HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

SZATV APPELLANT

AND

MINISTER FOR IMMIGRATION
AND CITIZENSHIP & ANOR RESPONDENTS

SZATV v Minister for Immigration and Citizenship
[2007] HCA 40
30 August 2007
S62/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Federal Court of Australia made on 31 October 2005 and in its place order:*

   (a) *appeal allowed with costs; and*

   (b) *set aside the orders of the Federal Magistrates Court made on 1 August 2005 and in their place order that:*

      (i) *a writ of certiorari issue directed to the Refugee Review Tribunal, quashing its decision made on 30 April 2003;*

      (ii) *a writ of prohibition issue directed to the Minister, prohibiting the Minister from giving effect to the Refugee Review Tribunal's decision made on 30 April 2003;*

      (iii) *a writ of mandamus issue directed to the Refugee Review Tribunal, requiring it to determine according to law the application for review made on 23 May 2002; and*

      (iv) *the Minister pay the applicant's costs.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with N J Owens for the appellant (instructed by Corrs Chambers Westgarth)

S J Gageler SC with P S Braham and T Reilly for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

SZATV v Minister for Immigration and Citizenship

Immigration – Refugees – The appellant was a Ukrainian national who faced persecution in his home region on account of the expression of his political beliefs through journalism – Whether the principle of internal relocation is consistent with the Convention relating to the Status of Refugees – Whether the Refugee Review Tribunal erred in holding that it was reasonable for the appellant to relocate elsewhere in Ukraine – Whether postulated relocation involves denial of fundamental right to free expression of political beliefs protected by Convention.

Immigration – Refugees – Well-founded fear of persecution – Whether a well-founded fear of persecution may be confined to a particular region of a country – Whether persecution may reasonably be avoided by relocation – Whether persecution may reasonably be avoided by living "discreetly" – Relevance of practicability – Relevance of territorial distinctions.

Words and Phrases – "discreet", "owing to", "practicable", "protection", "refugee", "relocation", "well-founded fear of persecution".

Migration Act 1958 (Cth), s 36(2).

Convention relating to the Status of Refugees, Art 1A(2).

GUMMOW, HAYNE AND CRENNAN JJ.

The Facts

1 The appellant was born in 1960 in the city of Chernovtsy, situated in what was then the Union of Soviet Socialist Republics ("the USSR"). Upon the dissolution of the USSR the appellant acquired Ukrainian nationality.

2 Chernovtsy (formerly Czernowitz) is situated in the west of Ukraine, close to the Carpathian mountain range and to the northern border of Romania. In the 19th century it was the chief city of the Bukovina region in the Austro-Hungarian Empire and was developed as an important educational and commercial centre; in 1919, under the Treaty of St Germain it passed to Romania and after World War II to the USSR[1].

3 Between 1981 and 1987 the appellant studied at the Chernovtsy State University and in 1987 he qualified as a civil engineer. The appellant married in 1981 and a child of the marriage, a son, was born in 1983. The appellant's wife and son remain in Ukraine.

4 In 1991 the appellant obtained a cadet-journalist position on a newspaper "*The Young Bukovinez*" and thereafter worked part-time as a freelance journalist. In December 1995 he was accepted as a qualified journalist on a new publication "*Chernovtsy-City*". In the period that followed the appellant researched and published articles in that newspaper on the subject of government corruption, in particular that of the regime of Theophil Bauer who had been appointed governor of the Chernovtsy region by a decree of the then Ukrainian President Kuchma.

5 The appellant arrived in Australia on 12 June 2001 and on 24 July of that year he lodged an application for a protection (Class XA) visa to be issued pursuant to the *Migration Act* 1958 (Cth) ("the Act"). A delegate of the Minister (the first respondent in this Court) refused to grant a protection visa and on 30 April 2003 that decision was affirmed by the Refugee Review Tribunal ("the Tribunal") (the second respondent in this Court).

The Tribunal Decision

6 The Tribunal accepted, as a serious problem in Chernovtsy, regional government corruption and the willingness of regional government officials to intimidate and to threaten public critics, such as journalists, with serious harm. It

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1 "Bukovina", *The New Encyclopaedia Britannica*, 15th ed (1994), vol 2 at 615-616.

also found that by reason of his political views the appellant had been subjected to "a systematic campaign of harassment" which included physical mistreatment. But in the penultimate paragraph of its reasons, par [81], the Tribunal concluded:

> "In summary I find that the [appellant] has suffered persecution in the past for the Convention reason of his political opinions. However, I am satisfied that, because the persecution he has suffered is localised to the Chernovtsy region, it is reasonable for the [appellant] to relocate elsewhere in Ukraine. Accordingly, I am not satisfied that his fears of persecution upon his return to Ukraine are well founded."

7 Section 483A of the Act provided that the Federal Magistrates Court had the same jurisdiction as the Federal Court in relation to a matter arising under the Act. With respect to the decision of the Tribunal, the parties accept that the effect of s 483A was to confer upon the Federal Magistrates Court the jurisdiction provided for in s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

8 An application to the Federal Magistrates Court by the appellant was dismissed on 1 August 2005, it being held that the complaints he made did not establish a case of jurisdictional error on the part of the Tribunal. An appeal to the Federal Court of Australia was heard by Tamberlin J and dismissed on 31 October 2005.

The "Relocation Principle"

9 In this Court, active opposition to the appeal was provided by the Minister. The Tribunal entered a submitting appearance. The appellant identifies as the primary issue the correctness of the "internal relocation principle" which was expounded by the Full Court of the Federal Court in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[2].

10 In *Randhawa*, after referring to the text of the Convention relating to the Status of Refugees ("the Convention") and in particular to that part of the definition of the term "refugee" in Art 1A(2), Black CJ said[3]:

> "Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for

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2 (1994) 52 FCR 437.

3 (1994) 52 FCR 437 at 440-441.

> construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their county of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders."

11 The appellant points to the absence from the text of the Convention definition of any reference to relocation to a safe area within the country of nationality or a former habitual residence. He correctly submits that any notion of "relocation" and of the "reasonableness" thereof is to be derived, if at all, as a matter of inference from the more generally stated provisions of the definition.

12 The Convention definition is drawn into Australian municipal law by s 36(2) of the Act. It supplies a criterion for the grant of a protection visa. Provision is now made in the Act by way of further specification of some of the general terms used in the Convention definition of "refugee". Sections 91R and 91S[4] are examples. However, no such provision is made respecting any "relocation principle".

13 On the other hand, § 208.13 of the United States Code of Federal Regulations, which is headed "Establishing asylum eligibility", provides in part:

> "An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so."

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4 Inserted by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth), Sched 1, Item 5. See *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 475; 231 ALR 544; *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 485; 231 ALR 556.

14 Further, with respect to the European Union, a Council Directive of 29 April 2004[5] contains the following as Art 8, with the heading "Internal protection":

> "1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

15 But, as indicated above, in Australia any "principle" respecting "internal relocation" must be distilled from the text of the Convention definition, which is applied by s 36(2) of the Act as a criterion for the grant of a protection visa. The critical portion in Art 1A(2) of the Convention definition of "refugee" states that that term shall apply to any person who:

> "(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it."

16 Of that provision McHugh and Gummow JJ said in *Minister for Immigration and Multicultural Affairs v Khawar*[6]:

> "This passage presents two cumulative conditions, the satisfaction of both of which is necessary for classification as a refugee. The first

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5 Directive 2004/83/EC.

