FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v SZSCA [2013] FCAFC 155

Citation:	Minister for Immigration and Border Protection v SZSCA [2013] FCAFC 155
Appeal from:	SZSCA v Minister for Immigration & Anor [2013] FCCA 464
Parties:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSCA and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 1225 of 2013
Judge(s):	**FLICK, ROBERTSON AND GRIFFITHS JJ**
Date of judgment:	10 December 2013
Catchwords:	**MIGRATION –** appeal from decision of Federal Circuit Court quashing decision of Refugee Review Tribunal – whether Tribunal failed to ask the right question or apply the correct test – truck driver in Afghanistan carrying building materials – imputed political opinion as a supporter of foreign organisations or the Afghanistan government because transporting construction and building materials – letter issued by Taliban to local council to get rid of respondent as criminal, infidel person – finding that if respondent was again intercepted on the roads by the Taliban he would face a real chance of serious harm and even death – whether Tribunal fell into jurisdictional error by expecting the applicant to modify his behaviour if returned to Afghanistan by remaining in Kabul
Legislation:	*Migration Act 1958* (Cth) s 36(2)
Cases cited:	*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 216 CLR 473 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 *Morato v Minister for Immigration* (1992) 39 FCR 401 *NALZ v Minister for Immigration and Multicultural and*

	Indigenous Affairs [2004] FCAFC 320, 140 FCR 270 *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 *SKFB v Minister for Immigration & Multicultural Affairs* [2004] FCAFC 142 *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, 233 CLR 18 *SZFDV v Minister for Immigration and Citizenship* [2007] HCA 41, 233 CLR 51 *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464 *VFAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 367
Date of hearing:	5 November 2013
Date of last submissions:	7 November 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	96
Counsel for the Appellant:	Mr G Johnson SC with Mr J D Smith
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the First Respondent:	Mr S B Lloyd SC with Mr P D Reynolds
Solicitor for the First Respondent:	Fragomen

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1225 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSCA** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE OF ORDER:	**10 DECEMBER 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appellant's name be changed to "Minister for Immigration and Border Protection".
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1225 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSCA** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE:	**10 DECEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FLICK J

1 In the present appeal the First Respondent has been found by the Refugee Review Tribunal to be a person to whom Australia does not owe protection obligations under the Refugees Convention. That Convention is incorporated into Australian municipal law by s 36(2) of the *Migration Act 1958* (Cth). Nor was he found to be owed protection obligations on other "*complementary protection*" grounds. In very summary form, the First Respondent was a self-employed truck driver in Afghanistan who had come to the attention of the Taliban and who had been attributed with political opinions, particularly by reason of his carriage of construction materials.

2 The facts are more fully set forth in the joint judgment of Robertson and Griffiths JJ and, accordingly, need not be repeated.

3 For present purposes it is respectfully considered sufficient to note that the Refugee Review Tribunal:

- accepted that if the First Respondent was "*again intercepted on the roads by the Taliban (and particularly if he was carrying construction materials) he would face a real chance of serious harm and even death, by reason of an imputed political opinion (and, as suggested in the post-hearing submission, as an example to others)*";

and:

- was satisfied that he "*could reasonably obtain relevant employment in Kabul so that he would not be obliged to travel between Kabul and Jaghori to make a living"*. The Tribunal was further satisfied that he had *"long-established skills making jewellery – a trade at which he worked from 1977 to 2001 – giving him real options in a very big city, either with his own business or as an employee…*".

The First Respondent maintained that he should not be required to modify his conduct or to alter his means of earning a livelihood in the manner advanced by the Tribunal. The findings of fact made by the Tribunal and its process of reasoning, it should be noted, are far from self-evident. The approach on the part of the Tribunal, the First Respondent nevertheless maintained, was not available to it by reason of the decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 216 CLR 473. The Federal Circuit Court of Australia agreed: *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464.

4 The Minister now appeals. On his behalf it is submitted that the decision in *S395* did not preclude the Tribunal proceeding in the manner in which it did proceed. The appeal, it is respectfully considered, should be allowed. It is, with respect, with considerable diffidence that a conclusion has been reached contrary to that of Robertson and Griffiths JJ and a conclusion reached which necessarily has the potential to place a constraint upon the reach of the protection afforded by the Refugees Convention.

5 The two passages in the decision in *S395* which assumed primary significance were observations made in the joint judgment of McHugh and Kirby JJ and also the joint judgment of Gummow and Hayne JJ. Relevantly, McHugh and Kirby JJ observed:

> [40] The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the

> person persecuted cannot reasonably be expected to tolerate it. 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. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.

Their Honours continued on to further observe:

> [41] History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention …

Gummow and Hayne JJ expressed much the same conclusions as follows:

> [80] If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

Attempts to limit the width of the conclusions expressed by their Honours, it was submitted on behalf of the First Respondent, were to be rejected. The conclusions expressed by their Honours, it was submitted, were generally expressed principles. Reliance was thus placed upon the following observations of McHugh and Kirby JJ:

> [50] In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.

In applying this decision, Weinberg J in *VFAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 367 at [32] said that the "*unifying principle*" was that *"[a]sylum seekers are not required, nor can they be expected, to take reasonable steps to avoid persecutory harm*" nor can they be "*expected to live 'discreetly' to avoid such harm*".

