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

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. In addition to the issue identified in Part II of the Minister's submissions, this appeal raises the question of whether a person who has a well-founded fear of persecution for a Convention reason, but who can reasonably relocate to an area within his country of nationality to avoid that persecution, is a refugee within the meaning of Article 1A(2) of the Convention.[1]

Part III: Section 78B of the *Judiciary Act 1903*

3. The First Respondent considers that no notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The First Respondent makes the following points in respect of the Minister's summary of the background to the matter.

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[1] The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (together referred to in these submissions as **the Convention**).

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5. *First*, the Minister notes that the Tribunal found that the Taliban imputed an adverse political opinion to the First Respondent.[2] This is correct, however, this was not the only Convention nexus relied upon by the First Respondent:

a) The First Respondent claimed in a statutory declaration that he had an actual political opinion as a supporter of foreign agencies[3] (which was consistent with the political opinion imputed to him). This claim was noted by the delegate.[4] It was also noted by the Tribunal,[5] and not rejected. It was claimed before the Federal Circuit Court that the Tribunal erred in failing to address the 'actual political opinion' claim. However, the court considered that it was unnecessary for the Tribunal to deal with it because the First Respondent only raised it in his statutory declaration before the delegate and did not repeat the claim later;[6]

b) The First Respondent also claimed that that he was a member of a particular social group, being truck drivers who transport goods for the government or foreign agencies.[7] It was claimed before the Federal Circuit Court that the Tribunal erred by not dealing with this particular social group claim. However, the court found that there was no point of distinction between the Tribunal's analysis as to 'imputed political opinion' and 'particular social group' because they were derived from the same underlying facts and it was sufficient that the Tribunal dealt with the underlying facts in the context of the imputed political opinion claim.[8] It accepted though that the First Respondent's claim was put on both bases.

6. *Secondly*, the Minister says that the Tribunal found that the danger to the First Respondent was *"limited to particular roads outside Kabul"*.[9] In this regard, the Tribunal accepted that there was an alternative safer route, but it might not be a reasonable option for commercial traffic.[10] Further, the Federal Circuit Court noted that it was unclear from the Tribunal's findings as to whether the danger to the First Respondent was in respect of the roads between Ghazni and Jaghori or included the region of Kabul.[11]

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2 Appellant's Submissions, p 2[7] lines 43-44.
3 AB88 [22].
4 AB107 line 45, AB108 line 38 and 52.
5 AB7 [31] lines 6-7.
6 AB238-239 [124]-[126].
7 AB88 [21]; AB176-7 [108]-[112].
8 AB238 [119]-[122].
9 Appellant's Submissions, p 3 lines 1-2.
10 AB19 [120] lines 39-43.
11 AB235 [102] lines 1-5.

Part V: Relevant legislative provisions

7. The First Respondent accepts the relevant legislative provisions are identified by the Minister in Part VII to the Appellant's Submissions and annexed thereto.

Part VI: Argument

The required approach

8. The question as to whether a decision-maker considering a claim for protection under the Convention can require an applicant to engage in conduct that it regards as reasonable in the circumstances upon his or her return to the country of nationality was comprehensively dealt with in *S395*.[12]

9. It may be observed that, in *S395*, the majority judgments identified their core conclusions about the required processes by reasoning from the language of the Convention; an analysis not limited to any particular Convention nexus or type of persecution. The conclusions reached were expressed to be of a general nature, applying "invariably"[13] and going to the decision-maker's "jurisdiction or power".[14]

10. Common to the majority judgments was that the Convention requires a decision-maker to assess what the claimant *would* do upon her or his return and, upon that factual conclusion, to assess whether there is a serious risk of persecution for a Convention reason. If that analysis reveals that the claimant would modify her or his behaviour to avoid persecutory harm, further questions arise as to whether taking that course itself may constitute persecution.

11. It is readily apparent that an assessment of this kind allows the decision-maker to consider whether the person would in truth continue to behave in a way that would attract persecution. In many cases, claims of this kind may not be credible. However, where they are credible and the Tribunal accepts that persecution for a Convention reason would follow; no further hurdle must be met by the claimant ("... *there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason?*"[15]).