6 (2002) 210 CLR 1 at 21 [61]-[62].

condition is that a person be *outside* the country of nationality 'owing to' fear of persecution for reasons of membership of a particular social group, which is well founded both in an objective and a subjective sense[7]. The second condition is met if the person who satisfies the first condition is *unable* to avail himself or herself 'of the protection of' the country of nationality. This includes persons who find themselves outside the country of their nationality and in a country where the country of nationality has no representation to which the refugee may have recourse to obtain protection. The second condition also is satisfied by a person who meets the requirements of the first condition and who, for a particular reason, is *unwilling* to avail himself or herself of the protection of the country of nationality; that particular reason is that well-founded fear of persecution in the country of nationality which is identified in the first condition.

The definition of 'refugee' is couched in the present tense and the text indicates that the position of the putative refugee is to be considered on the footing that that person is *outside* the country of nationality. The reference then made in the text to 'protection' is to 'external' protection by the country of nationality, for example by the provision of diplomatic or consular protection, and not to the provision of 'internal' protection provided inside the country of nationality from which the refugee has departed." (emphasis in original)

17 The applicants for protection visas in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003*[8] were Ukrainian nationals. In a joint judgment, Gleeson CJ, Hayne and Heydon JJ said of the Convention definition[9]:

"The immediate context is that of a putative refugee, who is outside the country of his nationality and who is unable or, owing to fear of persecution, unwilling to avail himself of the protection of that country. As explained in *Khawar*[10], we accept that the term 'protection' there refers to the diplomatic or consular protection extended abroad by a county to its

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7 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

8 (2004) 222 CLR 1.

9 (2004) 222 CLR 1 at 8 [19].

10 (2002) 210 CLR 1 at 10 [21] per Gleeson CJ. See also at 21 [61]-[62] per McHugh and Gummow JJ.

> nationals. In the present case, the first respondent must show that he is unable or, owing to his fear of persecution in Ukraine, unwilling to avail himself of the diplomatic or consular protection extended abroad by the State of Ukraine to its nationals. Availing himself of that protection might result in his being returned to Ukraine. Where diplomatic or consular protection is available, a person such as the first respondent must show, not merely that he is unwilling to avail himself of such protection, but that his unwillingness is owing to his fear of persecution. He must justify, not merely assert, his unwillingness."

18 It also is well settled since *Chan v Minister for Immigration and Ethnic Affairs*[11] and *Minister for Immigration and Ethnic Affairs v Guo*[12], that the requirement that the "fear" be "well-founded" adds an objective requirement to the examination of the facts and that this examination is not confined to those facts which formed the basis of the fear experienced by the particular applicant.

19 With these propositions in mind, it will be seen that the matter of "relocation" finds its place in the Convention definition by the process of reasoning adopted by Lord Bingham of Cornhill in *Januzi v Secretary of State for the Home Department*[13]. His Lordship said[14]:

> "The [Convention] does not expressly address the situation at issue in these appeals where, within the country of his nationality, a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where (it is said) he could reasonably be expected to relocate. But the situation may fairly be said to be covered by the causative condition to which reference has been made: for if a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he could have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason."

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11 (1989) 169 CLR 379 at 389, 396-397, 406, 413, 429.

12 (1997) 191 CLR 559 at 571-572, 596.

13 [2006] 2 AC 426.

14 [2006] 2 AC 426 at 440.

20 The reference in the passage to the unavailability of the protection of the country of nationality of the refugee is best understood as referring not to the phrase "the protection of that country" in the second limb of the definition, but to the broader sense of the term identified in *Respondents S152/2003*[15]. This was the international responsibility of the country of nationality to safeguard the fundamental rights and freedom of its nationals.

21 Lord Bingham went on in *Januzi*[16] to refer to the statement in the UNHCR Handbook[17], at [91]:

> "The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

22 His Lordship, significantly both for *Januzi* and the present appeal to this Court, added[18]:

> "The corollary of this proposition, as is accepted, is that a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country."

The Submissions

23 The Minister framed the issue, for a situation such as that presented by this appeal, as being whether it be reasonable, in the sense of practicable, for the appellant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. This formulation does not suffer from

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15 (2004) 222 CLR 1 at 8-9 [20].

16 [2006] 2 AC 426 at 440.

17 UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979).

18 [2006] 2 AC 426 at 440.

the defects urged by the appellant. It does not turn upon a "hypothetical assumption", nor does it prevent account being taken of the presence of a subjective fear of persecution, nor does it treat the presence of a "safe area" within the country of nationality as determinative of the existence of a well-founded fear of persecution.

24 However, that does not mean that, without more, the formulation by the Minister is sufficient and satisfactory. What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.

25 It is true that the Convention is concerned with persecution in the defined sense, not with living conditions in a broader sense. The distinction was emphasised by Lord Bingham in *Januzi*[19] as follows:

> "[T]he thrust of the Convention is to ensure the fair and equal treatment of refugees in countries of asylum, so as to provide effective protection against persecution for Convention reasons. It was not directed (persecution apart) to the level of rights prevailing in the country of nationality."

The reasoning in the last sentence might be applied to such matters as differential living standards in various areas of the country of nationality, whether attributable to climatic, economic or political conditions. In *Januzi*[20] Lord Hope of Craighead added:

> "I too would hold that the question whether it would be unduly harsh for a claimant to be expected to live in a place of relocation within the country of his nationality is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights."

26 Nevertheless, in particular cases territorial distinctions may have an apparent connection with the particular reason for the asserted well-founded fear of persecution. There may be instances where differential treatment in matters of, for example, race or religion, is encountered in various parts of the one nation state so that in some parts there is insufficient basis for a well-founded fear of persecution. However, in other cases the conduct or attribute of the individual

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19 [2006] 2 AC 426 at 447.

20 [2006] 2 AC 426 at 457.

which attracts the apprehended persecution may be insusceptible of a differential assessment based upon matters of regional geography.

27 The case advanced by the respondent in *Khawar*[21] (which had yet to be tested in the Tribunal) is an example. The respondent's case was that in Pakistan violence against women as a social group was tolerated and condoned, not merely at a local level by corrupt, inefficient, lazy or under-resourced police, but as an aspect of systematic discrimination; this was said to amount to a failure by Pakistan to discharge its responsibilities to protect its female citizens.

28 The proposition that the appellants in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[22] could avoid persecution by living "discreetly" was rejected in the Court, as imposing a false dichotomy between the situation of "discreet" and "non-discreet" homosexual males in Bangladesh. The Tribunal had not asked whether "discretion" was the price to be paid to avoid persecution. McHugh and Kirby JJ said in that regard[23]:

> "The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality."

29 In the present case, public expression of political opinion was of particular significance for the appellant by reason of his activities in Chernovtsy as a journalist. The Tribunal appears to have approached his situation on the footing that he might not be able to work as a journalist elsewhere in Ukraine because to do so would be expected to bring upon him further persecution by reason of his political opinions, but this did not make it "unreasonable" for him to "relocate" within Ukraine. This was because as things stood he did not have an anti-

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21 (2002) 210 CLR 1 at 11-12 [25].

22 (2003) 216 CLR 473. cf *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142 at 1143 [1], 1167 [150]-[151]; 216 ALR 1 at 2, 35-36.

23 (2003) 216 CLR 473 at 489 [40].

government profile generally in Ukraine and might be able to obtain other work not involving the expression to the public of his political opinions.

30 The critical passage in the Tribunal's reasons is in par [79] and reads:

> "I find that notwithstanding the possible requirements of registration that in the particular circumstances of this case, internal relocation is a realistic option for the Applicant. The Applicant has already shown himself to have the resilience and flexibility to resettle in Australia and find work in this country. He is well educated. While he may not be able to work as a journalist elsewhere in Ukraine I believe that he may be able to obtain work in the construction industry as he has done in Australia. I have already found that the chance of the Applicant being arrested by the SBU [the Ukrainian security service] upon his return to Ukraine is remote. I am also satisfied that he does not have an anti-government political profile generally in Ukraine and would not be of adverse interest to authorities outside the Chernovtsky region."

