HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

SZFDV APPELLANT

AND

MINISTER FOR IMMIGRATION
AND CITIZENSHIP & ANOR RESPONDENTS

SZFDV v Minister for Immigration and Citizenship
[2007] HCA 41
30 August 2007
S61/2007

ORDER

Appeal dismissed with 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 DLA Phillips Fox)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

SZFDV v Minister for Immigration and Citizenship

Immigration – Refugees – The appellant was an Indian national who faced persecution in his home region on account of his political beliefs – 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 India.

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 – Relevance of practicability – Relevance of territorial distinctions.

Immigration – Refugees – See *SZATV v Minister for Immigration and Citizenship*.

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

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

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

1 GUMMOW, HAYNE AND CRENNAN JJ. This appeal from the Federal Court of Australia (whose appellate jurisdiction was exercised by Madgwick J) was heard together with *SZATV v Minister for Immigration and Citizenship*[1] and the same counsel appeared on each appeal. These reasons should be read with those in *SZATV*.

2 Madgwick J dismissed an appeal from the dismissal by the Federal Magistrates Court of an application for certiorari to quash a decision of the Refugee Review Tribunal ("the Tribunal") (the second respondent in this Court and a submitting party), for prohibition directed to the Minister (the first respondent in this Court), and for mandamus directing the Tribunal to redetermine according to law the appellant's application for a protection visa.

3 The appellant is an Indian national, born at Theni in the State of Tamil Nadu in 1977. He arrived in Australia on 16 May 2004 and applied for a protection visa. In his application the appellant gave his religion as "Hindu". The application was refused by a delegate of the Minister on 11 June 2004 and the Tribunal subsequently affirmed the decision of the delegate.

4 On 13 October 2004, the appellant attended a hearing conducted by the Tribunal and gave evidence with the assistance of an interpreter. He had no legal or other representation at the hearing.

5 The appellant claimed that his father and his family sympathised with the Communist Party and that his brother had worked as a Party member in Tamil Nadu. The appellant left school when he was 16 years of age and after the death of his brother he was employed at the mill in Coimbatore where his father worked. The appellant worked at the mill for approximately three and a half years until the employer company ceased operations there in 2002. The mill was situated some 200 km from the home where his mother still lived and the appellant returned there after the closure of the mill.

6 The country information showed that according to the 1991 Census the population of Tamil Nadu was more than 62 million, 88.67 percent of the population were Hindus and Tamil was spoken by 86.7 percent of the population and Telugu by 2.2 percent.

7 The appellant asserted that while his brother had been working as a member of the Communist Party he had opposed the two major Tamil parties, the Dravida Munnetra Kazhagam (the DMK) and the All-India Anna Dravida

---

1 [2007] HCA 40.

Munnetra Khazagam (the AIADMK). He maintained that his brother had been killed by "rowdies" from these parties at a Communist Party meeting in 1998. The appellant did not distinguish between the Communist Party of India and the Communist Party of India (Marxist).

8 The appellant was elected a trade union leader of the employees at the mill and disputed some payments to the workers by their employer. He believed that the mill owners held him responsible for the subsequent closure of the mill by government order in 2002. He claimed, among other things, that the mill owners had used their influence as DMK members to procure the laying by the police of false charges of murder of a DMK leader, and that he had been assaulted by DMK "rowdies" in July 2003. Threats also were made to his family. The appellant claimed that in August 2003 he had moved to the capital of Tamil Nadu, Chennai (formerly Madras), where he had continued to fear persecution by DMK "rowdies". He stayed in Chennai until he left for Australia in May 2004, travelling on an Indian passport issued in June 2003 and with an Australian business visa.

9 The Tribunal stated:

> "As put to the [appellant] at the Tribunal hearing, based on the country information considered, I thought it plausible the mill owners, who were allegedly members of the DMK, had used their influence to cause problems for the applicant; ... That said I did not think it plausible the DMK or the mill owners would continue to target him should he relocate within India."