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12 *Appellant S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71, see especially [40]-[43] and [82]-[83].

13 *S395*, at [43].

14 *S395*, at [82].

15 *S395*, at [42].

12. Where the decision-maker concludes that the claimant would on return modify her or his behaviour, then the question would arise whether this itself means that the person would on return be persecuted for a Convention reason. This would involve *inter alia* a consideration of the significance of the avoided behaviours to the person; in some cases, the decision-maker may find that the modifications that would be made do not amount to persecution (and therefore the person would not be a "refugee" under the Convention).

13. It is not in dispute that the approach described in *S395* was not undertaken by the Tribunal in the present case. The courts at first instance and below found that this amounted to jurisdictional error.

14. The Minister argues that the *S395* approach can be short-circuited in certain categories of cases. In these cases, according to the Minister, a decision-maker can ignore what the person *would* do on return and whether they *would* in fact face Convention protected persecution. On the Minister's argument, the decision-maker can, instead of asking the question posed by the Convention, ask whether the person could avoid harm by modifying her or his behaviour in a manner that is "reasonable", including because any modification does not involve the abnegation of what is said to be "a Convention trait". If the answer to this question is "yes", then the decision-maker (according to the Minister) can entirely put aside the question whether there is a serious risk that the person on return would be persecuted for a Convention reason. Presumably, in such cases the decision-maker can conclude that the person is not a refugee because he or she *could* avoid harm, whether or not he or she *would* do so.

15. It is clear, and beyond argument, that the approach advanced by the Minister is inconsistent with the reasoning in *S395*, which included the following:

- *But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.*[16]
- *It is one thing to say ... that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would* ***not*** *refrain from such activities – if, in other words, it is established that he would in fact act unreasonably – he is not entitled to refugee status.*[17]

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16 *S395*, at [40].

17 *S395*, adopted at [41].

- *The notion that it is reasonable for a person to take action that will avoid persecutory harm* ***invariably*** *leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality.*[18] [Emphasis added.]

- *The tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. ... No less importantly, if the tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.*[19]

- *Addressing the question of what an individual is* ***entitled*** *to do (as distinct from what the individual* ***will*** *do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning... leads to error. It distracts attention from the fundamental question.*[20] [Emphasis added.]

16. The Minister implicitly recognises the tension. The Minister does not dispute the correctness of the observations made in *S395*.[21] Rather, it is said that, notwithstanding the breadth with which the principles were there expressed, they must be understood "*in the context in which they were uttered*". It is said that the principles identified and applied in *S395* by the majority "*could not always be applied literally*".[22]

17. In substance, the Minister is arguing that the principles expressed in *S395* were wrongly stated in that they were expressed in too broad terms. The Minister does not have the courage of his convictions to say this expressly and thereby to have to justify seeking to re-open a recent decision of this Court, which has, as the Minister fairly acknowledges, "broad support".[23] Rather, the Minister adopts the approach of Flick J in describing the breadth of this Court's reasoning in that case as "unnecessary on the facts".[24]

18. Even if the statement in *S395* were expressed more broadly than was "necessary" (which is not accepted in any event), this does not make the statements *obiter dicta*. They do not constitute a separate issue that did not arise on the facts. Rather, the majority judgments, reasoning from the language of the Convention, expressed the principles in broad and

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18 *S395*, at [43].
19 *S395*, at [82].
20 *S395*, at [83].
21 Appellant's Submissions, at [28].
22 Appellant's Submissions, at [58], lines 30-32.
23 Appellant's Submissions, at [28].
24 Appellant's Submissions at [21] and [58].

applicable terms to the facts of the case. They constitute the *ratio decidendi* of that decision.

19. As the Minister has not sought to disturb that decision, the Minister's arguments must be rejected and the appeal dismissed. In any event, the approach adopted by the majority in *S395* is drawn from the language of the Convention and leads to no absurd results: there is no reason to doubt the correctness of the principles as stated in that case.

20. Having regard to the reasoning of this Court in *S395* and *NABD*,[25] Robertson and Griffith JJ were correct to accept that the relevant principles arising out of these decisions were as follows:[26]

a) a Tribunal cannot require an applicant to behave in a certain manner, but

b) it is permissible for the Tribunal to conclude that an applicant would not in fact behave in a certain manner upon his return.