6 The references in these joint judgments to persons not being required to take "*avoiding action*" or taking "*reasonable steps to avoid persecutory harm*" or to behaving in a more "*discreet*" manner, it is respectfully considered, are references to (for example) a person exposed to persecution not being required to modify or conceal or act more discretely in respect to the manner in which he expresses his religious or political beliefs. A person remains exposed to persecution for the purposes of the Refugees Convention if, in order to avoid persecution, he must practise his religious or political beliefs or his sexual behaviour in private or in some other manner so as not to attract the attention of his persecutors. The joint judgments in *S395* do not refer to the present situation, where the steps which the claimant is being asked to take relate to behaviours which are not directly protected by the Convention.

7 The political opinions imputed to the First Respondent in the present appeal were opinions imputed to him by reason of his having driven his truck and, in particular, carrying construction materials. There is, perhaps not surprisingly, no finding that the manner in which the First Respondent sought to express or manifest his political opinions was by driving his truck. Nor is there any finding that the First Respondent in fact actually held the political opinions imputed to him.

8 Nothing in *S395* places any impediment on a conclusion being reached that, in some circumstances, a claimant could (for example) cease to engage in particular conduct that was the source of the political opinion being imputed to him, and which did not in fact form part of the way in which his political opinions were being expressed, and hence avoid persecution. In such circumstances, the claimant would not be entitled to protection. Nor does the object of the Refugees Convention require any contrary conclusion.

9 It is accepted that a claimant should not be expected to take "*reasonable steps to avoid persecutory harm*" where that harm directly relates to a characteristic that the Refugees Convention seeks to protect. It is clearly inappropriate to require claimants to "*hide*" their anti-government political views, or to be "*discreet*" about their homosexuality. The protection afforded by the Convention would be seriously diminished if it were otherwise. But the Convention does not relevantly seek to provide a right to engage freely in behaviour unrelated to the specified categories of protection, when such behaviour may result in the imputation of a particular political opinion.

10 In the present appeal, the First Respondent does not seek to express any political opinion – be it one that is actually held or one that may be imputed to him – by driving his truck. By reasoning that the First Respondent could avoid persecution by pursuing a livelihood other than truck-driving, it is not understood that the Refugee Review Tribunal placed any constraint or impediment upon the manner in which the First Respondent wished to express any political opinion.

11 That which is protected by the Refugees Convention is the freedom to hold (for example) religious or political beliefs and the freedom to freely express or practice those beliefs free of persecution. But it is not an unqualified freedom. If a person is thus able to freely express his beliefs in one part of a country but not another, it may be reasonable to require him to relocate. Such relocation, it has been held, would not involve any "*abnegation*" of any attribute of his beliefs: cf., *SZFDV v Minister for Immigration and Citizenship* [2007] HCA 41 at [15], 233 CLR 51 at 55-56 per Gummow, Hayne and Crennan JJ. It has thus been said that it would be "*anomalous*" if the international community was "*under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders*": *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 440-441 per Black CJ. There nevertheless remains a tension between a claimant being able to avoid persecution by relocating and a freedom to express a belief openly. That tension is exposed by the dissenting judgment of Kirby J in *SZFDV* who referred to the fact that "*the proposition that the appellant should relocate within India amounts, in effect, to an hypothesis that it would be reasonable for the appellant to 'hide' his political beliefs from those who, it is postulated, have persecuted him in his home State ... but he could be free of persecution if he were to move to another and different State ...*": [2007] HCA 41 at [33]. Notwithstanding this tension, many cases have recognised the fact that persecution may be avoided if a claimant can reasonably relocate. It is thus recognised that there "*may be instances where differential treatment in matters of, for example, race or religion, is encountered in various parts of the one nation state so that in some parts there is insufficient basis for a well-founded fear of persecution*": *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 at [26], 233 CLR 18 at 27 per Gummow, Hayne and Crennan JJ. Consideration as to whether a claimant can reasonably be required to relocate requires consideration as to whether the claimant can freely express his beliefs in one part of a nation State but not another: Id.

12 It may be accepted that the facts of the present appeal fall closer to *S395* than to the decision of the Full Court of this Court in *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 320, 140 FCR 270. On the facts of that case, and as pointed out by Emmett J, there was there "*no suggestion that the appellant fear[ed] persecution by reason of his membership of a particular social group*…": [2004] FCAFC 320 at [47]. His Honour concluded that the appellant in that case was "*not expected to cease behaviour that caused the authorities to impute a political opinion to him*" but rather "*expected to cease behaviour that caused the authorities to impute illegal conduct to him*": [2004] FCAFC 320 at [50]. And, as Downes J pointed out, *NALZ* was itself a "*case … one step removed from S395*" and a case that did "*not contemplate changed behaviour to avoid persecution but to avoid creating a wrongful perception of membership of a protected class*…": [2004] FCAFC 320 at [57]. On the facts of the present appeal, the political opinions imputed to the First Respondent arose because the "*Taliban, as part of their disruptive activities, generally targets and discourages drivers carrying construction materials*…". On the facts of the present appeal it is thus the very conduct which was the reason for the political opinions being imputed to the First Respondent which is the conduct which the Tribunal reasoned could be avoided and the threat of persecution thereby avoided.

