Id at 679 [78]–[81] (Kirby J).
27 Id at 679–680 [82]–[84] (Kirby J).
28 Id at 680–681 [84]–[88] (Kirby J).
29 Id at 681 [89] (Kirby J).
30 Thiyagarajah, above n2 at 565 (von Doussa J).
31 Id at 562 (von Doussa J).
32 Elihu Lauterpacht & Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller, Volker Türk & Frances Nicholson (eds), Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection (2003) at 123. Indirect refoulement is where a Contracting State returns a refugee to another state which, in turn, returns the refugee to a third state where the refugee may be at risk of persecution for a Convention reason.
that France would provide effective protection to Mr Thiyagarajah and his family and, therefore, that it was not inconsistent with the obligations owed to Mr Thiyagarajah under domestic law or the Convention to deport him to France without considering the substantive merits of his asylum application.33

The decision in Thiyagarajah was subsequently extended and developed by later cases. It was held in the Full Federal Court that Australia did not owe protection obligations in a situation where the applicant for a protection visa had not been granted refugee status, but held a returning resident’s visa and was entitled to the grant of a residence permit in the safe third country.34 A single judge bench of the Federal Court later held that a temporary right to re-enter a safe third country, with a right to leave and re-enter whilst the applicant’s refugee status was determined, may be sufficient for effective protection.35 The right to reside, enter and re-enter the safe third country, as described in Thiyagarajah, need not be a legally-enforceable right.36 However it must be effective, so that ‘as a matter of practical reality and fact, the applicant is likely to be given effective protection’.37 This is a question of fact and degree that does not require proof of actual permission or a right to enter the safe third country.38 The Court has also held that whether the third country is a party to the Convention is a relevant factor to be considered in deciding whether it is safe, however it is not determinative of this issue.39

The correctness of the decision in Thiyagarajah had previously been questioned.40 As discussed above, both the Full Federal Court and the High Court in NAGV agreed that the words of s36 could not support the construction given to them by the established jurisprudence on effective protection.

7. Amendments to the Act

Subsequent to the appellants’ applications for protection visas, the Act was amended to include subss 36(3) to 36(7), which deem Australia to have no protection obligations to an asylum seeker in certain circumstances. The changes made to the Act apply to applications for visas made on or after 16 December 1999. Section 36(3) now provides as follows:

Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in,
whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

Subsections 36(4) and (5) qualify this by stating that s36(3) does not apply if the refugee has a well-founded fear of persecution in that country for a *Convention* reason; or where the refugee has a well-founded fear that the country will return the refugee to another country where the refugee will be persecuted for a *Convention* reason. In the Senate Debates, Senator Patterson stated, with regard to s36(3), that ‘it is not that we expect people to apply to every country that is a signatory to the convention before they can apply here; it is if they have an existing right to enter a country’.41

The interpretation of the amendments to s36 did not arise for consideration in *NAGV*. However, in regards to subss 36(3) to 36(7), Kirby J stated that ‘[i]t may be that issues will arise in the future under exclusion provisions of Australian statutes, which will present questions of ambiguity’.42 The joint reasons mentioned that Parliament might have taken steps (by amending s36) to qualify explicitly the operation of the *Convention* definition for the purposes of s36(2).43

The Full Federal Court in *Applicant C* rejected the submission that s36(3) codifies the principle of effective protection in *Thiyagarajah*.45 This means that Australia does not owe protection obligations under the *Convention* to:

(i) a person who can, as a practical matter, obtain effective protection in a third country (based on *Thiyagarajah*); and

(ii) a person who has not taken all steps to avail himself or herself of a legally-enforceable right to enter and reside in a third country (based on s36(3) of the *Act*).

The High Court in *NAGV* has, of course, now held that protection obligations will be owed by Australia in the former case, where the deeming provision of s36(3) does not apply. As identified in *Applicant C*, such a situation might occur where a third country gives an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, so that the person may have effective protection in the absence of a right under s36(3).46 In such a situation, Australia continues to have an obligation to consider substantively the application for a protection visa.

In *Applicant C*, the Court also held that the reference to a ‘right to enter and reside in, whether temporarily or permanently’ refers to a legally-enforceable right.47 The practical capacity to bring about lawful permission to enter and reside

41 Kay Patterson, Australia, Senate, *Parliamentary Debates (Hansard)*, 25 November 1999 at 10672.
42 *NAGV*, above n4 at 682 [99] (Kirby J).
43 Id at 676 [58] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ).
44 *Applicant C*, above n5 at 172 (Stone J).
45 See also *NAGV*, above n7 at 49 (Finn J) and 64–65 (Emmett J).
46 *Applicant C*, above n5 at 172 [64] (Stone J).
in a third country is not sufficient, as this would require the applicant to apply to ‘all countries where it could be reasonably expected that the applicant would be granted a visa for entry and temporary or permanent residence’. However, it need not be a permanent right, for example a visa can be revoked without notice or reasons, yet is enforceable against an officious immigration officer. Such a right may arise other than by the granting of a visa, for example where the entry requirements to a country are a valid passport of a nominated country. In establishing whether such a right exists, consideration may need to be had to whether the conditions permitting the grant of the right still exist, or whether there are factors permitting its revocation.