In its statement of findings and reasons the Tribunal said:

> "For the purpose of this decision, the Tribunal will accept the [appellant] was involved in some kind of conflict with the employers of his former workplace [the mill]. It accepts the mill owners used their contacts in the DMK in Tamil Nadu to cause the [appellant] some kind of problem in Tamil Nadu. The Tribunal accepts the [appellant] also had problems after he moved to Madras [in Tamil Nadu], for reasons of his activities for the local communist party there. However, as put to the [appellant] at the Tribunal hearing, protection obligations in Australia may not be owed if I was satisfied he could safely travel to and reside in another location in India. Further, I may expect him to safely relocate if I was satisfied it was reasonable in all the circumstances to expect him to do so."

10 The Tribunal referred to country information showing that the adjoining State of Kerala had a relatively large Tamil speaking community and that the

Communist Party, to which the appellant claimed to belong, had a significant presence in that State.

11 The Tribunal's reasoning may be understood by regard to the following passages in its reasons:

> "I do not think it plausible the mill owners or the DMK would have the capacity to cause the [appellant] problems in Kerala ... [s]hould the [appellant] reside in eg Kerala ... I am not satisfied his parents would continue to be questioned as to his whereabouts.
>
> ...
>
> At the Tribunal hearing the [appellant] also confirmed he had received 8 years education in Tamil Nadu, and that he had been employed there in *inter alia* a political party as well as in a mill. The [appellant] also claimed to speak 'Telegu, Tamil, and a little English'. That said, the Tribunal noted the appellant was able to respond to a number of its questions without recourse to the interpreter during the course of the Tribunal hearing. The [appellant] has shown himself capable of overcoming any language problem in Australia, and I am satisfied should he relocate to eg Kerala, with a Tamil speaking community, language difficulties would not constitute a problem for him. Accordingly, I am not satisfied that for reasons of any claimed language, employment or lack of family contact difficulties, it would be unreasonable to expect the applicant to relocate within India.
>
> Furthermore, no evidence was provided that there were concerns with respect to infirmity, health services or education. Neither did the country information considered in this decision satisfy me that relocation on these grounds would be unreasonable for this [appellant]. Accordingly, I am satisfied the [appellant] can be reasonably expected to relocate within India and by so doing avoid any well founded fear of persecution for a Convention reason.
>
> Accordingly, I am satisfied the [appellant] does not have a well founded fear of persecution for a Convention reason in India."

12 In this Court, the three grounds of appeal which were pressed were that the Federal Court had erred in failing to find jurisdictional error by the Tribunal by reason of the Tribunal having:

(a) asked whether the appellant might reasonably be expected to relocate within India in order to avoid persecutory harm;

(b) treated the reasonable availability of protection against persecutory harm within India as determinative or conclusive of his refugee status; and

(c) failed to make findings about, and to consider, whether requiring the appellant to relocate would involve the abnegation of the attribute for which the appellant was selected for persecution."

13 None of these grounds is made out.

14 Grounds (a) and (b) amounted to an attack upon the use of any notion of "relocation" as a step in concluding that the appellant's fear of persecution is not "well-founded". As indicated in the reasons in *SZATV*, and as a general proposition to be applied to the circumstances of the particular case, it may be reasonable for the applicant for a protection visa to relocate in the country of nationality to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution.

15 As to ground (c) advanced by the appellant, the Tribunal did, as is demonstrated in the passages from its reasons which have been set out, consider and make findings about whether relocation to Kerala would involve abnegation of the attribute for which the appellant had come into conflict with the mill owners and members of the DMK. His agitation respecting the working conditions at the mill and other activities as a Communist Party member had brought the appellant into trouble in Tamil Nadu. But, for the reasons given, the Tribunal concluded, as it was open for it to do, that the appellant could safely relocate to Kerala and that it would not be unreasonable to expect him to do so.