13 There is no inconsistency between the approach of the High Court in *S395* and the decision of the Full Court in *NALZ*.

14 Notwithstanding the differences between the present appeal and those in *NALZ*, it is concluded that neither the Refugees Convention nor *S395* precludes the course of reasoning which it is understood was sought to be pursued by the Tribunal in the present proceeding. The Federal Circuit Court Judge, with respect, erred in deciding otherwise.

15 To so conclude is not to attempt to put any qualification upon the generally expressed statements made in either of the joint judgments in *S395* or to conclude contrary to the cautionary remarks of McHugh and Kirby JJ at para [50]. Albeit a process of reasoning which could well have been better and more clearly expressed, the conclusion that the Tribunal's process of reasoning does not fall foul of *S395* is to do no more than to apply the language employed in *S395* by reference to the facts of that case and to apply that language in the context of Article 1 of the Refugees Convention and the objects of that Convention. It was simply unnecessary on the facts presented in *S395* for their Honours to address the relevance of a claimant being required to modify or change his behaviour in a manner

separate from the manner in which he expressed his sexuality. And it is no part of the protection afforded by that Convention to confer a licence or a protection upon persons to engage in forms of conduct divorced from the manner in which (for example) a person may practice or espouse his religious or political beliefs or opinions. An agnostic may, for example, be exposed to persecution because he likes dressing in a black shirt with a white collar reminiscent of a Catholic priest. He may face persecution because he is wrongly thought to be a Christian. Similarly, many young people now wear what was once regarded as a Roman Catholic cross as a mere fashion accessory without any intention to convey a particular religious belief. The Refugees Convention, however, does not seek to protect the freedom of such persons to dress in that manner.

16 In the absence of any finding being made that the First Respondent feared persecution simply by reason of driving his truck, and no such finding was made, the appeal should be allowed.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 10 December 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1225 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSCA** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**FLICK, ROBERTSON AND GRIFFITHS JJ**
DATE:	**10 DECEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ROBERTSON AND GRIFFITHS JJ

Introduction

17 The Minister appeals from the judgment of the Federal Circuit Court of Australia delivered on 7 June 2013. The primary judge upheld the present first respondent's application for review of a decision of the Refugee Review Tribunal (the Tribunal) which affirmed the decision of the then Minister for Immigration and Citizenship to refuse to grant the present first respondent a protection visa (for convenience we will hereafter refer to the present first respondent as "the respondent").

18 The Minister challenges the primary judge's decision on the following grounds:

(a) error by finding that the Tribunal had made a jurisdictional error;

(b) contrary to the primary judge's findings, the judgment in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (*S395*) did not prevent the Tribunal from refusing the respondent a protection

visa upon the basis that the respondent would have no well-founded fear of persecution for a Convention reason if he could, reasonably, avoid any well-founded fear by either working as a jeweller (as an employee, or in his own business) or by changing his employment as a truck driver so that he was driving entirely within Kabul and not on roads where, on the Tribunal's findings, he may be stopped by the Taliban; and

(c) contrary to the primary judge's reasoning:

(i) for the respondent to change his means of making a living, as contemplated by the Tribunal, would not involve any suppression, modification, hiding or denial of any opinion, belief, characteristic or membership of a particular social group that is protected by the Refugees Convention; and

(ii) to affirm the delegate's decision, upon the basis that the respondent would not have a well-founded fear of persecution if he did not make a change to his method of making a living, as contemplated by the Tribunal, which was reasonable in his circumstances, did not involve any contravention of any principle established by *S395*, or any jurisdictional error.

Background facts

19 The following broad summary of the relevant background facts is taken primarily from the judgment below.

20 The respondent is a citizen of Afghanistan and is of Hazara ethnicity. He arrived in Australia by boat as an "offshore entry person" on 21 February 2012. He applied for a protection visa on 29 April 2012 and attached a statutory declaration in which he outlined his claims to protection. He claimed to fear persecution if he were to return to Afghanistan on the basis of his being a member of a particular social group, which he described as "truck drivers whom (sic) transport goods for foreign agencies". He made a separate claim of fear of persecution if he were to return to Afghanistan based upon what he described as "my imputed and actual political opinion: as a supporter of foreign agencies".

21 The respondent lived with his family in Kabul. He had originally grown up and lived in Jaghori. His wife and children remain in Kabul. In 2007, the respondent became a self-

employed truck driver transporting and delivering goods such as wood, animal skins and food goods to different places in Afghanistan, usually between Kabul, Ghazni and Jaghori. He said that from around January 2011 he started transporting goods like cement, stones and other building and construction materials between Kabul and Jaghori because he was paid more. The respondent claimed that a political opinion had been imputed to him as a supporter of foreign organisations or the Afghanistan government, because of his work and particularly in transporting construction and building materials. He also claimed that, due to his ethnicity and religion, he feared serious harm by the Taliban.