In *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* (hereafter *WAGH*), the Full Federal Court allowed an appeal by a husband and wife who were citizens of Columbia. The appellants both held a passport containing a business and tourism visa issued by the United States (hereafter US). The Court held this did not amount to a right to enter and reside in the US. Lee J held that the reference to a ‘right to enter and reside’ in s36(3) implicitly involves a right to receive protection equivalent to that to be provided to that person by a Contracting State under the *Convention*. His Honour also held that it is not sufficient that a person has the capacity to enter a country and has access to a refugee determination system that offers effective protection to refugees. Carr J agreed with Lee J that the RRT erred in its construction of s36(3) saying that a tourism and business visa did not amount to a right to enter and reside in the US as the appellants would not be travelling to the US for reasons of business or tourism. Hill J reasoned that the RRT did not consider the right of the appellants to ‘reside’ in the US, which constituted error.

If the *Law of Return* is considered to be a right to enter and reside in a third country, then all persons who identify, or who are classified as, Jewish are prevented from seeking asylum in Australia. In *NAEN v Minister for Immigration and Multicultural and Indigenous Affairs* the appellant was a Russian Jew who had a well-founded fear of persecution based upon her religion and ethnicity. The appellant claimed that she had converted to Christianity (her husband was of the Russian Orthodox faith) and although this was not accepted by the RRT, it

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47 Id at 170 [58] (Stone J). See also V872/00A v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 57 (hereafter *V872/00A*) at 62 (Hill J); *WAGH*, above n40 at 275 [20] (Lee J) and 285 [75] (Carr J).
48 Id at 170 [58] (Stone J).
49 Id at 171 [60] (Stone J).
50 Id at 170 [59] (Stone J).
51 *WAGH*, above n40.
52 Id at 279–280 [42]–[44] (Lee J), (Hill J) 283 [64] and 285 [75] (Carr J).
53 Id at 279 [41] (Lee J).
54 Id at 279 [41] (Lee J).
55 Id at 279 [41] (Lee J).
56 Id at 285 [75] (Carr J).
57 Id at 284 [66] (Hill J).
58 (2004) 135 FCR 410 (hereafter *NAEN*).
59 Id at 418–419 [30] (the Court).
illustrates the important question, raised by the judgment of Kirby J in *NAGV*, as to who is considered to be a Jew.\(^{60}\) Such questions await further judicial consideration.

Sections 91M to 91Q of the *Act* also provide other restrictions on the grant of a protection visa. Where an applicant:

(i) has a right to re-enter and reside in, whether temporarily or permanently, a third country; and

(ii) the applicant has resided there for at least seven days; and

(iii) the Minister has made a declaration in relation to that country

the applicant must seek the protection of this country before they are permitted to make an application for a protection visa.\(^{61}\) No declaration has yet been made under s91N(3) in respect of an available country.\(^{62}\)

Thus, the safe third country concept still exists under the *Act*. However, how far is the current approach consistent with Australia’s obligations under international law?

8. **The Concept of the Safe Third Country in International Law**

The concept of a safe third country is not peculiar to the Australian context. Other countries, such as Canada, the US and members of the European Union (hereafter EU), have also addressed this issue in various ways, including through multi or bilateral agreements between states.\(^{63}\) Within the EU, for example, the Dublin Convention\(^{64}\) determines which country has responsibility for determining an application for asylum. Within the Australian context, a safe third country may include a country which has already granted a refugee adequate protection, whether under the *Convention* or otherwise, or a country from which the person should have requested protection, possibly including a country to which the person has never travelled.

\(^{60}\) *NAGV*, above n4 at 678–679 [75] (Kirby J).

\(^{61}\) See *Migration Act* 1958 (Cth) ss91M–Q. The Minister may determine that these provisions do not apply to an asylum seeker if it is in the public interest: s91Q.

\(^{62}\) *WAGH*, above n40 at 277 [28] (Lee J).


