HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION — APPELLANT

AND

SZSCA & ANOR — RESPONDENTS

Minister for Immigration and Border Protection v SZSCA
[2014] HCA 45
12 November 2014
S109/2014

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G T Johnson SC with J D Smith for the appellant (instructed by Australian Government Solicitor)

S B Lloyd SC with P D Reynolds for the first respondent (instructed by Fragomen)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration and Border Protection v SZSCA

Migration – Refugees – Application for protection visa – Where applicant threatened by Taliban – Where Refugee Review Tribunal affirmed decision not to grant protection visa because risk of persecution would only arise on roads outside Kabul, which applicant could avoid – Whether Refugee Review Tribunal fell into error identified in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 – Whether Refugee Review Tribunal failed to address whether it would be reasonable to expect applicant to remain in Kabul.

Words and phrases – "internal relocation principle", "live discreetly", "real chance of persecution", "reasonable to expect", "well-founded fear of persecution".

Migration Act 1958 (Cth), s 36(2)(a).
Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967), Art 1A(2).

1 FRENCH CJ, HAYNE, KIEFEL AND KEANE JJ. The first respondent ("the respondent") is a citizen of Afghanistan, of Hazara ethnicity, from the Jaghori district in the Ghazni province. He arrived in Australia by boat on 21 February 2012 and subsequently applied for a protection visa.

2 In his application the respondent said that he and his immediate family have lived in Kabul since 2007 and that he has worked as a self-employed truck driver since that time. Prior to that, he worked in Jaghori manufacturing jewellery. The respondent said that his work as a truck driver required him to drive between Kabul, Ghazni and Jaghori. From about January 2011, he began to specialise in the transportation of construction materials between Kabul and Jaghori because it provided him with a higher income.

3 Around late January 2011, the respondent was en route to Jaghori when he was stopped by the Taliban, who warned him not to carry construction and building materials. The respondent explained, in a submission to the Refugee Review Tribunal ("the Tribunal"), that the Taliban considered that, by transporting such materials, he was acting for the government or for foreign organisations. He was released because he said that he was carrying the materials for a shopkeeper and, in his view, because this particular group was "more merciful than other Taliban". Thereafter, he took measures to avoid Taliban checkpoints, although he continued to carry construction materials.

4 In about November 2011, another Hazara truck driver showed the respondent a letter he had been given by the Taliban ("the Taliban letter"). The Taliban letter, a translated copy of which was produced to the Tribunal, was headed "Islamic Emirate of Afghanistan, Ghazni Province, Khogyani District". It alleged that the respondent was "assisting and cooperating with government and foreign organisations in the transportation of logistical and construction materials from Ghazni city to Jaghori and to Malestan district." It called upon "local council people to perform their Islamic duty ... to get rid of this criminal, infidel person." It told them "to take firm action as soon as possible to get rid of this apostate, criminal person on the road from Qarabagh and Janda areas."

5 The respondent said that he decided then to leave Afghanistan and did so 10 days later.

6 The respondent's application for a protection visa was refused by a delegate of the appellant. That decision was affirmed by the Tribunal. Given the nature of the issues on this appeal, it is necessary to refer to the findings of the Tribunal in some detail.

7 The respondent told the Tribunal that he feared that, if he returned to Afghanistan, he would be abducted, abused and/or killed by the Taliban. He also feared that he would be deprived of his ability to make a living. His fears of mistreatment or harm had three bases: his Hazara ethnicity and Shia religion; his membership of a particular social group, namely truck drivers who transport goods for foreign agencies; and his imputed and actual political opinion supportive of foreign agencies.

8 The Tribunal was not satisfied that the Taliban targets Hazara Shias on a systematic and discriminatory basis, or that Afghan truck drivers are persecuted by reason only of their occupation. Nonetheless, the Tribunal accepted that the Taliban generally targets drivers carrying construction materials and discourages them from doing so, and that the Taliban may impute to persons undertaking that activity political opinions supportive of the Afghan government or non-governmental aid organisations. The Tribunal considered it to be quite plausible that the respondent had been warned to desist from such activity.