22 As we have said, the respondent started transporting construction materials from Kabul to Jaghori from about January 2011. He claimed that he was stopped by the Taliban and warned not to use his truck to carry building materials or he would be killed. The Taliban thought the respondent was carrying building materials to assist the government or foreign agencies. He continued transporting the building and construction materials because, he said, there was not a lot of work and he had to support his family. After the Taliban learned that the respondent continued to carry building materials, he claimed that they threatened to kill him in a letter dated October 2011 which was handed to him in November 2011 by another truck driver. The respondent claimed that, in these circumstances, if he returned to Afghanistan he would be unable to work as a truck driver anymore and that he would be deprived of "basic needs". Further, he claimed that the authorities in Afghanistan would be unable and unwilling to protect him.

(a) The delegate's decision

23 The Minister's delegate refused the grant of a protection visa in a decision which was conveyed to the respondent under cover of a letter dated 19 June 2012. Relevantly, while the delegate accepted that the respondent had been threatened by the Taliban on one occasion, the delegate did not accept that his life had been threatened by the letter adduced by the applicant. The delegate determined that given the lack of further contact with the Taliban since the incident in January 2011, the respondent's claim that he received a letter in which the Taliban threatened him for continuing to transport the same type of materials since January 2011 was not credible. The delegate accepted that travel by road in Afghanistan, and in the area around Jaghori, was difficult and that large stretches had reportedly been under Taliban control at various times and there were regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along those roads. The delegate

did not accept, however, that the respondent would be targeted if he returned and found that he "had the option of undertaking other employment" in what the delegate described as his home village in the district of Jaghori.

(b) The Tribunal's decision

24 The respondent sought a review by the Tribunal of the delegate's decision. He submitted additional material in support of his review application. On 26 September 2012 the Tribunal affirmed the delegate's decision. We will now summarise the Tribunal's reasons (which we will refer to as "R"), only insofar as relevant to this appeal.

25 As to the respondent's claim that he had been specifically threatened by the Taliban, the Tribunal made the following relevant findings:

(a) the Tribunal acknowledged that the respondent's claims of fear of persecution included claims that he would be harmed or mistreated in Afghanistan "as a member of a particular social group: truck drivers who transport goods for foreign agencies; as well as for his imputed and actual political opinion as a supporter of foreign agencies" (R[31]);

(b) the Tribunal was not satisfied that Afghan truck drivers as such are persecuted simply by reason of membership "of the suggested particular social group, "Afghan truck drivers'(sic)", however, it accepted that the Taliban, as part of their disruptive activities, generally targets and discourages drivers carrying construction materials and that such persons may be imputed with a political opinion supportive of the Afghan government and/or non-governmental aid organisations (R[115]);

(c) accordingly, it was "quite plausible" that the respondent was warned to desist from such activity and, although the Tribunal observed that in its view it was unlikely that the respondent would continue to engage in that activity after being so warned and that he would be able to travel regularly on the same roads and simply evade checkpoints, the Tribunal accepted that it was possible and proceeded on that basis (R[115]);

(d) it is therefore significant that, in contrast with the delegate's finding, the Tribunal proceeded on the basis that the Taliban's letter was genuine and that the respondent had been specifically threatened, with the consequence that the Tribunal accepted that if the respondent was again intercepted on the roads by the Taliban, particularly if he

was carrying construction materials, he would face a real chance of serious harm and even death by reason of an imputed political opinion (R[119]);

(e) subject to some qualifications set out in R[126] and [127], the Tribunal stated that it was satisfied that the respondent would face a real chance of persecution for a Convention reason, namely imputed political opinion, if he were to be stopped at a Taliban checkpoint on the roads between Kabul and Jaghori or Malestan and, in particular, in passing through Qarabagh district (R[120]);

(f) the qualifications in R[126] and [127] were in the following terms:

> It was put to the [respondent] at hearing that, whether or not there is a problem for him travelling between Kabul and Jaghori, he might not necessarily face the same problem if he remained in Kabul where he has lived for several years.
>
> **The issue of relocation does not arise as such**. The Tribunal is satisfied that as a matter of fact the [respondent] is a resident of Kabul, not of Jaghori and that Kabul is now the [respondent]'s relevant home region. Notwithstanding that Jaghori is the [respondent]'s original home district, he changed his residence to Kabul in 2007 and he and his family have been established there since. His wife and children remain in Kabul. (Emphasis added).

(g) the Taliban seems not to have been aware that the respondent was living in Kabul (R[129]); and

(h) in an important passage in R[130], the Tribunal explained why it concluded that the respondent would not face a real chance of persecution if he were to return to Kabul and changed his occupation:

> Nor does Tribunal accept that the [respondent] is a high-profile target for the Taliban who would be actively pursued and targeted throughout Afghanistan, rather than someone to be harmed should he again come to their attention. (It is also not clear that the [respondent] would continue to be targeted at all unless he continued to transport construction materials). The Tribunal does not accept that the [respondent] would be constrained to continue working as a truck driver on the roads between Ghazni and Jaghori, which is where he faces a real chance of persecution rather than in his home region of Kabul. The Tribunal is satisfied that the [respondent] could reasonably obtain relevant employment in Kabul so that he would not be obliged to travel between Kabul and Jaghori to make a living. The [respondent] has long-established skills making jewellery – a trade at which he worked from 1977 to 2001 – giving him real options in a very big city, either with his own business or as an employee. The Tribunal does not accept that the [respondent] would be prevented from doing so by reason of lack of capital or a claimed – but unelaborated – inability to "physically partake in the labour necessary to return to the business". Nor, given his employment history, does the Tribunal accept that working as a truck driver is a core

> aspect of the [respondent]'s identity or beliefs or lifestyle which he should not be expected to modify or forego.