21. Further, having regard to these principles, Robertson and Griffith JJ were correct in finding that:[27]

> ... *on the facts of this case the Tribunal committed a jurisdictional error as identified in* S395 *when it embarked upon a chain of reasoning... that the respondent could avoid persecution if he were to change his occupation and work as a jeweller in Kabul.*

22. The approach adopted by Robertson and Griffith JJ is consistent with, and promotes the purpose of, the Convention. Persons who have a well-founded fear of Convention-protected persecution on their return would be "refugees" and would be protected. The approach advanced by the Minister fails to extend protection to all individuals who have a well-founded fear of Convention-related persecution, namely it does not protect those who, for example, have undertaken conduct that has led to an adverse political opinion being imputed to them and the conduct in which they will engage in upon return will again attract Convention-related persecution. To undermine this purpose, derived from the express language of Article 1A(2), with limitations and requirements that are not found in the language of the Convention is not an approach that should be adopted.

23. Similarly, the Minister's suggested approach of affording a lesser standard of protection where the persecution is for an imputed political opinion as opposed to other grounds dilutes the level of protection afforded to refugee claimants and there is no basis for differentiating the degree of protection to be provided by reference to differing Convention grounds. In particular,

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25 *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1; [2005] HCA 29 at [10]-[11] and [168]

26 AB277 [61].

27 AB277 [62].

it does not promote the purpose of the Convention to elevate Convention grounds involving innate characteristics as opposed to grounds involving some degree of choice in behaviour on the part of an applicant; nor does it promote the purpose of the Convention to downgrade the protection afforded where Convention-related persecution flows from an imputed political opinion. From the point of view of the need for protection, it matters very little whether the refugee claimant actually holds the opinion that has been imputed to the claimant or whether it is reasonable for her or him to desist from the activity that is attracting persecution for a Convention reason.

24. The above submissions are sufficient to dispose of the appeal. The following submissions respond to a number of particular arguments advanced on behalf of the Minister.

No protection without abnegation of a Convention trait

25. A critical aspect of the Minister's argument is that if a person can avoid Convention-related persecution by "reasonably" modifying behaviour that does not itself involve an "abnegation of a Convention trait", then the person is not a refugee under the Convention. A number of comments can be said about this argument.

26. *First*, as noted above, there is no room to read into the analysis of *S395* a limitation that behaviour can be required to be modified if it does not involve an abnegation of a Convention trait. Indeed, the approach the Minister says was implicit in *S395* is precisely the type of reasoning that Gummow and Hayne JJ warned against (emphasis added):[28]

> *Addressing the question of what an individual is entitled to do (as distinct from what the individual will do)* ***leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right.***

27. *Secondly*, the Minister's argument is predicated upon the erroneous concept that the Convention is intended to protect Convention 'traits'. However, the language of Article 1A(2) indicates that it protects *individuals* who have a well-founded fear of persecution *for a Convention reason.*[29] That is, the Convention nexus is met if the reason for persecution is one of the reasons identified in the Convention. The proper inquiry thus focuses on the reason for persecution, rather than upon the propriety or reasonableness or Convention-relatedness of what the applicant would do to attract persecution. Having regard to the language of the Convention, it will be sufficient for persecution to be for a Convention reason if it is directed by

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[28] At [83], underlining added.

[29] See also *S395*, per McHugh and Kirby JJ at [40].

the persecutor for such a reason, irrespective of the motivations of the victim of persecution.

