IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 109 of 2014

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

And

SZSCA
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal raises one issue, namely, whether a person in Australia may be found not to meet the definition of a refugee in circumstances where that person could, upon return to his or her country of nationality, avoid persecutory harm by changing his or her occupation, it would be reasonable for that person to do so and it would not abnegate a trait protected by the Refugees Convention[1].

Part III: Section 78B of the Judiciary Act 1903 (Cth)

3. The Minister has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and has concluded that no such notice is necessary.

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[1] The Refugees Convention is the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

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Part IV: Citations

4. This appeal is from orders made by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v SZSCA* [2013] FCAFC 155. That was an appeal from the orders made by the Federal Circuit Court in *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464.

Part V: Facts

Background

5. The first respondent (**respondent**) is a citizen of Afghanistan and a Shi'a Muslim of Hazara ethnicity. He arrived in Australia on 21 February 2012 and applied for a protection visa on 4 May 2012. On 19 June 2012 a delegate of the applicant made a decision to refuse to grant the respondent a visa. On 4 July 2012 the respondent applied to the second respondent (**Tribunal**) for review of that decision.

6. The respondent relied on the following history. He originally came from the Jaghori District of Afghanistan, part of the Hazarajat area in central Afghanistan to the South-West of Kabul. In around 1977, he began work as an apprentice silver jeweller and started his own jewellery manufacturing and retailing business in 1978. According to the respondent's visa application, he was self-employed as a jeweller until 2001 (although his agent's submissions dated 4 September 2012 at [14] suggests that he did not sell the business until 2007). In 2007, the respondent moved with his family to Kabul. There he bought a truck and became a self-employed truck driver. His usual routes were between Kabul, where he lived, and Ghazni and Jaghori. He claimed that he had been stopped many times by the Taliban on these routes to see if he had a mobile phone or government documents. In around January 2011 he was stopped again, but this time was found to have been carrying plaster and was warned not to do it again. In spite of this, the respondent continued transporting building and construction equipment on these routes. The Taliban imputed him with support for the government or western agencies as a result of carrying building materials. In around November 2011 he received a letter from the Taliban warning him that he would be killed for his association with the government or foreign agencies. He sold his truck and left Afghanistan 10 days later. His family remained in Kabul. The respondent claimed that he faced harm if he continued driving trucks and that he would be forced to do so because he was unable to provide the capital or physically partake in the labour necessary to return to his former business of jewellery making.

7. The Tribunal's decision, dated 26 September 2012, accepted that the respondent had been a truck driver, had been intercepted by Taliban at checkpoints on the roads, had been warned for carrying construction material – an activity that led the Taliban to impute the respondent with support for the government or foreign agencies - and that he had for that reason received the letter from the Taliban threatening his life. The Tribunal also accepted that certain routes on which the respondent had travelled as a truck driver were dangerous and that the respondent faced a real chance of persecution for a Convention reason (imputed political opinion) if he were to be

stopped at a Taliban checkpoint[2]. However, the Tribunal found that this danger was limited to particular roads outside Kabul. The Tribunal found that the respondent did not have a well-founded fear of persecution in Kabul, where he and his family had resided since 2007, and that he could reasonably obtain employment in Kabul so that he would not have to travel (incurring danger) to make a living[3]. The Tribunal's findings included ones that:

a. the respondent had 'long established skills making jewellery – a trade at which he had worked from 1977 to 2001 – giving him real options in a very big city, either with his own business or as an employee"[4];
b. it did not accept either that the respondent was prevented by lack of capital or physically from working as a jeweller[5];
c. work as a truck driver is not "a core aspect of the (respondent's) identity or beliefs or lifestyle which he should not be expected to modify or forego"[6].

8. Further, the Tribunal did not accept that the respondent was a high-profile target and found that the respondent had no real chance of persecution for a Convention reason in Kabul. The Tribunal found that the Taliban did not seem to be aware that the respondent was living in Kabul and that, in any event, he would not be pursued by the Taliban to Kabul[7]. There were also broader findings as to the safety of Kabul for the respondent[8].

9. The Tribunal also considered other claims of the respondent that are not important for the purposes of the appeal[9].

10. Accordingly, the Tribunal was not satisfied that the respondent satisfied the criteria in s 36(2)(a) of the *Migration Act 1958* (**the Act**)[10].

11. With respect to the complementary protection criterion in s 36(2)(aa) of the Act, the Tribunal was also not satisfied that the respondent met these. In this part of its reasons, the Tribunal was satisfied that in the respondent's "home region where he actually resides (Kabul) there would not be a real risk that he will suffer significant harm".

Decision of the Primary Judge

12. On 25 October 2012 the respondent applied to the Federal Magistrates Court[11] for judicial review of the Tribunal's decision. On 7 June 2013 the primary judge (Judge

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[2] Tribunal's reasons at [115], [119]-[120]
[3] Tribunal's reasons at [126]-[134]
[4] Tribunal's reasons at [130]
[5] Tribunal's reasons at [130]
[6] Tribunal's reasons at [130]
[7] Tribunal's reasons at [129]-[131], [134]
[8] Tribunal's reasons at [132]-[133]
[9] It found that the respondent did not face a real chance of harm simply as an Hazara Shi'a now or in the reasonably foreseeable future. The Tribunal was not satisfied that the respondent would face a well-founded fear of persecution by reason of being a returnee from Australia, a failed asylum seeker, a returnee from the west, or for having adopted "a distinctly foreign set of mannerisms and customs" while in Australia. See Tribunal's reasons at [110], [121]-[125]
[10] Tribunal's reasons at [139]

Nicholls) upheld the application and issued writs in the nature of certiorari and mandamus[12].

