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 REPLY

Part I:

1. This Reply is in a form suitable for publication on the internet.

Part II:

2. The Appellant maintains his prior submissions and makes the following further submissions in reply.

3. No notice of contention was filed by the First Respondent in relation to the findings of the Federal Circuit Court referred to in paragraph 5(a) and (b) of his submissions.

4. The First Respondent's submissions ignore, including at paragraphs 11-23, the causative element of the definition of a refugee, being the first condition of Article 1A(2) of the Refugees Convention, identified in paragraph 35 of the Appellant's submissions. In *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 24-25 – before coming at [19] to their endorsement of what was said in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440 per Lord Bingham of Cornhill – Gummow, Hayne and Crennan JJ referred with approval to *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 21 [61]-[62] per McHugh and Gummow JJ and *Minister for Immigration and Multicultural Affairs v Respondents 152/2003* (2004) 222 CLR 1

Filed on behalf of the Appellant by:

Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000
DX 444 Sydney

Date of this document: 25 July 2014
Contact: Andras Markus

File ref: 14004709
Telephone: 02 9581 7472
Facsimile: 02 9581 7650
E-mail: Andras.Markus@ags.gov.au

at 8 [19] per Gleeson CJ, Hayne and Heydon JJ. Those passages make clear that the Convention definition of "refugee" presents two cumulative conditions, the first of which is that a person be "*outside* the country of nationality 'owing to' fear of persecution...". *S152* at [19] also makes clear that it is not enough "merely that" (the refugee claimant) "is unwilling" to return to his country of nationality.

5. *SZATV* and the simultaneous judgment in *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 are also inconsistent with the First Respondent's submissions in other ways. One of those is that the rejection in those cases of arguments to the effect that *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 left no room for the application of the relocation principle illustrates that *S395* should *not* be understood as creating any simple and absolute rule to the effect that a person who "would" behave in such a way as to face a well-founded fear of persecution will *necessarily* fall within the definition of a refugee in Article 1A(2) of the Refugees Convention. Where the relocation principle, as explained in *SZATV* and *SZFDV*, applies, it may not be overcome simply by the claimant insisting that he or she "would" nonetheless go where danger would be faced, rather than where he or she would have no well-founded fear of persecution for a Convention reason. There is no absolute necessity for the decision-maker always to be governed by what the claimant "would" do. To contend that there is such an absolute necessity ignores not only the text of the Convention, including the causative component of Article 1A(2) explained in *SZATV* and *Januzi*, but it also fails to acknowledge the purpose of the Convention referred to in paragraph 50 of the Appellant's submissions with reference to *S395* at 489-490 [41].

6. Also, as the Full Court of the Federal Court of Australia observed in *Minister for Immigration and Multicultural and Indigenous Affairs v VWBA* [2005] FCAFC 175 at [12], the majority (in *S395*) "*did not decide whether, if the Tribunal were to find that a person had modified his or her behaviour under the influence of a well-founded fear of persecution, and as a result of the modification would no longer have that fear, the person would without more be a refugee*".

7. In further answer to paragraph 23 of the First Respondent's submissions, the Appellant is not consigning any "lesser standard of protection" in cases of imputed, rather than actual political opinion, or differentiating inappropriately between Convention reasons. Rather, the Appellant is focusing upon the causative element of Article 1A(2) (previously described) and is also pointing to the purpose of the Refugees Convention which, as *SZATV* makes clear, does allow some measure of what Kirby J described (at [104] in *SZATV*) as "reasonable adjustment". Again, the findings of the Refugee Review Tribunal ("the Tribunal") at AB21 [130] are important. No abnegation of a Convention trait would be involved on the Tribunal's findings.

8. With respect to paragraph 26 of the First Respondent's submissions, the quotation from what was said by Gummow and Hayne JJ at [83] needs to be appreciated in the context in which it appears, particularly what was said by their Honours at [80]-[82]. That context was the expression of the homosexuality of the review applicant.

9. In answer to paragraph 27 of the First Respondent's submissions, the First Respondent again, with respect, appears to overlook or incorrectly state the Appellant's argument. That argument, as already indicated, focuses upon the causative component of the definition in Article 1A(2) and the purpose of the Convention.

10. To the extent that the Appellant has used the expression "traits", it has done so synonymously with the qualities or features embodied within the various Convention reasons. It is not enough, however, for a person to satisfy only the second and not the first of the two cumulative conditions referred to in paragraph 35 of the Appellant's submissions (i.e. those identified in *Khawar* at 21 [61]; *SZATV* at 24 [15]-[16]) – or vice versa. The Appellant is not denying the need to look at the circumstances of the individual. Nor is the Appellant denying the need to look at the motivation of the persecutor when testing the presence of a Convention reason. The Appellant's argument is only requiring consideration to be given to each aspect of Article 1A(2).