31 Earlier in its reasons the Tribunal had observed of the appellant it seemed that "[i]f he went back to Ukraine and got work outside journalism ... he would not be at risk of further mistreatment". Counsel for the Minister described this passage as the Tribunal "flirting with error". But later, in par [79], the Tribunal went beyond flirtation. This led to the ultimate conclusions in par [81] respecting the "reasonableness" of relocation in Ukraine. Paragraph [81] has been set out earlier in these reasons.

Conclusions

32 The effect of the Tribunal's stance was that the appellant was expected to move elsewhere in Ukraine, and live "discreetly" so as not to attract the adverse interest of the authorities in his new location, lest he be further persecuted by reason of his political opinions. By this reasoning the Tribunal sidestepped consideration of what might reasonably be expected of the appellant with respect to his "relocation" in Ukraine. It presents an error of law, going to an essential task of the Tribunal. This was determination of whether the appellant's fear of persecution was "well-founded" in the Convention sense and thus for the purposes of s 36(2) of the Act.

Orders

33 The appellant was entitled to relief of the nature provided by s 39B of the Judiciary Act. The appeal should be allowed with costs and the order of the Federal Court of 31 October 2005 should be set aside. In place thereof, the appeal to the Federal Court should be allowed with costs and the orders of the

Federal Magistrates Court of 1 August 2003 set aside. In place of the costs order made by the Federal Magistrates Court, the Minister should pay the appellant's costs in that Court. In respect of the decision of the Tribunal made 30 April 2003 there should be orders for certiorari to set aside that decision, for prohibition directed to the Minister and for mandamus requiring the Tribunal to reconsider according to law the appellant's application for review made 23 May 2002.

Further Proceedings

34 Upon any redetermination by the Tribunal the basic issue will be whether at that time the appellant is a person to whom Australia owes obligations under the Convention, so as to attract s 36(2) of the Act. The Tribunal will exercise afresh its powers and those of the original decision-maker[24]. Further, in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[25] Gummow ACJ, Callinan, Heydon and Crennan JJ said:

> "Section 36, like the Convention itself, is not concerned with permanent residence in Australia or any other asylum country, or indeed entitlements to residence for any particular period at all. Its principal concern is with the protection of a person against a threat or threats of certain kinds in another country. Neither the texts nor the histories of the Act and the Convention require that when the threat passes, protection should be regarded as necessary and continuing."

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24 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518.

25 (2006) 81 ALJR 304 at 314 [36]; 231 ALR 340 at 350.

35 KIRBY J. In this appeal from the Federal Court of Australia[26], the appellant was granted special leave to permit this Court to consider the internal flight or relocation alternative (or principle) in the context of the requirements of the Convention relating to the Status of Refugees, 1951[27] and the Protocol relating to the Status of Refugees, 1967[28] (together "the Refugees Convention").

36 The availability of internal relocation by applicants for "refugee" status under the Refugees Convention has become the subject of much decisional law in countries of refuge[29]. It has also been the subject of a lot of academic comment[30]. The United Nations High Commissioner for Refugees ("UNHCR") has published advice helpful to the task of elucidating the contested postulate[31]. Within countries having legal systems similar to that of Australia, the issue has lately engaged courts of high authority including the House of Lords[32], the New Zealand Court of Appeal[33] and the Federal Court of Appeal in Canada[34].

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26 *SZATV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1627 per Tamberlin J, exercising the appellate jurisdiction of the Federal Court of Australia.

27 Done at Geneva on 28 July 1951: 189 UNTS 150; [1954] ATS 5.

28 Done at New York on 31 January 1967: 606 UNTS 267; [1973] ATS 37.

29 See European Council on Refugees and Exiles, *Research Paper on the Application of the Concept of Internal Protection Alternatives* (2000) ("Research Paper"). The Research Paper sets out decisions in eighteen countries, including Australia.

30 Eg Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 123 [5.61]; Hathaway and Foster, "Internal protection/relocation/flight alternative as an aspect of refugee status determination" in Feller et al (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) at 357-417 ("Hathaway and Foster"); Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined", (1998) 10 *International Journal of Refugee Law* 499.

31 United Nations High Commissioner for Refugees (UNHCR), *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001).

32 *Januzi v Home Secretary* [2006] 2 AC 426. See also *E v Home Secretary* [2004] QB 531 (CA); *R v Home Secretary; Ex parte Robinson* [1998] QB 929.

33 *Butler v Attorney-General* [1999] NZAR 205.

34 *Ranganathan v Canada (Minister of Citizenship and Immigration)* [2001] 2 FC 164; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682.

37 In expressing Australian law on this subject it has been useful to examine these legal sources. Because they all address, ultimately, the Refugees Convention and its requirements, it is obviously desirable to attempt the expression of a consistent approach. Although there have been differences of detail in the exposition, the existence of a relocation alternative or principle in some form is now generally accepted.

38 I agree in the orders proposed in the reasons of Gummow, Hayne and Crennan JJ ("the joint reasons")[35]. As will appear, to a substantial degree, I concur in the reasoning that lies behind those orders. However, because I come to my conclusions in a somewhat different way, I will express them in these separate reasons.

The facts

39 The starting point is a need to get a little more of the flavour of the circumstances into which the Refugee Review Tribunal ("the Tribunal") injected what I shall call the "relocation test". I use that expression in preference to "relocation principle"[36] because, as I shall show, the test has a somewhat fragile footing in the text of the Refugees Convention itself.

40 The introduction of the test into decision-making in refugee cases has become extremely common. In a sense, every time a refugee applicant leaves a country of nationality that is large (or even middling) in size, a question now appears to be presented as to whether the claim to refugee status should be rejected on the footing that the applicant could have moved elsewhere in the country of nationality rather than looking for surrogate protection from the country of refuge.

41 The background facts are stated in the joint reasons[37]. However, it is useful to appreciate the extent to which the Tribunal accepted the "key claims" of the appellant, SZATV[38]. He was generally found to have been a credible witness. The Tribunal recorded that he had worked for several years in Ukraine

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35 Joint reasons at [33]. See also reasons of Callinan J at [108].

36 Joint reasons at [9].

37 Joint reasons at [1]-[5].

38 The name has been anonymised in accordance with s 91X of the *Migration Act* 1958 (Cth) ("the Act").

as a freelance journalist, ultimately graduating to full-time work on a newspaper in Chernovtsy, the city in which he was born, educated and lived[39].

42 Before the middle of July 2000 there had been a number of objections to articles which the appellant had written about corruption in government. One of these articles, published in July 2000, criticised the regional Governor for corruption. In the result, both the editor of the newspaper and the appellant were singled out for threats. The appellant was publicly abused by the Governor and received a telephone call from the Deputy Governor in which he was "brazenly threatened … with death if he continued to write articles critical of the regional administration"[40].

43 There followed anonymous callers threatening "trouble"; a search of the appellant's apartment and office; an incident in which he was bashed; and warnings to his wife that her employment was in danger. In May 2001 the appellant was also summoned to the local police station, a troubling development. He departed for Australia in June 2001.

44 The Tribunal accepted independent country information to the effect that "despite the fact that the Constitution of Ukraine and a 1991 law provide for freedom of speech and the press the government does not respect these rights … [S]everal journalists have been murdered and a number have suffered serious injuries in assaults, all of which may have been politically motivated."[41] The Tribunal also accepted that the governmental authorities in Ukraine "interfere with news media by intimidating journalists"; pressure journalists to apply self-censorship; and utilise defamation law to silence critics. Specifically, the Tribunal "accept[ed] both that regional government corruption and the willingness of regional government officials to intimidate and threaten with serious harm is a serious problem in Chernovtsky"[42]. The Tribunal acknowledged that registration for social benefits and employment was still unofficially required in Ukraine, as in Soviet days, despite a court ruling that it was illegal[43]. Nevertheless, without evaluating the extent, nature and precise causes of the "fear" claimed by the appellant as the reason for his departure from Ukraine to Australia (and whether such fear was otherwise "well-founded" within

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39 Refugee Review Tribunal, decision and reasons of the Tribunal, 30 April 2003 ("Reasons of the Tribunal") at [3], [64], [66].