13. The primary judge found that the Tribunal had considered what "*could* (not *would*) happen in Kabul ... such that the (respondent) could avoid persecution" (emphasis in the original). His Honour found that this was the same error as had been identified by the majority in *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (***S395***)[13]. His Honour focused upon the Tribunal's expectation that the respondent could avoid persecutory harm on return to Afghanistan by modifying or refraining from certain conduct (driving trucks on dangerous roads) and the absence of any finding that the respondent would not engage in that conduct.

14. The ground upheld by his Honour was the first of three grounds raised by the respondent's amended notice of appeal. The third ground was not pressed,[14] and the second was rejected.[15] That rejected ground included an argument that "the Tribunal failed to consider the fear of persecution by reason of membership of a particular social group variously described as: 'truck drivers (who) transport (goods) for foreign agencies' and 'Afghan truck drivers who transport goods relating to the Government and foreign organisations'".[16]

Decision of the Full Federal Court

15. The Minister appealed on 28 June 2013. There was no notice of contention. The appeal was dismissed by a majority of the Full Federal Court (Robertson and Griffiths JJ) (**Majority**). Justice Flick dissented.

16. The Majority held that the Tribunal's approach was inconsistent with the principles enunciated by the majority in *S395* because it failed to consider not only whether but also why the respondent would change his occupation where the Tribunal's task was to decide whether the respondent had a well-founded fear of persecution[17]. There were four essential aspects to the majority's reasons.

17. First, the Majority did not accept the appellant's submission that *S395* was distinguishable because the envisaged change in this case involved no abnegation of a Convention attribute[18]. This was because "the threat had been made and the Taliban was proceeding on the basis that the respondent had the political opinion of being a supporter of foreign agencies".[19]

18. Secondly, the Majority rejected the argument that there was no error shown by the Tribunal's finding that truck driving was not a core aspect of his identity, beliefs or

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[11] That Court is now the Federal Circuit Court of Australia by operation of the *Federal Circuit Court of Australia Act* 1999.
[12] *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464 (**Primary Decision**)
[13] Primary Decision at [101], [106]-[108]
[14] Primary Decision at [14]
[15] Primary Decision at [115]-[134]
[16] Primary Decision at [117]
[17] *Minister for Immigration and Border Protection v SZSCA* [2013] FCAFC 155 (**Full Court Decision**) at [62]
[18] Full Court Decision at [63]-[64]
[19] Full Court Decision at [64]

lifestyle[20]. In this respect, the Majority considered two recent decisions of the United Kingdom Supreme Court[21] and concluded that the distinction between "core" and "marginal" rights may be important in determining whether conduct might amount to "persecution", because that concept involves "more than a breach of human rights", but their Honours found that the distinction between "core" and "marginal" rights was irrelevant here because the general threat had crystallised into a specific threat to kill the respondent.[22] Further, the Majority considered that, given the Tribunal's finding that truck driving had given rise to the Refugees Convention's protection of an imputed political opinion, there was no room to expect or require the respondent to change those activities so as to bring the case within *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270 (**NALZ**) or the "resolution" of the relocation principle outlined in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (**SZATV**)[23].

19. Thirdly, the Majority distinguished,[24] in the following way, the decision of the Full Federal Court in *NALZ*. Their Honours distinguished the judgment of Emmett J upon the basis that his Honour had found "no expectation that the appellant would cease behaviour that caused the authorities to impute a political opinion to him or to identify him as a member of a particular social group", adding: "Rather, at most, the appellant was expected to cease behaviour that caused the authorities to impute illegal conduct to him"[25]. The Majority then distinguished the judgment of Downes J upon the basis that *NALZ* "did not involve changed behaviour to avoid persecution, but rather changed behaviour to avoid creating a wrongful perception of membership of a particular class"[26], their Honours adding that this is not the case here, as "the Tribunal accepted that the Taliban targets drivers carrying construction materials and that such persons might be imputed with a political opinion supportive of the Afghan Government and/or non-governmental aid organisations".[27] The Majority also distinguished the judgment of Downes J by noting that Downes J relied upon the fact that the appellant was trading with an unlawful organisation, whereas there was no finding in this case that carrying construction material was unlawful.[28]

20. Fourthly, the Majority found that the Minister's argument impermissibly sought to introduce a test of "reasonableness" into the assessment of whether there is a real chance that an applicant would be persecuted[29]. Their Honours found that this would eliminate the important distinction present in the relocation principle that "reasonableness" does not extend to "modification of behaviour which involves any of the specified Refugees Convention-based grounds of persecution."[30] Their

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[20] Full Court Decision at [65]
[21] *HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596* (**HJ (Iran)**) and *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 (**RT (Zimbabwe)**)
[22] Full Court Decision at [66]
[23] Full Court Decision at [66]
[24] Full Court Decision at [67]-[77]
[25] Full Court Decision at [70]
[26] Full Court Decision at [76]
[27] Full Court Decision at [76]
[28] Full Court Decision at [77]
[29] Full Court Decision at [78]
[30] Full Court Decision at [80]

Honours held that this reasoning also applied to conduct giving rise to an imputed Convention ground[31].