28. *Thirdly*, the approach of the Minister that attaches significance to the question whether the conduct of a victim that attracts Convention-protected persecution is conduct that amounts to an "expression" of a so-called Convention trait would further narrow the definition of "refugee" under the Convention. There is no textual basis in the Convention for a focus upon the motivations of the victims of persecution. In the present context, the Minister says that it was correct to attach significance to the fact that the conduct that attracted persecution (driving trucks loaded with construction materials) was not an expression of a Convention trait.[30]

29. Practically, a requirement that applicants demonstrate that the actions that they propose to engage in upon their return constitute a manifest expression of a 'Convention protected attribute' rather than for some other reason will lead to individuals facing persecution for a Convention reason falling outside the protection of the Convention. For example:

a) a person who would be stoned as an apostate because he proposes to change religion from Shiite Muslim to Christian in Iran upon his return, when such a change is done to please a future parents-in-law or spouse (rather than because the conversion comprises a manifestation of their true religious beliefs) will fall outside the Convention on the Minister's test;

b) a teacher who would return to educating girls in Nigeria and who is therefore at risk of religiously motivated persecution from extremists, will fall outside the Convention on the Minister's view if the religious persecution is suffered only to sustain a wage rather than as an expression of a political or other belief;

c) a Falun Gong practitioner in China who engages in the practice for social reasons rather than to express a true belief in the practice and who would continue to do so in the future and attract persecution for a Convention reason, would likewise fall outside the Convention; and

d) a journalist in The Ukraine who faces persecution by the government because he would, upon return, continue to publish articles critical of the government because he is instructed to do so by his editor and because he wants to retain his job, rather than as an expression of his own political belief (which is pro-government), would fall outside the Convention on the Minister's test.

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[30] Appellant's Submissions, at [43].

30. It is submitted that such an approach would undermine the purpose of the Convention, imposes a requirement not found in the language of the Convention, and is unsupported by authority. The Convention protects individuals with a well-founded fear of persecution for a Convention reason; not individuals with a well-founded fear of being persecuted by reason of engaging in conduct expressive of a 'Convention protected trait'.

31. *Fourthly*, the Minister's argument is necessarily premised upon the presumption that there is such a thing as a "Convention trait". If there is not such a thing that is applicable to all five Convention reasons, then the argument must fail. It may be possible to construct some notional "traits" associated with religious and political beliefs and with race and nationality from the text of the Convention because they have a relatively fixed ambit. However, the notion of "membership of a particular social group" is and was intended to be an elastic concept, capable of meeting circumstances not known at the time of the making of the Convention. Membership of a particular social group can rely upon traits (such as being a left-handed man,[31] being a woman,[32] being an able bodied young man,[33] being a member of a particular clan or subclan,[34] being born in breach of family planning regulations (a 'black' child),[35] being a member of a particular family,[36] or being of a particular social class,[37] or being in possession of wealth[38]). Membership of a particular social group can depend upon what a person does, such as the person's occupation,[39] that the person makes statements

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31 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; [1997] HCA 4 at 264 per McHugh J.

32 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; [2002] HCA 14 at [32]-[35] per Gleeson CJ; at [81]-[83] per McHugh and Gummow JJ; at [126]-[131] per Kirby J; see also *Weheliye v Minister for Immigration and Multicultural Affairs* [2001] FCA 1222 (women from Somalia); *SXPB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 11 (young women from Albania); *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 135 (women from Iran: at [26]).

33 *Applicant S v Minister for Immigration and Multicultural Affairs* (2003) 217 CLR 387; [2004] HCA 25.

34 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; [2000] HCA 55 CLR 1.

35 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293; [2000] HCA 19.

36 *MZYPW v Minister for Immigration and Citizenship* (2012) 289 ALR 541; [2012] FCAFC 99 at [2]; *Minister for Immigration and Citizenship v SZCWF* (2007) 161 FCR 441; 2007] FCAFC 155.

37 *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565; 130 ALR 314 at 568 (a member of the upper class in the French revolution).

38 *Ram*, per Nicholson J.

39 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389; [2003] FCAFC 133 (there was no dispute that 'entrepreneurs and businessmen in Russia' were capable of comprising a group); *Nouredine v Minister for Immigration and Multicultural Affairs* (1999) 91 FCR 138; [1999] FCA 1130 (beauty workers in Algeria); *Ram* (doctors, lawyers and teachers in Cambodia under Pol Pot: at 568). Note also the following passage in *Nouredine* at [13]: *"In Zamora, the Full Court instanced human rights workers in some countries. It is easy to think of*

critical of the authorities,[40] that he or she deserted from a ship,[41] that he or she engaged in adultery,[42] that he or she had been a prostitute,[43] that he or she lived alone,[44] or that he or she has divorced his or her spouse[45]).