9 The Tribunal proceeded upon the basis that the Taliban letter was genuine and that the respondent was threatened by it. It accepted that, if the respondent was again intercepted by the Taliban on the roads on which he usually travelled, he would face a real chance of serious harm and even death for a reason specified in the Refugees Convention[1] ("the Convention"), namely the political opinion imputed to him. The Tribunal considered the risk of harm would be greater if he were carrying construction materials. The Tribunal does not appear to have dealt with the matter on the basis of the respondent's claim that, in fact, he held that political opinion. Nor does the Tribunal appear to have attached significance to the description of the respondent in the Taliban letter as an apostate. However, these omissions are not presently in issue.

10 The Tribunal did not accept that the respondent is a high-profile target who would be actively pursued by the Taliban throughout Afghanistan. It viewed him as someone who might be harmed if he came to the Taliban's attention, which would likely only occur if he continued to transport construction materials. There was evidence that the Taliban does not actively pursue and target low-profile persons in Kabul. The area in which the respondent lived in Kabul was predominantly Hazara, where enquiries by the Taliban as to his whereabouts would be conspicuous.

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1 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

11 The Tribunal observed that, as late as June 2012, the Taliban did not appear to know the respondent's whereabouts. This observation appears to have been drawn from the respondent's statement that, at that time, his brother had advised him that the Taliban was asking about the respondent's whereabouts, having noticed that he was no longer driving on the roads between Kabul and Jaghori. However, this enquiry might also be thought to suggest a level of interest in the respondent on the part of the Taliban.

12 The focus of the Tribunal's determination was upon security in Kabul, which it considered to be "relatively good". It concluded that it was not satisfied that the respondent would face a real chance of persecution if he remained there. It found that the risk of persecution would only arise in the area constituted by the roads on which he had been driving outside of Kabul, and he could avoid this area. It followed that the respondent did not satisfy the criterion for the grant of a protection visa set out in s 36(2)(a) of the *Migration Act* 1958 (Cth).

13 At a practical level, the Tribunal was of the view that the respondent would not be obliged to travel between Kabul and Jaghori to make a living. It was satisfied that the respondent could obtain employment in Kabul, such as in making jewellery, as he had formerly done in Jaghori. The detailed account of the hearings before the Tribunal, which is contained in the Tribunal's reasons, does not suggest that this matter was put to the respondent by the Tribunal.

14 On the respondent's application to review the Tribunal's decision, the Federal Circuit Court of Australia (Judge Nicholls) ordered that the decision be quashed and that the matter be remitted for determination according to law[2]. A majority of a Full Court of the Federal Court of Australia (Robertson and Griffiths JJ, Flick J dissenting) dismissed an appeal from the Federal Circuit Court's decision[3].

15 The decisions of the Federal Circuit Court and the majority in the Federal Court referred[4] to what was said in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[5] as relevant to this matter. In that case the

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2 *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464.

3 *Minister for Immigration and Border Protection v SZSCA* (2013) 222 FCR 192.

4 *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464 at [101], [107]-[108]; *Minister for Immigration and Border Protection v SZSCA* (2013) 222 FCR 192 at 207-209 [51]-[56], 210-211 [61]-[62].

5 (2003) 216 CLR 473; [2003] HCA 71.

Tribunal had accepted that it was not possible for the protection visa applicants to live openly as homosexuals in Bangladesh, but found that they had conducted themselves discreetly and there was no reason to suppose that they would not continue to do so if they returned to that country. Four members of this Court held that, by reasoning in this way, the Tribunal failed to consider the question it had to decide – whether the applicants had a well-founded fear of persecution[6]. The question for the Tribunal was whether there was a real chance that, upon return to Bangladesh, the applicants would be persecuted for a Convention reason[7]. This had not been addressed.

16 In the later case of *SZATV v Minister for Immigration and Citizenship*[8], Kirby J said that the two majority judgments in *S395* both spoke of the need for the decision-maker to focus attention on the propounded fear of the applicant for a protection visa and whether it was well founded; and to consider that issue on an individual basis and by reference to the individual applicant, not by reference to a priori reasonable conduct, such as living discreetly, which might reduce the risk of persecution. Gummow and Hayne JJ had said in *S395* that it is irrelevant to the enquiry whether a fear of persecution is well founded to say that the applicant is to be expected to live discreetly[9].

17 The essential reasoning in *S395* was that the Tribunal had diverted itself from its task of determining whether there would be a real chance that the applicants would be persecuted if they returned to Bangladesh, by focusing on an assumption about how the risk of persecution might be avoided. Gummow and Hayne JJ said that the enquiry was what might happen if the applicants returned, not whether adverse consequences could be avoided[10]. It followed that the issue

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6 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 489 [39] per McHugh and Kirby JJ, 501 [82], 503 [88] per Gummow and Hayne JJ.

