

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQZN v MINISTER FOR IMMIGRATION & ANOR

[2012] FMCA 939

MIGRATION – Recommendation by Independent Merits Reviewer that the applicant not be recognised as a person to whom Australia has protection obligations – whether reviewer failed to accord the applicant procedural fairness.

Migration Act 1958 (Cth), s.425

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576

Kioa and Others v West and Another (1985) 159 CLR 550; [1985] HCA 81

Minister for Immigration and Citizenship v SZGUR and Another (2011) 241 CLR 594 [2011] HCA 1

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273; [1995] HCA 20

Plaintiff M61/2010E v The Commonwealth of Australia and Others; Plaintiff M69/2010 v The Commonwealth of Australia and Others (2010) 243 CLR 319; [2010] HCA 41

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam (2003) 214 CLR 1; [2003] HCA 6

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100

SZATV v Minister for Immigration and Citizenship and Another (2007) 233 CLR 18; [2007] HCA 40

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2006) 228 CLR 152; [2006] HCA 63

SZQEN v Minister for Immigration and Citizenship (2012) 202 FCR 514; [2012] FCA 387

Applicant: SZQZN

First Respondent: MINISTER FOR IMMIGRATION &
CITIZENSHIP

Second Respondent: DAVID CORRIGAN IN HIS CAPACITY
AS INDEPENDENT MERITS REVIEWER

File Number: SYG 2967 of 2011

Judgment of: Barnes FM

Hearing date: 5 July 2012

Delivered at: Sydney

Delivered on: 11 October 2012

REPRESENTATION

Counsel for the Applicant: Mr Gormly

Solicitors for the Applicant: Craddock Murray Neumann

Counsel for the Respondents: Mr Smith

Solicitors for the Respondents: Minter Ellison

ORDERS

(1) The application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 2967 of 2011

SZQZN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

**DAVID CORRIGAN IN HIS CAPACITY AS INDEPENDENT
MERITS REVIEWER**
Second Respondent

REASONS FOR JUDGMENT

These proceedings

1. By application filed on 22 December 2011 the applicant sought an injunction restraining the first respondent from relying on the recommendation of an Independent Merits Reviewer (the “IMR” or “reviewer”) made on 20 November 2011 that the applicant was not a person to whom Australia owed protection obligations under the Refugees Convention and a declaration that the recommendation was not made in accordance with law.
2. The applicant relies on an amended application filed on 4 April 2012. In written submissions filed on 21 June 2012 the applicant abandoned grounds two and three of the amended application. The only ground now relied on in these proceedings is as follows:

The second respondent (the reviewer) failed to accord the applicant procedural fairness by not disclosing to the applicant

that it was in issue whether or not Behsud was the applicant's home area in Afghanistan or whether or not the applicant's return to Afghanistan meant the applicant's return to Kabul rather than Behsud.

Particulars

The applicant claimed that while he was born in Pakistan, he belonged to the village of ... in Behsood Afghanistan, in his Entry Interview;

It was not in issue throughout the Refugee Status Assessment/Independent Merits Review (RSA/IMR) process that the applicant's family fled from Behsud, Wardak Province Afghanistan to Pakistan;

It was not in issue in the RSA whether or not Behsud was the applicant's home area in Afghanistan or whether or not the applicant's return to Afghanistan meant the applicant would be returning to Behsud;

The applicant's claims to the IMR for protection, including on the question of relocation, were predicated on the basis that his return to Afghanistan meant his return to Behsud;

The reviewer gave no indication throughout the IMR process that he was considering finding that Behsud was not the applicant's home area or that the applicant would not return to Behsud;

In finding that Behsud was not the applicant's home area the reviewer avoided consideration of the applicant's claims of fear of persecution from the Kuchis or Taliban in Behsud.

In finding that Behsud was not the applicant's home area, the reviewer also avoided consideration of the reasonableness of the applicant's relocation to Kabul.

Background

3. The applicant arrived by boat at Christmas Island on 3 July 2010. In a biodata form, apparently completed on the day of the applicant's arrival on Christmas Island, in response to the question requesting "[t]he place you were born" he is recorded as having given the answer "Behsood" and in response to the question asking "Country, Province, District, Village, Sub village" he replied "Afghanistan, Wardak, Behsood" and a named village. He also provided the name of a village elder and

claimed to be of Afghani citizenship. He was interviewed by an officer of the Department on 2 August 2010 and on 14 November 2010 he requested a refugee status assessment (RSA). He claimed to have a well-founded fear of persecution from the Taliban in Afghanistan and Pakistan.

4. In the interview of 2 August 2010 he claimed that he was born in Pakistan. It was apparently put to him that he had said "*Behsood*" in Afghanistan in his biodata form. He is recorded as having stated that "*I belong to there but I have never been there*".
5. In a statutory declaration dated 14 November 2010 accompanying his application for a RSA, the applicant claimed to be a citizen of Afghanistan, an ethnic Hazara and a Shia Muslim who was born in the Hazara Mahala area of Pakistan. He claimed that his parents and older brother had been born in Behsud, Afghanistan, but that the rest of his family were born in Pakistan.
6. The applicant claimed to fear persecution in Pakistan and also to fear being killed or persecuted by the Turi, the Taliban and the Pashtuns because of his religion and ethnicity if returned to Afghanistan. The applicant claimed that Behsud in Afghanistan was an Hazara area that the Taliban and Pashtuns had attacked three to four times. He claimed that if he was deported to Afghanistan the Taliban would kill him as they would know that he had lived all his life in Pakistan and if they found out where he had lived they would know that he was associated with the Turi people (who had forcibly recruited his brother in Pakistan). He claimed that the government in Afghanistan was controlled by the Taliban and could not protect him as he was an Hazara and a Shia Muslim.
7. The applicant claimed that there was nowhere in Afghanistan he could live as he did not have any land or family there and did not know anything about Afghanistan except what his brother and parents told him. He claimed he was a foreigner in Afghanistan as well as in Pakistan.
8. On 9 February 2011 the RSA officer recommended that the applicant not be recognised as a person to whom Australia had protection obligations. The officer found that the applicant was a credible witness

but was not satisfied that he had a well-founded fear of persecution in Afghanistan in the reasonably foreseeable future on the basis of his ethnicity or religion. In making such findings the RSA had regard to the applicant's claims that his family had fled from Behsud and that in the past the Taliban had attacked that area. The RSA found it plausible that the applicant's family had fled Behsud due to the attacks. However the RSA found no evidence to suggest that the claims of persecution by the Turis extended to Afghanistan and found, having regard to independent country information, that there was no real chance of persecution of the applicant in Afghanistan for reason of his Hazara race or on the basis of his religion. The RSA was not satisfied the applicant would be considered a foreigner or face persecution in Afghanistan if recognised as having lived in Pakistan.

