Administrative Review Tribunal

A Guide to Refugee Law in Australia

Chapter 9 – Third country protection

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Administrative Review Tribunal

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Chapter 9 – Third country protection[1]

Introduction

The criteria for a protection visa in ss 36(2)(a) and (aa) of the *Migration Act 1958* (Cth) (the Act) require that the non-citizen is a person 'in respect of whom Australia has protection obligations', either because they are a refugee or on complementary protection grounds.[2]

Sections 36(2)(a) and (aa) are qualified by subsections (3) to (5A) which set out circumstances in which Australia is taken not to have protection obligations. These provisions call for consideration of whether an applicant has access to protection in any country apart from Australia.[3]

The qualification in s 36(3) provides that Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country apart from Australia. There are exceptions to this qualification which operate, broadly, where a person has a well-founded fear of being persecuted or faces a real risk of significant harm in that country, or has a well-founded fear of *refoulement* from that country to a place where they face such treatment.[4]

Thus, an applicant may be found not to be a person in respect of whom Australia has protection obligations, even if they might satisfy the applicable definition of 'refugee' or meet the complementary protection criterion in s 36(2)(aa), if protection is available in another country.

Section 36(3) and the related provisions introduced in 1999 were aimed at ensuring 'that only those who most need [Australia's] assistance - those with no other country to turn to are able to enter [Australia's] protection system'.[5]

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1 Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Legal Services.

2 For applications made before 16 December 2014, determination as to whether an applicant is a refugee for the purpose of s 36(2)(a) is by reference to art 1A(2) of the Refugees Convention as amended by the Refugees Protocol (the Convention), whereas for applications made on or after that date, 'refugee' is defined in s 5H of the Act. 'Complementary protection' refers to the criterion in s 36(2)(aa) of the Act, which commenced on 24 March 2012 and applied to applications not finally determined as at that date.

3 For protection visa applications made prior to 16 December 2014, the issue of third country protection may also arise under art 1E of the Convention, which provides that the Convention does not apply to a person who is recognised by the authorities of the country in which he or she has taken residence as having the rights and obligations attached to the possession of the nationality of that country. The effect of art 1E is discussed in Chapter 7 – Exclusion and Cessation. While the statutory exclusion under s 36(3), as it qualifies the refugee criterion, has been described as directed to the same 'concern' (*NBGM v MIMIA* [2004] FCA 1373 at [59]) and as 'consonant with' art 1E (*Applicant C v MIMA* [2001] FCA 229) they are distinct tests, and should not be confused. The view that s 36(3) was consonant with art 1E was not shared by Allsop J who considered that the text of s 36(3) 'tends to the contrary': *V856/00A v MIMA* (2001) 114 FCR 408 at [31] - endorsed by the Full Federal Court in *MIMAC v SZRHU* (2013) 215 FCR 35 at [45], [79]. Article 1E has no application to protection visa applications made on or after 16 December 2014, for which the definition of 'refugee' is exhaustively defined in s 5H of the Act.

4 Sections 36(4)–(5A).

5 Commonwealth, *Parliamentary Debates*, Senate, 25 November 1999, 10668-9 (Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs). Sections 36(3)–(7) were inserted by the *Border Protection Legislation Amendment Act 1999* (Cth) (No 160, 1999) and apply to visa applications made on or after 16 December 1999. Subsections (4)–(5A) were substituted by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011) to provide mirror qualifications for the complementary protection criterion in s 36(2)(aa). Section 36(3) was further amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (No 113 of 2012), which came into effect on 18 August 2012 and amended the wording of s 36(3) so that rather than referring to Australia having protection obligations *to* certain persons, it now refers to Australia having protection obligations *in respect of* such persons (sch 1, item [8]).

It will usually be convenient to approach an applicant's case by first considering whether circumstances in their country of reference give rise to protection obligations under s 36(2)(a) or (aa). While the Full Federal Court has described this as the correct approach to addressing questions involving s 36(3),[6] it is not necessarily a jurisdictional error to deal with s 36(3) on the hypothesis that s 36(2) would apply,[7] and there is no strict requirement for a decision-maker to first consider s 36(2). Whichever approach is taken, it is important always to consider whether an applicant who may otherwise satisfy s 36(2)(a) or s 36(2)(aa) must nevertheless be taken not to be a person in respect of whom Australia has protection obligations because of the operation of s 36(3).

The statutory qualification to 'protection obligations'

The substantive qualification to s 36 is contained in subsection (3), but this itself is qualified by subsections (4), (5) and (5A).[8] They provide as follows:

Protection Obligations

(3) Australia is taken not to have protection obligations in respect of 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.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

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[6] *SZRTC v MIBP* (2014) 224 FCR 570 at [25].

[7] *SZUDE v MIBP* (2015) 235 FCR 65 at [57]. This is consistent with authority before *SZRTC*: see *NBGM v MIMIA* (2006) 150 FCR 522 at [20]; *AZAAL v MIAC* [2009] FMCA 23 at [8]; *SZRJH v MIAC* [2012] FMCA 798 at [13]–[14]. Following *SZRTC* a number of Federal Circuit Court judgments found that while a failure to follow the approach described in *SZTRC* as correct might be an error, it is not a jurisdictional error: see *SZSMG v MIBP* [2014] FCCA 776 at [17] (although later overturned by consent on appeal, this aspect of the judgment was undisturbed), *SZRUT v MIBP* [2015] FCCA 263 at [44]–[47] and the first instance judgment in *SZUDE v MIBP* [2015] FCCA 60 at [49]–[50]. The Refugee Law Guidelines state that although there is no prescribed order in which s 36 must be considered, decision makers should ensure they have followed s 36A, which requires ss 36(2)(a) and (aa) to be considered without reference to s 36(3) for the purposes of making a 'protection finding', as well as relevant policy or Ministerial Directions in assessing ss 36(2)(a) and (aa): Department of Home Affairs, 'Policy: Refugee and Humanitarian – Refugee Law Guidelines', section 3.18.1, as re-issued 27 November 2022 ('Refugee Law Guidelines'). Note that the obligations under s 36A do not appear to apply to the Tribunal.

[8] Sections 36(3)–(5) were introduced by the *Border Protection Legislation Amendment Act 1999* (Cth) (No 160 of 1999). Subsections (4) and (5) were substituted, and a new subsection (5A) was introduced with effect from 24 March 2012: *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011). The *Border Protection Legislation Amendment Act 1999* (Cth) (No 160 of 1999) also introduced subsections (6) and (7) which are interpretive provisions.

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Section 36(3) applies in relation to any country apart from Australia, including countries of which the non-citizen is a national.[9] The question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.[10]

In short, under these provisions, Australia is taken not to have protection obligations in respect of a person who:

- has a right to enter and reside in any other country - whether permanently or temporarily; and
- has not taken all possible steps to avail him/herself of that right;

provided that:

- he or she does not have a well-founded fear of Convention based persecution in that country;[11] or there are not substantial grounds for believing that, as a necessary and foreseeable consequence of availing themselves of the right to enter and reside in that country, there is a real risk he or she will suffer significant harm;[12] and
- he or she does not have a well-founded fear of *refoulement* from the other country to a country where:
  - he or she has a well-founded fear of Convention based persecution;[13] or
  - there are substantial grounds for believing there is a real risk he or she will suffer significant harm (as a necessary and foreseeable consequence of availing themselves of the right to enter and reside).[14]

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[9] Although the provisions of s 36(3)–(7) have usually been considered in relation to 'safe third countries', the prevailing view is that they are not limited to third countries but can apply to a country of which the non-citizen is a national, including the country of flight: see *NBGM v MIMIA* (2006) 150 FCR 522 at [12], [54], [210], with the High Court not disturbing this aspect of the Full Court's reasons: see *NBGM v MIMA* (2006) 231 CLR 52, to be read with *MIMIA v QAAH of 2004* (2006) 231 CLR 1. However, in light of the majority's interpretation of the Convention definition of 'refugee' in *NBGM*, the provisions of ss 36(3), (4)(a) and (5) would probably operate in the same way as art 1A(2) in relation to the country of flight and therefore need not be given separate consideration. Importantly, although it appears that ss 36(3)–(7) can apply to the country of flight, the High Court's reasons in *NBGM* clearly do not suggest that all protection visa applications should be considered under those provisions rather than under s 36(2)(a) and art 1A(2). Prior to 24 June 2023, Subdivision AK of Division 3 of Part 2 (ss 91M–91Q) provided that non-citizens who were either nationals of two or more countries, or who had a right of residence in a third country, had previously continuously resided there and the Minister had made a declaration in relation to such countries, were unable to make a valid protection visa application. This Subdivision was repealed by Schedule 2 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) (No 26 of 2023).