32. Given the breadth of activities and features that could define a particular social group, there is no clear limit to what might be a Convention trait. In the present case, the First Respondent claimed to be a member of a particular social group constituted by truck drivers who carried construction materials; this claim was not rejected by the Tribunal.[46] Even if driving a truck were not to fall within the notion of the expression of a political opinion (which is not admitted), it could clearly be a Convention trait if it was conduct that defined membership of a particular social group. In these circumstances, the Court should reject an argument the Convention imposes a test according to which persons who face persecution for a Convention reason but who are not expressing a Convention trait are not protected under the Convention. It is an unworkable test and it finds no basis in the language of the Convention.

33. *Finally*, there is no authority that supports the proposition that a behavioural requirement can be imposed if it does not involve "abnegation of a trait protected by the Convention". In *SZFDV*,[47] this Court considered whether requiring the appellant to relocate would involve the abnegation of the attribute for which the appellant was selected for persecution. However, the question was raised in the context of relocation (which is not this case) and the Court was simply responding to the ground of appeal raised by the appellant in that case. The ground of appeal was whether there was jurisdictional error because the Tribunal *"failed to make findings about, and to*

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further illustrations, such as landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, and ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural Revolution."

40 *Dranichnikov* (entrepreneurs and businessmen in Russia who publically criticised law enforcement authorities for failing to take action against criminals); *NAPU v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 193 (outspoken Bangladeshi journalists: [37]).

41 *Minister for Immigration and Citizenship v SZNWC* (2010) 190 FCR 23; [2010] FCAFC 157 at [12], [17] and [19] per Perram J.

42 *SZMWI v Minister for Immigration and Citizenship* (2009) 111 ALD 160; [2009] FMCA 770.

43 *AZAAD v Minister for Immigration and Citizenship* (2010) 189 FCR 494; [2010] FCAFC 156 (this group was accepted by the first Tribunal, although the second Tribunal demurred on this issue and rejected the claim for other reasons: at [13], [18], [23]); *Nouredine* (prostitute 'almost anywhere': at [13]).

44 *SVRB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 123 (Albanian woman who lived alone without male protection; this characteristic operated in combination with her occupation, being a tax collector and her Catholic religion: at [11]).

45 *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43; [2003] FCAFC 129 (divorced women in Iran).

46 See para 5(b) above.

47 *SZFDV v Minister for Immigration and Citizenship* (2007) 133 CLR 51; [2007] HCA 41.

consider, whether requiring the appellant to relocate would involve the abnegation of the attribute for which the appellant was selected for persecution",[48] and the Court's response was 'no'.[49] The Minister has taken a rejection by the Court of a proposition put to it and sought to elevate that negative into a positive test. *SZFDV* does not provide authority for the proposition that the abnegation of a Convention attribute is a requirement that must be satisfied by refugee claimants.

Applying any abnegation principle in this case

34. Even if the Minister's test were correct, it would not avoid the conclusion that the Tribunal erred in the present case. On the Minister's test, the Tribunal would have had to determine whether it would constitute the abnegation of a Convention trait if the First Respondent were expected to give up driving trucks with construction materials. This assessment could have been undertaken only if the Tribunal had determined whether this activity was the basis for the First Respondent's membership of a particular social group, as he had claimed.[50] It did not do so.[51] Hence, even if the Minister's test were correct, the Tribunal did not apply it and so the appeal should be dismissed or special leave should be revoked because the appeal does not provide a proper basis for the issue sought to be agitated to be determined.

35. The Minister seeks to answer this point by criticising the particular social group claim made by the First Respondent. It is said that the essential characteristic of the particular social group was fear of persecution.[52] This was not raised by the Minister before the Federal Circuit Court or the Full Federal Court and the Minister cannot now make this complaint.

36. Further, the question of whether a particular social group exists is a question of fact for the Tribunal. It is by no means apparent that a group comprising truck drivers who transport goods for the government or foreign agencies as a matter of law is incapable of constituting a particular social group.