9. On 4 April 2011 the applicant sought Independent Merits Review. In written submissions dated 20 April 2011 the applicant's representative repeated the applicant's claims and added that he was an Afghan citizen who had lived his whole life in Pakistan, that he had never lived in Afghanistan, that he had no land, family or friends there and that his "*knowledge of Afghanistan*" was "*restricted*" to what his older brother and parents had told him. It was claimed that he did not speak the Afghani Hazara dialect of Dari, but instead spoke a Pakistani dialect.
10. The adviser provided the reviewer with an extensive summary of country information in relation to matters such as the current security situation in Afghanistan, the targeting and discrimination of Hazara Shia in Afghanistan, the availability of state protection and the difficulties of returning to and relocating within Afghanistan.
11. By letter of 23 August 2011, the Department advised the applicant that his negative RSA would be checked for currency. The applicant provided further information and a written statement to the Department. In his written statement he made further claims about the targeting of Behsud by Kuchis and the Taliban. He also claimed that it was "*impossible*" to live in Behsud. He claimed that he was a "*refugee by birth*" and made various claims about the area of Pakistan in which he had been living.
12. On 13 September 2011 the Department notified the applicant that the negative RSA had been checked for currency and that the Department

was not satisfied that the outcome should be changed. The applicant was, however, advised that his case would be the subject of an independent review. The applicant's representative provided further documentation in support of his claim on 9 September 2011 and 16 September 2011. On 7 October 2011 the adviser provided further detailed written submissions and documentation, including an extensive summary of country information, in support of the claim that as a Shia Hazara from the Turi region of Pakistan the applicant would be imputed by the Taliban with the political opinions held by members of the Turi tribe who shared the Hazara's Shia religion and who were said to be fiercely opposed to the Taliban. Updated country information was also provided in relation to the current situation for Hazara Shia Muslims in Afghanistan.

13. On 28 October 2011 the applicant attended an interview with the IMR. A transcript of the interview is in evidence before the Court as an annexure to the affidavit of Susan Archer affirmed on 3 April 2012.

The IMR recommendation

14. On 20 November 2011 the reviewer recommended that the applicant not be recognised as a person to whom Australia has protection obligations under the Refugee Convention.
15. In his report the reviewer set out in some detail the claims made by the applicant at various times and referred to country information, in particular about the situation in Afghanistan. In his findings and reasons the reviewer accepted that the applicant was a national of Afghanistan. The reviewer also found that the applicant was a credible witness. The applicant's account of his experiences in Pakistan was said to be consistent and in accord with country information in relation to the conflict between the Turis and the Taliban in his home area in Pakistan. The reviewer accepted that the applicant was born in Pakistan as claimed and that his family were originally from Behsud in Afghanistan. The reviewer also accepted the applicant's claims about incidents and harm that he and his family had suffered in Pakistan. As the reviewer was satisfied that the applicant did not face a real chance of persecution in Afghanistan, his country of nationality, for the reasons articulated in his refugee status application, he did not consider

whether the applicant had a well-founded fear of persecution in Pakistan on account of the past incidents.

16. In considering whether the applicant had a well-founded fear of persecution in Afghanistan the reviewer found at paragraph [55]:

Though the claimant's family were originally from Behsud, he has never lived and has no family there and I therefore do not consider it to be his home area. I have therefore considered first whether he could go and live in the Afghan capital of Kabul without facing a real chance of persecution for a Convention reason based on his expressed fear of the Taliban on account of being a Hazara Shia from the Turi area of Pakistan.

17. The IMR found, for a number of reasons, that although the applicant had a strong subjective fear, he would not face a real chance of persecution for a Convention reason if he were to go and live in the Afghan capital of Kabul. The reviewer accepted that the applicant had a “distinct accent”, that “he [would] be immediately recognisable as not being from Afghanistan” and that “he may even be recognised as coming from the Turi area of Pakistan”. However the IMR also had regard to the fact that millions of Afghans had returned to Afghanistan from Pakistan since 2002, including those born in Pakistan, and that, apart from reports about border incidents, there was no country information to suggest that Hazara persons who had lived in Pakistan (including in Turi areas) were targeted by the Taliban in the rest of Afghanistan. In light of this information the reviewer found that the fact that the applicant had worked as a waiter in a restaurant in Pakistan would not increase his risk of facing persecution in Kabul.

18. The IMR found that the applicant would not face a real chance of persecution on account of being an Hazara Shia from the Turi area of Pakistan or because his brothers were fighting for the Turis. The reviewer also found no evidence of “a general campaign by the Taliban insurgency to target Hazara Shias” or to support a claim “that Hazaras [were] being persecuted on a consistent basis”. The IMR concluded that:

... [the applicant] would not face a real chance of discrimination amounting to persecution (including by being denied adequate employment, access to essential services or the ability to buy land

and property) on account of being an Hazara Shia, now or in the reasonably foreseeable future.

19. In reaching his conclusions, the reviewer had regard to country information about the extent of the Hazara population in Kabul, the cohesiveness of their community and the relative ease of integration for new arrivals in Kabul, as well as to evidence that the security situation in Kabul was “*relatively stable compared to the rest of the country*”. Notwithstanding “*isolated*” terrorist incidents in Kabul, the reviewer found that there was nothing to indicate that Hazaras were “*specifically targeted*” and concluded that the applicant did not face a real chance of persecution in Kabul from the Taliban because he was an Hazara Shia now or in the reasonably foreseeable future.
20. The reviewer addressed the applicant’s expressed fear of the Kuchis in Behsud, but found that there was little evidence to indicate he would face a real chance of persecution from them in Kabul. The IMR’s finding in this respect was said to be “*reinforced*” by the fact that the applicant did not have any land either in Kabul or elsewhere in Afghanistan and that this was “*the traditional issue of dispute between [Hazaras and Kuchis]*”.
21. The reviewer also considered whether the applicant would face a real chance of persecution for a Convention reason on the roads in Afghanistan in light of evidence of Taliban and criminal attacks in many parts of the country. He found that the applicant had “*substantial experience as a waiter and would have no need or reason to travel through insecure routes*”. The reviewer found that the applicant would not travel on routes that would expose him to a real chance of serious harm and was not satisfied that he faced a real chance of persecution from the Taliban and/or criminal elements in travelling through Pashtun-dominated areas or insecure routes.
22. On the basis of country information the reviewer did not accept that the applicant would be accused of being a spy because he had sought asylum in Australia or that he would face a real chance of persecution now or in the reasonably foreseeable future for reason of returning as a failed asylum seeker from a Western country.