[10] Section 36(6). Subsection (7) provides that subsection (6) does not, by implication, affect the interpretation of any other provision of the Act. Note that the state and effect of foreign law are questions of fact and as such, are susceptible of proof by expert evidence from a witness suitably qualified to express an opinion about the laws of the relevant foreign state. However 'it is not necessary for a court or tribunal to resort to expert evidence of that kind in order to make a finding as to the effect of a relevant law of a foreign country. If, for example, the text of a presumably relevant statute of that country or an authoritative statement in a legal text book or other authority appears to suggest with sufficient precision the effect of the law in question, the court or tribunal is entitled, in the absence of contradictory expert evidence, to make a finding accordingly': *Applicants in V 722 of 2000 v MIMA* [2002] FCA 1059 at [33], referring to the *Evidence Act 1995* (Cth) s 174(1). Although the Tribunal is not bound by the rules of evidence (s 420(a) of the Act), those rules can provide guidance.

[11] Section 36(4)(a).

[12] Section 36(4)(b).

[13] Section 36(5).

[14] Section 36(5A).

Despite some judgments to the contrary, the weight of authority suggests that the obligation falls on the decision-maker to make a finding of fact that a right to enter or reside in a third country exists and is not defeasible, even where an applicant fails to assert such defeasibility.[15] It therefore appears safer for a decision-maker to address all elements of s 36(3) to support a finding that an applicant is not a person in respect of whom Australia has protection obligations.

Right to enter and reside, whether temporarily or permanently

Section 36(3) requires a right to enter and reside in another country. That right may be temporary or permanent, and there is no restriction on the manner in which the right arises or is expressed. The question of whether a person has the relevant right is likely to be uncontroversial where the applicant is a national of the other country,[16] but other cases can give rise to difficulties.

'Country' is not expressly defined for this purpose, but has been accepted to mean in this context, 'the territory of a nation with its own government; a sovereign state'.[17] Key indicia of a country include such matters as a right to control immigration and a capacity to defend itself.[18] The existence of a country is a question of jurisdictional fact (i.e. it can be objectively ascertained), but the question of *which* country is relevant for the purposes of considering ss 36(3)–(5A), is to be determined on the merits.[19]

'Right' means a lawfully given liberty, permission or privilege

Section 36(3) of the Act does not refer to, or presuppose, a legally enforceable right under domestic law. It is sufficient to have a 'liberty, permission or privilege lawfully given' which has not been withdrawn.[20]

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[15] In *ABB19 v MICMSMA* [2022] FCA 715, Allsop CJ held that since s 36(3) operates as a qualification on a visa applicant's right to make claims for protection under s 36(2), the appellant's failure to articulate a qualification affecting their right to enter or reside in a third country did not obviate the Tribunal's obligation to make a finding of fact on the materials before it that such a right was currently in existence and not immediately defeasible on return to that third country: at [60]. Earlier, in *SZHWI v MIMA* [2007] FCA 900, Allsop J (as he then was) had found the Tribunal erred in not considering whether the applicant had taken all possible steps to avail himself of a right to enter and reside in circumstances where this point had not been conceded by the applicant and was not otherwise in issue. The Federal Circuit Court in *SZRNT v MIBP* [2015] FCCA 765 took a similar approach, despite the applicant having implicitly accepted that he had not taken all possible steps to avail himself of the right to enter and reside in India. However, in *SZLAN v MIAC* (2008) 171 FCR 145 Graham J held that it was for the appellant to satisfy the Tribunal that the criterion in s 36(2)(a) had been satisfied and that required the appellant to satisfy the Tribunal that he had not been excluded from eligibility for a protection visa by his failure to take all possible steps to avail himself of a right to enter and reside in, relevantly, India and disagreed with the contrary approach taken in *SZHWI*: at [58]. Graham J followed this approach in the later judgment of *SZGXK v MIAC* [2008] FCA 1891: at [32].

[16] Nationality is to be determined solely by reference to the law of the relevant country: s 36(6). Note that in some circumstances, the question of whether an applicant is already recognised as a citizen of a country or merely as having a presently existing right to acquire citizenship by applying for it may need careful consideration of the law in question. Further, the laws of a country may not always confer on its nationals a right to enter and reside: *SZOUY v MIAC* [2011] FMCA 347 at [7].

[17] *BZAAH v MIAC* [2012] FMCA 1228 at [48], [51] (upheld on appeal: *BZAAH v MIAC* (2013) 213 FCR 216 at [51]–[52].

[18] *BZAAH v MIAC* [2012] FMCA 1228 at [65]–[69]. In that case, Burnett FM rejected the applicant's contention that the Tribunal erred in considering Spain, rather than the European Union (EU), when determining the application of s 36(3)–(5). His Honour held that the EU was not a country for the purposes of ss 36(3)–(5) given the absence of two key indicia of nationhood, namely immigration control and national security, both of which remained the responsibility of member states. The conclusion that the EU was not a State was upheld on appeal: *BZAAH v MIAC* (2013) 213 FCR 216 at [59], [83].

[19] *BZAAH v MIAC* [2012] FMCA 1228 at [88]–[89]. Although the judgment only referred to ss 36(3) and (4) in relation to this point, this reasoning would also appear equally applicable to ss 36(5) and (5A). This reasoning was not disturbed on appeal: *BZAAH v MIAC* (2013) 213 FCR 216.

[20] *MIMAC v SZRHU* (2013) 215 FCR 35. Buchanan J (at [89]), all other members of the Court agreeing, endorsed the construction by Allsop J in *V856/00A v MIMA* (2001) 114 FCR 408. The Full Court rejected the construction that s 36(3) required a legally enforceable right which had been stated in *Applicant C v MIMA* [2001] FCA 229 at [28], *Kola v MIMA* [2001] FCA 630 at [36], and upheld by the Full Federal Court in *MIMA v Applicant C* (2001) 116 FCR 154 at [65] and *Kola v MIMA* (2002) 120 FCR 170 at [63] respectively.