7 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 490 [43] per McHugh and Kirby JJ, 498-499 [72] per Gummow and Hayne JJ.

8 (2007) 233 CLR 18 at 45 [89]; [2007] HCA 40.

9 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 501 [82].

10 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 500 [80].

to which the correct enquiry was directed – whether the fear of persecution was well founded – had not been addressed.

18 In the present case the Tribunal did not fall into the error identified in *S395*. The critical aspect of the reasoning of the Tribunal in the present case was its finding that the respondent would not face a real chance of persecution if he remained in Kabul and did not travel on the roads between Kabul and Jaghori. The Tribunal found that he would suffer a real chance of harm for a Convention reason if he carried construction material in another area, but that he was safe in Kabul. In contrast to *S395*, therefore, the Tribunal did not divert itself from the question of whether the respondent would face a real chance of persecution if he returned to Afghanistan.

19 This matter also differs from *S395* in that the risk of persecution claimed in that case was general and nationwide. The occasion for consideration of whether the applicants could be safe from harm in a particular area of Bangladesh did not arise. In this case the risk of harm was specific to an area.

20 In this matter the Tribunal did not consider that the issue of relocation arose as such, for the reason that the respondent already resided in Kabul, the place where he was considered to be relatively safe. However, as will be explained, the same considerations as are relevant to relocation apply when the Tribunal identifies an area where the visa applicant may be safe, so long as he or she remains there.

21 The "internal relocation principle" is well established. According to this principle, a person is not a refugee within the meaning of the Convention if he could avail himself of the real protection of his country of nationality by relocating to another part of that country. The connection of the principle to the definition of a refugee in the Convention, and the conditions for the principle's application, were explained by this Court in *SZATV*[11]. In that case the Tribunal refused to grant a protection visa because it determined that the visa applicant, a Ukrainian journalist who had suffered persecution for his political opinions, could relocate to another region of Ukraine, even though he might not be able to continue to work there as a journalist. The Tribunal failed to consider what

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11 (2007) 233 CLR 18; see also *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 at 55 [14]; [2007] HCA 41.

might reasonably be expected of the applicant with respect to relocation, which this Court held was an error of law[12].

22 In *SZATV*, Gummow, Hayne and Crennan JJ observed that the Convention definition of a refugee is drawn into Australian law by s 36(2) of the *Migration Act*[13], which provides the criteria for granting a protection visa. Their Honours added that any principle respecting internal relocation must therefore be distilled from the text of the Convention[14]. The critical portion in Art 1A(2) of the Convention states that the term "refugee" applies to any person who:

> "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 ..."

23 Their Honours accepted[15] as correct the explanation given by Lord Bingham of Cornhill in *Januzi v Secretary of State for the Home Department*[16] as to how the internal relocation principle finds its place in the Convention. Whilst Art 1A(2) does not make express reference to relocation, in the sense of there being a place within a person's country where he or she could reasonably be expected to relocate, such a restriction on the Convention's protection may be seen to arise from the causative condition expressed in the definition of "refugee". If a person could have relocated to a place within his own country where he could have no well-founded fear of persecution, and where he could reasonably be expected to relocate, then the person is outside the country of his nationality because he has chosen to leave it and seek asylum in another country. He is not outside his country owing to a well-founded fear of persecution for a Convention reason. The person is not, within the Convention definition, a refugee.

24 In this case the respondent submitted that, in *SZATV*, this Court did not consider an alternative explanation of the internal relocation principle to that

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12 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 29 [32].

13 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 23 [12].

14 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 24 [15].

15 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 25 [19].

16 [2006] 2 AC 426 at 440 [7].

proposed in *Januzi*. On this alternative approach, a person who can reasonably relocate to a safe area within his country remains a refugee, but he may nevertheless be returned to the safe area without Art 33(1) of the Convention, which relates to non-refoulement, being breached. It is true that this argument does not appear to have been considered by the Court in *SZATV*; however, this is not sufficient reason to reconsider that decision. None of the conditions referred to in *John v Federal Commissioner of Taxation*[17] is present.