23. The reviewer also addressed the applicant's claim that he had no land in Afghanistan, no means to support himself or his family, no family in Afghanistan and no knowledge of the country. However it found that these claims did not disclose a Convention nexus.
24. The reviewer concluded that the applicant would not face a real chance of persecution in Kabul for a Convention-related reason now or in the reasonably foreseeable future. More generally the IMR found that, even considering the applicant's claims cumulatively, his fear of persecution was not well-founded and he was not a refugee. The reviewer therefore recommended that the applicant not be recognised as a person to whom Australia has protection obligations.

Whether denial of procedural fairness

25. The applicant contended that the reviewer had failed to accord him procedural fairness by not disclosing at any stage in the review process that there was an issue as to whether Behsud was his home area in Afghanistan or whether his return to Afghanistan meant his return to Kabul.
26. Counsel for the applicant acknowledged that it was open to the IMR to make a finding of fact that Behsud was not the applicant's home area. However it was submitted that an obvious or natural evaluation of the material before him would not have led the reviewer to this conclusion in circumstances where the applicant's claimed fear of return to Afghanistan and the adviser's submissions on relocation to Kabul were said to be predicated on the applicant's return to Behsud as his home area.
27. It was pointed out that procedural fairness requires the decision-maker to bring to the applicant's attention the critical issue or factor on which the decision is likely to turn (see *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [19] referring with approval to the remarks of Mason J in *Kioa and Others v West And Another* (1985) 159 CLR 550 at 587; [1985] HCA 81 to that effect and also see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 311; [1995] HCA 20 per McHugh J and

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam (2003) 214 CLR 1; [2003] HCA 6 at [81] and [150]).

28. Reliance was placed by the applicant on the decisions of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 228 CLR 152; [2006] HCA 63 at [29]-[32] and *Minister for Immigration and Citizenship v SZGUR and Another* (2011) 241 CLR 594; [2011] HCA 1. In *SZGUR* the High Court stated (at [9]) by reference to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 that:

Procedural fairness requires ... [t]he decision-maker [to] also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision.

29. Counsel for the applicant also referred in oral submissions to the decision of Yates J in *SZQEN v Minister for Immigration and Citizenship* (2012) 202 FCR 514; [2012] FCA 387 in relation to the concept of home area. In the context of applying the relocation principle in relation to relocation from an applicant's home region to another place in his country of nationality his Honour remarked (at [38]) that:

In proceeding on this basis I do not think that the reference in the cases to "home region" or "home area" (or similar expressions) is to be given a narrow or restrictive meaning to refer, for example, only to the place where the claimant happens to be living at the time of the feared persecution, or that a "home region" or "home area" is necessarily limited to one location if similar and substantial ties exist at another location that would also appropriately characterise that location as a "home region" or "home area" of the claimant. Whether such ties exist and whether a particular location can be appropriately characterised as a "home region" or "home area" are matters of fact.

30. While the applicant acknowledged that the issue of whether Behsud was appropriately characterised as his home area was a question of fact for the reviewer, it was submitted that as the applicant's home area and place of return had not been an issue for the RSA, he had to be put on notice by the IMR that this was an issue he had to address. The RSA

was said to have made findings that were inconsistent with any finding that Behsud was not the applicant's home area or that he would not be returning there in the context of accepting that his family fled from Behsud due to attacks from the Taliban.

31. The applicant also acknowledged that the reviewer had raised with him at the interview the possibility that he could live in Kabul without a well-founded fear of being persecuted as an Hazara. There was, however, said to be nothing to alert the applicant that this issue would be used in a context other than relocation. It was submitted that this exchange did not convey that there was an issue as to whether Behsud was or was not the applicant's home area. The applicant contended that the reviewer's questions at the IMR interview about return to Kabul by the applicant did not constitute sufficient notice of what the applicant's counsel described as "*the new configuration of issues*", not least because the reviewer did not exclude return to Behsud.
32. The finding about Behsud not being the applicant's home area was said to be critical, as it had "*reconfigured the issues*" compared to those before the RSA and enabled the reviewer to avoid making findings on the applicant's claims in relation to the reasonableness of his relocation to Kabul and his fears of the Kuchi and Taliban in Behsud. The applicant was also said to have been denied the opportunity to comment on the issue of whether Behsud was his home area or whether he would be returning there.
33. The applicant submitted that on the material before the reviewer it was not an obvious conclusion that Behsud was not the applicant's home area, having regard to the applicant's consistent claim that he "*belonged*" to Behsud even though he had never been there. It was pointed out that the applicant's credibility had not been put in issue either by the RSA or the IMR. There was said to be no indication in any of the claims or evidence before the IMR that the applicant had deliberately severed his ties or that his family had severed their ties with their village in Behsud. It was submitted that when the applicant claimed to be a "*refugee by birth*" in Pakistan this was not a claim that he belonged to Pakistan or that he had severed ties with his family's place of origin in Behsud. Rather, the applicant was said to have made claims about what would happen to him if he returned to Behsud.