This distinction was highlighted by the Full Federal Court in *MIMAC v SZRHU*,[21] a case concerning the right of a Nepalese citizen to enter and reside in India on the basis of a treaty between the two countries. The Court observed that the terms of the treaty appeared to give rise to a right of residence, but not a right of entry[22] and indicated that the Tribunal should evaluate whether, in combination with those terms, the administrative arrangements for entry satisfy the test of a liberty, permission or privilege lawfully given, to enter and reside in the country.[23]

The Full Federal Court provided further guidance on the scope of a 'right to enter and reside' in *SZTOX v MIBP*.[24] The Court confirmed that the 'right' in s 36(3) is not confined to a right which is sourced in domestic law, such as a statute, regulation or other legislative instrument. Rather, the source of the right might also lie in an executive act, such as a Treaty, executive policy or other executive instrument.[25] The Court emphasised that these examples are not exhaustive and that the proper construction of s 36(3) must accommodate the potentially wide range of laws and executive acts which could create a right or entitlement in the relevant sense.[26] The existence and source of the right will be a matter of evidence.[27]

Also considering the scope of the 'liberty, permission or privilege lawfully given' test, the Federal Circuit Court has held that s 36(3) incorporates the following: a right to claim, against the appropriate state organ, entry and residence (and a corresponding duty on the state organ to grant such entry and residence); or a privilege, liberty or permission to enter and reside, whether or not that privilege, liberty or permission is revocable; and also a right that will arise on satisfaction of certain pre-conditions.[28] Each of these appears consistent with the test endorsed by the Full Federal Court in *SZRHU*.

Therefore, while a legally enforceable right to enter and reside which is specified in the domestic law of a country will come within s 36(3), the scope of that provision is not limited to such circumstances.

'Right' means a presently existing right

The right referred to in s 36(3) must be an existing right, and not a past or lapsed right, or a potential right or an expectancy. The relevant 'liberty, permission or privilege' must be a permission

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21 *MIMAC v SZRHU* (2013) 215 FCR 35.
22 *MIMAC v SZRHU* (2013) 215 FCR 35 at [88], cf [127]–[128].
23 *MIMAC v SZRHU* (2013) 215 FCR 35 at [90]. In *MZZXS v MIBP* [2015] FCA 1384 at [14], the Court held that in order to assess whether entry is pursuant to a right to enter and reside, the Tribunal needs to know by what means the entry is permitted. In this case it failed to evaluate the evidence of the existence of the right – it simply listed three sources it had earlier referred to and concluded that they proved a right of the applicant to enter and reside in India.
24 *SZTOX v MIBP* [2015] FCAFC 77.
25 *SZTOX v MIBP* [2015] FCAFC 77 at [41]. This overturns the reasoning of the Federal Circuit Court in *SZTOG v MIBP* [2015] FCCA 180 at [34] and *SZTQN v MIBP* [2015] FCCA 188 at [25] that the right to enter and reside must be a right that arises under the law of the country.
26 *SZTOX v MIBP* [2015] FCAFC 77 at [41].
27 *SZTOX v MIBP* [2015] FCAFC 77 at [42]. Contrary to the view expressed in *MZZXS v MIBP* [2015] FCA 1384 at [14] that the Tribunal needs to know by what means the entry is permitted and identify the existence and source of the right, the Full Court of the Federal Court in *MIBP v SZUSU* (2016) 237 FCR 305 held that there is no requirement for the Tribunal to identify the source of the right of entry with that degree of precision: at [38]. For instance, where the Executive Government of a third country publishes a statement that refers to the right of citizens of other countries to enter, and no question arises as to the authenticity of that statement, there is no reason why the Tribunal would need to inquire any further.
28 *SZTOG v MIBP* [2015] FCCA 180 at [32] and *SZTQN v MIBP* [2015] FCCA 188 at [25].

which obtains its effective substance from its grant 'and thereafter from the lack of any withdrawal of it and from the lack of any existing prohibition or law contrary to its exercise'.[29]

The issue as to whether the right in s 36(3) could be a lapsed right arose for consideration in *Suntharajah v MIMA*.[30] In that case, the applicant held a valid UK student visa at the time of the Tribunal's decision, but claimed the visa would be cancelled on arrival in the UK because he had abandoned his course of study. The Court held that the Tribunal erred in law in failing to resolve that question. Justice Gray stated:

> In my view, before it is possible to be satisfied that a person has a right to enter and reside in another country, where the possession of a current visa is the right asserted, it is necessary to examine the nature of that visa, the circumstances in which it was granted and whether the factors warranting its revocation exist. A visa cannot be said to afford a right to enter and reside in a country if it is bound to be revoked as soon as its holder attempts to make use of it by entering the country.
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> …
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> If, on arrival, [the applicant's] visa was bound to be cancelled, it could not be said that the visa constituted a right to enter and reside. Before it could come to the conclusion that the applicant had a right to enter and reside in the UK, the Tribunal was bound to resolve that question.[31]

Quoting the above passage from *Suntharajah* with approval, the Federal Court in *ABB19 v MICMSMA* held that where a 'right' to enter and reside in a third country depends on a visa or permit which is before the Tribunal, the Tribunal necessarily must consider any factors apparent on the face of that visa or permit which speak to its defeasance or defeasibility. The failure of the self-represented appellant in that case to assert that the visa or permit would be immediately defeasible (in contrast to *Suntharajah*) did not derogate from the Tribunal's task under s 36(3)..[32]

The Department of Home Affairs, in its 'Policy: Refugee and Humanitarian - Refugee Law Guidelines' ('the Refugee Law Guidelines') state where the laws of the country provide a right to

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29 *MIMAC v SZRHU* (2013) 215 FCR 35 at [45], citing Allsop J in *V856/00A v MIMA* (2001) 114 FCR 408 (at [31]). The construction by Allsop J was endorsed by Buchanan J (at [89]), with all other members of the Court agreeing (at [7], [93], [130], [131]).

30 *Suntharajah v MIMA* [2001] FCA 1391.

31 *Suntharajah v MIMA* [2001] FCA 1391 at [17]–[19]. Although this judgment approached s 36(3) on the basis that it required a legally enforceable right, rather than a liberty, permission or privilege lawfully given, it appears equally applicable applying the latter test. Contrast *V856/001 v MIMA* (2001) 114 FCR 408 at [84]–[87], where Allsop J considered in *obiter dicta* that the words 'has not taken' in s 36(3) are wide enough to cover past completed failures as well as continuing failures. Thus, if the applicant had left Syria with a right to re-enter and reside, but had allowed that right to lapse prior to the delegate or Tribunal dealing with his application, s 36(3) would apply, even though the failure was completed in the past, in the sense that the right was lost before the application was considered. In *MIMA v Applicant C* (2001) 116 FCR 154 Stone J referred to the possible situation where, at the time the application for a protection visa is under consideration, the circumstances which permitted the grant of the right no longer exist or the factors warranting its revocation are established: at [59]. Her Honour commented that whether or not there could be said to be a right to enter the relevant country in such a case would depend on all the circumstances of that case. However, she found it unnecessary to consider the point further, and did not comment on Allsop J's analysis of this issue. Note that in light of the High Court decision in *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161, the *Thiyagarajah* principle of 'effective protection' discussed in these cases is no longer considered good law. While the reasoning of Allsop J in *V856/001 v MIMA* (2001) 114 FCR 408 at [31] as to the meaning of 'right' in s 36(3) was endorsed in *MIMAC v SZRHU* (2013) 215 FCR 35 per Buchanan J at [89], with all other members of the Court agreeing, that endorsement did not extend to the *obiter* comments in relation to 'has not taken'.