25 The factum upon which the principle of relocation operates is that there is an area in the visa applicant's country of nationality where he or she may be safe from harm. In this matter it was found by the Tribunal that Kabul was such a place. By analogy with the internal relocation principle, given the existence of a place within his country of nationality where the respondent would have no well-founded fear of persecution, it could not be concluded that he is outside Afghanistan and unable to return to that country owing to a well-founded fear of persecution if it could reasonably be expected that he remain in Kabul and not travel outside it. As in *SZATV*, it is the question of what may reasonably be expected of the respondent which must be addressed.

26 The UNHCR Handbook[18] recognises that persecution of a particular group may occur in only one part of a country, and that in such situations a person will not be excluded from refugee status merely because he could have sought refuge in another part of the country, if in all the circumstances it would not have been reasonable to expect him to do so. In *Januzi*[19], Lord Bingham, in an observation referred to in *SZATV*[20], said that the corollary of this proposition is that a person will be excluded from refugee status if, in all the circumstances, it would be reasonable to expect him to relocate to another part of the same country.

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17 (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

18 United Nations 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, reedited 1992) at [91].

19 [2006] 2 AC 426 at 440 [7].

20 (2007) 233 CLR 18 at 26 [22].

27 In *SZATV* the Minister submitted that what is "reasonable" in this context is to be equated with what is "practicable"[21]. Gummow, Hayne and Crennan JJ accepted this submission, but added[22]:

> "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."

28 In *SZATV* the effect of the Tribunal's decision was that the applicant was expected to move to another region of Ukraine and live "discreetly" so as not to attract attention[23]. It was observed that, in *S395*, the notion that the applicants could avoid persecution by living "discreetly" had been rejected[24]. In *SZATV* it was held[25] that the Tribunal had sidestepped consideration of what might reasonably be expected of the applicant with respect to his relocation. This presented an error of law going to an essential task of the Tribunal – determining whether the applicant's fear of persecution was well founded in the Convention sense, and thus also for the purposes of s 36(2)(a) of the *Migration Act*.

29 The Tribunal in this case did not consider that the internal relocation principle applied, because the respondent already lived in Kabul. The Tribunal therefore did not consider the question whether the respondent could reasonably be expected to remain there and not transport materials on the roads outside Kabul, where he would be at risk of harm. This was an incorrect approach. Although the respondent had lived in Kabul since 2007, he had not been confined to that area and his work had taken him outside it. An expectation that he now remain within Kabul raises considerations analogous to those with which the internal relocation principle is concerned – specifically, whether such an expectation is reasonable.

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21 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 26 [23].

22 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 27 [24].

23 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 29 [32].

24 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 28 [28].

25 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 29 [32].

30 In *Januzi*[26], the House of Lords approved the approach of the Court of Appeal in *E v Secretary of State for the Home Department*[27] as to the nature of the test to be applied to determine whether an asylum seeker could reasonably be expected to move to a safe haven within his or her country of nationality – that is, to internally relocate. In the respects relevant to this matter, the Court of Appeal said[28]:

> "Relocation in a safe haven will not provide an alternative to seeking refuge outside the country of nationality if, albeit that there is no risk of persecution in the safe haven, other factors exist which make it unreasonable to expect the person fearing persecution to take refuge there ... Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is 'outside the country of his nationality by reason of a well-founded fear of persecution'."

The nature of the test was said[29] to involve "a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker."

31 In the present case it is not just the living conditions for the respondent in Kabul – and whether he would face a real chance of persecution if he stayed there – which should have been considered by the Tribunal. Rather, it was necessary for the Tribunal to consider the impact on the respondent of remaining in Kabul and not driving trucks on the roads he usually frequented in the course of his business. Addressing this question properly may have raised various issues for the Tribunal's consideration. At the least, the question clearly directs attention to the respondent's ability to earn an income from other sources and to his needs and those of his family.

32 The Tribunal did not address this question. It did not address what was necessary to an enquiry whether it was reasonable to expect the respondent to remain in Kabul and not drive trucks outside it. It made one assumption – that

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26 [2006] 2 AC 426 at 446 [15], 448 [20].

27 [2004] QB 531.

28 *E v Secretary of State for the Home Department* [2004] QB 531 at 543 [23].

29 *E v Secretary of State for the Home Department* [2004] QB 531 at 543 [24].

the respondent would be able to work as a jewellery maker in Kabul, as he had formerly done in Jaghori. This assumption does not appear to have been put to the respondent for his comment. The respondent had raised concerns about his ability to earn a living if he were to return to Afghanistan, but the Tribunal did not explore this subject with him.