16 This case thus stands in contrast to *SZATV*.

17 The appeal should be dismissed with costs.

18 KIRBY J. This appeal was heard at the same time as the appeal in *SZATV v Minister for Immigration and Citizenship*[2]. Like that appeal, this appeal, also from the Federal Court of Australia[3], is designed to permit this Court to elucidate the internal relocation alternative (or principle) ("the relocation test") in the context of the Convention relating to the Status of Refugees, 1951[4] as amended by the Protocol relating to the Status of Refugees, 1967[5] (together "the Refugees Convention").

The decisional background

19 Many of the facts relevant to the decision in the appeal are set out in the reasons of Gummow, Hayne and Crennan JJ ("the joint reasons")[6]. Also stated there are passages from the reasons for decision of the Refugee Review Tribunal ("the Tribunal"). In respect of the Tribunal's reasons, the appellant, SZFDV[7], sought judicial review on the basis of alleged jurisdictional error. Such review was refused in the Federal Magistrates Court by Scarlett FM[8]. That refusal was, in turn, confirmed by Madgwick J, exercising the appellate jurisdiction of the Federal Court.

20 In dismissing the appeal to the Federal Court and affirming the approach of the Tribunal, Madgwick J referred to his earlier dissenting reasons in the Full Court of the Federal Court in *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs*[9]. In those reasons, Madgwick J had raised a question as to whether the previous elaboration of the Australian test for decisions in cases where "refugee" status has been refused, on the footing that the applicant could reasonably relocate to a different part of the applicant's country of nationality or

---

2 [2007] HCA 40.

3 [2005] FCA 1312.

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

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

6 Joint reasons at [3]-[10].

7 The name of the applicant is anonymised in accordance with the *Migration Act* 1958 (Cth), s 91X.

8 [2005] FMCA 908.

9 (2004) 140 FCR 270. See consideration in *SZATV* [2007] HCA 40 at [91]-[94].

habitual residence ("country of nationality")[10], needed to be reconsidered in light of the decision of this Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[11]. However, conforming in this case to the majority approach in *NALZ*, Madgwick J proceeded on the basis that he was bound to accept the conclusion that the conventional assessment of relocation was unaffected by the reasoning in *S395*.

21 Deciding the appeal on that basis, Madgwick J held that the appeal should be dismissed. He added[12]:

> "Having regard to the way the Tribunal member found the facts in this case, it might well be that, even should another test be applied (namely what would the appellant do if actually returned to India by way of possible relocation), the factual findings would, in any event, mandate the conclusion that he would relocate."

Common issues about internal relocation

22 In this appeal, I shall follow the same course as has been adopted in the joint reasons[13]. My reasons too should be read together with those in *SZATV*. I shall not set out again an analysis of the origins of the relocation test. Nor will I repeat the competing theories that have been offered to suggest a textual foundation, in the Refugees Convention definition of "refugee"[14], for importing consideration of whether the refugee applicant should (before resorting to a claim upon Australia for surrogate "protection" from persecution) reasonably relocate in his country of nationality, India, to a part of that country where he could safely secure that country's "protection".

23 Additionally, I shall omit the explanations that have been offered directed to the other principal way of looking at the problem, on a textual basis, by reference to whether the refugee applicant in Australia lacks the "well-founded fear" of persecution that is necessary to establishing entitlements under the Refugees Convention definition of "refugee", on the footing that, were the appellant now returned to India, he could safely relocate and suffer no

---

10 As expressed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437.

11 (2003) 216 CLR 473.

12 [2005] FCA 1312 at [8].

13 Joint reasons at [1]. See also reasons of Callinan J at [50].

14 Included in Australian municipal law by the *Migration Act* 1958 (Cth), s 36(2).

persecution. All of these considerations are explained in *SZATV*[15]. It is unnecessary for me to repeat them here.

24 The appellant could not succeed in this appeal in a frontal attack on the relocation test as being inconsistent with the text and purposes of the Refugees Convention. Whatever may be the difficulties of reconciling the notion of internal relocation with the language, history and purposes of the Refugees Convention, an internal relocation test is now well established in international State practice (and also accepted by the United Nations High Commissioner for Refugees).