The Minister accepted that the words in parentheses in the fourth and fifth lines of this extract did not involve any retreat from the Tribunal's finding that if the respondent was again intercepted on the roads by the Taliban he would face a real chance of serious harm and even death.

26 It may also be noted that the Tribunal was not satisfied that the respondent met the complementary protection criterion in s 36(2)(aa) of the *Migration Act 1958* (Cth) (the Act). The Tribunal explained in R[136] that this was on the basis of its satisfaction that, in the respondent's home region of Kabul, there would not be a real risk that he would suffer significant harm, presumably because of the findings set out at R[130]. We return to this issue at [76]-[79] below.

The Federal Circuit Court decision

27 In his judicial review application, the respondent's primary argument, upon which he succeeded, was that the Tribunal had fallen into jurisdictional error because it had failed to ask the right question or had applied the wrong test contrary to *S395*. In essence, the respondent's complaint was that the Tribunal had unlawfully expected him to modify his behaviour, by not working as a truck driver outside Kabul, to avoid persecution. He argued that this error was particularly evident in R[126]-[134].

28 In broad terms, the Minister responded by saying that, on a fair reading, the relevant paragraphs of the Tribunal's reasoning did not amount to the imposition of some expectation that the respondent would no longer work as a truck driver carrying construction materials in Taliban-controlled areas, but rather constituted findings in respect of the various claims made by the respondent. (This submission was not pursued on appeal to this Court.)

29 The Minister also sought to distinguish *S395* on the basis that:

(a) the harm feared there (i.e. persecution because of homosexuality) related to all of the relevant country;

(b) a distinction should be drawn between a fear of persecution based on a person's sexual orientation over which the person has no real control and the respondent's conduct in driving trucks carrying construction materials which in the present case gave rise to the imputed political opinion;

(c) the respondent had ceased working as a truck driver before leaving Afghanistan and, if he were to return to Afghanistan, he could do something else; and

(d) in circumstances where the Tribunal found that there was other work available to the respondent as a jeweller, a modification of the respondent's behaviour in taking on that work was not in relation to a "core aspect of his identity, beliefs or lifestyle".

30 While acknowledging that many elements of the Minister's argument were "attractive", the primary judge concluded that the respondent should succeed for the following essential reasons.

31 First, the Minister's attempt to defend the Tribunal's decision on the basis that the Tribunal was effectively applying legal principles relevant to relocation (see, for example, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437), could not be reconciled with the fact that the Tribunal specifically and emphatically disavowed that the case involved relocation (see R[127]).

32 Secondly, the respondent presented his case on the basis that, if he were returned to Afghanistan, he would continue to drive a truck and he had no other employment option in order to maintain his family. The Tribunal's analysis, which was to the effect that the respondent would not be forced to drive trucks in Taliban-controlled areas and, to avoid persecution, he could drive trucks in the Kabul region or revert to being a jeweller, involved error as identified in *S395*. In particular, having regard to R[130], the Tribunal's reasoning was that the respondent **could** (as opposed to **would**) avoid persecutory harm if he did not continue to transport construction materials outside the Kabul region. In the absence of any clear finding that the respondent would not drive a truck, the Tribunal's analysis should be seen as proceeding on the basis that the respondent need not drive a truck. The last sentence of R[130] simply emphasised that the Tribunal's approach was that the respondent **could** avoid harm by modifying his behaviour and not working as a truck driver at all. It should be noted that, in contrast to the way in which the Minister argued below, on appeal, he accepted that the Tribunal's analysis was that the respondent **could** avoid harm by such modification but argued that this did not involve jurisdictional error.

33 Thirdly, at [105] the primary judge specifically addressed the Minister's argument that the respondent's circumstances were different because truck driving was not a "core aspect" of his "identity or beliefs or lifestyle". His Honour found that this did not bring the

case within either *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270 (***NALZ***) nor the "resolution" of the relocation principle exposed in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (***SZATV***) because of the "link" established by the Tribunal's finding at R[120] between the respondent's conduct in transporting construction materials and the imputed political opinion which gave rise to the Refugees Convention ground of protection.

34 Fourthly, while there were elements of the Tribunal's analysis which supported the Minister's contention that the Tribunal was simply making findings in respect of claims made by the respondent, the court below concluded that this did not provide a satisfactory answer. At [111], the primary judge said:

> … In one sense, dealing with the [respondent]'s claims as to why he could reasonably return to Afghanistan, including Kabul, by approaching the claims on the basis that he could reasonably, and safely, live and work in Kabul presents a far greater parallel with an argument that the Tribunal approached this as a relocation case and was dealing with the objections to relocation in the manner required in *SZMCD v Minister for Immigration and Citizenship & Anor* [2009] FCAFC 46; (2009) 174 FCR 415 at [124] per Tracey and Foster JJ.