34. Reference was also made to parts of the transcript of the IMR interview in support of the proposition that it was not an obvious conclusion that the applicant was not from Behsud or that it was not his home area. It was contended that the applicant had expressed attachment to Behsud as his home area and referred to it as the place to which he would be returning.
35. It was also submitted that the applicant's adviser's submissions had been put on the basis that Behsud was the applicant's home area. This was said to be apparent from the fact that the adviser had addressed the issue of relocation to Kabul which, by inference, clearly envisaged a relocation to Kabul from the home area of Behsud.
36. The first respondent submitted that the applicant had not established that he was denied the opportunity to address a critical issue or that such denial resulted in some practical unfairness. For a number of reasons it was contended that the applicant was sufficiently on notice that the reviewer might find that Behsud was not his home area and might consider whether he could safely reside in Kabul, having regard in particular to his claims never to have lived in Behsud and to have no family or land there, the absence of any finding by the RSA that Behsud was his home area, the fact that the applicant's adviser addressed the possibility of the applicant residing in Kabul and what occurred at the IMR interview. It was also submitted that such a finding was open to the IMR as a conclusion that was reached based on an obvious and natural appraisal of the applicant's claims and evidence.
37. Insofar as reliance was placed by the applicant on the principles in *Alphaone* (as discussed in *SZBEL* and *SZGUR*) the first respondent drew attention to the context in which the critical passage from *Alphaone* occurred, submitting that the IMR did not have an obligation to put to the applicant that he might find that Behsud was not the applicant's home area and that he could safely reside in Kabul.

Consideration

38. For the reasons that follow I am satisfied that, having regard to the claims of the applicant and his evidence and submissions, he can be said to have been on notice that the IMR might find that Behsud was

not his home area and might consider whether he could safely reside in Kabul. I am also satisfied that the finding that Behsud was not the applicant's home area in Afghanistan was open to the reviewer on the available material and was a conclusion reached based on an obvious and natural appraisal of the applicant's claims and evidence.

39. The remarks in *Alphaone* about the content of procedural fairness commence with the observation by the Full Court of the Federal Court (at 590-591) that:

... the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material. (Emphasis added).

40. However their Honours also pointed out that the rules of natural justice do not require the decision-maker “to disclose what he is minded to decide” or, generally, “to invite comment on the evaluation of the ... case” (at 591).

41. Further, the Full Court expressed the view (at 591) that (as Jenkinson J had explained in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 108-109) such general propositions may be subject to qualifications in particular cases, including relevantly that:

1. *The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it ...*
2. *The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material ...*

42. As the Full Court acknowledged, such qualifications may be no more than an application of the general requirements of procedural fairness in particular cases (*Alphaone* at 591 and see *SZBEL* at [31] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). The Full Court stated in *Alphaone* (at 591-592) that the obligation of procedural fairness:

... extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

43. Subject to such “*qualifications*” the decision-maker is “*not obliged to expose his or her mental processes or provisional views to comment before making the decision in question*” (*Alphaone* at 592).
44. In determining the requirements of procedural fairness in a particular case it is necessary to have regard to the statutory context (cf *SZBEL* and *SZGUR*) and to the facts and circumstances of the case, including the evidence and submissions of the applicant (and see *Alphaone* at 592 in which the Full Court considered the application of such principles to the facts in that case).
45. In this case, unlike *SZBEL*, the statutory context does not include s.425 of the *Migration Act 1958* (Cth). There is little relevant statutory context in relation to the circumstances in which a recommendation must be made to the Minister other than in relation to the definition of refugee (see *Plaintiff M61/2010E v The Commonwealth of Australia and Others*; *Plaintiff M69/2010 v The Commonwealth of Australia and Others* (2010) 243 CLR 319; [2010] HCA 41 at [88] and [91]).
46. However, insofar as reliance was placed on the statement of principles in relation to the relocation principle in *SZQEN*, such statement of principles plainly proceeded on the basis that the relocation principle concerned relocation from the claimant’s home area to another place in the claimant’s country of nationality (see *SZQEN* at [38] and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437). These cases recognise that (as Black CJ stated in *Randhawa* at 440-441):

Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention

definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders. (See also SZATV v Minister for Immigration and Citizenship and Another (2007) 233 CLR 18; [2007] HCA 40.)

47. It was in that context that Yates J stated in *SZQEN* (at [38]):

... I do not think that the reference in the cases to “home region” or “home area” (or similar expressions) is to be given a narrow or restrictive meaning to refer, for example, only to the place where the claimant happens to be living at the time of the feared persecution, or that a “home region” or “home area” is necessarily limited to one location if similar and substantial ties exist at another location that would also appropriately characterise that location as a “home region” or “home area” of the claimant. Whether such ties exist and whether a particular location can be appropriately characterised as a “home region” or “home area” are matters of fact.

48. Critically, this is not a case in which an applicant fled his or her home region owing to a fear of persecution. Rather, in this case the applicant stated that he feared going to a country he had never been to before. What was in issue was whether the applicant had a well-founded fear of persecution for a Convention reason in Afghanistan, his country of nationality. Nonetheless, *SZQEN* does make it clear that “home area” is not to be given a narrow meaning, but also that whether a particular location can be so characterised is a matter of fact.

49. In the case of a person who had fled his country of nationality the assessment of whether the person had a well-founded fear of persecution would naturally commence with a consideration of the situation in the area where the person had previously lived (or other home area to which the person had similar or substantial ties). That could not occur in this case. In a case such as the present, where the applicant had never lived in Afghanistan, there was obviously an issue as to whether there was an area within Afghanistan that could be characterised as the applicant’s home area and, if so, what it was. If so, the issue of relocation would arise if there was a well-founded fear of

serious harm for Convention reasons in such home area. However, it is also obvious from the Convention definition of refugee that if an applicant has no home area in the country of nationality, then the presence of an accessible area within that country where there is no real chance of the feared persecution will be determinative (see *SZATV* at [23], albeit in the context of considering relocation). As discussed further below, in written submissions to the IMR the applicant's adviser not only clearly recognised the alternative ways in which the case may be assessed but also specifically addressed the possibility of the applicant living in Kabul.

50. It is important to have regard to all the facts and circumstances, including the actual claims made by the applicant. While in the biodata form dated 3 July 2010 (the date the applicant arrived on Christmas Island) the applicant claimed he had been born in Behsud (or Behsood) in Wardak Province, Afghanistan, in his entry interview conducted on 2 August 2010 he is recorded as stating that he was born in Pakistan and that he did not know if he had citizenship in Afghanistan or Pakistan. When asked about the fact that he had referred to Behsud on the form, he responded "*I belong to there but I have never been there*". The claims he made at that time related to his circumstances in Pakistan and his fears on return to Pakistan.
51. As detailed above, in his statutory declaration of 14 November 2010 the applicant claimed to be a citizen of Afghanistan who was Hazara and a Shia Muslim. He stated that he had been born in Pakistan and that while his parents and older brother had been born in Behsud Afghanistan, the rest of his family were born in Pakistan. Under the heading "*Background*" he claimed that "*Behsood is a Hazara area however the Taliban and Pushtuns (sic) have attacked this area around 3 to 4 times*". He claimed to fear returning to Afghanistan and Pakistan. He made detailed claims about why he left Pakistan. He also claimed generally that he believed if he returned to Afghanistan and Pakistan he faced a real chance of being killed or persecuted for reasons of his religion and ethnicity. He claimed that in Pakistan the Turis would recruit him to go into battle and that "*[i]f I am deported to Afghanistan I will be killed by the Taliban as they would know that I have lived all my life in Pakistan and if they find out that I lived in Parachiner they would know I was associated with the Turi*".