37. Finally, it is clear that the Minister's criticism is without foundation. The group comprises (a) truck drivers who (b) transport goods for the government or foreign agencies. There are two objective indicia that define the group that are unrelated to a fear of persecution. The group comprising "parents of black children" is not an appropriate point of comparison because the determination as to whether a person is a "parent

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48 *SZFDV*, [12(c)].
49 *SZFDV*, [15].
50 AB88 [21] and AB176 [108]
51 See para 5(b) above.
52 Appellant's Submissions, at [56]

of a black child" inherently requires one to ask whether the parent has a child born in breach of a prohibition that gives rise to the fear of persecution. The same cannot be said for whether someone is a truck driver who transports goods for the government or foreign agencies. A person who drives trucks for foreign agencies is or may be a member of the group irrespective of the fear he holds and whether or not he as an individual is at risk of persecution. A comparison with the group in *Dranichnikov* (that is, '(a) entrepreneurs and businessmen in Russia who (b) publically criticised law enforcement authorities for failing to take action against criminals groups') is the better comparison, which group is similarly defined by an occupation and a particular activity.

Conduct and persecution

38. The Minister also makes certain submissions in respect of what conduct amounts to persecution and contends that persecution requires a violation of fundamental human rights and freedoms.[53] The suggestion appears to be that requiring a person to desist from engaging in activity that does not impinge upon those fundamental rights is acceptable.

39. A flaw in this analysis is that, in circumstances where it is accepted that an individual *will* engage in a particular activity that *will* lead to the loss of his life, then it must be accepted that there is a clear breach of a fundamental right (that is, a right not to be subject to threats to life[54]).

40. The circumstance in which there is nuance as to whether a person's fundamental rights are being impinged upon arises where the person *will desist* from engaging in an activity because of a fear of being killed, in which case a question will need to be asked as to whether what the person is giving up as a consequence of his fear amounts to a deprivation of a fundamental right (or no more than a marginal right).

41. In the present case, the Tribunal did not reject the First Respondent's claim that he would return and drive trucks. It accepted that, if he did so, then the Taliban might kill him. In this circumstance, it must be accepted that he faces a well-founded fear of being deprived of a fundamental right. The fact that he could take a course to avoid being killed is not the point if he will not in fact take that course (reasonably or not). The relevant right is

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53 Appellant's Submissions, at [37].

54 This is implicit in the Convention definition of persecution as referred to in Article 1A(2) of the Convention, it is recognised in Article 33(1) of the Convention which prohibits refoulement where life or freedom would be threatened in the stated circumstances, and is expressly recognised in s 91R(2)(a) of the Migration Act which defines persecution as including a threat to a person's life or liberty.

the right not to be subject to threats to life, not the right to be gainfully employed to subsist, as the Minister suggests.[55]

42. In contrast, if the position was that the First Respondent would desist from driving trucks, *then* one asks whether that deprivation amounts to persecution (that is, of the right to subsist). However, that is not this case and this is where the confusion on the part of the Minister lies.

43. Nor, on either approach, does the question as to what the First Respondent should *reasonably* do form part of the analysis. The question is what would he do, and then the appropriate analysis flows from the answer to that question (as explained in *S395*).

44. It should also be noted that, for the avoidance of doubt, to the extent that the Minister suggests that it is important to ask whether *"particular conduct is undertaken for one of the Convention reasons"*,[56] an examination of the authorities cited by the Minister shows that that question is directed to the conduct of the *persecutor* not that of the asylum seeker. That makes perfect sense having regard to the language of the Convention - determining the reason for persecution must require inquiry as to the motive of the persecutor.

NALZ

45. The Minister also criticises the approach of Robertson and Griffith JJ to *NALZ*.[57] However, when their Honours' judgment is examined, it is clear that their Honours carefully considered the decision in *NALZ* and properly identified a number of features that distinguished the present facts from those that arose in that case.

46. An examination of *NALZ* reveals that the Court in that case did not hold that an applicant could reasonably be expected to modify his behaviour in certain circumstances but, rather, found that the adverse attention that would be attracted by the applicant were he to continue engaging in certain illegal conduct lacked a Convention nexus (that is, it would be prosecution for breach of the law rather than persecution for a Convention reason).[58] That is in contrast to the present case where the First Respondent was expected to cease behaviour that caused a political opinion to be imputed to him. There is also no suggestion in the present case that the conduct in question (truck driving) was illegal activity, as was the case in *NALZ*.