35 Fifthly, as to the Minister's submission that the Tribunal was not expressing any expectation that the respondent would cease working as a truck driver if he were to be returned because the Tribunal had already noted that he had stopped such work in Kabul for a period of up to four months before leaving Afghanistan, the primary judge found that this occurred in the context of the respondent preparing to leave for Australia. He sold his truck in order to fund his escape from Afghanistan and, in those circumstances, there was no basis for finding that the respondent had voluntarily elected to cease driving a truck or that he would not drive a truck if he were to return to Afghanistan. On appeal, the Minister accepted that what the respondent did in this respect was caused by the threat made by the Taliban.

36 For completeness, it might also be noted that several other arguments raised by the respondent below in support of his judicial review application were not accepted. They included the Tribunal's alleged failure to consider what the respondent said was his express claim to fear harm on the ground of actual – and not merely imputed – political opinion. The primary judge acknowledged that there was a single reference to "actual" political opinion in the respondent's statutory declaration, but found that the claim was not subsequently developed by the respondent or by his advisers. Accordingly, the primary judge concluded at

[126] that that particular claim had not been sufficiently raised before the Tribunal so as to require the Tribunal to deal with it. The primary judge added at [127] that the respondent's claims of both actual and imputed political opinion related to his claimed membership of a particular social group, namely truck drivers who transport goods for foreign agencies and that is the way in which the Tribunal dealt with the matter.

Outline of Minister's submissions

37 The appellant Minister submitted that the three grounds of appeal raised essentially the same point which reduced to whether the primary judge was correct in finding that the Tribunal was prevented by the judgments in *S395* from reasoning as it did at R[130]. The Minister submitted that the Tribunal was entitled to decide the matter as it did as the circumstances of the respondent did not engage Australia's protection obligations by reason of his ability to live and work in Kabul where he did not have any well-founded fear of persecution. The relevant risk was not persecution for reason of any immutable characteristic or belief but rather because of the work the respondent had engaged in. He modified the behaviour that he claimed was the cause of the threats against him ultimately by ceasing to work as a truck driver, selling his truck and leaving Afghanistan. Although the Tribunal found that the modifications were not in respect of some conduct that was the ordinary manifestation of a "core aspect of his identity, beliefs or lifestyle" (R[130]), as we have indicated, the Minister accepted in oral argument that the respondent took these actions as a result of the threat contained in the Taliban's letter dated October 2011 that he would be killed because he had persisted in transporting construction materials despite the Taliban's earlier warning.

38 The Minister further submitted that the facts of the case showed the fragility of a claim that relied on a person's employment from time to time as opposed to some more permanent characteristic: he referred to *Morato v Minister for Immigration* (1992) 39 FCR 401 at 404-405 (*Morato*).

39 The Minister submitted that although the Tribunal here expected the respondent to do different work from that which had caused him to be threatened, that did not mean that it fell into one of the errors identified in *S395*. First, both the respondent's claims and the Tribunal's reasoning in respect of those claims were different from *S395*. Secondly, "expectations" of conduct on return to a country of nationality did not necessarily indicate

error. Whether it does or not depends on the nature of the claims and, in particular, the Convention reason for the harm feared.

40 The Minister further submitted that the primary judge erred in distinguishing *NALZ* on the basis that the Tribunal had found a Convention nexus for the harm feared by the respondent, namely, imputed political opinion. The Minister submitted that the critical fact in *NALZ* case was that the appellant there had not engaged in the relevant conduct because of any actual political opinion or that he feared harm for reason of membership of a particular social group: 140 FCR 270 at [48]. It was for that reason, the Minister submitted, that there would be no Convention related persecution arising from the appellant's refraining from that conduct. The Minister referred to *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [26] (*Chen Shi Hai*). While both *NALZ* and the present case involved the modification of behaviour, the difference between them and *S395* was that such modification did not involve an interruption, denial or impact upon any of the characteristics that were protected by the Convention.

41 The Minister referred to *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 at [15]-[16] (*SZFDV*) as apparently distinguishing *SZATV* on the basis that *SZFDV* did not involve the Tribunal envisaging "abnegation of the attribute" for which the appellant had faced persecution, whereas *SZATV* did. The Minister submitted that "requiring" the respondent to modify his employment did not involve him "modifying beliefs or opinions or hiding membership of a particular social group…". Alteration of occupation and alteration of place of residence within the country of nationality – where each would be reasonable in the circumstances and would result in there being no well-founded fear of persecution – ought not to be treated differently.

42 As we have indicated, in oral argument the Minister accepted that it was a correct characterisation of the Tribunal's reasons to say that they focused on the question of what the respondent could or should do if he were returned to Afghanistan rather than on what he would do. But the Minister contended that this approach was not inconsistent with *S395* because the Tribunal's expectation that the respondent could change his occupation and become a jeweller or take up another occupation in Kabul did not involve the abnegation of any Refugees Convention attribute. In this respect it was important to the submission that the respondent's political opinion was imputed only. As we understood the submission, if the political opinion had been actual rather than imputed the Minister's analysis would not have

been available. The Minister explained that the reference to "abnegation of any Refugees Convention attribute" was drawn from *SZFDV*. In that case, one of the grounds of appeal taken to the High Court was that the Federal Court had erred in failing to find jurisdictional error on the part of the Tribunal for failing to make findings about, and to consider, whether requiring the appellant to relocate in his country of nationality "would involve the abnegation of the attribute for which the appellant was selected for persecution". That ground of appeal was rejected. Gummow, Hayne and Crennan JJ found at [15] that the Tribunal did in fact make relevant findings on these matters in reaching its conclusions that the appellant could safely relocate and that it would not be unreasonable to expect him to do so.