32 *ABB19 v MICMSMA* [2022] FCA 715 at [67]. In that case, the appellant was a national of the Democratic Republic of the Congo who held a South African permanent residence permit. The permit's terms stated that it may be revoked if its holder spent longer than three years outside of South Africa. At the time of the Tribunal's decision, the appellant had resided in Australia for four years. The Court held that, having regard to the terms of the permit (and to South African immigration law, which indicated that a request to extend the length of time a permanent resident could stay outside South Africa could only be made before the expiry of the three-year period), it was legally unreasonable for the Tribunal to find that the appellant's permanent residence permit would or could not be revoked on return to South Africa.

enter and reside, decision-makers should determine that the law is still in effect for the applicant or that the applicant's circumstances have not changed such that the applicant will no longer be within the ambit of such laws.[33]

The Refugee Law Guidelines state there is no 'bad faith' element in s 36(3), such that if an applicant has allowed a right to enter and reside in another country to lapse, this will not amount to conduct that must be disregarded in determining whether the applicant has a well-founded fear of persecution.[34]

Right to enter and reside …

The right to which s 36(3) refers is not merely a right to enter. It must be a right to enter and reside.[35] The right should be construed as a whole. Attempts to construe the individual terms within the phrase have the potential to mislead and to divert attention away from the object and purpose sought to be achieved by s 36 as a whole, as well as to divert attention into questionable analogies as to what the phrase 'right to enter' or the term 'reside' may mean in other areas of the law.[36]

Thus, 'reside' in the context of s 36(3), particularly when paired with the expression 'temporarily', has a more particular meaning than its usual dictionary sense of 'to dwell permanently or for a considerable time; have one's abode for a time'.[37] The concept of 'reside' need not extend to the ability to establish an abode in another country; it may amount to no more than just the temporary right to eat and sleep there.[38] However, residence suggests something more than just a short or passing visit.[39]

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33 Department of Home Affairs, 'Refugee Law Guidelines', section 3.18.3.4, as re-issued 27 November 2022. Note that Ministerial Direction No 84, made under s 499, requires the Tribunal to have regard to those Guidelines, where relevant (for further discussion, see Chapter 12 – Merits Review of Protection Visa Decisions).

34 Department of Home Affairs, 'Refugee Law Guidelines', section 3.18.3.4, as re-issued 27 November 2022. While the Guidelines only make reference to this conduct being disregarded for the purposes of s 5J(6) which applies to applications made on or after 16 December 2014, there is no reason in principle why a different view would be taken with respect to such conduct for the purposes of s 91R(3) as it applies to pre-16 December 2014 applications (for further discussion of s 5J(6) and s 91R(3), see Chapter 3 – Well-founded Fear). The proposition that the right to enter and reside cannot be a lapsed right is also consistent with Australia's obligations under the Convention, and with the intention of Parliament to meet those obligations as expressed during the passage of relevant amendments: Commonwealth, *Parliamentary Debates*, Senate, 25 November 1999, 10669 (Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).

35 *WAGH v MIMIA* (2003) 131 FCR 269 at [64]. Graham J in *SZLAN v MIAC* (2008) 171 FCR 145 held at [68] that this does not call for consideration of two separate rights. In *SZRCQ v MIAC* [2012] FMCA 788 at [7]–[8], the Court followed *SZLAN* and inferred from country information contained in the Tribunal's decision that it had correctly considered the issue of whether the applicant had a presently existing right to enter *and* reside in India, rejecting the applicant's claim that the Tribunal had considered only the right to enter.

36 *SZMWQ v MIAC* (2010) 187 FCR 109 at [97].

37 *The Macquarie Dictionary* (The Macquarie Library, revised 3rd edition, 1997). The *Oxford Dictionary of English* (Oxford University Press, revised 2nd edition, 2005) similarly defines 'reside' to mean to 'have one's permanent home in a particular place'. In *MIMAC v SZRUH* [2013] FCCA 1164, Judge Cameron stated that as to reside somewhere temporarily is something less than dwelling there permanently, dictionary definitions of 'reside' are of limited assistance and cannot be employed to qualify or determine the minimum duration of residence: at [19]. It was noted in *SZRTC v MIBP* (2014) 224 FCR 570 at [27] that there is an obvious tension between the stability which is suggested by the word "reside" and the transience implied by the word temporarily.

38 *SZMWQ v MIAC* (2010) 187 FCR 109 at [26]. The Court rejected the appellant's argument that 'reside' amounted to more than just the temporary right to eat and sleep in another country but had to extend to the right to establish an abode there. Similarly, in *SZRTC v MIBP* (2014) 224 FCR 570 at [34], it was held that there is no need for a person to be able to stay in the third country for a period which would ordinarily require him or her to obtain accommodation such that they would satisfy an 'abode' requirement, disagreeing with the earlier view espoused by Judge Cameron in *SZRUH v MIAC* [2013] FCCA 1164.

39 *SZRTC v MIBP* (2014) 224 FCR 570 at [28].

Justice Hill observed in *WAGH v MIMIA* that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside.[40] Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour's opinion, a more difficult question. The applicants in that case held US visas 'for the purpose of business and tourism'. Referring to the usual dictionary sense of 'reside',[41] his Honour stated that it would be an unusual, but not impossible, use of the word to refer to a tourist.[42]

In the same case, Lee J took a narrower approach. Justice Lee observed that the applicant wife's right to enter and reside in the United States 'would be a right to enter and to reside for the purpose of tourism or business, not a right to enter and reside in the United States for the purpose of receiving protection or some equivalence to that to be provided by a Contracting State under the Convention'.[43] His Honour held, with Carr J agreeing on this point, that a temporary six month visa issued 'for the purpose of business and tourism' would not be sufficient to provide the holder with a legally enforceable right to enter the United States for purposes outside of business or tourism. Their Honours noted that in the circumstances of the case, the appellants would not be travelling to the United States for the purposes of tourism or business and would thus obtain no entitlement to be admitted into that country upon arrival.[44]

On the other hand, in *Applicants in V722 of 2000 v MIMA* Ryan J held that where the applicants had current temporary residence permits under Italian law and needed only to notify the border control of their intention to re-enter, it was open to the Tribunal to conclude that they had a right to enter and reside, at least temporarily, in Italy. The Court observed that the Tribunal's understanding of the particular law in question, and the effect of the current entry permit, were questions of fact which the Tribunal was entitled to resolve in the way it did.[45]

In both *WAGH v MIMA* and *Applicants in V722 of 2000 v MIMA* the courts were considering whether there existed a *legally enforceable* right to enter and reside temporarily. As noted above, s 36(3) does not require such a right to be legally enforceable – it will be sufficient if there is a 'liberty, permission or privilege lawfully given' which has not been withdrawn.[46] As the seemingly higher threshold suggested by these earlier cases is predicated upon a different, now rejected interpretation of the meaning of a 'right' for the purposes of s 36(3), it should be treated with some caution.

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40 *WAGH v MIMIA* (2003) 131 FCR 269 at [64].

41 'To dwell permanently or for a considerable time; have one's abode for a time': *The Macquarie Dictionary* (The Macquarie Library, revised 3rd edition, 1997).

42 *WAGH v MIMIA* (2003) 131 FCR 269 at [65].

43 *WAGH v MIMIA* (2003) 131 FCR 269 at [42], [75].

44 *WAGH v MIMIA* (2003) 131 FCR 269 at [43], [75].

45 *Applicants in V722 of 2000 v MIMA* [2002] FCA 1059 at [48]. The Tribunal had relied on its understanding of art 4 of Italian Law No 40 of 6 March 1998, and the current entry permit, as the source of the applicants' entitlement to remain in, or re-enter, Italy. However, Ryan J considered that the Tribunal did not need to go that far because the fact that the first applicant had resided and worked in Italy since 1986 and had been joined there by the second applicant in 1993 raised a presumption that Italy would not peremptorily preclude them from returning to Italy after travelling to Australia on valid Italian passports endorsed with Australian visitors' visas. That presumption was strengthened by the fact that the applicants had unexpired temporary residence permits and pending applications for permanent residence permits: at [34]. However, this broad view of the potential application of s 36(3) by reference to presumptions based on prior residence may go beyond the concept of a liberty, permission or privilege as endorsed in *MIMAC v SZRHU* (2013) 215 FCR 35.