33 This matter does not fall to be decided on grounds of procedural fairness. Even if the Tribunal's assumption were correct, that assumption could not provide a complete answer to the question the Tribunal should have addressed. Without addressing the question whether it would be reasonable to expect the respondent to remain and work in Kabul, having regard to the circumstances in which that would place him, the Tribunal could not make a final determination as to whether he could be said to have a well-founded fear of persecution. Failure to address this question constituted an error of law.

34 The appeal should be dismissed with costs.

35 GAGELER J. The definition of "refugee" in Art 1A(2) of the Refugees Convention[30] contains four cumulative elements: (1) the person concerned must fear "persecution" in the country of his or her nationality; (2) the persecution so feared must be "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; (3) that fear of persecution for one or more of those Convention reasons must be "well-founded"; and (4) the person must be outside the country of his or her nationality "owing to" that well-founded fear.

36 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[31] was concerned with the third element of the definition. The principle for which that case stands is that a fear of persecution for a Convention reason, if it is otherwise well-founded, remains well-founded even if the person concerned would or could be expected to hide his or her race, religion, nationality, membership of a particular social group, or political opinion by reason of that fear and thereby to avoid a real chance of persecution. The rationale for the principle was encapsulated by Dyson JSC as a member of the Supreme Court of the United Kingdom which adopted the principle in *HJ (Iran) v Secretary of State for the Home Department*[32]:

> "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country." (emphasis in original)

37 The *S395* principle should not be extended beyond its rationale. The principle directs attention to why the person would or could be expected to hide or change behaviour that is the manifestation of a Convention characteristic[33]. The principle has no application to a person who would or could be expected to

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30 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

31 (2003) 216 CLR 473; [2003] HCA 71.

32 [2011] 1 AC 596 at 656 [110].

33 *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at 625 [22], 647 [82], 653 [98], [100].

hide or change such behaviour in any event for some reason other than a fear of persecution[34].

38 The *S395* principle similarly has no application to a person who would or could be expected to hide or change behaviour that is not the manifestation of a Convention characteristic. That is so even if the person would or could be expected to change that behaviour in order to avoid a real chance of persecution by reason of the perpetrators of persecution wrongly imputing a Convention characteristic to the person. The price that the person would be paying to avoid persecution in such a case would not be the sacrifice of an attribute of his or her identity that is protected by the Convention. As Downes J succinctly put it in *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs*[35], the principle has no application to a case which "does not contemplate changed behaviour to avoid persecution but to avoid creating a wrongful perception of membership of a protected class".

39 This case, like *SZATV v Minister for Immigration and Citizenship*[36] and *SZFDV v Minister for Immigration and Citizenship*[37], is concerned primarily with the fourth element of the definition. The principle for which those cases stand is that the fourth element will be absent, even though the other three elements are present, if it would be reasonable for the person concerned to return to a region within the country of nationality where, objectively, there is no appreciable risk of the persecution of which the person has the fear that is well-founded. That is the principle on which so-called "relocation" or "internal flight" cases turn, though there is no reason to confine the principle to circumstances which involve a region which is different from the region in which the person last lived before leaving the country of nationality. The principle applies to a person who could safely return to his or her home region but not go to another region in the same way as it applies to a person who could safely return to another region but not go to his or her home region.

40 Underlying the principle is a purposive understanding of the causative connection connoted by the words "owing to" within the context of the Convention. The purposive understanding is that a person is not in need of the protection of the international community, for which the Convention provides,

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34 Eg *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142 at 1144 [10]-[11], 1170 [168]; 216 ALR 1 at 4, 40; [2005] HCA 29.

35 (2004) 140 FCR 270 at 283 [57].

36 (2007) 233 CLR 18; [2007] HCA 40.

37 (2007) 233 CLR 51; [2007] HCA 41.

outside the country of his or her nationality if it would be reasonable for the person to return to a region within that country where the person would be safe from persecution.

41 Questions raised by the fourth element of the definition are therefore: whether there is a region within the country of nationality in which there is no appreciable risk of the persecution of which the person has a well-founded fear; and, if so, whether or not it would be reasonable for the person to locate within that region on return to his or her country of nationality.