Outline of respondent's submissions

43 The respondent submitted that the key findings of the Tribunal were that it did not accept that he would be "constrained" to continue working as a truck driver on the roads between Ghazni and Jaghori, which was where he faced a real chance of persecution; he could reasonably obtain employment in Kabul "so that he would not be obliged" to travel between Kabul and Jaghori to make a living; he had long-established skills making jewellery and the Tribunal did not accept that the respondent "would be prevented from doing so"; and the Tribunal did not accept that "working as a truck driver is a core aspect of the [respondent]'s identity or beliefs or lifestyle which he should not be expected to modify or forego." The Tribunal also expressly stated that the matter was not one that involved any question of the reasonableness of relocation.

44 The primary judge accepted that on a fair reading the Tribunal imposed an expectation on the respondent to cease driving trucks upon his return in order for him to avoid persecution by reason of an imputed political opinion, which amounted to jurisdictional error. In doing so, the primary judge rejected submissions that the matter could be dealt with in a manner similar to relocation and that it was permissible to expect an applicant to modify his behaviour if that behaviour was not a core aspect of the claimant's identity or beliefs or lifestyle.

45 The respondent submitted that a fair reading of the Tribunal's decision at R[126]-[134] was that the Tribunal considered it reasonable to expect him to modify his behaviour or forego working as a truck driver to avoid persecution. There was no apparent error in the reasoning of the primary judge at [93]-[108].

46 The respondent submitted that, on the authorities, it was plain that the Tribunal will fall into jurisdictional error should it require an applicant to modify his behaviour. Its statutory task is to determine what an applicant would do upon his return and to assess whether his claimed fear is well-founded and for a Convention reason with reference to that conduct. It is not entitled to impose requirements as to what an applicant could or should do to avoid persecution. To do so is to ask the wrong question.

47 The respondent referred to *S395* at [40]-[43] and [82]-[83] and to *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 at [168] (*NABD*) and submitted that a Tribunal cannot require an applicant to behave in a certain manner but it is permissible for the Tribunal to conclude that an applicant would not in fact behave in a certain manner upon his return.

48 The respondent submitted there was no support for the proposition that the Tribunal is entitled to impose any requirement as to what it expects an applicant to do to avoid persecution and the imposition of any such requirement was plainly contrary to the express language in the above authorities. There was no support for the proposition that one engages in an exercise to determine whether a requirement goes to a characteristic protected by the Convention. To the contrary, such an exercise would be inconsistent with the statements in *S395* at [43] and [82]-[83]. There was no authority in support of the proposition that an applicant can reasonably be expected to modify his or her behaviour to avoid persecution in a general sense, beyond the question of relocation. *S395* was direct authority to the contrary. The respondent submitted that *NALZ* was not to be understood as departing from the principles in *S395* and referred in particular to the reasoning of Emmett J at [50].

49 It should also be noted that Mr S Lloyd SC (who appeared with Mr P Reynolds for the respondent) formally reserved his client's rights to argue in another place that 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 Refugees Convention. Rather, that person *is* a refugee but a contracting State does not breach its obligations under the Refugees Convention if that State were to return the person to the relevant internal area. It was acknowledged that this proposition is contrary to existing authority.

Consideration

50 At the heart of the Minister's appeal is the contention that the respondent would have no well-founded fear of persecution for a Convention reason if he could, reasonably, avoid his claimed fear by staying in Kabul and not engaging in the work which gave rise to the imputed political opinion which underpinned his fear. The Minister submits that this approach is not inconsistent with *S395* and that the primary judge erred in taking the contrary view. On the facts of this case we disagree, for the following reasons.

51 First, it is appropriate to spend a little time analysing *S395* in view of its central significance. It was not a relocation case.

52 In *S395*, the Tribunal had rejected the applications by two male citizens of Bangladesh for protection visas, which applications were based on their claim to have a well-founded fear of persecution in Bangladesh by reason of their homosexuality. The Tribunal accepted that it was not possible to live openly as a homosexual in Bangladesh, but it found that the applicants had conducted themselves in a discreet manner and that there was no reason to believe that they would not continue to do so if they returned. The applicants argued that the Tribunal had committed jurisdictional error by imposing upon them a requirement that they live discreetly in order to avoid persecution.

53 The High Court (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) held that no such requirement had been imposed and the Tribunal had simply made a finding of fact that they would live discreetly if they were returned. However, four members of the Court made it clear that, while the Tribunal had to determine how an asylum seeker is likely to live on return to his or her country of origin and assess the chance of persecution on that basis, it is not relevant to consider whether the asylum seeker **could** live in the country of origin without attracting adverse consequences.

54 Justices McHugh and Kirby made the following observations on the issue at [40] to [43]:

> …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. **The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors.** Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of

> the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.
>
> History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. **It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention**…
>
> **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. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many — perhaps the majority of — cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.** (Emphasis added, italics in original).