40 Reasons of the Tribunal at [66].

41 Reasons of the Tribunal at [67].

42 Reasons of the Tribunal at [69].

43 Reasons of the Tribunal at [78].

the meaning of the Refugees Convention), the Tribunal turned, in the concluding and decisive three paragraphs of its reasons, to the relocation test which proved decisive for its decision.

45 Discussing this issue, the Tribunal said[44]:

> "I find that notwithstanding the possible requirements of registration that in the particular circumstances of this case, internal relocation is a realistic option for the Applicant. The Applicant has already shown himself to have the resilience and flexibility to resettle in Australia and find work in this country. He is well educated. While he may not be able to work as a journalist elsewhere in Ukraine I believe that he may be able to obtain work in the construction industry as he has done in Australia. I have already found that the chance of the Applicant being arrested by the SBU [security police] upon his return to Ukraine is remote. I am also satisfied that he does not have an anti-government political profile generally in Ukraine … [T]he Applicant has suffered persecution in the past for the Convention reason of his political opinions. However, I am satisfied that, because the persecution he has suffered is localised to the Chernovtsky region, it is reasonable for the Applicant to relocate elsewhere in Ukraine. Accordingly, I am not satisfied that his fears of persecution upon his return to Ukraine are well-founded."

46 It was on this basis only that the appellant's claim for a protection visa as a "refugee" was rejected. The Federal Magistrates Court (Nicholls FM) on an application for judicial review found no error[45]. The Federal Court affirmed that decision[46]. Now by special leave the matter is before this Court.

The legislation and the Refugees Convention

47 The Refugees Convention is introduced into Australian municipal law by s 36(2) of the *Migration Act* 1958 (Cth) ("the Act") providing for protection visas. To be entitled to such a visa an applicant must fall within Article 1A(2) of the Refugees Convention. This defines a "refugee" as any person who:

> "owing to well-founded fear of being persecuted for reasons of … political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

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44 Reasons of the Tribunal at [79]-[81].

45 [2005] FMCA 935.

46 [2005] FCA 1627.

habitual residence, is unable or, owing to such fear, is unwilling to return to it."

48 The Refugees Convention contains no express exception from the stated protection obligations for a case where a refugee applicant might reasonably relocate to a safe district or place within the country of nationality or habitual residence. Nor is there any such provision in the Act[47]. Neither is there any regional directive[48] or regional treaty[49] applicable to Australia's protection obligations under the Refugees Convention.

49 The *travaux préparatoires* which describe the drafting history of the Refugees Convention do not suggest that the attention of the drafters was at any stage directed to a relocation test[50]. It does not appear that specific consideration was given to an exception for the possibility of safe relocation within the country of nationality or habitual residence ("country of nationality")[51]. The premise upon which, at first, it was assumed that the Refugees Convention would operate was that, if a serious risk of harm to the refugee applicant was established anywhere in the country of nationality, that meant that a failure of protection had occurred, justifying the departure from that country to claim surrogate protection from another country and a continuing well-founded fear of return[52].

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47 Compare in this respect the United States Code of Federal Regulations. See joint reasons at [13].

48 Compare European Union, Council Directive 2004/83/EC. See joint reasons at [14].

49 Organisation of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 UNTS 45, Art 2. This provision extends the definition of "refugee" in African State parties as "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order *in either part or the whole* of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (emphasis added). See Hathaway, "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative", unpublished paper (1999).

50 de Moffarts, summarised in European Council on Refugees and Exiles, Research Paper at 11.

51 See eg European Council on Refugees and Exiles, Research Paper at 10.

52 Hathaway and Foster at 359.

50 The internal relocation issue only began to emerge in earnest in the mid-1980s. According to Professor Hathaway and Dr Foster, recognised experts on the Refugees Convention, it was at about that time that the typical type of person, claiming protection as a refugee, began to change[53]. Whereas earlier many such persons were those who had fled from communist countries, by the 1980s, a "different" type of applicant was appearing. This applicant was more likely to be from a country that was "politically, racially, and culturally 'different'" from the country in which he or she sought refuge[54].

51 It was in the foregoing historical context that refugee adjudicators and national governments looked again at the Refugees Convention to see whether it would yield a stable "principle" or test to differentiate "genuine" refugees, who complied with the Refugees Convention definition, from others who did not. It was this quest that led to a number of suggested textual bases upon which to found a consideration of the relocation hypothesis.

52 Each of the three textual foundations propounded presents difficulties. Yet unless a convincing, or at least acceptable, textual foundation can be identified for a relocation test, courts of law should not accept the notion. They should leave it to the States parties to the Refugees Convention to re-negotiate its terms to provide explicitly the exception which, on this view, has crept into State practice in order to afford a ground for rejecting "different" refugee applicants, said to fall outside the original purpose of the Refugees Convention yet claimed to come within its present language.

The textual foundations for a relocation test

53 *Three possible approaches*: Other courts have analysed the propounded exception for the reasonable possibility of relocation within the country of nationality. They have identified the different consequences of choosing amongst the possible textual foundations[55]. In the past, two main theories have emerged to sustain the relocation test. Argument in this appeal has suggested a third possible theory:

(1) *The words "owing to"*: The first (and new) textual thesis latches onto the words "owing to" in the definition of "refugee" (above). If, although

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53 Hathaway and Foster at 359.

54 Hathaway and Foster at 359-360.

55 *Januzi* [2006] 2 AC 426 at 441-442 [9] per Lord Bingham, 463 [65] per Lord Carswell; cf *E* [2004] QB 531 at 541 [16] per Lord Phillips of Worth Matravers MR.

exhibiting "fear", the refugee applicant is outside the country of nationality or habitual residence not "owing to" the propounded fear but "owing to" some extrinsic reason, immaterial to the Refugees Convention's purposes, the definition is not engaged. Thus, if the applicant is simply seeking to improve his or her economic, social or humanitarian condition, the Refugees Convention definition will not be attracted. A practical test for such a case might be whether the applicant has failed, or refuses, to select the most proximate, economic and available solution to relieve the propounded "fear", by moving elsewhere in the country of nationality. A failure to select that option, or to reclaim it whilst outside the country of nationality would, on this thesis, demonstrate that the claim for refugee status was unfounded and should be rejected;

(2) *The words "protection of the country"*: The second textual thesis, which enjoys much support in legal writing[56] and in some court decisions[57], fixes on the closing words of the defined categories of forbidden persecution. It concerns itself with the inability or unwillingness of the applicant to "avail himself of the protection of [the] country" of nationality. Thus, it initiates a search to discover whether, in fact, there is the inability or unwillingness to claim "the protection" of the country within the entirety of its geographical boundaries. If within that country, its "protection" could be obtained, simply by moving somewhere else, the inability or unwillingness would not be an inability or unwillingness of the kind contemplated by the Refugees Convention definition but one that must be based on some other, extraneous, motivation, such as economic, social or humanitarian advancement; and

(3) *The words "well-founded"*: The third textual thesis is said to lie in the requirement that the "fear" of persecution, justifying the obligation of protection by the country of refuge, must be "well-founded". The requirement of "well-foundedness" introduces an objective standard. According to this third approach, "well-foundedness" of the claimed "fear" will be objectively missing (whatever any subjective state) where the persecutory source of the "fear" could reasonably be avoided by returning to the country of nationality and moving somewhere else within that country. A failure or unwillingness to do so, in such circumstances, would demonstrate the fact that the refugee applicant remains "outside the country" of nationality on some basis other than a "well-founded" fear, as

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56 Eg Hathaway, *The Law of Refugee Status* (1991), 134.