46 *MIMAC v SZRHU* (2013) 215 FCR 35.

In *SZQRM v MIAC*, the Federal Circuit Court upheld a Tribunal finding that a right to enter and reside in the United Kingdom for three months could be characterised as a right to 'reside' within s 36(3) in circumstances where it conferred privileges normally associated with residency, including the right to work, and where the UK government described the right as a 'right of residence'.[47]

While conferral of such privileges may be indicative of a right of residence, s 36(3) does not incorporate any requirement to necessarily examine such matters as a person's ability to obtain employment or to access welfare benefits upon taking up residence.[48] Furthermore, the weight of judicial authority indicates that Australia's protection obligations are not enlivened by virtue of the possibility that if, by exercising such a right outside Australia, a person may suffer privation or be exposed to significant difficulties in maintaining a lifestyle.[49] In this vein it has been held that there is no requirement for a decision-maker to examine or evaluate any particulars or circumstances of an applicant in the third country (other than as required by the exceptions in ss 36(4)–(5A)).[50] However, some Federal Court judges have made *obiter* comments that the term 'reside' is likely to imply at least some minimum physical and economic conditions beyond the mere ability to cross a border.[51]

It has also been held that the right to reside in another country does not need to include 'the rights and obligations which are attached to the possession of nationality' which trigger the non-applicability of the Convention under art 1E (applicable to protection visa applications made before 16 December 2014), or the same treatment accorded to nationals in respect of employment conditions and social security that art 24 of the Convention requires contracting States to accord to refugees lawfully staying in their territory.[52]

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47 *SZQRM v MIAC* [2013] FCCA 772 at [114]–[117], upheld on appeal in *SZQRM v MIBP* [2013] FCA 1297. The case involved the rights available to the applicants in the UK as holders of passports from a European Union Member State. Judge Nicholls noted that the right to work is not necessarily an indicator of a right to residence, referring to *SZMWQ v MIAC* (2010) 187 FCR 109 at [110], but it makes the right more than a right just to visit, and, while the description by the UK government was not determinative, it provided evidence that if they were employed or studying, for example, the right could be seen as extending beyond three months.

48 *SZMWQ v MIAC* (2010) 187 FCR 109 at [82], [109], [32].

49 *SZMWQ v MIAC* (2010) 187 FCR 109 at [32].

50 *MZAIU v MIBP* [2015] FCCA 1898 at [18], [21]. The Court rejected the applicant's argument that the Tribunal ought to have considered the circumstances specific to him, such as his characteristics and the circumstances that would confront him in the third country, when considering whether he had a right to reside.

51 In *SZRTC v MIAC* (2014) 224 FCR 570 Flick J observed in *obiter* that a right to cross a border into a third country but to thereafter remain in economic or physical conditions so devoid of any acceptable standard may be found to not constitute a right of the kind being described: at [48]. In *DQD16 v MIBP* [2021] FCA 1586, Mortimer J agreed with Flick J's 'tentative views' and commented in *obiter* that 'the concept of residence implies, at least, some form of reasonable access to the necessities of life, enough to sustain oneself so as to be described as "residing"'. Her Honour stated that this was not to read any requirement of some kind of minimum 'lifestyle', need for social welfare or 'comfort' into s 36(3), but that 'it is to recognise that entry and residence is more than crossing a border, and that conditions which no person could reasonably be expected to tolerate on an ongoing basis, and which might be described as inhumane, would not be comprehended within the phrase "right to enter and reside"': at [51]–[53]. The Tribunal had found that the appellants, Indian nationals, could migrate to Nepal in accordance with the India-Nepal Treaty of Peace and Friendship of 1950, they would live there freely and that one of the appellants would be able to find a job and such that they both had a 'right to enter and reside'. The Court, in concluding that the Tribunal's finding in this regard was open to it, remarked that 'what the appellants were fearful of was being exposed to a far lesser level of such services than they had enjoyed in Australia': at [54].

52 *SZMWQ v MIAC* (2010) 187 FCR 109 at [8]–[9]. The appellant in this case was a citizen of the Czech Republic and the Tribunal considered whether, as a citizen of the European Union (EU), he had a right to enter and reside in Spain. The appellant argued, among other things, that the Tribunal should have held that a 'right to reside' included the right to participate in the country's system of social security, in the same way as a national of that country. The appellant had argued before the Tribunal that this was particularly relevant for him as an unskilled person of Roma ethnicity, because of a resulting high risk of unemployment in Spain. The Court held that the 'right to enter and reside' is merely that (per Rares J at [34], Flick J at [104], Besanko J agreeing). It is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee status in the other country (per Rares J

Ultimately, while the scope of the concept of 'reside' in s 36(3) is imprecise, the cases make it clear that whether an applicant's right in a particular case would amount to a right to enter and reside in the relevant sense will involve questions of fact and degree, but that not every visa would activate s 36(3).

Whether temporarily or permanently

Section 36(3) makes it clear that the right to reside can be permanent or temporary. There is no minimum period specified as being sufficient, and a stay of any length involving a pause in a person's travel may (but does not necessarily) constitute temporary residence.[53] While the term '*right … to reside*' suggests more than a right to a mere transitory presence, the term 'temporarily' means that right need not be an enduring one.

In *SZQPS v MIAC* the Federal Magistrates Court found no error in the Tribunal's conclusion that the applicant had a temporary right to enter and reside in South Korea in circumstances where the applicant had previously been issued with a number of South Korean entry permits on the basis of his marriage, but at the time of the Tribunal's decision, had less than two months remaining on his permit.[54]

In *SZRTC v MIBP* the Full Federal Court unanimously held that the temporary period of residence contemplated by s 36(3) is not linked with protection obligations owed to an applicant, and need not be co-extensive with the period during which protection obligations persisted in relation to an applicant by reason of the circumstances in his or her country of origin.[55] The applicants in this case were citizens of Burundi and had a right to enter and stay in any one of four other member countries of the East African Community for up to six months. Justices Tracey and Griffiths considered that this constituted a right to reside temporarily in those third countries,[56] and while the possibility of refoulement to a place of persecution at the end of six months might be relevant to the operation of the exceptions in s 36(4), (5) or (5A), that was a separate question to whether the person had a temporary right to enter and reside.[57]

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at [34]). Flick J (Besanko J agreeing) considered that there is no reason why any right further than a right to enter and reside should be implied from the terms of s 36(3), but left open the question of whether a person who has a right to enter and reside in another country may confront economic or physical circumstances of such a kind that he may not truly be said to have such a right: at [110]. See also *MZYMO v MIAC* [2011] FMCA 793, upheld on appeal in *MZYMO v MIAC* [2012] FCA 144 for another illustration of circumstances where s 36(3) was found to apply to a non-citizen on the basis of a right to reside in the EU. In that case, the Tribunal limited its consideration to EU countries in which the applicant would have work rights, finding that in those countries where he had a right to temporarily enter and reside but, as a Romanian national, no right to work, he had a well-founded fear of significant economic hardship amounting to serious harm for reasons of his Romanian nationality and s 36(3) therefore did not apply by reason of s 36(4). The Court found no error in the Tribunal's approach.

53 *SZRTC v MIBP* (2014) 224 FCR 570 per Tracey and Griffiths JJ at [34]. Their Honours also observed at [28] that in the context of s 36(3) the word 'temporarily' does not introduce any temporal limitation; Flick J made similar observations at [44].