47. Further, in contrast to *NALZ*, the conduct in the present case was conduct inherent to the particular social group to which the First Respondent

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55 Appellant's submissions, p16[51].

56 For example, Appellant's Submissions, p11[37] lines 7-9.

57 AB280 [67]-282 [77]; Appellant's Submissions, p11 [38]-p 13 [42];

58 See Emmett J at [44], [50]

claimed to belong and the view imputed to him was consistent with his actual political opinion.

48. In any event, the decision in *NALZ* cannot assist the Minister in reading down *S395*. To the extent that *NALZ* does, as the Minister contends, stand as authority for the proposition that the Tribunal can require the First Respondent to modify his behaviour to avoid persecution either generally or in the case of an imputed political opinion, such a proposition is contrary to *S395* and wrong.

The Minister's 'relocation analogy' point

10 49. The Minister also challenges the reasoning of Robertson and Griffith JJ for rejecting the proposition that the rationale underlying the test of reasonableness in a relocation case did not extend to changing an occupation that gives rise to an imputed political opinion.[59]

50. The argument put by the Minister was that, even though the Tribunal expressly stated that the present case was not a 'relocation' case,[60] the Court should nevertheless look to cases addressing the relocation principle and identify some transcendent principle that the Tribunal should ask whether it is reasonable to expect an applicant to change his occupation to avoid persecution.

20 51. There is no authority for such a principle and it is diametrically opposed to the analysis in *S395* at [40], [43], [82]-[83]. It is also contrary to *SZATV*,[61] where the Court held that the Tribunal engaged in jurisdictional error by requiring a journalist to relocate and to cease being a journalist to avoid persecution. In essence, the Court considered that, even in a relocation case, the Tribunal was required to consider whether the visa applicant *would* face persecution in the new location considered to be generally safe, which analysis could not involve requiring the visa applicant to avoid conduct that might attract persecution there.

52. In the present case, as Robertson and Griffith JJ stated,[62] "*The difficulty with*
30 *that submission is that the rationale underlying the test of reasonableness in a relocation case does not extend to changing an occupation which gives rise to an imputed political opinion as is the case here.*" As their Honours further explained:[63]

> *As Kirby J emphasised at [97]* [in *SZATV*], *to consider what is reasonable for an asylum seeker to do by way of internal relocation is not to hypothesise supposedly reasonable conduct which involves modification of behaviour which involves any of the*

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59 AB283 [78]-AB288 [91].
60 AB20 [127]-[128]
61 *SZATV v MIAC* (2007) 233 CLR 18.
62 AB283 [79].
63 AB283-4 [80].

specified Refugees Convention-based grounds of persecution which is the object of the Convention to prevent and which S395 *forbids (to similar effect, see* HK (Iran) *at [20] and [21] per Lord Hope and* RT (Zimbabwe) *at [19] per Lord Dyson). Acceptance of the Minister's approach here would eliminate that important distinction. We consider that the distinction also applies to conduct giving rise to an imputed Convention ground. It is important in this context not to lose sight of the Tribunal's findings at R[119] and [120], to the effect that the respondent's conduct in transporting construction materials gave rise to an imputed political opinion that he supported the Afghan government and/or non-governmental aid organisations and that he faced a real chance of serious harm or even death if he were again intercepted on the roads by the Taliban. The Tribunal either expected or required the respondent to change his occupation and remain in Kabul notwithstanding that the respondent had said that, if he returned to Afghanistan, he would resume work as a truck driver. The primary judge was correct to hold that the Tribunal's approach was inconsistent with* S395."

53. Further, as the learned Federal Circuit Court Judge stated:[64]

One difficulty for the Minister is that the Tribunal specifically, and emphatically, disavowed that this was a case involving relocation ([127] at CB 199 to [128] at CB 199). The Minister's attempt before the Court to separate the concept of relocation and the principles underpinning it, or relevant to it, left unanswered the question that, if the Tribunal believed that this was not a relocation case, then how could its analysis be said to have applied principles relevant to relocation? I am not comfortable with the proposition that the Tribunal was purporting to apply a set of principles derived from a concept integral to the definition of a well-founded fear while having stated that the circumstances before it were not appropriate to that course.