57 Eg *Butler v Attorney-General* [1999] NZAR 205 at 214 (Court of Appeal) per Keith J.

> defined. This would be so because the simpler and more rational expedient of looking to the country of nationality for protection would otherwise have been embraced before, or rather than, claiming such protection from another country. After all, the "surrogate" protection by another country, as envisaged by the Refugees Convention, is an exception to the normal principle of international law that protection is usually the obligation of the individual's country of nationality.

54 *Disregarding two hypotheses*: For the purposes of this appeal, two of the foregoing theses can be disregarded by this Court. First, a reliance on "owing to" would introduce barren arguments about causation. Such arguments bedevil the law. They should be avoided wherever possible[58]. To classify a claim to refugee status as falling outside the Refugees Convention definition because not "owing to" fear of being persecuted for Refugees Convention reasons begs the very question that the Refugees Convention definition is designed to answer. It is difficult enough to discern any implied, or inherent, foothold in the text of the definition to sustain the internal relocation test. The first textual thesis is unconvincing.

55 Much more attractive is the suggested attention to the inability or unwillingness of the refugee applicant "to avail himself of the protection of that country", ie the country of nationality. On the face of things, this explanation of the relocation principle appears to present the most convincing textual foundation for the propounded "exception". Moreover, it does so by giving content to words that seem to lie at the heart of the purposes of the Refugees Convention, namely protection of a refugee applicant.

56 Thus, if it were the case that such an applicant were "unable or … unwilling to avail himself of the protection of [the] country [of nationality]" because, *throughout* that country an adequate level of protection was missing, the hypothesis of the Refugees Convention would be fulfilled. Its text would be engaged. On the other hand, if, in some parts of the country of nationality, that country was perfectly able and willing to provide internal "protection" to the putative refugee, the propounded inability or unwillingness of that person to avail himself or herself of such (localised) "protection of that country" would not sustain the asserted "fear".

57 Thus, if the country concerned were able to afford protection, albeit in a different town, district or region, the basis for the necessary unwillingness or inability would be knocked away. This is the preferred explanation adopted for the relocation test by Professor Hathaway and Dr Foster[59].

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58 cf *Chappel v Hart* (1998) 195 CLR 232 at 268 [93].

59 Hathaway and Foster at 358-359.

58 So far as Australian law is concerned, a real difficulty is presented for this second textual support for relocation. It appears in two decisions of this Court, mentioned in the joint reasons[60]. In those decisions, this Court appears to have decided that the term "protection", in the Refugees Convention definition, is a reference to "diplomatic or consular protection" extended abroad by a country to its nationals[61]. In *Minister for Immigration and Multicultural Affairs v Khawar*[62] it is said specifically that "protection" is not "the provision of 'internal' protection provided inside the country of nationality from which the refugee has departed".

59 Although that view enjoys some support in academic writing[63], it has been strongly criticised, including by Professor Hathaway and Dr Foster. They describe it as an attempt "to force a narrow, decontextualised reading of 'protection' onto the 1951 Convention"[64]. They assert that understanding "protection" within the Refugees Convention definition as limited to "diplomatic protection" outside the country of nationality or habitual residence is "out of step with most contemporary pronouncements of UNHCR as manifested in its official documents … materials and interventions in domestic adjudication."[65]

60 Professor Hathaway and Dr Foster also cite a great deal of judicial and other writing, including the reasons of Black CJ in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[66], which has hitherto been followed routinely in such cases by Australian judges and refugee claim adjudicators. The hypothesis on which those reasons were written was that the applicable consideration for deciding "refugee" status was the availability of domestic "protection" in the country of nationality rather than the availability of diplomatic protection abroad. Overseas courts have not followed this Court's view of the meaning of "protection" in this context[67]. In my view, this Court

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60 Joint reasons at [16]-[17] citing *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 21 [61]-[62]; *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* (2004) 222 CLR 1 at 8 [19].

61 *Khawar* (2002) 210 CLR 1 at 21 [62].

62 (2002) 210 CLR 1 at 21 [62].

63 Eg Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2000) 12 *International Journal of Refugee Law* 548.

64 Hathaway and Foster at 380.

65 Hathaway and Foster at 379-380 (footnotes omitted).

66 (1994) 52 FCR 437 at 440-442. See joint reasons at [10].

67 Eg *Januzi* [2006] 2 AC 426 at 463 [66] per Lord Carswell.

should reconsider its holding in this respect. The contrary view appears more persuasive. Moreover, it is one more relevant to the central purposes of the Refugees Convention. It is also more relevant to the issue under consideration in this appeal.

61 Nevertheless, until this Court reconsiders what it has said about the meaning of "protection" in the Refugees Convention, I should follow and apply the stated rule. In this condition of the law in Australia, the only possible textual basis left to afford a foundation for the suggested relocation test, is thus the notion of "well-foundedness".

62 *Test of well-foundedness*: To derive from the requirement that a refugee applicant's fear of persecution upon specified grounds must be "well-founded" an implication that, if it is reasonable for the refugee applicant to move to a different town, district or region of the country of nationality, the fear will *not* be well-founded, puts a great deal of strain on the language of the Refugees Convention.

63 Effectively, this approach imports an exception or qualification upon the Refugees Convention definition for a policy reason, one which did not really emerge to significance in the international community until the 1980s. It obliges courts and refugee adjudicators to rewrite and qualify the Refugees Convention definition of "refugee". Nevertheless, this is certainly the way the relocation rule has now been imported into judicial and Tribunal decisions in this country. It has happened not without some cogent criticism that approaching the problem presented by the Refugees Convention in this way involves building an edifice of reasoning on a very scant textual foundation[68]. I understand this criticism. However, ultimately, I would not accept it, at least in the circumstances of this case and in the light of the past authority of this Court to which I have referred.

The general acceptance of a relocation test

64 *The critics*: A number of international writers have criticised the foregoing development of the relocation test or "principle". Amongst them, Gaetan de Moffarts[69] has disputed the existence of *any* internal protection test as one incongruous with the text of the Refugees Convention and the views of its drafters. According to de Moffarts, it is a basic assumption of the Refugees Convention that, if *some part* of the territory of the country of nationality is such as to give rise to a Refugees Convention related "fear", it is the obligation of the national government concerned to remove the source of such fear by providing

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68 Germov and Motta, *Refugee Law in Australia*, (2003) at 389-398; cf Vrachnas et al, *Migration and Refugee Law*, (2005) at 260-262.

69 See European Council on Refugees and Exiles, Research Paper at 11 [7.3].

effective protection nation-wide. That obligation, it is said, derives from the duty of a national government to provide security for its nationals everywhere within its borders. Within such a country, a national is ordinarily entitled by international human rights law to move about without hindrance.

65 According to such critics, in light of the Refugees Convention criteria of persecution, the country of refuge, in respect of which the "fear" of return is demonstrated, should normally not be entitled to avoid its obligations by demanding that an applicant should have responded, or now respond, to such "fear" in some other and different way. Thus, the Refugees Convention, on this view, envisages the possibility of dual or multiple responses to such a "fear". If the fear is genuine, and is proved on both an objective and subjective basis, the duty of the country of refuge is sufficiently established. This is no less so because there might be additional and different obligations imposed by international law on other countries, including the country of nationality, were the refugee applicant to invoke their protection.