52. Importantly, the only claims the applicant made specific to Behsud in this context were that his parents and older brother had been born there and that it was an Hazara area which the Taliban and Pashtuns had attacked three to four times. It is also relevant to note that in this statutory declaration the applicant stated in relation to whether there was a place in “*that country*” where he could be safe:

There is nowhere in Afghanistan that I could live as I do not have any land or family there.

I was born in Pakistan therefore I do not know anything about Afghanistan only what my older brother and parents told me.

I am a foreigner in Afghanistan and Pakistan.

If I go back to Afghanistan the Taliban will kill me as they would know that I am a foreigner as I have lived all my life in Pakistan.

In Pakistan I would be discriminated as I do not have any rights there as I am an Afghan citizen.

53. The applicant’s claim to “*belong*” to Behsud has to be seen in light of his original incorrect claim to have been born there and also his subsequent clarification that he could not go back to Afghanistan (generally) and that he was “*a foreigner in Afghanistan*” with nowhere he could live as he had no land or family there and did not know anything about it beyond what his family had told him. While the applicant referred to Behsud in the context of explaining his family background and Taliban activity there, his claims were not focused on Behsud, but rather on Afghanistan as a whole. The statutory declaration does not give rise to a claim that Behsud was the applicant’s home area to which he would definitely return in the sense considered in *SZQEN*, although it did not exclude that possibility.

54. On 17 November 2010 the applicant was interviewed by the RSA. The RSA decision contains only a limited description of the applicant’s claims at interview. However the RSA referred to the applicant’s claim that he was born in Pakistan, but was a citizen of Afghanistan, and that his family had fled from Behsud (which, it appears from the RSA decision, was as a result of past Taliban attacks in Behsud). The RSA described the applicant’s claim as a claim that he would be persecuted in Afghanistan by the Taliban for reasons of race and religion and

targeted as a foreigner because he had not lived in Afghanistan. The applicant also made claims in relation to persecution faced by his family in Pakistan where his remaining family members lived.

55. The RSA accepted that the applicant was a citizen of Afghanistan and hence assessed his claims in relation to Afghanistan. However in so doing the RSA did not find that Behsud was the applicant's home area in Afghanistan. She did refer to the fact that the majority of the Hazaras lived in Hazarajat but also to the fact that a significant proportion lived in Kabul. The RSA referred generally to the Taliban and to information that was said to suggest that in locations where Hazaras constituted a majority (such as in the Hazarajat), the community appeared able to prevent Taliban incursions. The RSA addressed a report about land disputes between Hazaras and Kuchis in Wardak province, in particular in the Behsud districts where the Hazaras associated Kuchis with the Taliban. However the RSA also considered that the reports of such conflict in Wardak were based on land disputes.
56. The RSA accepted that it was plausible that the applicant's family had fled past Taliban attacks in Behsud. The RSA did address the absence of any recent evidence to indicate that Hazaras were specifically targeted in the province of Wardak. However the RSA went on to find that the Hazaras were no longer specifically targeted for reasons of their race. This finding related to Afghanistan generally. The RSA did not accept that the applicant had "*established a profile*" that placed him at additional risk. The RSA rejected the claim that the applicant would be considered to be or targeted as a foreigner in Afghanistan because he had lived in Pakistan and/or because he had not lived in Afghanistan, notwithstanding his dialect and the fact that he was not familiar with the travel routes and villages in Afghanistan and that it was plausible he would be identified as having lived in Pakistan. The RSA also rejected the claim that the applicant had a well-founded fear of persecution in Afghanistan for reason of his religion.
57. In their first written submission to the IMR dated 20 April 2011 the applicant's advisers referred to the fact that as the child of Afghan refugees from Behsud, Wardak Province, Afghanistan the applicant was an Afghan citizen. The adviser submitted that the applicant's

experiences in Pakistan were relevant to the extent that they affected his subjective fear of persecution and whether it would be reasonable for him to relocate within Afghanistan. However the submission also referred to the fact that the applicant had never lived in Afghanistan, the fact that he had no land, family or friends there, that the applicant claimed that his knowledge of Afghanistan was purely restricted to what his family had told him and that he spoke a Pakistani dialect of Dari. It was claimed generally that the applicant feared persecution throughout Afghanistan. Submissions were also made about the security situation in Afghanistan, including Kabul and the Hazarajat (in which area Wardak Province is situated).

58. While relocation was addressed, the adviser recognised that the delegate had not considered relocation within Afghanistan. Country information about the difficulties faced by returnees who attempted relocation was provided “*to support [the applicant’s] claims in his Statutory Declaration*”. It would appear that this is a reference to the applicant’s statutory declaration of 14 November 2010. The applicant did not expressly refer to relocation within Afghanistan in his statutory declaration. Rather he stated that there was nowhere in Afghanistan that he could live, as he did not have any land or family there, that he did not know anything about Afghanistan beyond what his family had told him and that he was a foreigner in Afghanistan. He claimed that the Taliban would know he was a foreigner.
59. The adviser proceeded on the basis that consideration would be given to whether the applicant had a well-founded fear of persecution in Jaghori (sic) which is not in Wardak province, although it is part of the Hazarajat. In addressing relocation, the adviser referred to the possibility of individuals such as the applicant being “*displaced*” to Kabul and the difficulties such persons would face. However, it was claimed generally that the applicant had a well-founded fear of persecution in Afghanistan. Importantly, under the heading “*Relocation*” the adviser stated:

As the independent information discussed above (under “Independent Information”) confirms, the Taliban are increasingly able to exert considerable power throughout Afghanistan. Attacks by people associated or aligned with the Taliban against members of the Hazara community are taking

place throughout Afghanistan, and have become increasingly frequent. Independent country information therefore provides compelling support for the conclusion that the persecution our client fears is not localised, and that, as a result, the issue of relocation does not arise. However, in the alternative, it is our submission that, given our client's circumstances, it is not reasonable to expect that our client to relocate within Afghanistan to avoid harm. (Emphasis added.)