25 In judging an applicant's claim to refugee status it is therefore permissible to consider the reasonableness of the applicant's relocation to another place within the applicant's country of nationality. If, reviewing all the facts, it is concluded that the applicant, acting reasonably, will relocate if returned to that country, it will be open to the decision-maker in Australia to conclude, where the source of the fear of a Refugees Convention-related persecution is localised in the country of nationality, that the propounded fear of persecution is not "well-founded". On that ground, the claim of "refugee" status, in accordance with the Refugees Convention, could properly be refused.

The applicable authority to be observed

26 Nevertheless, in Australia, where the decisions of the Tribunal are subject to the possibilities of judicial and constitutional review, the courts that perform such review are obliged to conform to the instruction of this Court on the requirements to be observed in discharging their function. Relevant to that instruction, in a case such as the present, is the decision of this Court in *S395*[16].

27 The decision in *S395* was subsequently distinguished by a later decision of the Court, constituted differently, in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[17]. Although that decision is, in some respects, difficult to reconcile with *S395* (and although McHugh J and I, who sat in both cases, considered that the outcome in *NABD of 2002* was governed by the holding in *S395*) the majority in the later *NABD* did not overrule

---

15 [2007] HCA 40 at [53]-[63].

16 (2003) 216 CLR 473.

17 (2005) 79 ALJR 1142; 216 ALR 1.

or expressly qualify *S395*[18]. It follows that the binding principles of law established by *S395* still operate in those cases to which those principles apply.

28 It remains, in the present case, to apply to the reasoning of the Tribunal, as it concerned the appellant SZFDV's submissions, not only the conclusions expressed by this Court in *SZATV* (that an internal relocation test might, as a matter of principle, properly be applied), but also the holdings that this Court had earlier laid down in *S395* (that the search is for what the particular applicant will *in fact* do if returned and it cannot be hypothesised that he will surrender the basic rights which the Refugees Convention is specifically intended to protect).

29 The essential question in this appeal is not, therefore, whether it was permissible for the Tribunal to consider the hypothesis of internal relocation by the appellant within India at all. So much is not now in doubt. The question is whether, in proceeding to consider that hypothesis, the Tribunal conformed to the approach which this Court's majority established by its holding in *S395*.

30 Whereas in *SZATV*[19], non-compliance by the Tribunal with this Court's decision in *S395* might have been understandable, because the Tribunal's decision in that case was given before the publication of this Court's reasons in *S395*, the circumstances of the proceedings involving SZFDV are different. In his case, the decision of the Tribunal was reached in October 2004 and handed down in the following month. This was therefore well after this Court's reasons in *S395* became available. Although those reasons were not referred to by the Tribunal in this case, by the time of its decision, they were undoubtedly available to it. In any case, they represented (and continue to represent) the law, binding on the Tribunal, until this Court, or the Parliament within its powers, alters the principles stated in *S395*.

Three important principles in *S395*

31 There are three important principles for which *S395/2002* stands:

(1) *Focus on the particular applicant*: The first is that the focus of attention in refugee applications is not, as such, upon what it might be reasonable, in an abstract sense or as part of a theoretical taxonomy, for the appellant, if returned to the country of nationality, to do in order to escape persecution[20]. This is not the correct approach, whether the case involves

---

18 See (2005) 79 ALJR 1142 at 1143 [2]; 216 ALR 1 at 2 per Gleeson CJ; 79 ALJR 1142 at 1170 [168]; 216 ALR 1 at 40 per Hayne and Heydon JJ.

19 [2007] HCA 40.

20 *S395* (2003) 216 CLR 473 at 490-491 [43] per McHugh and Kirby JJ.

the suggestion of "living discreetly" as a homosexual man in Bangladesh (as in *S395*), or moving to another part of the country of India to avoid the claimed persecution for political opinion (as in the present case). The question, described there as the "central question in any particular case"[21], is, as Gummow and Hayne JJ explained in *S395*[22]:

> "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".