66 Critics within Australia have fastened on the textual difficulty of deriving the relocation test from the consideration of well-foundedness, given that "the crucial consideration is whether [the refugee applicants] are outside their country owing to a well-founded fear of Convention-related persecution"[70]. Necessarily, "every applicant for refugee status has already made the ultimate relocation – to another country in order to claim refugee status"[71]. The question then presented is concerned with a "fear" said already to have existed. Any investigation of the "reasonableness of the relocation" at some later time cannot be justified unless it is demonstrated that it is specifically relevant to whether the fear was "well-founded" when it arose, occasioning the applicant's flight. At that moment, internal relocation may never have been considered. Yet the purpose of the relocation test is apparently to demand its consideration before making requests for refugee protection upon the chosen country of refuge.

67 Vigorous criticisms can obviously be addressed to the formulation of particular rules of thumb, which are then applied by refugee claim adjudicators and courts as if they were part of the Refugees Convention definition. Unless such rules are expressed in valid municipal legislation or in other binding rules of law, the introduction of a test such as "would it be unduly harsh to expect this person … to move to another less hostile part of the country"[72] or "would it be

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70 Germov and Motta, *Refugee Law in Australia* (2003), 396.

71 Germov and Motta, *Refugee Law in Australia* (2003), 397.

72 *Thirunavukkarasu* (1993) 109 DLR (4th) 682 at 687 per Linden JA. This was followed in *Ex parte Robinson* [1998] QB 929.

reasonable to expect such a move?" tend to take on a life of their own in mass jurisdiction decision-making. This is, in part, because of perceived administrative necessity and an understandable desire for consistency. However, it obviously involves a danger of forgetting the need for a link to the text of the Refugees Convention, said here to derive from the notion of well-foundedness. Keeping that link in mind, and applying it, is essential to ensure that the decision-maker never loses sight of the protective purposes of the Refugees Convention and does not read into its provisions qualifications, limitations and exceptions that are not there.

68 *Introduction of relocation test*: I appreciate fully all of the foregoing criticisms. However, it cannot now be doubted that, both in widespread State practice and in the understanding of the office of UNHCR, formulations of the relocation test have come to be generally accepted.

69 The inclusion in 1979 in the UNHCR *Handbook* on the Refugees Convention of par 91[73] was doubtless intended to act as a limitation or check upon the over-reach of any relocation test. However, in the way Lord Bingham of Cornhill explained in *Januzi v Home Secretary*[74], the corollary of the principle there stated, to avoid the misuse of the postulate of internal relocation, is that the reasonable possibility of relocation is accepted as a proper consideration.

70 Importantly, whilst not embracing this Court's approach that "protection" is a reference to diplomatic protection *abroad*, the House of Lords in *Januzi* clearly found the textual source of a relocation rule in the requirement that refugee status has to be based on a *well-founded* fear of persecution.

71 Their Lordships explain that, if the applicant could reasonably be expected to relocate to a place within the country of nationality where there is no fear of persecution and where protection is available, then he or she could not be said to be outside the country of origin "owing to a well-founded fear". No well-founded fear will then explain an unwillingness or inability on the part of the applicant to claim protection from the country of nationality which is the primary and natural provider of such protection[75].

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73 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (1979; revised in 1992). Set out in joint reasons at [21].

74 [2006] 2 AC 426 at 440. See joint reasons at [22].

75 [2006] 2 AC 426 at 440 [7] per Lord Bingham; cf Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 125-126.

72 The main point of *Januzi* was to cut back, for the United Kingdom, a view expressed in some of the earlier cases and commentaries, that the protection of the country of refuge extended not only to protection from the sources of Refugees Convention-related persecution but also to protection from other human rights violations and deprivations. In harmony with the way the relocation test has been grafted onto the Refugees Convention, *Januzi* was expressed to take decision-makers back to the text and to the Refugees Convention's purpose to provide a protection against specified *persecution* and nothing else.

73 *Growing State practice*: There is a further basis for supporting a relocation test, so explained. Whatever the legitimacy of the early criticisms of the expansion of a type of exception for the possibility of relocation within the country of alleged persecution, the fact is that, in a comparatively short period, widespread State practice has now embraced the notion of a disqualifying alternative expressed in terms of the reasonableness of internal relocation in the country of nationality.

74 A report by the European Council on Refugees and Exiles[76] collects the practice of many States. This practice is evidenced in numerous court and tribunal decisions in fourteen European nations as well as in Australia, New Zealand, Canada and the United States of America. Although differences exist in the way the internal relocation test is expressed, explained and applied, there is a high level of acceptance of the hypothesis in one form or another.

75 A feature of this outcome, in countries of common refuge, is the reliance on the recognition by UNHCR itself of the existence of some such rule and also by most of the leading scholars expert in this field. Thus, UNHCR in 2003 published detailed guidelines[77], specific to the topic of the "Internal flight or relocation alternative" within the context of the Refugees Convention definition. These *Guidelines* conclude with the observation[78]:

> "The question of whether the claimant has an internal flight or relocation alternative may … arise as part of the holistic determination of refugee status. It is relevant only in certain cases, particularly when the source of persecution emanates from a non-State actor. Even when relevant, its

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76 European Council on Refugees and Exiles, Research Paper.

77 UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, (2003) ("Guidelines").

78 UNHCR, Guidelines at 8 [38].

applicability will depend on a full consideration of all the circumstances of the case and the reasonableness of relocation in another area in the country of origin."

76 *International practice*: Against the background of this strong, largely consistent national and international practice and the qualified acceptance of its legitimacy by UNHCR itself, it would be impossible and undesirable for this Court to deny this development in Australia alone. On legal questions of this kind, national courts and tribunals must inform themselves of relevant international developments. Having done so — as I have attempted to do in these reasons — in the absence of some peculiar local legal basis for departure, they should seek to reflect the international approach in their own municipal decisions.

The operation of the internal relocation rule

77 *Viewing relocation in context*: The conclusion of UNHCR, just quoted, indicates, to my mind, the correct way in which an accurate application of the Refugees Convention (and hence, in Australia, of s 36(2) of the Act) will be achieved by refugee claim adjudicators, the Tribunal and the courts.

78 In each case it is necessary to keep in mind the purpose, under the Refugees Convention, for which the reasonable possibility of relocation is being considered. It is not a free-standing prerequisite to individual entitlements under the Refugees Convention. Those entitlements arise on the refugee applicant's establishing a presence outside the country of nationality owing to a well-founded fear of being persecuted for Refugees Convention reasons. The postulated capacity to relocate is only relevant insofar as it casts light on the question whether the reason for being outside the country of nationality is a "well-founded" fear of the risk of persecution. A propounded "fear" might not be classified as "well-founded" if, instead of seeking protection from Australia, it would be reasonable for the applicant to rely on his or her country of nationality to afford the protection at home by the simple expedient of moving to another part of the country, free of the risk of persecution.

79 *Ways of testing reasonableness*: By definition, an applicant for refugee status is a person who has made the application for protection outside the country of nationality. Flight to the country of refuge, and the necessity of building a new life there (generally starting with few, if any, assets and with various disadvantages), ordinarily indicates that the refugee applicant will have accepted as tolerable risks and burdens of *external* relocation. But would not the prospect of *internal* relocation always be more reasonable and thereby exclude the requirement of external protection where internal relocation was or is a reasonable option?

80 A review of the literature suggests that this conclusion will not invariably follow, either as a matter of fact or law. Thus, internal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven[79]. Nor if the evidence indicates that there are other and different risks in the propounded place of internal relocation[80]; or where safety could only be procured by going underground or into hiding[81]; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation[82].