60. In other words, the adviser recognised the alternative ways in which the case may be assessed and submitted primarily that the issue of relocation did not arise, but went on to canvass the possibility of relocation if it arose. After addressing the possibility of the applicant living in Jaghori (although not in terms of relocation) the submission went on to address the possibility of the applicant residing in Kabul, about which country information was discussed (albeit contending that it would not be appropriate to expect the applicant to “relocate” within Afghanistan). In circumstances where the adviser addressed the security situation in Afghanistan generally and in Kabul in particular, it cannot be inferred that it was being submitted that Kabul was **only** relevant in the context of relocation (albeit this was one aspect of the submissions). Rather, the adviser specifically claimed that the persecution the applicant feared was not localised and hence the issue of relocation did not arise.
61. It is the case that in a written statement of 7 September 2011 the applicant referred to the situation in Behsud and attacks by the Kuchi and Taliban and stated that it was “*impossible living in Behsood*”. However he also stated he was a “*refugee by birth*”. Such claims clearly raised the prospect of dangers to the applicant if he lived in Behsud, but he did not claim that it was his home area in the sense that he would live there if returned to Afghanistan. The applicant’s adviser was clearly alert to the possibility that Behsud may be regarded as the applicant’s home area and provided country information about conflict in that part of Afghanistan. In a submission of 7 October 2011 the adviser also claimed that the applicant feared persecution “*throughout Afghanistan*”, again addressing the security situation generally in Afghanistan as well as in Kabul and the Hazarajat. Reference was made not only to general difficulties faced by those who may attempt to relocate, but also to the applicant’s absence of family and tribal links

as well as to the particular difficulties faced by Afghans born overseas lacking social networks and land in Afghanistan who return to Afghanistan. Reliance was placed on country information stressing that the availability of networks in the form of relatives was vital to a person's ability to live in a given area.

62. In other words, while the applicant, through his adviser, was clearly alert to the possibility that the IMR may conclude that Behsud was the applicant's home area (and may address relocation in that context) the submissions not only highlighted the applicant's lack of connections in Afghanistan but also addressed his claims on a more general level in relation to the whole of Afghanistan as a foreigner who had never lived there and had no land, family or friends there. The submissions about Kabul were not confined to Kabul as a place of relocation. In other words the applicant had the opportunity to and did address what ultimately was the critical issue for the reviewer as to whether he would face a real chance of persecution in Kabul.
63. It is also relevant to have regard to the IMR interview as a whole in order to assess the opportunity given to the applicant to address the issues of whether Behsud was his home area as well as whether he could safely reside in Kabul.
64. At the IMR interview conducted on 28 October 2011, which the applicant's adviser attended, the applicant confirmed that he had been born and had lived in Pakistan where the rest of his family still lived and that his father was from Behsud but had left Afghanistan in 1993.
65. After the applicant discussed his fears in Pakistan, the reviewer informed him that the IMR's focus would be on whether he had a real chance of persecution in Afghanistan (transcript p.8 lines 24-36). When asked why he feared "*going to live in Afghanistan*" the applicant explained that his father escaped from Afghanistan because Pashtun people were killing Hazaras and that the Taliban killed his father in Pakistan because he was Hazara and Shia (despite the difficulty of killing Hazara in Parachinar because there were a lot of Hazara there) (transcript p.8 line 46 to p.9 line 6). He then claimed that in Afghanistan it was easy to kill Hazara (transcript p.9 line 6). The applicant also referred to the fact that in 2007 the Shia Turi people in Pakistan had beaten the Taliban in fighting and claimed that for this

reason the Taliban, who would recognise that he was from Parachinar because of his accent and that he was a Shia, would kill him if he went back to Afghanistan. He also referred to the fact that many Sunni people had returned to Afghanistan when beaten by the Shia people in Parachinar and claimed (transcript p.9 lines 23-33):

Then they went back – when they beat in Parachinar so they went back to Afghanistan, then they joined Taliban, and they distribute everywhere in Afghanistan in different cities and areas.

They have a very strong network to each other. They get very quickly messages. If I go of course I will be killed. In Behsud the Taliban – in Parachinar the Taliban they burn our four areas. Because the Shia people as well own that, before that they burn nearly 40 per cent of the area. So 60 per cent of those people went back to Afghanistan. Because they have revenge. If we go back to Afghanistan they will find me. I don't think so I can reach to my area if Kabul is very close.

66. In this rather unclear response the applicant did refer to retaliatory action by the Taliban against the Shia area of Behsud as well as to not being able to reach his “area”, but also to Kabul. He went on to refer to events in Pakistan (and his “area” and “home” in Pakistan), before claiming generally that he did not believe he would be safe from Sunni people who had moved to Afghanistan from Pakistan “*in any corner of Afghanistan*” (transcript p.11 line 34).
67. The reviewer referred to country information the applicant had provided about Taliban attacks on Turis near the border in Afghanistan (and I note Behsud is not in a border area). However the IMR put to the applicant that there was no country information to suggest that the Taliban attacked Turis or people who had lived in Turi areas of Pakistan in “*the rest of Afghanistan*” (that is, other than near the border). Relevantly the reviewer then stated (transcript p.12 lines 12-16):

So this may lead me to conclude that if you return to central areas of – if you went and lived in central areas of Afghanistan such as, say, Kabul, that you wouldn't face a real chance of persecution on account of being a Hazara returning to Afghanistan from a Turi area in Pakistan.

68. This clearly foreshadowed a possible finding that the applicant could safely “return” to Kabul, thus alerting the applicant to the fact that there was an issue that his “return” to Afghanistan meant a return to Kabul.
69. When information was put to the applicant to suggest he may not face a real chance of persecution as a Hazara Shia, he responded by referring first to the Taliban and Kuchi Hazara areas in Afghanistan (not only Behsud but also Ghazni) and then more generally. He stated (at transcript p.13 lines 10-33):

First I'm telling you about the Behsud. For last 14 years the Taliban and Kuchi people they are taking all Hazaras land, every year. Same thing they are taking on Ghazni as well. And everywhere in Afghanistan you can see they are taking on Hazara areas. That's what I want to bring to your knowledge.