21. The dissenting judgment of Flick J found that there was nothing in *S395* that prevented the conclusion that a claimant could avoid persecution by ceasing to engage in an activity where that was not inconsistent with the protection afforded by the Convention[32]. His Honour found, at [8], that: "*Nothing in S395 places any impediment on a conclusion being reached that, in some circumstances, a claimant could (for example) cease to engage in particular conduct that was the source of the political opinion being imputed to him, and which did not in fact form part of the way in which his political opinions were being expressed, and hence avoid persecution. Nor does the object of the Refugees Convention require any contrary conclusion*". At [9], Flick J accepted that a claimant "should not be expected to take reasonable steps to avoid persecutory harm where the harm directly relates to a characteristic that the Refugee Convention seeks to protect" – his Honour adding that it is "clearly inappropriate to require claimants to '*hide*' their anti-government political views, or to be '*discreet*' about their homosexuality". However, the balance of what his Honour says at [9] and [15] makes clear that his Honour did not accept the Convention provided "a right to engage freely in behaviour unrelated to the specified categories of protection" simply because "such behaviour may result in the imputation of a particular political opinion." At [15], his Honour returned to focus upon the "objects of the Convention" and found that "it was simply unnecessary on the facts presented in *S395* for their Honours to address the relevance of a claimant being required to modify or change his behaviour in a manner separate from the manner in which he expressed his sexuality" – adding that "it is no part of the protection afforded by (the) Convention to confer a licence or a protection upon persons to engage in forms of conduct divorced from the manner in which (for example) a person may practise or espouse his religious or political beliefs or opinions". The appellant respectfully contends that the reasoning of Flick J is to be preferred.

Part VI: Argument

Statement of the issue

22. The issue raised by the appeal is stated in paragraph 2 above.

23. The critical findings in the Tribunal's decision were those to the effect that the respondent would not have a well-founded fear of persecution in Kabul[33] where:
    a. he had already relocated and where his family were living;[34]
    b. he could (reasonably) remain by working as a jeweller, including in his own business – work as a truck driver not being a core aspect of his identity, beliefs or lifestyle which he should not be expected to modify or forego.[35]

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[31] Full Court Decision at [80]
[32] Full Court Decision at [8]-[9] and [15]
[33] Tribunal's reasons at [129]-[134]
[34] Tribunal's reasons at [126]-[127]
[35] Tribunal's reasons at [130]

24. Contrary to the conclusions reached by the primary judge[36] and the Majority in the court below[37], those findings of the Tribunal were not inconsistent with the principles enunciated by the majority in *S395*. Any indication in *S395* as to whether the Tribunal should look at what a claimant *would* do rather than what he *could* do was in the context of conduct which was an expression of a characteristic (in *S395*, homosexuality) protected by the Convention. The essential point in the present case is that driving trucks (with or without building materials) was not claimed, or found, to be, for the respondent, the expression of something protected by the Convention. Driving trucks with building materials was simply an activity that caused him to have a political opinion imputed to him. It is not in dispute that the Tribunal did not approach the matter by asking what the respondent would do, rather than what he could do, but, essentially for the reasons given by Flick J and having regard to the text and purpose of the Convention, the Tribunal was entitled to approach the matter as it did. Unlike *S395*, this is a case where all that the respondent needed to do, not to fall within Article 1A(2) of the Convention, was to change his occupation in a way that the Tribunal found to be reasonable (remaining where he had already relocated and where his family are still living)) in circumstances where there was nothing about his work as a truck driver which was an expression of a characteristic protected by the Convention. Also, a consequence of the Tribunal's findings at [130] was that not driving trucks would not, in the case of the respondent, be "persecution".

25. The Majority also held that the Tribunal erred by not considering *why* the respondent would take the step of not driving trucks,[38] but it is at least implicit in the Tribunal's findings that the respondent stopped driving trucks because of the threat from the Taliban. For the reasons just given, this was not indicative of jurisdictional error. To refrain from driving trucks was, for the respondent, neither persecution nor the abnegation of a Convention trait. Contrary to the Majority's reasoning at [64], the Minister's argument that *S395* was distinguishable because the change of occupation envisaged by the Tribunal would not involve abnegation of an attribute protected by the Convention was not answered by the proposition that the respondent's life had already been threatened by the Taliban and that they were proceeding upon the basis that the respondent had the political opinion that the Taliban had attributed to him. Again, to refrain from driving trucks, remaining in Kabul working as a jeweller, was not, for the respondent an abnegation of political opinion or anything else (such as race, or religion) that the Convention protected. For the Tribunal to find as it did was quite different from, for example, expecting a gay person to behave "discreetly" – which may involve the abnegation of a Convention characteristic if that is not how (absent the threat of persecution), that person would otherwise behave. Flick J was correct to find as he did, particularly at [8]-[9] and [15].

26. The majority in *S395* did not find that the Tribunal had proceeded on the basis of what the appellants *could* do.[39] However, McHugh and Kirby JJ said:[40]

> *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*

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[36] Primary Decision at [106]-[108]
[37] Full Court Decision at [62]
[38] Full Court Decision at [62]
[39] *S395* at 481 [10] per Gleeson CJ, 487 [34] per McHugh and Kirby JJ, 502 [84] per Gummow and Hayne JJ, 513 [110] per Callinan and Heydon JJ
[40] *S395* at [43]

consider properly whether there is a real chance of persecution if the person is returned to the country of nationality.

27. Gummow and Hayne JJ said:[41]

The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

28. Those statements have broad support[42] and the Minister does not question their correctness in the context in which they were uttered (where what appeared to be contemplated was some modification or restriction of the expression of a trait protected by the Convention.) The paragraphs of *S395* relied upon by the Majority at [62] (quoted by their Honours at [54]-[55], do not include the statement of commencement of what McHugh and Kirby JJ said at [40] that "the purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention...". That same understanding of the purpose of the Convention being the protection of the qualities captured by the Convention reasons is also evident elsewhere within those quotations. Those statements, however, do not go so far as to exclude ***any*** consideration of what a putative refugee could reasonably do upon return to his or her country of nationality.