54 *SZQPS v MIAC* [2012] FMCA 108. However, although the Court did not directly consider the relationship between the temporary right and the period for which the applicant would require protection, it did express concern that the circumstances gave rise to doubt as to the applicant's present entitlement to enter and reside in South Korea (the permit had lapsed by the time of judgment) and opined that the Tribunal should be cautious in applying s 36(3) to temporary residences of short duration: at [23]–[24].

55 *SZRTC v MIBP* (2014) 224 FCR 570 at [28], [33], [43]. This rejected the approach of Lee J held in *obiter* in *WAGH v MIMIA* (2003) 131 FCR 269 at [34], namely that while the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required, should not be followed.

56 *SZRTC v MIBP* (2014) 224 FCR 570 at [31].

57 *SZRTC v MIBP* (2014) 224 FCR 570 at [28]. In *SZSMG v MIBP* [2014] FCA 877 at [9] the Court observed that particularly if the right to enter and reside in a country is for a temporary period, the critical questions which arise for the decision-maker are what is likely to occur at the conclusion of the period and whether or not s 36(5) or (5A) are engaged.

However that right arose or is expressed

Section 36(3) clearly does not require that the applicant has visited or lived in the country in relation to which effective protection is being considered. It refers only to a right to enter and reside in a country, whether temporarily or permanently, and 'however that right arose or is expressed'. For example, a legally enforceable right to enter and reside in a country as evidenced by a current but unused visa, or in legislation relating to a class of person of which the applicant is a member[58] might be caught by s 36(3) notwithstanding that the applicant has never visited that country.

All possible steps

Subsection 36(3) applies to a non-citizen who has not taken **all possible steps** to avail himself or herself of a right to enter and reside in another country.

The phrase 'all possible steps' means what it says and should not be read down. For example, it should not be construed as 'all steps reasonably practicable in the circumstances', 'all reasonably available steps' or 'all reasonably possible steps'.[59]

Before determining that s 36(3) applies, the decision-maker must be satisfied that there is at least one possible step that the applicant *could* have taken.[60] The 'steps' referred to may relate to a range of administrative or practical measures that are incumbent on the applicant to undergo.[61] However, the phrase 'all possible steps' does not involve any evaluative process based on the applicant's particular circumstances.[62]

Before it can be determined whether 'all possible steps' have been taken, a decision-maker must first make a finding of fact on the materials before it that the applicant has a 'right' in the relevant

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[58] Such as South Korean laws relating to North Koreans (as discussed in *SZGKB v MIMIA* [2005] FMCA 1544 and *NBLC v MIMIA, NBLB v MIMIA* (2005) 149 FCR 151), or Israel's Law of Return (as discussed in *NAEN v MIMIA* (2004) 135 FCR 410, *NAPI v MIMIA* [2004] FCA 57, and *NAGV of 2002 v MIMIA* [2002] FCA 1456 and on appeal in *NAGV v MIMIA* (2003) 130 FCR 46 and *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161), or Spain's legislation and practice conferring a right of residence on European Union citizens (as discussed in *SZMWQ v MIAC* (2010) 187 FCR 109). In *MIMA v Applicant C* (2001) 116 FCR 154 at [60], Stone J observed that a country's entry requirements may be met by proof of identity and citizenship of a nominated country being provided at the border, for example by production of a valid passport, without the necessity for a visa. Note however that in *SZQWP v MIAC* [2012] FMCA 532 the Court, following *SZHYB v MIMIA* [2007] FMCA 311 at [33], commented that the decision-maker is not required to refer to a specific provision in the domestic law of the relevant foreign country to find that a right exists for the purposes of s 36(3), so long as the existence of the right is supported by evidence: at [21].

[59] *NBLC v MIMIA, NBLB v MIMIA* (2005) 149 FCR 151 at [64]; *SZUBI v MIBP* [2015] FCCA 226 at [30], upheld on appeal in *SZUBI v MIBP* [2015] FCA 1203.

[60] *SZRNT v MIBP* [2015] FCCA 765 at [13]–[14], where the Court found that the Tribunal had erred by failing to consider whether there were in fact any possible steps the applicant could have taken to avail himself of the right to enter and reside in India.

[61] For example, in *SZMWQ v MIAC* (2010) 187 FCR 109 a national of the Czech Republic claimed to fear persecution on the basis of his Roma ethnicity. Although he had a right to enter and reside in Spain as a European citizen, he needed a valid travel document to remain there beyond three months. He had no intention of renewing his Czech passport, and in these circumstances the Tribunal found that he had not taken all possible steps to avail himself of the right to enter and reside in Spain. The Court found no error in this approach. Justice Rares suggested at [44] that where a person finds themselves destitute and starving in a third country, they could satisfy a decision-maker that they have taken all possible steps to avail themselves of the right to enter and reside there. Other examples where no error has been found in the Tribunal's finding that an applicant had not taken all possible steps include cases concerning a Chinese national with a valid Papua New Guinea (PNG) visa who had not attempted to re-enter PNG: *SZJLV v MIAC* [2007] FMCA 1501; and a North Korean defector who was entitled to South Korean citizenship, but who had not entered that country: *NBLC v MIMIA, NBLB v MIMIA* (2005) 149 FCR 151. The Refugee Law Guidelines contain examples of measures that may constitute 'steps': see Department of Home Affairs, 'Refugee Law Guidelines', section 3.18.5, as re-issued 27 November 2022.

[62] *MZAIU v MIBP* [2015] FCCA 1898 at [18]. The Court rejected the applicant's argument that the Tribunal ought to have considered the circumstances specific to him, such as his characteristics and the circumstances that would confront him in the third country, when considering what steps he could or should have taken.

sense to enter and reside in another country.[63] As discussed above, the right referred to in s 36(3) must be a presently existing right that is available at the time of decision, and not a right that could be acquired at that time. It would appear, therefore, that s 36(3) would not apply where an applicant has not taken all possible steps to *acquire* a right of the kind referred to. For example, an applicant may have a right to permanent residence or even citizenship merely by applying for it – for example through parentage or marriage – but may refuse to do so.

In some circumstances, the distinction between a presently available right and a right that may be acquired simply by applying for it may be a fine one, and there may be room for development of the law on this question.[64]

Applying s 36(3) – Some scenarios

It is important that the material before the decision-maker adequately supports a conclusion that s 36(3) applies in a particular case. Where the relevant liberty, permission or privilege to enter and reside in the country derives from the law of a country, it will often be necessary to pay careful attention to the terms of the law in question. In some cases, the distinction between whether an applicant has the relevant right and whether they have taken 'all possible steps' to avail themselves of that right can be a fine one.

Case Study: Israel's Law of Return

Israel's Law of Return 5710–1950 relevantly provides that '1. every Jew has the right to this country as an Oleh'; and '2. Aliyah shall be by Oleh's visa [which] shall be granted to every Jew who has expressed his desire to settle in Israel, unless the Minister for Immigration is satisfied that the applicant (1) is engaged in an activity directed against the Jewish people or (2) is likely to endanger public health or the security of the State'.

In *MZXLT v MIAC*,[65] the Federal Magistrates Court held that the right in question is premised on the desire of the person to invoke the Law of Return and that in the absence of a genuine voluntary expression of a desire to invoke that law, the right could not be regarded as an existing right but rather a conditional or contingent right. As there was not only an absence of an expression of a desire to settle in Israel, but rather, a clear positive assertion on the part of the first applicant that she did not desire to settle in Israel, it was wrong to interpret the expression of a desire to settle in Israel as being one of a number of 'possible steps' which she should have taken in availing herself of a right to enter and reside in Israel.[66] The Court held that it was not simply an error of fact in interpreting foreign law but rather an error of law in interpreting the application of s 36(3).