42 The standard of reasonableness posited by the second of those questions, directed as it is to whether or not a person having a well-founded fear of persecution is to be characterised as being outside the country of nationality "owing to" that well-founded fear within the meaning of Art 1A(2), must itself be informed by the purposes of the Convention. It would not be consistent with the purposes of the Convention for the person to be expected to locate in a region of the country of nationality where he or she would be exposed to a real chance of persecution for one or more Convention reasons even if the person does not currently fear that persecution. Applying the *S395* rationale, it would also not be consistent with the purposes of the Convention for the person to be expected to hide or change behaviour that is the manifestation of a Convention characteristic in order to avoid such persecution in that region. That much was explained by Kirby J in *SZATV* when he said[38]:

> "It cannot be a reasonable adjustment, contemplated by [the] 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 Convention] are intended to protect and uphold."

The point is illustrated by the outcome in *SZATV*, which concerned a Ukrainian journalist found to have a well-founded fear of being persecuted by a regional government in Ukraine by reason of the past expression of his political opinions. The Refugee Review Tribunal was held to have erred in law in considering it reasonable for the journalist "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"[39].

43 The Convention being expressed in its preamble to be founded on the "principle that human beings shall enjoy fundamental rights and freedoms without discrimination", it can also be accepted that it would not be consistent with the purposes of the Convention for the person to be expected to locate in a

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38 (2007) 233 CLR 18 at 48-49 [102].

39 (2007) 233 CLR 18 at 29 [32].

region of his or her country of nationality at the cost of sacrificing his or her dignity or depriving him or her of the enjoyment of fundamental rights or freedoms. There is, however, a real difference between the enjoyment of fundamental rights and freedoms and the level of enjoyment of fundamental rights and freedoms. The reasoning of the plurality in *SZATV*[40] adopted and applied the reasoning of the House of Lords in *Januzi v Secretary of State for the Home Department*[41] in emphasising that the Convention is not directed (apart from persecution) to the level of civil, political, social or economic rights prevailing in the country of nationality. The actual holding in *Januzi* was that the standard of reasonableness is not concerned with assessing the quality of life which the person might be expected to have within the safe region of the country of nationality against basic norms of civil, political and socio-economic rights[42].

44 Nor is the test of reasonableness concerned with assessing the quality of life which the person concerned might be expected to have within the safe region of the country of nationality against the quality of life which the person could expect to have if the person were able to move freely about the country of nationality without fear of persecution. The content of the standard of reasonableness, as applied to a consideration of a person's economic circumstances within the safe region of the country of nationality, is, rather, that encapsulated in the passages from the UNHCR Guidelines on International Protection quoted with approval in *Januzi*. The most pertinent of those passages for present purposes is the following[43]:

> "It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned."

45 The Tribunal here found: that the first respondent ("the respondent") had a fear of persecution by the Taliban in Afghanistan; that the feared persecution was by reason of political opinion imputed to him by the Taliban; and that the fear of that persecution was well-founded. The Tribunal also found that there

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40 (2007) 233 CLR 18 at 27 [25].

41 [2006] 2 AC 426.

42 [2006] 2 AC 426 at 446-448 [15]-[19], 457 [45]-[46], 459 [54].

43 [2006] 2 AC 426 at 448-449 [20].

was no appreciable risk of the occurrence of that persecution if the respondent returned to, and remained in, Kabul.

46 The Tribunal was correct to recognise that, on those findings, "the issue of relocation does not arise as such" given that the respondent had established his home in Kabul before he left Afghanistan. Yet the Tribunal was also correct to recognise that those findings did give rise to an issue about the application to the respondent of the same principle as that which underlies an issue of relocation: whether the respondent was outside Afghanistan "owing to" that well-founded fear of persecution by the Taliban in Afghanistan. The question which the Tribunal needed to address was whether it would be reasonable for the respondent, on return to Afghanistan, to live and work in Kabul. I cannot see that the Tribunal failed to address and to answer that question.