29. The role of reasonableness in the definition of a refugee springs from both the text and the purpose of the Refugees Convention. Reasonableness may inform both the question of whether certain conduct amounts to persecution[43] and whether a person is outside his or her country of nationality owing to a well-founded fear of persecution for a Convention reason. This case involves whether reasonableness is relevant to what employment a claimant can engage in, where a change in employment would, on the facts as found by the Tribunal, enable the claimant to remain in a place where he or she would not have a well-founded fear of persecution and the change would not abnegate any trait protected by the Convention. Here, the respondent's job had given rise to an imputed political opinion, but it had no other significance. A different analysis (and outcome) from *S395* is accordingly warranted.

30. For the reasons that follow, the question posed by the definition of a refugee may be answered by reference to what a person could reasonably do so long as the word "reasonably" encompasses not only physical circumstances (or capability), but also an absence of persecution for a Convention reason.

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[41] *S395* at [80]

[42] see for example *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282; *Okoli v Canada (Minister for Citizenship and Immigration)* 2009 FC 332; Muhur v Ashcroft 335 F 3d 958 (7th Circ. 2004); *Michigan Guidelines on Nexus to a Convention Ground*, [5] agreed to at the Second Colloquium on Challenges in International Refugee Law, held at Ann Arbor, Michigan, USA, on March 23–25, 2001; *HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596*

[43] See, for example, *S395* at 489 [40] per McHugh and Kirby JJ; Refugee Appeal No. 74665/03 (NZ) 7.7.04 at [120] – [123]

31. The essential elements of the appellant's argument are:
    a. The relevant question posed by Article 1A(2) of the Refugees Convention is whether the respondent is *outside* his country of nationality *owing to* a well-founded fear of persecution for reasons of political opinion;
    b. It is relevant to that question to ask whether there is anywhere in the respondent's country of nationality to where he could reasonably relocate and in which he would not have a well-founded fear of persecution;
    c. It is also relevant to the question to ask whether the respondent could reasonably return to his former place of residence in his country of nationality if he would not have a well-founded fear of persecution in that place. Part of the consideration of that question may be whether it would be reasonable for the respondent to change his occupation to enable him to stay in that place, where the change of occupation does not involve abnegation of a trait protected by the Convention;
    d. The question whether the respondent could reasonably be expected to cease conduct that had drawn, and may in the future draw, the adverse attention of the Taliban, goes both to the question of why the respondent is outside his country of nationality and whether the harm that he fears is persecution for a Convention reason.

The relevant statutory provisions

32. The issue to be decided in this case arises out of s 36(2)(a) of the Act, which incorporates by reference the definition of a refugee contained in Article 1A(2) of the Convention. The wording of s 36(2)(a), which sets out a criterion for the grant of a protection visa, is that the visa applicant is "*a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol*". That wording closely corresponds with the prior form of s 36(2) of the Act, as considered in *NAGV and NAGW of 2002 v Minister for Immigration and Indigenous Affairs and Another* (2005) 226 CLR 161, where the provision was quoted by the plurality at 168 [11]. In *NAGV* at 176 [42], Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ explained that the phrase "*'to whom Australia has protection obligations under [the Convention]' describes no more than a person who is a refugee within the meaning of Art 1 of the Convention*"[44]

The questions posed by Article 1A(2) of the Refugees Convention

33. The text of the Refugees Convention reveals that its scope and purpose are limited. For example, not every form of harm is covered, but only persecution and then not every form of persecutory conduct is covered, only that undertaken for one of the specified reasons[45].

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[44] The balance of that paragraph from *NAGV* explained that there was accordingly in that case "no super added derogation from that criterion by reference to what was said to be the operation upon Australia's international obligations of Art 33(1) of the Convention".

[45] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 225 at 232-233 per Brennan CJ, 248 per Dawson J, 257-258 per McHugh J, 284 per Gummow J; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302-303 [24]-[29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ

34. The relevant part of the definition of a refugee in the Refugees Convention is found in Article 1A(2) that states that the term 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 ...*

35. This passage presents two cumulative conditions.[46] The first condition is that a person be *outside* the country of nationality 'owing to' fear of persecution for one or more of five specified reasons, which is well-founded both in an objective and subjective sense. Where, for instance, a person may be reasonably expected to relocate to a place within the country of nationality where there is no well-founded fear of persecution, "it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of persecution for a Convention reason."[47] Similarly, in the present case, if all that stopped the respondent from returning to Kabul and remaining in that city, working as a jeweller, thereby (on the findings of the Tribunal) having no well-founded fear of persecution for a Convention reason, was his own intention to resume driving trucks, he would not be *outside* Afghanistan *owing to* a well-founded fear of persecution for a Convention reason. The appellant's argument is accordingly supported by the text of Article 1A(2), for the same reasons as explained (with respect to the relocation principle) in *SZATV* per Gummow, Hayne and Crennan JJ at [18] and, more particularly, at [19] with reference to *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440 per Lord Bingham of Cornhill. See also *SZATV* per Kirby J at [94] to similar effect.

36. The second condition may be satisfied in one of two ways: first, if the person is *unable* to avail himself or herself of the protection of the country of nationality; and secondly, if the person is *unwilling* to avail himself or herself of the protection of the country of nationality because of a well-founded fear of persecution for a Convention reason. The protection referred to here is diplomatic or consular protection.[48]

37. The protection to be afforded by the Convention is not in respect of any form of harm. The harm must amount to "persecution".[49] In the context of the Refugees Convention, the notion of persecution refers to the conduct that includes a violation of fundamental human rights and freedoms[50] or, in other words, that offends the

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[46] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 21 [61]-[62]; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 283 per Gummow J

[47] *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440 per Lord Bingham of Cornhill applied in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 25-26 [19]

[48] *Khawar v Minister for Immigration and Multicultural Affairs* (2002) 210 CLR 1 at 21 [62]