The America and international forces in Afghanistan they can't control a small group of the Taliban. And you also are looking how many American soldiers been killed in Afghanistan. The Taliban are fighting with America and NATO with the super powers and they are also killing Hazaras as well.

Second thing because I born in Parachinar. I don't have anyone in Afghanistan. I don't have my family. I don't have land. If I go back to Afghanistan they will keep harassing me because of my language, my accents, because I born in Parachinar. If I go to Behsud I don't think I will be alive. Because in Behsud there is no electricity, there's no gas, I don't have any land. And in Behsud there is not any bazaar and there is not any income I can survive. I can survive my family. The very first thing the Behsud people will not accept me. They will find out about me, who I am. Because you are escaper, why you escape before and now you coming.

If they accept me, they will accept me for war. They will put me to fight with the Kuchi and Taliban. That's why I escape from Parachinar because the Parachinar people they ask me to fight.

70. Such a response clearly addressed the possibility that Behsud may be regarded as the applicant's home area. However the applicant referred to his lack of family, social connections and land in Behsud and claimed that the Behsud people would not accept him. In other words he raised several reasons why he could not go to Behsud that

highlighted his lack of connections or ties. While the applicant did not expressly claim that Behsud was not his home area, the IMR's analysis of that issue and conclusion in that respect was a natural and obvious evaluation of the applicant's evidence.

71. The reviewer then raised with the applicant his claims in relation to Kuchis (which had been put in terms of conflict in Wardak province). In that context the reviewer referred to the fact that the country information referred to conflicts in Wardak province and Behsud over land (of which the applicant had none). Moreover the IMR also observed that "*the reports don't seem to indicate that Hazara Shias would be at risk in other parts of the country from Kuchis, including Kabul*" (although one isolated incident in western Kabul in the previous year was described) (transcript p.14 lines 38-43).
72. The reviewer raised with the applicant that "*these matters*" may indicate that he did not have a well-founded fear of the Kuchis (transcript p.15 lines 5-6).
73. The applicant responded by addressing the situation in Behsud "[a]s far as [he knew]". However, consistent with the fact that the reviewer had not proceeded on the basis that it was not in dispute that Behsud was the applicant's home area in Afghanistan, the applicant also asked "*I'm telling you about the Behsud. You talking about the Behsud to me, that's right?*" (transcript p.15 lines 13-14). The IMR responded that he was "*talking about Behsud but [he was] also talking about Kabul as well*" (transcript p.15 line 16), which again indicated to the applicant that there was an issue about whether he could safely live in Kabul.
74. In his response, the applicant suggested that "*they*" (presumably the Kuchis) also "*take*" in Ghazni (another area in Afghanistan) and went on to say that he feared the Taliban in Afghanistan, not only in Behsud, but also "*the same thing*" in Kabul (transcript p.15 lines 18-34). Thus the applicant had and took the opportunity to address his fear of harm not only in Behsud, but also in Kabul.
75. After the applicant returned to addressing events in Pakistan, the reviewer told him he had a fair idea about the situation "*in the area you came from*" in Pakistan (transcript p.16 lines 35-36) and put to him for comment what he described as "*information regarding the situation in*

Kabul” (transcript p.16 lines 39-40). In particular the IMR put to the applicant information about the proportion of the population of Kabul that was Hazara, the ease of integration, and the “*relatively stable*” security situation in Kabul “*compared to the rest of the country*” (transcript p.16 lines 40-50) suggesting that “*this may indicate that you could live in Kabul without a well-founded fear of being persecuted as a Hazara*” (transcript p.17 lines 14-15).

76. This was the critical issue for the reviewer and was isolated as such at the interview. The applicant responded by claiming that Taliban from the area of Pakistan he had been born in had returned to Kabul and would find him and kill him (transcript p.17 lines 27-30).
77. The reviewer also raised with the applicant whether given his experience as a waiter he would need to travel much on the roads in Afghanistan and whether any harm on a road would involve a Convention nexus (transcript p.18 lines 1-3).
78. Finally, the applicant’s adviser made an oral submission about the applicant’s fear of returning to Afghanistan (transcript p.21 line 20 to p.22 line 20). Relevantly she stated:

It’s very clear that [the applicant], because he was born and raised in Parachinar, return to Afghanistan would be immensely difficult for him. He has no support networks or extended family networks remaining in Afghanistan, and the area from which his family originates is Behsud which is a particularly dangerous area for Hazara people at the moment. And although the fighting in Behsud has been described as being overland by some observers, there are other observers who suggest that the Kuchi are acting in – as agents of the Taliban. And that the Kuchi who are participating in the fighting in Behsud seem to be particularly well armed.

There has been footage of Afghan National Army soldiers standing by while Kuchi loot Hazara houses in Behsud. And although the Central Government of Afghanistan has made attempts to resolve the matters, particularly in Behsud, those attempts have not been successful.

[The applicant] also has a very strong accent and he speaks a dialect of Hazaragi that is not widely spoken in Afghanistan and that would make it very clear from the moment that he opened his mouth that he is not from Afghanistan or even from a particular

area in Afghanistan. And given the importance of personal networks, as outlined in the UNHCR Guidelines, in order for people to settle and to assimilate within Afghan society, his lack of – the fact that he obviously comes from elsewhere and his lack of social support would make him particularly vulnerable.

I also draw your attention to my colleague's submission that the Hazaras working and employed in Kabul are paid significantly less than the average wage. And his responsibility for his family and he's expressed that very deep sense of responsibility clearly today, makes him particularly vulnerable again to being exploited or unable to support his family members, and even himself. I'd also point you to the section of the submission where it's argued that the Hazaras are particularly vulnerable within Afghanistan due to the long-standing nature of the discrimination and marginalisation of them, which leads in some instances to them being targeted because of that vulnerability.

Because of the fighting in the Kurram agency in Parachinar where [the applicant] comes from and the very porous nature of the border, people are crossing backwards and forwards all the time. So [the applicant's] accounts of the way in which information would be shared by Sunni people from Parachinar with Sunnis who have returned to Afghanistan is plausible.