11. Similarly, paragraphs 28-30 of the First Respondent's submissions proceed on a mischaracterisation of the Appellant's argument. The Appellant is not denying the need to examine the motivation of the persecutor, rather than the victim, in the context of the Convention reason requirement. Rather, the Appellant is making the point that the First Respondent is not outside his country of nationality because of a well-founded fear of persecution for a Convention reason if, as the Tribunal has found, he may avoid any well-founded fear of persecution by remaining in Kabul, working as a jeweller, reasonably, without modifying or giving up any "core aspect of [his] identity or beliefs or lifestyle which he should not be expected to modify or forego" (AB 21, [130] lines 19-29).

12. Each of the examples given by the First Respondent at paragraph 29 involves scenarios that beg their own questions and involve distinguishable facts. None serves to refute the principles for which the Appellant has contended, or to deny the present case.

13. With respect to paragraphs 31-32 of the First Respondent's submissions, reference has already been made above to the Appellant's use of the term "Convention trait". The fact that a "particular social group" may have different characteristics depending upon the facts of the case does not deny the approach for which the Appellant contends. Whilst it is not in any way essential to the Appellant's case, it is also observed that the possible range of composite indicia of a "particular social group" also highlights how affectation of one part of a composite giving rise to such a group, where it exists, may not of itself be an adjustment that is unreasonable or incompatible with the Convention (see *SZATV* per Callinan J at [107]).

14. Paragraphs 33 and 51-52 of the First Respondent's submissions, with respect, ignore the way in which *SZFDV* came to a different result from *SZATV* (as explained in paragraph 48 of the Appellant's submissions).

15. With respect to paragraphs 34-37 of the First Respondent's submissions, the Appellant maintains his submissions at paragraph 56 and also repeats his reference above to the absence of any notice of contention filed by the First Respondent with respect to the findings made by the Federal Circuit Court at AB 238 [120]-[123], rejecting the ground described by that court at AB 237 [116]-[117]. Also, the First Respondent points to no evidence to show any feature other than fear of persecution to distinguish truck drivers who carry building materials from truck drivers generally (who were found by the Tribunal not to be a "particular social group" (AB18 [115]).

10

16. The First Respondent's submissions under the heading "Conduct and Persecution" again, with respect, repeat the error of ignoring the causative element of the definition of refugee. The Tribunal's decision in the present case ultimately turned upon the reasonableness for the First Respondent of altering his occupation to that of a jeweller and remaining in Kabul (where he had already relocated). Because it was reasonable for him to make that alteration, the said causative component was not fulfilled. It is no answer to say that if the First Respondent did go back to Afghanistan and drive trucks carrying building materials, he may be killed – and that being killed would be serious harm. If his position is that he insists upon
20 driving trucks (carrying building materials or not), he is not outside of Afghanistan because of any well-founded fear of persecution – given the safety that the Tribunal has found he would have by remaining in Kabul as a jeweller.

The textual basis for the relocation principle

17. Paragraphs 54-62 of the First Respondent's submissions contend a different basis for the relocation principle (Article 33(1)) than has been found by this Court in *SZATV*[1] and *SZFDV* (the causative component of Article 1A(2)).

30 18. No good reason has been given for overruling those two decisions of this Court. For the approach taken by the court in this respect, see *Plaintiff M76-2013 v Director-General of Security* (2013) 88 ALJR 324 at 347 [125] per Hayne J; *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1106-1107 [62]-[70]; *Queensland v Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J.

19. There is no suggestion that this Court was inadvertent as regards Article 33, which was mentioned in the transcript of the hearing of *SZATV* and *SZFDV* ([2007] HCA Trans 205 at page 34 of 72) .

40 20. The decision in *SZATV* followed the decision of the House of Lords in *Januzi* that was "based firmly on the words of the 1951 Convention"[2].

21. Also, whereas the text of Article 1A(2) provides a satisfying basis for the relocation principle, as explained in the above passages of *SZATV* and *Januzi,* Article 33(1) does not provide an attractive textual foundation. It refers only to return to the "frontiers" of "territories where (the person's) life or freedom would threatened".

---

[1] At 25-26 [16], and more particularly, [19], with reference to *Januzi* at 440. See also *SZATV* at [140].

[2] Goodwin-Gill and McAdam, *The Refugee in International Law*, OUP, 2009 at 125

22. Further, if Article 33 did help support the relocation principle, that would not justify ignoring the causative component of Article 1A(2), as does the First Respondent.

Dated: 25 July 2014

10

Geoffrey Johnson SC
Telephone: (02) 8226 2344
Facsimile: (02) 8226 2399
Email: geoffrey.johnson@stjames.net.au

Justin Smith
Telephone: (02) 9231 6351
Facsimile: (02) 9221 5386
Email: jsmith@selbornechambers.com.au