47 The respondent was represented before the Tribunal by a migration agent. The migration agent had noted in a pre-hearing submission to the Tribunal that the delegate had appeared to assume that, on return to Afghanistan, the respondent would not resume work as a truck driver. The migration agent had acknowledged that the respondent had previously been employed as a silver jeweller but had submitted that "due to a drop in demand, the income he received from such employment became insubstantial to raise his family". The migration agent had gone on to quote statistics from a recent report of the Danish Immigration Service to the effect that 36% of the work force was unemployed in Afghanistan and that another 36% was earning less than $1 a day. The migration agent had continued:

> "Further, the [respondent] has no education and is a 48 year old man who will be unable to be employed in labour intensive positions, whilst he is only skilled in silver making, which he found was an insufficient profession in order to support his family. If returned to Afghanistan, in order to provide for his family the [respondent] would be required to resume his employment as a truck driver and would risk detection and/or identification at Taliban checkpoints."

48 The Tribunal specifically recorded in its reasons for decision that, during the hearing, it discussed with the respondent material relating both to security in Kabul and to the "practical issues" associated with living in Kabul, which the Tribunal referred to later in its reasons under the heading "Kabul". The Tribunal also recorded that, at the Tribunal's invitation, the respondent's migration agent provided a post-hearing submission which was to the effect that the respondent would be unable to return to the jewellery business in Kabul and would in consequence be forced again to take up employment as a truck driver, thereby taking him out of Kabul. The inability of the respondent to return to the jewellery business in Kabul was said in the post-hearing submission to be not only because the respondent was an uneducated person who was then 48 years

old but also because he would be "unable to provide the capital or physically partake in the labour necessary to return to the business".

49 Under the heading "Kabul", the Tribunal went on in its reasons for decision to record findings which included that the respondent and his family had since 2007 established their home in a solidly Hazara area of Kabul, where his wife and children remained, and that the respondent would not face a real chance of persecution by the Taliban were he to return to and remain in Kabul. As to the practical issues associated with the respondent being able to work in Kabul, the Tribunal said this:

> "The Tribunal does not accept that the [respondent] would be constrained to continue working as a truck driver on the roads between Ghazni and Jaghori, which is where he faces a real chance of persecution rather than in his home region of Kabul. The Tribunal is satisfied that the [respondent] could reasonably obtain relevant employment in Kabul so that he would not be obliged to travel between Kabul and Jaghori to make a living. The [respondent] has long-established skills making jewellery – a trade at which he worked from 1977 to 2001 – giving him real options in a very big city, either with his own business or as an employee. The Tribunal does not accept that the [respondent] would be prevented from doing so by reason of lack of capital or a claimed – but unelaborated – inability to 'physically partake in the labour necessary to return to the business'."

50 The Tribunal's reasons for decision, of course, "are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed"[44]. But even without resort to that well-worn principle, I cannot read the passage quoted from those reasons as doing other than confronting and answering the correct question of whether it would be reasonable for the respondent, on return to Afghanistan, to live and work in Kabul.

51 That view of what the Tribunal did makes it necessary for me to address a specific criticism of the Tribunal's reasoning advanced on the respondent's behalf in the appeal to this Court. The criticism is that the Tribunal failed to address a specific claim of the respondent that he feared persecution by the Taliban on the basis of being a member of a particular social group comprising truck drivers who transport goods for the Afghan government or for foreign agencies. Had the Tribunal addressed and accepted that claim, it is argued, the Tribunal could not have gone on to find that it was reasonable for the respondent to avoid

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44 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6.

persecution by remaining in Kabul. That was because, to remain in Kabul, the respondent would need to give up work as a truck driver, and giving up work as a truck driver would involve changing the very behaviour which was a characteristic of the particular social group of which the respondent was a member.

52 The difficulty for the respondent in so criticising the reasoning of the Tribunal lies in needing to characterise truck drivers who transport goods for the Afghan government or for foreign agencies as a particular social group for the purposes of the Convention. There appears to have been no basis in the material before the Tribunal for considering that a group so defined had anything in common, save for a fear of persecution by reason of their imputed political opinion. That deficiency is fatal to the respondent's argument[45]. Had the material disclosed some other common characteristic, a further question as to whether those common characteristics were sufficient to constitute a particular social group would have arisen[46]. In particular, it would be necessary to consider the impact of the Tribunal finding that it did not accept "that working as a truck driver is a core aspect of the [respondent's] identity or beliefs or lifestyle which he should not be expected to modify or forego". Now is not the time to explore that question.

53 I would allow the appeal.

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45 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571; [1997] HCA 22 applying *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; [1997] HCA 4; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 400 [36]; [2004] HCA 25.

46 Cf *Ouanes v Secretary of State for the Home Department* [1998] 1 WLR 218.