81 An inability or unwillingness on the part of the national authorities to provide protection in one part of the country may make it difficult to demonstrate durable safety in another part of that country[83]. In some circumstances, having regard to the age of the applicant, the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable[84]. In each case, the personal circumstances of the applicant[85]; the viability of the propounded place of internal relocation[86]; and the support mechanisms available if an applicant has already been traumatised by actual or feared persecution[87], will need to be weighed in judging the realism of the hypothesis of internal relocation.

82 *Variable country information*: In the nature of things, country information available to refugee adjudicators is often expressed at a high level of generality. It may not extend in sufficient detail to establish, in a convincing way, the differential safety of other towns, districts or regions of the one country. The fact

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79 European Council on Refugees and Exiles, Research Paper at 8-9.

80 *The Michigan Guidelines on the Internal Protection Alternative*, agreed to at the First Colloquium on Challenges in International Refugee Law, 9-11 April 1999, at [13].

81 Hathaway and Foster at 384-385.

82 Hathaway and Foster at 391.

83 Hathaway and Foster at 383.

84 Hathaway and Foster at 386-387.

85 UNHCR, Guidelines at 6 [25].

86 European Council on Refugees and Exiles, Research Paper at 12 [8.1], 52.

87 UNHCR, Guidelines at 6 [26].

that in Australia the inquiry is relevant only to the well-foundedness of the fear of persecution on the part of the refugee applicant indicates that, where otherwise a relevant "fear" is shown, considerable care will need to be observed in concluding that the internal relocation option is a reasonable one when, by definition, the applicant has not taken advantage of its manifest convenience and arguable attractions.

Individual assessment and acting discreetly

83 *The issue in S395/2002*: The appellant mounted a two-pronged attack on the decision of the Tribunal in the present case, based on the reasoning of the majority of this Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[88] ("*S395*"). That case was decided after the Tribunal delivered the decision now in question[89]. The Tribunal did not, therefore, have the advantage of this Court's analysis.

84 *S395* involved a claim to refugee status by two homosexual men from Bangladesh who complained of a well-founded fear of persecution for reason of their membership of a "particular social group", namely stigmatized homosexuals in that country. The Tribunal had rejected the claim on the basis of its finding that the applicants would "live discreetly" if they were returned to Bangladesh. As such, they would not be persecuted. The majority of this Court found that the Tribunal had erred in the exercise of its jurisdiction by failing to consider whether there was a real chance that the applicants would *in fact* suffer serious harm if they were returned and if people in Bangladesh found that they were homosexual. The majority decided that refugee applicants were not required to take reasonable steps to avoid persecutory harm if this involved them in a denial of the basic rights to freedom from persecution which the Refugees Convention is designed to uphold and safeguard.

85 In this appeal, the appellant had two complaints in the light of the decision in *S395*. First, he argued that the Tribunal had failed to address the question, mandated by *S395*, of how and where, *in fact* he would be likely to live if returned to the country of his nationality. He argued that, instead, the Tribunal had avoided that essential question by superimposing a propounded obligation to act reasonably, as by relocating to another part of Ukraine. Alternatively, if this error of general approach were not established, the appellant argued that a specific jurisdictional error had occurred by the Tribunal's hypothesising not only that he should relocate in Ukraine but that he would change his occupation there

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88 (2003) 216 CLR 473.

89 The Tribunal's decision is dated 30 April 2003. It was handed down on 22 May 2003. *S395* was decided on 9 December 2003.

and thereby submit to the very type of persecution which the Refugees Convention was designed to prevent, discourage and, where it occurred, redress.

86 *The holding in S395*: It was a common theme of the two joint reasons in *S395* that the Tribunal, in that case, had committed jurisdictional error by superimposing an hypothesis that the applicants would continue to "act discreetly", on the basis that this was the reasonable way of avoiding persecution as homosexuals in Bangladesh[90]. The error in that case lay in classifying members of the "social group" in question as between those who would act "discreetly" and those who might not. Moreover, the error lay in failing to consider how the applicants in that case would *in fact* act and whether such conduct would involve a real chance of persecution on one or more of the Refugees Convention grounds.

87 The importance of the Tribunal's addressing its attention to the way in which the particular applicant would act *in fact*, if returned to the country of nationality, was emphasised in both of the joint reasons in *S395*[91]. Thus, McHugh J and I said[92]:

> "The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many … cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm … To determine the issue of real chance without determining whether the

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90 (2003) 216 CLR 473 at 487 [34]-[35] per McHugh and Kirby JJ, 501 [82] per Gummow and Hayne JJ.

91 *S395* (2003) 216 CLR 473 at 490-491 [43]-[44], 494-495 [57] per McHugh and Kirby JJ, 500 [78], 501 [83] per Gummow and Hayne JJ.

92 (2003) 216 CLR 473 at 490-495 [43]-[58] per McHugh and Kirby JJ (emphasis in original). See also at 501 [82] per Gummow and Hayne JJ.

> modified conduct was influenced by the threat of harm is to fail to consider the issue properly … The central question is always whether *this individual applicant* has a 'well-founded fear of being persecuted for reasons of … membership of a particular social group'."

88 In their joint reasons in *S395*, Gummow and Hayne JJ likewise emphasised the need to consider whether, in fact, the particular applicant would be exposed to the real chance of persecution if the applicant were returned to the country of nationality[93]:

> "The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made.
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> …
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> Addressing the question of what an individual is *entitled* to do (as distinct from what the individual *will* do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning … leads to error … [The Tribunal] did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention."

89 It follows that the common ground in the two joint majority reasons in *S395* was the need for the decision-maker to focus attention on the propounded fear of the individual applicant and whether it was "well-founded"; to consider that issue on an individual basis and not, for example, by reference to *a priori* reasonable conduct that could or might avoid persecution; and to concentrate on what would happen to the applicant *in fact*, not what could or might happen if the applicant behaved in a particular way that would reduce the risk of persecution, as for example by behaving discreetly.

90 In the present appeal, the appellant asked, reasonably in my view, whether there was a difference between requiring a person to "act reasonably", by behaving discreetly as a homosexual in Bangladesh, and requiring a journalist, who had been propounding unwelcome political opinions in one region of Ukraine, to "act reasonably" by relocating to another part of that country, so as to

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93 (2003) 216 CLR 473 at 500 [78], 501 [83], 503 [88] (emphasis in original).

avoid upsetting persecutors, fear of whose conduct had led to the flight from Ukraine to Australia and the application for protection as a refugee.

91 *Subsequent conflict in the Federal Court*: The appellant's question, which relates to the ambit of the application of the principle stated in *S395*, has been the subject of differences of opinion in the Federal Court of Australia. In *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs*[94] the operation of the principle in *S395* divided a Full Court of that court.

92 *NALZ* was a case concerned with an Indian national who claimed a well-founded fear of persecution owing to suspected connections with a Sri Lankan separatist organisation. The suspicion was claimed to be founded on his religion as a Muslim and his engagement in the business of selling electrical goods to Sri Lankan nationals. The Tribunal refused refugee status. It concluded that the applicant's religion was immaterial. As to his occupation, it concluded that "the appellant could avoid future arrest by not selling electrical goods to Sri Lankan nationals"[95]. It decided that it would not be "unreasonable for him to avoid arrest by so doing"[96]. The question was whether this was but an impermissible variation on the theme of "acting discreetly". A majority (Emmett and Downes JJ) thought not. However, the third judge, Madgwick J considered that the Tribunal's reasoning involved the very kind of error that *S395* had identified[97].

93 In rejecting this argument, in *NALZ*, Emmett J suggested two reasons for distinguishing *S395*. The first, he concluded, was a factual one, namely that the sexual orientation of the applicants in *S395* could not be removed, by reasonable action or otherwise, anywhere within Bangladesh. The source of the persecution was thus nation-wide and generalised[98]. In this sense it was like that faced by persons in the class found to exist in *Khawar*[99] (unprotected women in Pakistan). Secondly, Emmett J concluded that the suggested adjustment in *NALZ* (ceasing to sell electrical goods) did not involve, in itself, surrender of fundamental rights of the kind protected by the Refugees Convention categories[100].