[49] Although Article 1A(2) refers to a fear of "being persecuted" the critical notion is still "persecution". The passive voice acts to put the focus on the predicament of the putative refugee rather than the persecutor: *Refugee Appeal No. 72635/01* (6 September 2002); [2003] INLR 629 at [168]

[50] *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [20] per Gleeson CJ, Hayne and Heydon JJ, 26 [73] per McHugh J; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at 21-22 [61]-[65], 32 [99] per McHugh J

standards of civil societies which seek to meet the calls of humanity[51]. However, it is not every breach of human rights that is covered by the Convention, as applied by s 36(2)(a). To be "persecution", it must be serious harm. Also, that persecution must be for one of the reasons enumerated in the Convention. (Section 91R of the Act helps inform both of these constraints in Australia, although it is not essential to the present case.) The question whether particular conduct is undertaken for one of the Convention reasons cannot be entirely isolated from the question whether that conduct amounts to persecution.[52] Moreover, the question whether particular discriminatory conduct is or is not persecution for one of the Convention reasons may necessitate different analysis depending on the particular reason assigned for the conduct.[53] Few fundamental rights can properly be described as absolute and some may, for example, give way to legitimate objects of national importance[54]. These are the concepts that lay behind the discussion of margin and core rights in the decision of the New Zealand Refugee Status Authority[55] adopted by the United Kingdom Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596. The concept is also apparent in the reasons of McHugh and Kirby JJ in *S395*[56] (compare per Gummow and Hayne JJ at 501 [83]) – particularly considering the way in which those remarks conclude by focusing upon concealment of a Convention trait.

38. The decision in *NALZ* provides a pertinent example of the application of these principles. In both *NALZ* and in the present case, the conduct that the Tribunal found to have caused the claimant difficulty was conduct which did not itself involve the expression of a trait protected by the Convention. In *NALZ*, the appellant, a citizen of India of Tamil ethnicity, was engaged in selling electrical goods. On his employers' instructions, he sold generators directly to Sri Lankan traders to be taken to Vanni[57] in Sri Lanka. He claimed that he was arrested twice and was accused of selling electric generators to the Liberation Tigers of Tamil Eelam (**LTTE**). On the second occasion he was accused of having LTTE dealings and providing arms and ammunition to the LTTE. Upon his release, he was warned that if he did not leave India he would be found to be an accomplice of the LTTE and branded as an LTTE member. The appellant claimed that he had acquired a profile as a suspected LTTE sympathizer and faced persecution for that reason even though he had never been a supporter of that group.

39. The Tribunal found that the appellant could avoid future arrests by not selling electrical goods to Sri Lankan nationals and that it was not unreasonable for him to avoid arrest by so doing. It found that the appellant feared that he may be harmed

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[51] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303 [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ

[52] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302 [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This is a corollary of an holistic approach to the interpretation of the Convention.

[53] *Chen Shi Hai* loc cit.; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-259 per McHugh J

[54] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303 [28] per Gleeson CJ, Gaudron, Gummow and Hayne JJ referring to Justice McHugh's analysis in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-259

[55] Refugee Appeal No. 74665/03

[56] (2003) 216 CLR 473 at 489 [40]

[57] The Vanni is a large area in the northern part of Sri Lanka

because of suspected connections to the LTTE, but such a connection would be suspected only because he sold generators to Sri Lankan traders who were suspected of having a connection with the LTTE[58]. For that reason, the Tribunal found that the appellant did not have a well-founded fear of persecution and so was not a person to whom Australia owed protection obligations.

40. Justice Madgwick (in dissent) found that the Tribunal had committed the error explained by the majority in *S395*. Emmett and Downes JJ found that it had not, but for different reasons. Emmett J distinguished *S395* on two bases. The first was that the conduct feared by the appellants in that case applied equally in all parts of Bangladesh.[59] Secondly, whereas in *S395* there was a clear finding that homosexual men in Bangladesh constituted a particular social group for the purposes of the Convention, in *NALZ* "there is no suggestion that the appellant fears persecution by reason of any opinion or belief that he holds" or other Convention reason.[60] At [48], Emmett J explained that "*while the Tribunal accepted that the appellant feared that he may be harmed because of suspected connections to the LTTE, such a connection would be suspected only because he sold generators to Sri Lankan traders who were suspected of having a connection to the LTTE*". At [49], Emmett J held that "*by refraining from dealing with Sri Lankans in those circumstances, the appellant is not being subjected to a threat of persecution for any Convention reason*". It is true that the last part of what Emmett J says in *NALZ* at [50] suggested that the appellant in that case was "not expected to cease behaviour that caused the authorities to impute a political opinion to him, or to identify him as a member of a particular social group" and that "at most, he is expected to cease behaviour that caused the authorities to impute illegal conduct to him", but the main thrust of the reasoning of Emmett J was not that the conduct was illegal but rather that it was not engaged in for one of the reasons protected by the Convention. See again, per Emmett J at [47]-[49] and the first part of [50].