32 The same point of specificity and individuality, addressed to "this individual applicant", was made by McHugh J and myself in the other joint majority reasons in *S395*[23].

(2) *Focus on well-foundedness of fear*: Secondly, the focus of attention, provided by the Refugees Convention definition of "refugee", is on the well-foundedness of the fear which the particular applicant for refugee status possesses. This point was also made clear in *S395*. The joint reasons of Gummow and Hayne JJ point out that the issue must be addressed against the background of the fact-specific inquiry of what the particular individual applicant *will* do if returned[24]:

> "If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question."

33 In the present instance, the proposition that the appellant should relocate within India amounts, in effect, to an hypothesis that it would be reasonable for the appellant to "hide" his political beliefs from those who, it is postulated, have persecuted him in his home State of Tamil Nadu. By inference, he would not be safe from persecution in his home State but, it is suggested, he could be free of

---

21 *S395* (2003) 216 CLR 473 at 500 [78] per Gummow and Hayne JJ.

22 *S395* (2003) 216 CLR 473 at 500 [78] (emphasis in original).

23 (2003) 216 CLR 473 at 490 [43].

24 (2003) 216 CLR 473 at 500 [80].

persecution if he were to move to another and different State of India (Kerala). In that State there would be no need to "hide" his beliefs because the government of that State includes participation by members of a local communist party. They would not continue the persecution. Because he could return to Kerala, and there be free of persecution, any "fear of persecution" he feels in Australia at the prospect of being returned to India is not "well-founded". There is no evidence that this is the way the Tribunal considered the appellant's case. Yet it is the only way that would conform to the Refugees Convention definition as explained in *S395*.

(3) *Acquiescence in persecution is not reasonable*: Most importantly, the joint reasons in *S395* each emphasised that it would not be a "reasonable" adaptation of the behaviour of an applicant for refugee protection in Australia to expect the applicant to return to the country of nationality and to abdicate, or repudiate, a fundamental right of the kind included in the list of Refugees Convention-related grounds of "persecution"[25]. Those grounds do not cover the whole gamut of individual human rights guaranteed by international law. They single out only those basic grounds of persecution that the Refugees Convention treats as central; that have been a common source of persecution leading to the flight of those who are victims of it; and that those who are the subjects of it are not expected to tolerate, if it happens in their country of nationality. The joint reasons of Gummow and Hayne JJ in *S395* make this clear in the passage just cited[26].

The jurisdictional errors of the Tribunal

34 *Failure to address the correct question*: In the present case, the Tribunal offended against each of the three foregoing principles laid down by this Court in its decision in *S395*. First, it did not ask whether the particular applicant would, as a matter of fact, relocate from Tamil Nadu if he were returned to India[27]. Instead, it asked whether the Tribunal could itself impose such an obligation on the appellant[28]:

---

25 (2003) 216 CLR 473 at 489 [40] per McHugh and Kirby JJ, 500 [80] per Gummow and Hayne JJ.

26 Above these reasons at [32]. See (2003) 216 CLR 473 at 500 [80].

27 (2003) 216 CLR 473 at 500 [80].

28 Refugee Review Tribunal, decision and reasons of the Tribunal, 18 October 2004 ("Reasons of the Tribunal") at 8.

> "As put to the applicant at the Tribunal hearing, protection obligations in Australia may not be owed if I was satisfied he could safely travel to and reside in another location in India. Further, *I may expect him to safely relocate* if I was satisfied it was reasonable in all the circumstances to expect him to do so."

35 Making it absolutely plain that the Tribunal was not addressing whether, if the appellant were returned to India he would *in fact* relocate from Tamil Nadu to the State of Kerala, the Tribunal's reasons proceed[29]:

> "Therefore, I am satisfied that if the applicant relocated from Tamil Nadu to Kerala he would not have a well-founded fear of persecution for a Convention reason."