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94 (2004) 140 FCR 270.

95 See (2004) 140 FCR 270 at 279 [37] per Emmett J.

96 See (2004) 140 FCR 270 at 279 [37] per Emmett J.

97 (2004) 140 FCR 270 at 274-275 [13].

98 (2004) 140 FCR 270 at 281 [46].

99 (2002) 210 CLR 1.

100 (2004) 140 FCR 270 at 281-282 [49]-[50].

94 Accepting that any question of "reasonable" adjustment (as in a propounded internal relocation) will raise issues on which minds may sometimes differ, the reasoning of Emmett J in *NALZ* offers an acceptable way of reconciling this Court's holding in *S395* with the by now well settled line of authority in Australia and elsewhere, recognising the existence of a consideration of internal relocation, where that course would be reasonable in the country of nationality. Such relocation will be a permissible hypothesis, open to the decision-maker, where it is neither contrary to the facts (ie, there is a local rather than nation-wide source of persecution) nor contrary to the essential purpose of the Refugees Convention (which denies, as unreasonable, an "adjustment" that would involve undermining the central purpose of the Refugees Convention of protecting the important, but limited, grounds of "persecution" specified in the Refugees Convention).

Application of the relocation principle

95 *Application to the first argument*: The foregoing analysis requires the rejection in this appeal of any suggestion that the consideration of the reasonable possibility of internal relocation would of itself be inconsistent with the language and purpose of the Refugees Convention, as given effect by s 36(2) of the Act.

96 The overwhelming evidence of State practice, international opinion and expert statements, concerned with the issue of internal relocation, supports the acceptability of taking that possibility into account in judging a claim to refugee status. Most such opinion and State practice gives consideration to the reasonable possibility of relocation as relevant to whether the "fear of being persecuted" for Refugees Convention reasons, propounded by the refugee applicant, is "well-founded". This approach is consistent both with the holdings of this Court on the meaning of "the protection" of the country of nationality to which the Refugees Convention definition is addressed[101] and the decision requiring that such claims be judged by reference to what the individual applicant fears and how the individual applicant may be treated if, in fact, he or she were returned to the country of nationality[102].

97 To consider what it is reasonable for the refugee applicant to do by way of internal relocation is not to hypothesise supposedly reasonable conduct such as "living discreetly". This was rejected in *S395*. The supposed possibility of relocation will not detract from a "well-founded fear of persecution", if otherwise established, where any such relocation would, in all the circumstances, be unreasonable. It will be unreasonable where to propound it amounts to an affront

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101 See above at [58].

102 See above at [86]-[89].

to any of the specified Refugees Convention-based grounds of persecution, which it is the object of the Refugees Convention to prevent, discourage and redress[103].

98 When these principles are applied to the present case, it is certainly arguable that the Tribunal correctly approached the application of the relocation test. It appears to have reached a conclusion that the source of the persecution of the appellant was localised in the Chernovtsy region of Ukraine. That factual determination was open on the evidence. It was apparently on that basis that the Tribunal concluded that it would be reasonable for the appellant to relocate to another region of Ukraine[104]. Further, the consideration of relocation was correctly perceived to be relevant to the issue of whether, within the Refugees Convention definition, the appellant's propounded fear of persecution was "well-founded". I remind myself again of this Court's instruction that it is a mistake for courts, considering applications for judicial review of administrative decisions such as those of the Tribunal, to conduct the review in an over-zealous way[105].

99 On the other hand, one of the key requirements, insisted upon by both joint reasons in *S395*, was that the Tribunal must consider how *in fact* the refugee applicant will act if returned to the country of nationality. Necessarily, this must be considered in cases where the internal relocation postulate is raised, bearing in mind that the applicant will be expected to act reasonably. However, the focus remains on the refugee applicant personally and what *in fact* might occur. In the present case, the Tribunal, uninstructed by *S395*, failed to give consideration to this issue which was important to all of the majority reasons in *S395*.

100 *Application to the second argument*: It is unnecessary for me to decide finally whether, on his first argument, the present appellant has established a constructive failure of the Tribunal to exercise the jurisdiction lawfully. This is because the appellant is certainly entitled to succeed on his second argument. This arose out of the Tribunal's thinking evident in the following passage[106]:

> "If he went back to Ukraine and got work outside journalism it seemed to me he would not be at risk of further mistreatment. He said that he will always be a journalist …

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103 cf reasons of Callinan J at [106]-[107].

104 Reasons of the Tribunal at [55], [79].

105 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 291.

106 Reasons of the Tribunal at [52] and [79].

> While he may not be able to work as a journalist elsewhere in Ukraine I believe that he may be able to obtain work in the construction industry as he has done in Australia."

101 This reasoning involves a more specific and particular error and the appellant latched onto it. Effectively, the Tribunal not only propounded the reasonable possibility of the relocation of the appellant within Ukraine but that the appellant would also change his occupation from journalist (where his political opinions could still get him into trouble) so as to "obtain work in the construction industry [in Ukraine] as he has done in Australia"[107] (where, by inference, his work would not cause him any trouble).

102 In this approach, the Tribunal displayed a clear error in its understanding of the purpose of the Refugees Convention which includes that of safeguarding the appellant's right to have, and to express, his "political opinion" in Ukraine and not to be persecuted for it. That right is specifically within the protection of the Refugees Convention. It cannot be a reasonable adjustment, contemplated by that Convention, that a person should have to relocate internally by sacrificing one of the fundamental attributes of human existence which the specified grounds in the Refugees Convention are intended to protect and uphold.

103 The Tribunal's perceived analogy to the appellant's work in the construction industry in Australia was clearly an irrelevant one. In Australia, there is no applicable inhibition on the appellant's entitlement to have and to express political opinions, including in relation to alleged corruption on the part of public figures. By inference, the appellant works in the construction industry in Australia because considerations of language and qualifications may make it difficult for him to secure immediately equivalent employment here as a political journalist. It appears plain that the Tribunal was applying, in the appellant's case, not only the hypothesis of reasonable internal relocation (which was acceptable) but also the hypothesis of avoiding the expression of political opinions in the relocated place (which was not).

Orders

104 The appellant has therefore established jurisdictional error on the part of the Tribunal. This attracts an entitlement to judicial review which should have been granted by the courts below. It follows that relief should now be granted by this Court in terms of the orders proposed in the joint reasons. I agree in the making of those orders.

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107 Reasons of the Tribunal at [79]. See also joint reasons at [31].

105 CALLINAN J. Subject to two matters, I agree with the reasoning and conclusion of Gummow, Hayne and Crennan JJ.

106 The first point that I would make is as to the appropriate interpretation of the Tribunal's findings. I would not regard it as having taken a stance that there was an expectation or requirement that the appellant could and should live discreetly elsewhere in Ukraine: rather its finding was, I think, that, to the extent that it was not unreasonable to require or expect that the appellant should cease to voice his political opinions wherever he might live in Ukraine, and, accordingly, taking it as a reasonable assumption that he would do so, he could not be regarded as a relevantly persecuted person.

107 The second point that I make is that it is, with respect, too categorical to hold that discretion with respect to membership, or an attribute of a social group, properly defined is a necessarily unreasonable requirement or expectation, or, if it has to be exercised to avoid persecution, will mean in all circumstances that the member is a persecuted person, or under threat of persecution for the purposes of the Convention relating to the Status of Refugees and the *Migration Act* 1958 (Cth).

108 I would join in the orders proposed by Gummow, Hayne and Crennan JJ.

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