41. Downes J also distinguished *S395* for two reasons. The first was that the appellant "*does not suggest that he was connected with the LTTE. His fear of persecution is associated with his appearing to be associated with the LTTE because he trades with Sri Lankans. Accordingly, the Tribunal's remarks addressed the question whether the appellant could avoid appearing to be within a class protected by the [Refugees Convention]*".[61] The present case is similar as, in each case, the conduct that the Tribunal envisaged the applicant could change was not conduct that expressed a Convention trait, but merely conduct creating the (false) appearance of opinion or support that was not actual. As Downes J explained, *NALZ* was "one step removed from S395" as "it does not contemplate changed behaviour to avoid persecution, but to avoid creating a wrongful perception of membership of a protected class" – a matter which his Honour thought "to be significant even though perceived membership of a protected class can give rise to persecution".[62] The second basis on which Downes J distinguished *S395* did make reference to the unlawfulness of the activity that the appellant was expected to forego,[63] but the main point was that "*the*

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[58] 140 FCR 270 at 281 [48]
[59] 140 FCR 270 at 281 [46]
[60] 140 FCR 270 at 281 [47]
[61] 140 FCR 270 at 282 [57]
[62] 140 FCR 270, still at [57]
[63] 140 FCR 270 at [58]-[59]

Refugee Convention protects persons from persecution for attributes over which they have no real control"[64]. It was in that context that Downes J immediately proceeded to say: "beliefs fall within its purview. Unlawful trading does not". There is no relevant difference between conduct which is rendered unlawful by the State and conduct which is prohibited by an opposition group (such as the Taliban in this case). The Taliban targeting drivers carrying building materials is relevantly no different from the Indian government targeting people supplying (at least indirectly) the LTTE with electrical or other goods. What was critical to the reasoning of Downes J was the focus of the Convention. While the critical conduct happened to be unlawful, what was important was that it was outside the scope of the protection afforded by the Convention. With respect, that was not addressed by the Majority.

42. In *NALZ*, both Downes J[65] and Emmett J[66] were clearly of the view that it is not enough, for conduct to be protected, merely that the conduct has led to imputation of a political opinion that is not in fact held. *NALZ* was decided on the basis that it was relevant to determination of refugee status to ask whether it was reasonable to expect a person not to engage in conduct that gave rise to a well-founded fear of harm (through imputation), but was not a Convention protected attribute. That is how *NALZ* assists, at least by way of analogy to the present case, despite any factual differences. See also per Flick J at [12]-[15] as to *NALZ*.

Application of the principles

43. As noted above, there is no claim by the respondent, or any finding, that he drove trucks carrying construction materials as an expression of a political opinion. That was merely a means that he chose to earn money. The Tribunal put to the respondent that he could remain in Kabul, where he had lived for some years[67]. Whereas the respondent asserted that, now that he had been threatened by the Taliban, they could easily find him in Kabul,[68] the Tribunal did not accept either that the Taliban were aware that the respondent was living in Kabul[69] or that the respondent is a high profile target who would be actively pursued and targeted there[70]. As noted above, the Tribunal made other findings as to the safety of the respondent in Kabul such that he had no well-founded fear of persecution in that city.[71] As also noted above, the Tribunal made findings at [130] to the effect that the respondent was able to reasonably obtain employment in Kabul utilising his long established skills making jewellery, or establish a business as a jeweller, and did not accept that the respondent would be prevented from doing so either by lack of capital or physical incapacity[72] - and the Tribunal made the specific finding at the end of [130] that it did not accept that working as a truck driver "is a core aspect of the applicant's identity, or beliefs or lifestyle which he should not be expected to modify or forego".

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[64] 140 FCR 270 at [58]-[59]
[65] 140 FCR 270 at [57]-[59]
[66] 140 FCR 270 at [47]-[49]
[67] Tribunal's reasons at [66]
[68] Tribunal's reasons at [66]
[69] Tribunal's reasons at [129]
[70] Tribunal's reasons, beginning at [130]
[71] Tribunal's reasons at [131]-[134]
[72] Tribunal's reasons at [130]

44. This reasoning dealt with a number of issues. Firstly, it answered the factual submission that the respondent could not find any work in Kabul other than truck-driving. Secondly, it dealt with the implicit submission that the respondent would either face significant economic harm in Kabul such as to amount to serious harm and thus persecution (cf. s 91R(2)(d)), or he would be forced to drive trucks and be killed by the Taliban. Thirdly, it dealt with the issue of whether ceasing to drive trucks might, of itself, be inconsistent with one of the characteristics which the Convention seeks to protect.

45. It is necessary to return to that third point, but before doing so, it may be noted that, with the exception of the fact that it does not involve moving from one place to another, the reasoning is identical to that involved in the application of the relocation test. That test turns on there being somewhere in the country of nationality where the putative refugee does not have a well-founded fear of persecution for a Convention reason. The decision maker must consider whether it is reasonable, in the sense of practicable, for that person to live in that place. That must depend on the particular circumstances of the applicant for refugee status and the impact on that person of relocation to the place of residence.[73] That is what the Tribunal considered in this case. In particular, it examined both the availability of employment and the impact of that employment on the respondent, having particular regard to the fact that truck driving was not a "core aspect" of the respondent's beliefs or lifestyle.

46. There is no reason why the principle underlying the relocation test is not helpful here. (Relocation usually involves more change than merely having to alter one's job or occupation. It typically involves that and much more including moving home and all that is involved in moving to a new location.) The question remains essentially the same: is there somewhere within the country of nationality where the applicant does not have a well-founded fear of persecution and could reasonably in his or her circumstances, be expected to live.