Internal relocation was simply a postulate conceived of by the Tribunal. No consideration was given to whether it would *in fact* have had any ultimate application in the appellant's case.

36 *Failure to address well-foundedness*: Secondly, because of the way in which the Tribunal approached the matter (contrary to the requirement of individual factual prediction established in *S395*), it failed to address the issue of reasonable relocation within India in the only way that is permissible under the Refugees Convention. Specifically, it failed to examine the "well-foundedness" of the appellant's *current* fear of persecution, based on the reality of what in fact he would reasonably do if he were returned to India.

37 This was not a hypothetical or theoretical problem in the case which the appellant propounded. Relocating from Tamil Nadu to Kerala is not the same thing as relocating from Victoria to Tasmania or relocating within Ukraine. The appellant's family, upbringing, language, culture, cuisine, tradition, friends, political colleagues and other links were all with the Tamil speaking people in the State of Tamil Nadu. The postulate that the appellant would move to a significantly different linguistic, cultural, political and familial environment of Kerala, simply because it is within the country of his nationality, portrays not only a naïve ignorance of the diversity of India but also a failure to address the relocation test in the correct way, as explained in *SZATV*.

38 The Tribunal's analysis of the appellant's case, given effectively in three pages of reasoning, is extremely slim[30]. However, if a want of real attention to the foregoing considerations might amount to an error *within* jurisdiction, the

---

29 cf *SZATV* [2007] HCA 40 at [93] citing *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270 at 281 [46].

30 Reasons of the Tribunal at 8-10.

failure to address the postulate of internal relocation in a manner anchored to the Refugees Convention text is an error *of* jurisdiction requiring correction by this Court.

39 *Failure to uphold Refugees Convention rights*: Thirdly, I now reach the most serious error on the part of the Tribunal. It betrays a failure to address the correct question for decision and is thus a clear jurisdictional error. The reasons of the Tribunal indicate no attention at all to whether it would be inconsistent with the purpose of the Refugees Convention to require the appellant to relocate within India, given that his asserted fear of persecution is claimed as being on the basis of his expressions of his political opinion. In the appellant's case, that political opinion was not addressed to changing the government and political culture in the State of Kerala. Rather, it was addressed to changing the power structures (including the government) of the appellant's native state of Tamil Nadu, a distinct society within India.

40 Although relocation within a country of nationality may sometimes be reasonable, and in a given case may deprive an applicant for refugee status of the "well-founded fear of persecution" for a reason expressed in the Refugees Convention necessary to attract "refugee" status, such relocation cannot be "reasonable" (and thus cannot be imposed by the Tribunal) where to relocate would effectively destroy the very protection which the Refugees Convention-related reason is designed to afford to the individual.

41 In this important respect, this case is analogous to *SZATV*. There, the Tribunal contemplated the return of the appellant to Ukraine, but under conditions not only of physically moving his residence but of abandoning his political opinions expressed as a journalist, and getting work in the construction industry that would not involve him in expressing his political opinions. This Court has concluded (correctly in my view) that, to impose such a requirement amounted to jurisdictional error entitling SZATV to relief from the Court.

42 Here, the Tribunal also contemplated the appellant's abandonment of his political opinions in India in the only place where it was relevant and important to the appellant to hold and express these political opinions, namely in the State of Tamil Nadu[31]. In effect, the Tribunal's approach in this case therefore amounts to the type of demand upon the appellant to "live discreetly" by reference to a ground stated in the Refugees Convention. Yet that is a demand that this Court's decision in *S395* rejected. Where the "discreet living" (moving to Kerala and opting out of the relevant political discourse) amounts to a negation or abdication of the relevant basic right expressed in the Refugees Convention, it is an error of

---

31 cf reasons of Callinan J at [50].

jurisdiction effectively to impose that requirement in an applicant's case[32]. Yet that is what the Tribunal did in the case of SZFDV.