It's highly likely that members of the Taliban or Pashtun insurgent groups would impute a political opinion to [the applicant] of being in opposition to Sunnis and to Pashtuns in particular. And that's based on the fighting between the Turi who are Shia Pashtun and they have defeated the Taliban. And that the Hazara people from Parachinar have been allied and in some cases forced to ally themselves with the Turi.

So in addition to the ground of imputed political opinion [the applicant's] race as a Hazara and his religion as a Shia I submit put him in danger of persecution in Afghanistan and I submit that for these reasons he meets the Convention definition of a refugee and engages Australia's protection obligations.

79. Thus, in the course of the interview, as in earlier written submissions, the applicant and his adviser raised the fact that he did not have any family or land in Afghanistan and that he would not be accepted in Behsud where he had no land and no income he could survive on. His adviser raised his lack of personal networks. While it cannot be inferred that the applicant was claiming that Behsud was not his home area, it is apparent that he was on notice that the IMR might find that

Behsud was not his home area and that the IMR might also consider whether he could safely reside in Kabul. Both the applicant and his adviser claimed that he had no real contact, knowledge or relationship with anything in Behsud, such that it was a natural and obvious evaluation that it was not his home area.

80. Further, in his responses to questioning about his fear of the Taliban and the Kuchi the applicant addressed not only the situation in Behsud, but also the situation in Kabul. The question of whether the applicant would have a well-founded fear in Kabul (not simply the issue of Kabul as a place of relocation) was expressly raised and answered at the hearing. The applicant was given the opportunity to address what was in fact the critical issue. The adviser took the opportunity to address living in Kabul as well as the issue of the reasonableness of relocation.
81. Having regard to the material before the reviewer, the issue could be seen as whether the applicant had a well-founded fear of persecution in Afghanistan. From that flowed the question of whether Behsud was his home area. If it was, there was clearly an issue of whether if the applicant would be harmed for persecutory reasons if he went to live in Behsud, and if so, whether it was reasonable for him to go to Kabul. However there was also clearly a possibility that the IMR may find that Behsud was not the applicant's home area and, in that context, consider whether the applicant was going to be harmed in Kabul for a Convention reason.
82. Despite the fact that the applicant claimed that Behsud was where his parents and older brother were born and from where they had fled to Pakistan, he did not claim expressly that it was his home area in Afghanistan. Rather he gave evidence that he had never lived there and that he had no family, land or connections there. In all the circumstances there was obviously an issue as to whether the applicant had a home area in Afghanistan and, if so, whether Behsud was his home area which was sufficiently brought to his attention. Moreover it was an obvious and natural evaluation of the evidence for the IMR to conclude that Behsud was not the applicant's home area.
83. As indicated, the transcript of the interview reveals that the IMR discussed the fact that the country information may lead him to

conclude that the applicant would not face a real chance of persecution in Kabul on account of being an Hazara returning to Afghanistan from a Turi area in Pakistan. The reviewer expressly asked the applicant whether he would like to comment on the possible finding that he could live in Kabul without a well-founded fear of being persecuted as an Hazara and also discussed with him country information regarding whether he would be at risk in Kabul from the Kuchis. The applicant's agent made oral submissions regarding conditions in Kabul. The applicant was clearly alert to and addressed the issue that his "return" to Afghanistan could mean "return" to Kabul.

84. Insofar as the applicant contended that the reviewer in some way "reconfigured" the case as it had been seen by the RSA, as counsel for the first respondent pointed out, the statutory scheme is not the same as applies to the Refugee Review Tribunal. Cases such as *SZBEL* must be seen in light of the fact that s.425 of the Migration Act requires that an invitation be given to give evidence about and make submissions on the issues that arise "on the review". In contrast in this case the starting point is the definition of refugee under the Migration Act and the claims made by the applicant. Moreover the RSA did not in fact make any finding about the applicant's home area as such and did not need to do so because relocation did not arise (as, indeed, was the primary submission of the applicant's adviser). Rather, the RSA found that the applicant had no well-founded fear of persecution anywhere in Afghanistan.
85. Furthermore, while the IMR did not expressly raise with the applicant the issue of whether Behsud was his home area in Afghanistan, the question of whether Behsud was or was not the applicant's home area was not ultimately the critical issue for the IMR. Rather, the critical issue was whether the applicant would be able to safely live in Kabul. That issue was clearly raised with him at the hearing. Beyond this, the applicant was given the opportunity to give evidence about whether Behsud was his home area or the area against which his claims should be assessed. While he gave evidence which pointed to the fact that his claims were based in part upon Behsud as a place in which he had a well-founded fear of persecution, this was not his only claim. He also claimed that he could not return to Behsud because he did not know anyone there, he owned no land there, he had no relatives or any other

connections and would be a stranger and furthermore that he would be persecuted wherever he went in Afghanistan. In the context of such claims and having regard to the transcript of the IMR interview it is apparent that sufficient opportunity was given to and taken by the applicant to address all of the critical issues that arose.

86. Finally, insofar as the applicant's concern was that the reasonableness of relocation was not addressed, it cannot be said that there was any deliberate attempt by the reviewer to avoid the issue or to put it to one side in some way that deprived the applicant of procedural fairness. The question of the reasonableness of relocation simply did not arise on the findings. It is clear in light of the decision of the High Court in *SZATV* and of Yates J in *SZQEN* that a prerequisite to the application of the principle of relocation is that there be a home area and that there be a fear of persecution in that home area. Whether a particular location can be characterised as a home area is a matter of fact.
87. In the particular circumstances of this case there was no practical unfairness in the reviewer's failure to specifically raise at the interview the possibility that he might find that Behsud was not the applicant's home area.
88. On the evidence before the Court I am satisfied that the applicant was sufficiently on notice that the IMR might find that Behsud was not his home area and might consider whether he could safely live in Kabul. Critically, the finding that Behsud was not the applicant's home area in Afghanistan was open to the reviewer on the available material and was a conclusion reached based on an obvious and natural appraisal of the applicant's claims and evidence (see *Alphaone* at 591 and *SZBEL* at [31]). The IMR was not obliged as a matter of procedural fairness to expressly put to the applicant that he might find that Behsud was not his home area. The IMR sufficiently raised with the applicant the issue of return to Kabul.
89. As no reviewable error has been established the application must be dismissed.

I certify that the preceding eighty-nine (89) paragraphs are a true copy of the reasons for judgment of Barnes FM

Date: 11 October 2012