Relocation under the Refugees Convention

54. The following submissions arise for determination only if the Court considers that the so-called relocation principle provides an applicable principle in the circumstances of the present case, contrary to the submissions in the former section. In essence, these submissions contend that the internal flight exception has been wrongly explained and is better understood, consistently with the language, purpose and objects of the Convention, as arising under Article 33(1) and not Article 1A.

55. The Minister's approach is erroneous because an applicant who is found to hold a well-founded fear of persecution for a Convention reason does not, by virtue of an internal relocation alternative, cease to be a "refugee" under the Convention. Rather, that person is a refugee but a contracting State does not breach its obligations under the Convention if that State were to return the person to a part of the person's home country where he or she does not face threats to her or his life or freedom.

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64 AB233 [92].

56. A person who can reasonably relocate elsewhere within his country may be returned to any safe haven without there being a breach of an obligation under the Refugees Convention. Article 33(1) of the Refugees Convention, which provides:

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

57. Thus, where a person meets the definition of refugee under Article 1A(2), he cannot be returned to the frontiers of his country where his life or freedom would be threatened, etc; he can, however, be returned to any safe region, being a place where he does not hold the relevant fear.

58. The practical significance of this approach is that, on the construction that would result in a person with an internal relocation option not having the status of a "refugee", a Contracting State could return the person to **any** part of his country, including those parts where the person faced a well-founded fear of persecution. A construction that would permit a Contracting State to *refoule* a person to a dangerous portion of his or her country where there is a real chance that he or she will be persecuted for a Convention reason is self-evidently subversive of the object and purpose of the Convention and such a construction should not be preferred if another construction is properly available.

59. In contrast, the approach contended for by the First Respondent imposes an obligations upon the Contracting State to, if it is proposing to expel the person, return the person *only* to an area within his country where his fear of persecution does not exist. This provides a focused mechanism to return refugees to a place where they are safe, if there is the practical capacity to do so and if it would be reasonable to do so, and as such it promotes the object and purpose of the Convention in comparison to the alternative.

60. It is acknowledged that this construction of the Convention is contrary to *SZATV*,[65] which adopted the analysis by Lord Bingham in *Januzi*, who identified the principle of internal relocation as arising from the causative condition in Article 1A(2). However, this Court did not consider this alternative construction in *SZATV*. Having regard to the language and purpose of the Convention, the correct and preferable analysis is that a person with a well-founded fear of persecution who can reasonably relocate to an area within his country where that fear is absent remains a refugee but he can be returned to the 'safe area' without Article 33(1) being breached.

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[65] See especially [15]-[22], following *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at [7].

61. It may be noted that Lord Bingham's analysis acknowledged that the Convention did not expressly address the relocation situation but his Lordship concluded that it found its home in the causative condition of Article 1A(2). A problem with this approach is that it fails to address the totality of the principle. Assume a person has a well-founded fear throughout her or his home country but had a right to enter a safe third country; the person would be a refugee under the Convention but could still be forcibly relocated under Article 33(1). Likewise, a person may be a refugee in circumstances where there was no diplomatic protection available to the person in Australia from the person's home country (hence "*unable... to avail himself of protection*") but that person could still be relocated to a safe region in the home country consistently with Article 33(1). It may be seen that the causative condition in Article 1A(2) is not an adequate explanation for the relocation or internal flight principle. Conversely, Article 33(1) provides a comprehensive basis for empowering a country to return persons to safe regions within their home country (or elsewhere).

62. The relevance of this for the present case is that the Minister's contention that a person who can reasonably relocate within his country to avoid persecution is not a "refugee" and that there is an analogous and broader principle that can be derived from this, is mistaken. That person remains a refugee despite the existence of a safe region in a refugee's home country.[66]

Part VIII: Oral Argument

63. The First Respondent estimates that 2 hours for oral argument is required.

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66 *Plaintiff M47/2012 v Director-General of Security and Others* (2012) 292 ALR 243, per French CJ at [21].