The real issues and discretionary relief

43 *Requirement to decide merits*: The claim by SZFDV of fear of persecution for a Refugees Convention reason on return to India appears rather thin on its evidentiary merits. Country information would demonstrate the existence of an active multi-party opposition movement in Tamil Nadu, including in the city of Chennai where the appellant lived. It would also establish the presence there of independent courts, including the High Court of Bombay, able to uphold the rights of individuals expressing minority political and industrial opinions.

44 Instead of approaching the appellant's claim in an orthodox manner, and determining that claim by reference to the evidence of the basis, or absence, of a "well-founded fear" of the kind specified in the Refugees Convention, the Tribunal took what has increasingly become an all too easy exit from the hard decisions required in evidentiary adjudications of this kind.

45 If the present appeal is dismissed, that "easy exit" will be invoked in even more cases in the future. This will be especially so where a country is large and diverse and where the refugee claim adjudicator or the Tribunal simply postulates their own view as to the reasonableness of an applicant's internal relocation. That postulate should never be allowed to undermine the important rights expressed in the Refugees Convention. Least of all should this occur by reasoning which fails in the three relevant respects to conform to the instruction of this Court in *S395*.

46 *Discretionary withholding of relief?*: Finally, I must consider whether the appeal should be dismissed in the exercise of the Court's discretion to withhold relief in the form sought by the appellant[33]. The provision of that relief is always discretionary. In his reasons, Madgwick J postulated the possibility that the Tribunal member's factual findings "would, in any event, mandate the conclusion that he would relocate"[34].

---

32 *S395* (2004) 216 CLR 473 at 491 [47], 500 [79].

33 cf *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [27]-[29], [88], [91]-[92]. See above, these reasons at [21].

34 [2005] FCA 1312 at [8].

47 I do not read such a conclusion into the Tribunal member's reasons. This is because the Tribunal omitted to ask what the appellant would do *in fact*, if returned to India. Instead, it concerned itself with what the Tribunal itself should, and could, notionally require of him. This is the type of jurisdictional error on the part of the Tribunal that must be nipped in the bud. Otherwise, the Tribunal will continue to ask whether the refugee applicant *should* relocate rather than whether, acting reasonably, the applicant on return *will* relocate. In effect, this is the error of asking the question "what an individual *is entitled* to do as distinct from what the individual *will do*". And that was correctly identified by Gummow and Hayne JJ in *S395* as jurisdictional error warranting the intervention of this Court[35]. The error does not become more acceptable by becoming more common. Nor is it more tolerable because the error is expressed by reference to a country like India rather than Ukraine.

48 If the Tribunal had not looked for an easy way out (by considering internal relocation) but had addressed the question of whether, in fact, the appellant's propounded fear of persecution if returned to Tamil Nadu in India was "well-founded", a negative conclusion on the merits would not have been at all surprising. But because the Tribunal avoided that issue and reached instead for the internal relocation option, and then stumbled, its decision cannot stand. Consistent with what this Court has said and done in *S395* and in *SZATV*, the appellant is entitled to relief.

Orders

49 The appeal should be allowed with costs. The orders of the Federal Court of Australia should be set aside. In place of those orders, this Court should order that the appeal to the Federal Court be allowed with costs and the orders of the Federal Magistrates Court of 16 June 2005 set aside with costs. In respect of the decision of the Tribunal made on 18 October 2004, there should be orders for certiorari to quash that decision; prohibition directed to the Minister to restrain his giving effect to that decision; and mandamus requiring the Tribunal to reconsider, according to law, the appellant's application for review made on 3 June 2004.

---

35 [2003] 216 CLR 473 at 500 [80].

50 CALLINAN J. Subject to what I have said in *SZATV v Minister for Immigration and Citizenship*[36], I agree with the conclusions of Gummow, Hayne and Crennan JJ in this appeal. I do not read the Tribunal here to have assumed or expected, on relocation or otherwise, the silencing of the appellant's political views. Indeed, the Tribunal's reasons focussed upon, and correctly identified, the activities in which he was involved and the controversy to which they gave rise as effectively exclusively local.

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

---

36 [2007] HCA 40.