47. Returning to the third point above, the Majority in a number of ways proceeded upon the basis that once particular conduct causes a political opinion to be attributed to a claimant, there is "no room to expect or require [that person] to change those activities"[74] so that he or she may live without a well-founded fear of persecution. That assumption featured not only in the Majority's reasoning at [66], rejecting the usefulness of any distinction between the "core" and the "margins" of fundamental human rights, but also in its earlier rejection, at [64] of the submission that *S395* was distinguishable from the present case because any change in work envisaged by the Tribunal did not involve abnegation of an attribute protected by the Convention. The Majority there rejected the argument because "the threat had been made and the Taliban was proceeding on the basis that the respondent had the political opinion of being a supporter of foreign agencies". The same idea featured in the Majority's distinction of *NALZ* upon the basis that the present case was one in which the respondent's conduct in transporting construction building materials gave rise to an imputed political opinion.[75]

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[73] SZATV at 27 [24].
[74] Full Court Decision at [66]
[75] Full Court decision at [75]-[76]

48. It also appears to have affected the Majority's sense that the case was not relevantly analogous with the relocation principle.[76] This was not a case, such as *SZATV* at [97], where Kirby J said that "relocation will be unreasonable where to propound it amounts to an affront to any of the specified Refugee Convention-based grounds of persecution, which it is the object of the Refugees Convention to prevent discourage and redress". At [80], the Full Court apparently saw the distinction between what could reasonably be expected applying the relocation principle and the kind modification of behavior seen by Kirby J in *SZATV* at [97] to be an affront to the Convention as being one which "applies to conduct giving rise to an imputed Convention ground". It would not matter (on the Majority's view) what the conduct was, it would seem, or whether it was or was not engaged in as an expression of a characteristic protected by the Convention. The appellant respectfully submits that this is going too far and shows error. Contrary to the Majority's reasoning at [80], this is not a case where the Tribunal acted contrary to the principle stated by Kirby J in *SZATV* at [97]. The Minister's argument in the present case involves no "affront to any of the specified Refugee Convention-based grounds of persecution..."[77]. This is not a case like *SZATV* where the occupation which the decision-maker envisaged being altered (as part of relocation) was one that involved the expression of the review applicant's political opinion. See *SZATV* per Gummow, Hayne and Crennan JJ at [29]. In *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 (***SZFDV***), an opposite result to *SZATV* was reached by the same bench, as relocation in *SZFDV* involved no abnegation of a Convention trait (see *SZFDV* per Gummow, Hayne and Crennan JJ at [15]-[16]). At [80], the Majority referred to *SZATV* at [97], but, with respect, erred by assuming that changing from truck-driving to being a jeweller would involve modification of behaviour which it is the object of the Convention to protect.

49. *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 does not support the Majority's reasoning. That case involved a claim of persecution for reasons of homosexuality. One argument presented by the Secretary was that "applicants who are gay and who avoid persecution by a modification of their behaviour may be said on return to have taken internal flight within the self to avoid persecution" (see per Lord Hope at [20]). As noted in *RT (Zimbabwe)* at [19] per Lord Dyson (the rest of the Court agreeing), that argument was rejected, as were arguments that it was necessary for the refugee claimant to show that living "discreetly" (as regards his homosexuality) was itself "persecution" and was not "reasonably tolerable". None of those was the Minister's argument in this case. No discretion as to a Convention trait was envisaged by the Tribunal or by the Minister's argument. *RT (Zimbabwe)* at [19] simply refers to *HJ (Iran)*.

50. The purpose of the Convention is to protect the holding of beliefs, opinions, membership and origins.[78] That is not the same as the protection of conduct that might give rise to a false imputation of such an opinion, belief, membership or origin. Conduct might, in some circumstances, be protected, but not where it falls outside the limitations of the Convention.

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[76] Full Court decision at [66], [74] and [78]-[82]
[77] Those being the words of Kirby J in *SZATV* at [97]
[78] *S395* at 216 CLR 473, 489-490 [41]

51. Here, any *right* in question was not the right to drive trucks, but the right to be gainfully employed to be able at least to subsist. On the findings of the Tribunal, particularly at [130], that right would not be denied by refusal of a protection visa.

52. With respect to the Tribunal's use of the phrase "core aspect", no jurisdictional error was made. The Tribunal was not using this phrase in the way it was considered in *HJ (Iran)*. In that case, the context was a claim to fear persecution for reasons of homosexuality - an immutable characteristic. In *RT (Zimbabwe)*, the context was a claim based on persecution for reason of a lack of a political opinion (held to be a Convention protected right). No such characteristic would be impinged upon in this case by the Tribunal's reasoning. Rather, the Tribunal was recognising that work as a truck driver was not something which for the respondent was protected by the Convention. That was unexceptionable, as work as a truck driver was, for the respondent, not part of any Convention trait (or its expression) or essential to his ability to work for a living.

53. For those reasons, the approach of the Tribunal was not inconsistent with the majority judgments in *S395* and was consistent with the approach considered in *SZATV*.

54. The Majority, with respect, ought not to have approached the case by treating as protected by the Convention any conduct that previously lead to the respondent being imputed with a political opinion. What is protected against is well-founded fear of "being persecuted" for a Convention reason. On the Tribunal's findings of fact, by reason of the safety that the respondent would have in Kabul, remaining and working in that city as a jeweller, the respondent was not outside Afghanistan because of any well-founded fear of persecution. On those findings, he would have no well-founded fear of persecution if he remained in Kabul as a jeweller.

55. With respect to the strands of Majority reasoning summarized above under the heading "the decision of the Full Federal Court":

55.1 The first (rejecting the argument that *S395* was distinguishable because the present case involves no abnegation of a trait protected by the Convention) is answered above by all of paragraphs 21-54.