In *SZTOG v MIBP* the Federal Circuit Court held that under the 'liberty, permission or privilege lawfully given' test, a 'right to enter and reside' may include an inchoate right that, under the law of

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63 *ABB19 v MICMSMA* [2022] FCA 715 at [51].

64 See e.g. the tentative view of Allsop J in *V856/00A v MIMA* (2001) 114 FCR 408 that while a capacity to bring about a lawful permission is not a 'right' to do what the permission allows to be done, a person may have an inchoate 'right' if it could be shown that a statute or piece of positive law of the country in question granted a permission on satisfaction of certain preconditions: at [26].

65 *MZXLT v MIAC* [2007] FMCA 799.

66 *MZXLT v MIAC* [2007] FMCA 799 at [100]–[107]. See also Kirby J's discussion of the Law of Return in *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [75]–[76], [96]–[98].

the third country, will arise on satisfaction of certain preconditions.[67] In light of this recent authority, it is unclear whether the requirement that an applicant express a desire to settle in Israel would be characterised as a precondition to an existing inchoate right (to enter and reside in Israel), as opposed to the Law of Return being a conditional or contingent right (as was found in *MZXLT*).

Ultimately, the state and effect of foreign law are questions of fact; and whether it is open to the decision-maker to find that s 36(3) applies will often depend upon the information before the decision-maker in relation to the law in question, and the factual findings actually made, as demonstrated in the below approach to cases regarding nationals of Nepal.

Case Study: India-Nepal Treaty of Peace and Friendship

In a number of Nepalese cases, the Tribunal has found that the applicant had a right to enter and reside in India within the meaning of s 36(3), on the basis of the Treaty of Peace and Friendship between the governments of India and Nepal which granted reciprocal rights 'to the nationals of one country in the territories of the other, the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature'.

A majority of the Full Federal Court in *MIMAC v SZRHU* found that the terms of the Treaty, while reflecting a mutual right of residence, did not appear to give rights of entry and so did not of itself support a finding of a right to enter and reside in India for the Nepali applicant.[68] However, the Court indicated that the Tribunal should pay regard to the actual terms of the Treaty and also evaluate whether, in combination with the terms of the Treaty, the administrative arrangements for entry by Nepalese citizens satisfy the requisite test of a liberty, permission or privilege lawfully given, to enter and reside in the country.[69]

Subsequent judgments of the Federal Circuit Court have upheld decisions in which the Tribunal, following this approach, has found that the administrative arrangements for entry, when read in light of the terms of the Treaty, amount to an entitlement to enter and reside consistent with that described in *MIAC v SZRHU*.[70] However, both that Court and the Full Federal Court have found error where, in making such findings, the Tribunal has referred only to the practical reality of the applicant's ability to enter and reside in accordance with those arrangements, without considering whether that 'practical reality' gives rise to a right of the type described in *SZRHU.*[71] However, it is not the case that simply referring to the 'practical reality' of the situation will of itself reflect a misunderstanding or misapplication of the principles in *SZRHU.* Rather, where the Tribunal

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67 *SZTOG v MIBP* [2015] FCCA 180 at [32]. The 'liberty, permission or privilege lawfully given' test was endorsed in *MIMAC v SZRHU* (2013) 215 FCR 35 (see discussion above).

68 *MIMAC v SZRHU* (2013) 215 FCR 35 at [88]; cf *obiter* comments disagreeing on this conclusion at [127]–[128].

69 *MIMAC v SZRHU* (2013) 215 FCR 35 at [90]. See also *MIBP v SZUSU* (2016) 237 FCR 305; cf *MZZXS v MIBP* [2015] FCA 1384 at [14].

70 *SZTQO v MIBP* [2014] FCCA 2636; *SZTPK v MIBP* [2014] FCCA 2259 at [24]; *SZRUT v MIBP* [2015] FCCA 263 at [30]; *SZUHR v MIBP* [2015] FCCA 3193 at [34].

71 See *SZTOX v MIBP* [2015] FCAFC 77; *SZTOG v MIBP* [2015] FCCA 180, *SZTQN v MIBP* [2015] FCCA 188, *SZUYA v MIBP* [2015] FCCA 2315 at [14]. Similarly, in *MZZXS v MIBP* [2015] FCA 1384 the Federal Court found that the Tribunal's reference to the 'practical situation' suggested that it did not understand that a right under s 36(3) is not established if all that exists is a capacity to bring about lawful entry: at [16]. The reference to 'practical reality' is said to have arisen from the now-defunct doctrine of effective protection: see for example *SZTOX v MIBP* [2015] FCAFC 77 at [39]. In contrast, no error arose from the phrases 'other arrangements that apply in practice' and 'the administrative practices' in *SZUHR v MIBP* [2015] FCCA 3193 at [34].

demonstrates that it has had regard to the actual terms of the treaty and has considered whether those terms, in combination with any administrative or other arrangements, establish the right of entry for Nepalese citizens required by s 36(3) a mere reference to 'practical reality' will not result in jurisdictional error.[72]

Case Study: North and South Korea

Section 36(3) has also been invoked in relation to defectors from the Democratic People's Republic of Korea (North Korea), on the basis of a right to the citizenship of the Republic of Korea (South Korea). In *SZGKB v MIMIA*[73] it was held that the Tribunal had correctly applied s 36(3) to an applicant found to be North Korean, where information before the Tribunal indicated that the Constitution of South Korea regards North Korean citizens as having citizenship of South Korea, and that once an applicant is found to be North Korean that applicant would automatically and immediately be granted South Korean citizenship. Although the applicant had first to establish that he was a citizen of North Korea and may have had difficulty doing so, this did not mean that he did not have an existing right to South Korean citizenship.[74]

Issues concerning North and South Korean nationality have also arisen in cases considering (the now repealed) s 91N(1).[75] In contrast to *SZGKB*, the evidence before the Tribunal in some of these cases indicated that an applicant who held North Korean nationality would not be *granted* South Korean nationality but rather, by operation of South Korean law, already *held* that nationality.[76] However, an applicant will not hold both North and South Korean nationality simply because they were born in North Korea, and the content and operation of South Korean nationality law must be considered in the circumstances of each case, including circumstances relating to the places of birth of the parents where relevant.[77]

The qualifications to s 36(3)

Even if a decision-maker is satisfied that an applicant has not taken all possible steps to avail him or herself of a right to enter and reside in another country, Australia may still have protection obligations if the applicant has a well-founded fear of being persecuted, or faces a real risk of significant harm in that country, or of *refoulement* from that country to a place where they face such treatment.

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72 *MIBP v SZUSU* (2016) 237 FCR 305 at [36]–[41]. The Court held that while the expression 'as a matter of practical reality' was unfortunate it was no more than loose language and distinguished the circumstances in *SZTOX v MIBP* and *MZZXS v MIBP*, noting that in both those instances the Tribunal had not demonstrated that it had understood or applied the principles in *SZRHU*.

73 *SZGKB v MIMIA* [2005] FMCA 1544.

74 *SZGKB v MIMIA* [2005] FMCA 1544. The Court noted at [28] that the fact that a party does not take any step to enforce a right does not mean that the right is not existing and legally enforceable: the right exists independent of any decision by its holder to enforce or not to enforce it. See also *NBCY v MIMIA* [2004] FCA 922; *SZGZF v MIMIA* [2005] FMCA 1740; *NBLC v MIMIA; NBLB v MIMIA* (2005) 149 FCR 151; and *SZFIG v MIMIA* [2006] FCA 1218.

75 Prior to 24 June 2023, s 91N(1) prevented a person from validly applying for a protection visa where he or she held dual (or multiple) nationalities. Subdivision AK of Division 3 of Part 2 (ss 91M–91Q), was repealed by Schedule 2 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) (No 26 of 2023).