\(^{64}\) Convention Determining the State Responsible for Examining Application for Asylum Lodged in One of the Member States of the European Community, signed in Dublin on 15 June 1990 (hereafter Dublin Convention). The Treaty of Amsterdam required that the Dublin Convention be replaced by a European Community Instrument; a Council Regulation (EC) No 343/2003 (18 Feb 2003) has been adopted for that purpose: Legomsky, above n63 at 579.
In the absence of a right to asylum, the prohibition on refoulement in Article 33 is the ‘cornerstone’ of the Convention, as ‘fulfilment of the non-refoulement obligation through time is functionally equivalent to a grant of asylum’. It is generally accepted that Article 33 of the Convention does not prohibit removal of a refugee to a safe third country where a refugee has access to protection, provided that certain prerequisites are met. However, the process by which such a decision is made and executed may, without proper safeguards, effectively entail a breach of Article 33 and, therefore, of international obligations owed under the Convention. A state is not absolved from its own obligations owed under Article 33 by the fact that another state has a greater responsibility for granting asylum in a particular case. Thus, states are not able to send an asylum seeker to a safe third country ‘if reliance is likely to result in a violation of Article 33’.

A. Connections with Australia and a Safe Third Country

The Executive Committee of the UNHCR has stated that in identifying the country responsible for examining an asylum request, regard ‘should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State’. However, where an asylum seeker already has a ‘connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State’. Conclusions of the Executive Committee are not formally binding, however regard may properly be had to them in interpreting the Convention.

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65 UNHCR, Executive Committee of the High Commissioner’s Programme, 44th Session, Note on International Protection, A/AC96/815 (31 August 1993) at [10]; Albuquerque Abell, above n63 at 70.
66 Savitri Taylor, ‘Australia’s ‘Safe Third Country’ Provisions: Their Impact on Australia’s Fulfilment of Its Non-Refoulement Obligations’ (1996) 15 U Tas LR 196 at 201. Article 14(1) of the Universal Declaration of Human Rights states that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’. While it is possible that it may be a source of binding legal obligations under international law, Article 14(1) grants no right to be granted asylum, nor a right to seek asylum in a particular country. See Legomsky, above n63 at 612–613.
67 See, for example, UNHCR, above n65 [20]; Lauterpacht & Bethlehem, above n32 at 122; UNHCR Executive Committee Conclusion No 58 (XL) ‘The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which they had already found Protection’ (1989) para (f); Taylor, above n66 at 201.
68 Taylor, above n66 at 203–204.
70 UNHCR Executive Committee Conclusion No. 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) para (b)(iv).
71 Ibid.
72 Goodwin-Gill, above n63 at 128.
73 Lauterpacht & Bethlehem, above n32 at 98.
An asylum seeker may have valid reasons for choosing to seek asylum in a particular country, including family, language or cultural connections; an established compatriot community; or greater religious or political tolerance. Under the Dublin Convention an asylum seeker may have their asylum claim considered substantively if a member of their family has been recognised as a refugee in that country. However, the definition of family is very narrow and is limited to immediate family. There is no similar provision in s36(3) to take into account connections or close links with either Australia or a safe third country. Importantly, an asylum seeker with relatives in Australia could be sent to a safe third country under s36(3). In this regard, Australia may be in breach of its obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Specifically, return to a safe third country may breach ‘the applicant’s internationally recognized right to family unity’. The Executive Committee Conclusion No 15 states that the ‘intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account’. Section 36 makes no provision for this consideration. This is especially important in light of the facts of NAGV. The Law of Return states that an ‘Oleh’s visa shall be granted to every Jew who has expressed his desire to settle in Israel’ (emphasis added). Neither the desire of the appellants in NAGV nor their legitimate reasons to seek asylum in Australia rather than Israel were considered in this context, and such factors will likely be ignored under s36(3).

B. Unilateral Decisions by Australia

In dissent, in Al-Rahal v Minister for Immigration and Multicultural Affairs, Lee J identified another important problem with s36(3):

Unilateral decisions based on the concept of a “safe third country” may lead to a waste of time and effort if persons whose applications have been refused on this ground, will not be accepted by the “safe third country”. Furthermore, it would appear that under the Act such persons would face an indefinite period in “immigration detention”.

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74 Albuquerque Abell, above n63 at 78.
75 Byrne & Shacknove, above n63 at 199.
78 Ibid.
79 Legomsky, above n63 at 675.
80 Conclusion No 15, above n70 at para (h)(iii).
81 Quoted in a case before the Federal Court of Canada: Katkova v Minister of Citizenship and Immigration (1997) 40 Imm Lr (2d) 216 at 217 (McKeown J).
82 Al-Rahal, above n3 at 82 [39].
The recent indefinite detention case of Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji\(^83\) is a case in point. Al Khafaji concerned an Iraqi national who was refused a protection visa under s36(3) on the grounds that he had not taken all possible steps to avail himself of a right to reside in Syria.\(^84\)

In the Federal Court, Mansfield J made the finding that there was no reasonable prospect of his removal from Australia to Syria or any other country in the reasonably foreseeable future. The High Court held that the continued detention of Mr Al Khafaji was not unlawful and that the Act required his continued detention until he was removed from Australia. Gummow J, in dissent, described it as ‘odd, if not paradoxical’\(^85\) that Mr Al Khafaji’s visa was rejected on the ground that he had a right to enter and reside in Syria, and yet he has been unable to avail himself of that right. His Honour also said:

> There must be a serious question as to whether there exists a ‘right’ of the nature identified in s 36(3) where it is insusceptible of exercise within a reasonable time of its assertion.\(^86\)

Explicit agreement of the third country to readmit the asylum seeker and to accord him or her a fair refugee status determination or effective protection without such a determination, may be a minimum legal requirement under international law.\(^87\)

Such consent could be communicated via email.\(^88\) Australia adopts a practice of making arrangements for entry into third countries before a person departs Australia.\(^89\) However, Australia does not seek such consent before a decision is made that a legally-enforceable right to enter and reside in a third country exists. Without express consent, the courts should be reluctant to find such a right, where there is a chance that in reality, as in Al Khafaji, it cannot be accessed.\(^90\)

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84 The facts are obtained from Al Khafaji, above n84 at 203–205 [7]–[17] (Gummow J).
85 Id at 205 (Gummow J).
86 Ibid.
88 Legomsky, above n63 at 632.
89 See discussion in V872/00A, above n47 at 75 [78] (Tamberlin J).
90 Admittedly, there exists a discretion under s 48B of the Act for the Minister to allow a further protection visa application to enable the claim to asylum to be reconsidered in light of the fact that readmission to the safe third country is not possible: See discussion in V872/00A, above n47 at 75 [78] (Tamberlin J). However, a mere discretionary provision does not guarantee that the asylum claim will be assessed.
C. Readmission Agreements

In the absence of international agreements with other countries, the safe third country concept under s36(3) will be difficult to implement fully.91 The UNHCR has encouraged states to conclude agreements which address not only readmission of non-nationals, but also responsibility for determining claims (the Dublin Convention is one such example).92 The UNHCR has also emphasised that such agreements should facilitate the transfer of asylum seekers only where the applicant has a connection or close links with another state.93 However, this is a problem for a state like Australia which, unlike Europe, is surrounded by many states which are not parties to the Convention or other major human rights instruments.94 There is a danger that states that have not acceded to the Convention may not have the necessary structures to determine claims and protect refugees against refoulement.95

D. Access to Asylum Determination

A minimum requirement under international law may also be that the third country will provide either a fair refugee status determination or effective protection.96 It is necessary for this requirement that Australia direct the asylum seeker to the relevant refugee authorities in the third country and provide the applicant with a document that states that they have been rejected on third country grounds and that their asylum application has not yet been determined in substance.97 Ideally, though not required under international law, such a letter should be written in one of the official languages of the third country.98 Currently, Australia does not guarantee this much, as s36(3) requires only that the asylum seeker will not be subject to direct or indirect refoulement.99 As the discussion in WAGH above indicates, it is not yet clear what standard of protection is necessary to enliven s36(3).

91 Mathew, above n77 at 146.
92 UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), Global Consultations on International Protection, 2nd meeting, EC/GC/01/12 (31 May 2001) at [18]; UNHCR, ‘Background Paper No. 3: Inter-State Agreements for the Re-admission of Third Country Nationals, Including Asylum Seekers, and for the Determination of the State Responsible for Examining the Substance of an Asylum Claim’ (May 2001).
93 UNHCR, ‘Background Paper No 3’, above n93.
95 Byrne & Shacknove, above n63 at 200.
97 Legomsky, above n63 at 674.
98 Legomsky, above n63 at 675; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), above n93 at [15]; European Council on Refugees and Exiles, ‘Safe Third Countries: Myths and Realities’ (1995).
99 Migration Act 1958 (Cth) ss36(4), 36(5).
9. Conclusion

It must be recalled that s36(3) deals with putative refugees whose claim to asylum has not yet been determined, rather than ‘failed’ asylum seekers. In light of the humanitarian object and purpose of the Convention, Australia should be reluctant to pass responsibility for determining these claims and providing asylum.

The Convention ‘provides a good example of an international treaty where tensions between human rights and state interests have been stretched to breaking point’.100 There is an obvious ‘meanness’101 inherent in provisions, which may exclude entire groups of people from seeking asylum in Australia; or which may force asylum seekers to obtain refuge in countries with which they have no connection; or which may, in practice, see asylum seekers indefinitely detained. More importantly, though, Australia’s safe third country provisions may also risk the violation of our international obligations, especially that of non-refoulement. Australia may not rely on its domestic legislation to avoid its international obligations.102 Thus, the developing case law surrounding s36(3) will need to be reassessed in light of these considerations.

100 Poynder, above n95 at 75.
101 Mary Crock, ‘The Refugee Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective’ in Susan Kneebone (ed), above n77 at 79.
102 Crawford & Hyndman, above n69 at 157.