55.2 The second (bearing upon the Tribunal's use of language – "core aspect of...identity, beliefs or lifestyle" – in the last sentence of [130]) is touched upon in paragraphs 47 and 52 above. The Majority first referred at [65] to the discussion by the Supreme Court of the United Kingdom of concepts of "marginal" and "core" rights in *RT Zimbabwe*[79]. The Majority there accepted[80] that this distinction may be important in determining whether conduct might amount to "persecution", because that concept involves "more than a breach of human rights", but, at [66], their Honours found that the distinction between "core" and "marginal" rights had limited if any relevance in the present case, because the general threat "had crystallised into a specific threat to kill the applicant". Their Honours went on to say (still at [66]): "*In the circumstances where the imputation arose solely because of the Taliban's*

[79] *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152
[80] Full Court decision at [66](c)

perception of the respondent's particular truck driving activities as indicating that he was a supporter of the Afghan government and/or foreign aid agencies and where for that reason the Taliban had informed the local council people 'to take firm action as soon as possible to get rid of this apostate, criminal person', we consider that the primary judge was correct to find at [105] that, given the Tribunal's specific finding at R[120] that those particular activities gave rise to the Refugees Convention's protection of an imputed political opinion, there was no room to expect or require the respondent to change those activities so as to bring his case within NALZ or the 'resolution' of the relocation principle outlined in SZATV". In the appellant's respectful submission, that statement shows error by its assumption that any conduct that leads to a political opinion being imputed to a claimant must for that reason be protected by the Convention, such that there is "no room to expect or require (the person) to change those activities"[81] – regardless of whether the conduct was in fact the expression, or part of the expression, of a Convention trait. The correct approach is, with respect, that taken by Flick J at [15].

55.3 The third (relating to *NALZ*) is dealt with above at paragraphs 38-42.

55.4 The fourth (i.e. the reasoning[82] that the rationale underlying the test of reasonableness in a relocation case cannot extend to changing an occupation which gives rise to an imputed political opinion) is answered at paragraphs 35, 45-46, 48-49. This is not a case (like *SZATV*) where the change of occupation envisaged by the Tribunal would abnegate a Convention trait. The relocation principle is useful and analogous: In each case, the claimant is not outside his/her country of nationality because of a well-founded fear of persecution. See again the rationale of the relocation principle in *SZATV* at [19] per Gummow, Hayne and Crennan JJ and at [94] per Kirby J.

Other points

56. In its conclusion, the Majority, at [90] questioned whether it mattered that the Tribunal did not make a finding whether the respondent was a member of a "particular social group" of truck drivers who carry construction materials in Afghanistan" and said *"if that social group were accepted as a matter of fact then carrying construction materials would be an element of that particular social group. In that event the Minister's contention based on the imputed nature of the respondent's political opinion would provide no answer because, it might be said, members of the group had to modify some attribute or characteristic of the group to avoid persecution..."*. The answer to this is that there are significant difficulties in the "narrower" particular social group there postulated. One is that the group would have the fear of persecution as its essential characteristic[83]. Because the transportation of construction material was not something innate to the respondent, he could only bring himself within the group by breaching the informal prohibition of that activity, just as the parents of black children could only form a group by breaching the one

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[81] Full Court decision at [66]

[82] Full Court decision at [79]-[82]

[83] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 400 [36], Gleeson CJ, Gummow and Kirby JJ held that "the characteristic or attribute common to all members of the group cannot be the shared fear of persecution". See also per McHugh J at 413 [75].

child policy[84]. For that reason, the proper focus of the argument was on the political opinion imputed to the respondent applicant by reason of his carrying building materials. Further, the Tribunal made a finding that it was "not satisfied that Afghan truck drivers as such are persecuted simply by reason of membership of the particular social group 'Afghan truck drivers'"[85]. If one adds "carrying building materials", that was only said to be significant because it led to imputation of political opinion – which was the very case dealt with by the Tribunal.

57. On the approach of the Majority, broad statements in *S395* apply to circumstances where any conduct (regardless of its nature) has given rise to an imputed political opinion and, so long as the conduct has brought a claimant to the attention of the putative persecutors and caused the claimant to be attributed by them with a Convention trait (such as political opinion), it is irrelevant to ask whether it would be reasonable to expect the applicant not to engage in that conduct again. This does not address the real concern of the Convention which was at the heart of the appeal before the Court.

58. Flick J was correct to focus on the purpose of the Convention as a means to resolving the issues before the Court. Rather than taking the approach adopted by the Majority, which was to see how the reasoning of the Tribunal matched the literality of statements in *S395* (which, given full effect, might have been apprehended not to allow for the relocation principle, whereas that was not the Court's intention[86]), Flick J looked at the relevant statements in *S395* in their context and thereby reached his conclusions at [15]. Whereas Flick J's approach was focussed on the extent of the protection afforded by the Convention, the Majority took a narrow view of *S395*, deploying its language regardless of the circumstances in which the language was used – and, in particular, regardless of whether the altered behaviour envisaged by the decision-maker would abnegate any Convention trait of the claimant. By taking that approach, the Majority also failed to recognise that the Minister's argument was not dependent on a strict analogy with the relocation principle or with a direct application of *NALZ*. Rather, those were merely signposts that the statements in *S395* could not always be applied literally. If they were, the scope of the Convention would be extraordinarily large. Here, for example, it could extend protection to people who chose to drive trucks where there was no need to do so.

Part VII: Relevant legislative provisions

59. The terms of s 36 of the Act, as at the time of the Tribunal's decision, are set out at the Annexure to these submissions. This provision remains in force in this form.

Part VIII: Orders sought

60. The Minister seeks the orders set out in the Notice of Appeal.

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[84] The difficulty of defining a particular social group entirely by reference to them suffering persecution, or by reference to an activity rather than a trait essential to who they are, is illustrated by *Applicant A v MIEA* (1997) 190 CLR 225 241-243, 257 and 285-286; *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at 299-300.

[85] Tribunal's reasons at [115]

[86] The subsequent cases of *SZATV* and *SZFDV* show that the relocation principle is not affected by *S395*

Part IX: Oral argument

61. The appellant estimates that he will require **2** hours for his oral argument (including any reply).

10 Dated: 20 June 2014

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ANNEXURE

Relevant legislative provisions

Migration Act 1958 (Cth), as at 26 September 2012

36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

Protection obligations

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

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

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

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

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

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

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

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

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

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

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

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