76 *SZOUY v MIAC* [2011] FMCA 347 at [40]. See also *SZOAU v MIAC* [2011] FMCA 820 at [5], upheld on appeal in *SZOAU v MIAC* (2012) 199 FCR 448; and *SZOYP v MIAC* [2012] FMCA 403.

77 *SZQYM v MIAC; SZQYN v MIAC* (2014) 220 FCR 505. By implication, such matters would also need to be considered in an assessment of s 36(3). In *SZQYM* the Federal Court held that whatever the content of South Korean nationality law, the mere fact that the appellants claimed to be North Korean nationals was not enough to engage the operation of (the now repealed) s 91N: at [68].

These questions will only arise once a decision-maker is satisfied that an applicant is a person to whom s 36(3) applies because they have a right to enter and reside, whether permanently or temporarily, in a third country. In *SZRTC v MIBP*, the Full Federal Court held that the correct approach to addressing questions involving s 36(3) is, after determining that the applicant is a person to whom that subsection applies, to determine whether its operation is then limited by ss 36(4), (5) and (5A).[78] Matters such as the kind of protection that can be obtained in the third country and the likely duration of the feared persecution will be relevant to that determination. Where s 36(3) applies, the decision-maker must only consider material and claims for protection relevant to ss 36(4)-(5A), and not those relating to a claim for protection made against the applicant's receiving country (for the purposes of s 36(2)).[79]

Particularly if the right to enter and reside in a country is a temporary one, critical questions include what is likely to occur at the conclusion of the period and whether or not s 36(5) or (5A) are engaged.[80] However, issues about a person's temporary right to reside in third country are not to be conflated with what might happen at the end of that temporary period, reflecting the different considerations that each of these provisions require. In *ACY16 v MICMSMA*, for example, the Federal Circuit and Family Court explained that the question of what might happens at the end of a temporary right to reside necessarily directed attention towards s 36(5) which, unlike s 36(3), did not raise questions about the right to reside in a third country but rather whether there was a well-founded fear of that country returning that person somewhere else.[81] It was also noted in that case that the question for the Tribunal was not whether it could be positively satisfied that the applicant could remain in the third country, but rather whether the evidence before it established that the applicant had a well-founded fear of being returned, and that it was not required to assume that the applicant's fear was well founded simply because there was a lack of contradictory evidence.[82]

Sections 36(4)(a) and (5) – well-founded fear of being persecuted

Subsections (4)(a) and (5) respectively provide that s 36(3) does not apply in relation to a country:

- if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
- if the non-citizen has a well-founded fear that:
    - the country will return the non-citizen to another country; and
    - the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

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78 *SZRTC v MIBP* (2014) 224 FCR 570 at [25].
79 *ABB19 MICMSMA* [2022] FCA 715 at [50].
80 *SZSMG v MIBP* [2014] FCA 877 at [9]. In that case, the Court held that while the Tribunal had referred to the applicant's ability to apply for further permission to remain in the UK after the expiry of his temporary right to reside there, it had erred by failing to consider whether there was a real chance that he would be *refouled* at the end of that period or some time later.
81 *AYC16 v MICMSMA* [2022] FedCFamC2G 292 at [28], [35]–[36]. In that case, the applicant had claimed that their right to reside in Ghana was limited to 90 days and that at the end of that time they would be returned to Nigeria where they held a well-founded fear of being persecuted. Although considering s 36(5), the Court's reasoning would appear equally applicable to s 36(5A) also.
82 *AYC16 v MICMSMA* [2022] FedCFamC2G 292 at [43].

Subsections (4)(a) and (5) pick up certain elements of the definition of a refugee, specifically 'well-founded fear of being persecuted … for [one of the Convention reasons]'. For that reason, the law that has developed on the meaning of those elements of art 1A(2) should be applied for the purposes of ss 36(4) and (5) in respect of a protection visa application made prior to 16 December 2014.[83] Thus, s 36(3) will not apply in respect of a country if the non-citizen has a well-founded fear of being persecuted, within the meaning of art 1A(2), in that country or of being returned to a country where they will be persecuted for one or more of the Convention reasons. In those circumstances, if s 36(2)(a) is otherwise satisfied, Australia will have protection obligations to that person.

Similarly, for protection visa applications made on or after 16 December 2014, the definition of 'refugee' in s 5H of the Act also refers to a 'well-founded fear of persecution'. For these applications, 'well-founded fear of persecution' is defined in s 5J of the Act. Although ss 36(4)(a) and (5) do not employ that exact phrase, the concepts in s 5J appear to be relevant to the determination of ss 36(4)(a) and (5) in respect of post 16 December 2014 applications.[84] Section 5J is discussed in Chapter 3 – Well-founded Fear.

Sections 36(4)(b) and (5A) - real risk of significant harm

Subsections (4)(b) and (5A) provide a similar qualification to s 36(3) on complementary protection grounds. Under these provisions, s 36(3) does not apply if:

- the Minister has substantial grounds for believing that as a necessary and foreseeable consequence of the non-citizen availing him or herself of the right to enter and reside another country ('the third country'), there would be a real risk of the non-citizen suffering significant harm; or
- the non-citizen has a well-founded fear that that the third country will return him or her to another country in respect of which there are substantial grounds for believing that there is a real risk the non-citizen will suffer significant harm (as a necessary and foreseeable consequence of availing him or herself to the right to enter and reside in *the third country*).

As with ss 36(4)(a) and (5), these provisions ensure that a person will not be refused a protection visa on the basis that they have a right to enter and reside in a third country, if using that right would place them at a real risk of suffering significant harm.

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[83] In *NBGM v MIMIA* (2006) 150 FCR 522, Mansfield J, with Black CJ generally agreeing, emphasised that s 36(4) is in terms which reflect art 1A(2) of the Convention and thus invokes considerations consistent with those applicable to art 1A(2) as explained by the High Court, e.g. in *Chan v MIEA* (1989) 169 CLR 379 at [51]. The qualification contained in s 91S of the Act should also be applied where relevant. The qualification in s 91R of the Act is expressed to be concerned only with the meaning of 'persecution' in art 1A(2) of the Convention. Therefore, it is arguably not relevant to the interpretation of the statutory provisions in subsections 36(4) and (5). However, in *NBLC v MIMIA, NBLB v MIMIA* (2005) 149 FCR 151, the Court held by majority that the word 'persecution' in s 36(4) has the same meaning as that defined in s 91R.

[84] The meaning of 'well-founded fear of persecution' imports a consideration of a person's 'receiving country' in ss 5J(1), (2) and (3), which in turn relates to a person's country of nationality (or country of former habitual residence for a stateless person). However, the concept of 'receiving country' does not sit well with ss 36(4) and (5), which are broadly concerned with a person's right to enter and reside in a safe third country which they may, or may not, be a national of. To ensure that ss 5J(1)(b), (1)(c), (2) and (3) are left with some work to do in circumstances where the third country being considered is not a 'receiving country', it seems necessary to adopt a purposive interpretation of 'receiving country' so that it also extends to a third country (as referred to in s 36(3)). An alternative interpretation would be to read down the meaning of 'well-founded fear of persecution' in s 5J so that only those parts that do not refer to a 'receiving country' would apply (namely ss 5J(1)(a), (4), (5) and (6)).

The assessment of the real risk of significant harm must be made with regard to the state protection, internal relocation and generalised risk qualifications to 'real risk' set out in s 36(2B) and to the definition of 'significant harm' in s 36(2A) of the Act.[85] These concepts are discussed further in Chapter 10 – Complementary Protection.

[85] *SZTPK v MIBP* [2014] FCCA 2259 at [37], [46].