55 To similar effect, Gummow and Hayne JJ made the following observations on the issue at [80] and [82]-[83]:

> If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. **But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question**. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. **The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences**.
>
> …

> Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. **To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection**. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. **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**.
>
> **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, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in *Applicant LSLS v Minister for Immigration and Multicultural Affairs* [[2000] FCA 211 at [20]-[21]], leads to error. It distracts attention from the fundamental question** … (Emphasis added, italics in original).

56 As Kirby J subsequently stated in *SZATV* at [89], the common ground in the two joint majority judgments in *S395* was:

(a) the need for the decision-maker to focus attention on the propounded fear of the individual asylum seeker and whether it was "well-founded";

(b) that issue has to be considered on an individual basis and not by reference to a priori reasonable conduct that could or might avoid persecution; and

(c) to concentrate on what would happen to the asylum seeker **in fact**, not what could or might happen if the asylum seeker behaved in a particular way that would reduce the risk of persecution, such as by behaving discreetly.

57 It is significant to note that the Tribunal made no finding of fact that the respondent would not resume the type of truck driving in which he was previously engaged were he to be returned to Afghanistan. Neither did it evaluate the consequence of the respondent having ceased truck driving by reason of the threat made by the Taliban. Although in R[115] the Tribunal expressly rejected any claim based on membership of a social group comprising "Afghan truck drivers", its subsequent finding in that paragraph that the Taliban targets and discourages drivers carrying construction materials (which gave rise to an imputed political

opinion supportive of the Afghan government and/or non-governmental aid organisations) suggests at least an implicit acceptance by the Tribunal of the respondent's membership of a narrower social group. We note that although the claim in respect of a narrower social group is not stated in the summary of claims at R[92] it is picked up at R[93]. In oral argument before us, Mr G Johnson SC (who appeared with Mr J Smith for the Minister) submitted that it was unnecessary for the Tribunal to make an explicit finding that the respondent was a member of that narrower social group in circumstances where the Tribunal accepted that the Taliban targeted and discouraged truck drivers from carrying building or construction materials because of the imputed or attributed political opinion inherent in such conduct.

58 Equally significantly (and as the Minister also accepted in oral argument), the Tribunal's reasoning and findings set out in R[130] reveal that the Tribunal saw the central question as what could or might happen to the respondent if he behaved in a particular way, namely by changing his work behaviour so as to remove the foundation for the imputed political opinion which gave rise to his claimed fear of persecution. Such an approach focuses on what could or might happen if the asylum seeker modified his behaviour to reduce the risk of persecution and not on the question of what would happen to him in fact were he to act in the way he said he would if he were returned to Afghanistan where, the Tribunal accepted, a specific threat had been made by the Taliban to kill him or have him killed.

59 It is significant that the Tribunal made a finding at R[119] that if the respondent resumed work as a truck driver driving on roads outside Kabul (particularly if he was again carrying construction materials) he would face a real chance of serious harm or even death, by reason of an imputed opinion. That finding was unchallenged and plainly open on the material before the Tribunal, which included the Tribunal's acceptance of the respondent's claim that in the October 2011 letter the Taliban threatened that he would be killed because he had not changed his conduct despite their earlier warning. The text of the letter, as translated, was as follows:

> Islamic Emirate of Afghanistan, Ghazni Province, Khogyani District, is informing the local council people to perform their Islamic duty which is:
>
> Resident of Jaghori, a criminal, seditious by the name of [the respondent], who is driving a Mazda vehicle. He is assisting and cooperating with government and foreign organisations in the transportation of logistical and construction materials from Ghazni city to Jaghori and to Malestan district.
>
> This is our Islamic duty to take a firm decision to get rid of this criminal, infidel

> person.
>
> Therefore we request from you, to take firm action as soon as possible to get rid of this apostate, criminal person on the road from Qarabagh and Janda areas.

60 To highlight the principles established by *S395* and their limits, the respondent drew attention to the decision in *NABD***.** In that case, it was argued that the Tribunal fell into error because it imposed a requirement that the asylum seeker not engage in apostasy upon his return to Iran, relying on *S395*. However, the Court concluded by a majority that no jurisdictional error was demonstrated because the Tribunal considered what the returnee would in fact do, not whether he could avoid persecution. At [168], Hayne and Heydon JJ said**:**

> At no point in its chain of reasoning did the tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the tribunal had asked in *Appellant S395/2002)* whether the appellant could **avoid** persecution; it asked what may happen to the appellant if he returned to Iran. Based on the material the tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way **he** chose to do so, there was not a real risk of his being persecuted. (Emphasis in original)

See also Gleeson CJ at [10]-[11].

61 We accept the respondent's submission that the relevant principles arising out of *S395* and *NABD* are:

(a) the Tribunal cannot require an asylum seeker to behave in a particular manner; but

(b) it is permissible for the Tribunal to conclude that an asylum seeker would not in fact behave in a particular manner upon his or her return.

62 In our view, on the facts of this case the Tribunal committed a jurisdictional error as identified in *S395* when it embarked upon a chain of reasoning (which is particularly manifest in R[130]) that the respondent could avoid persecution if he were to change his occupation and work as a jeweller in Kabul. That approach is inconsistent with the principles enunciated by the majority in *S395* and as set out in [38] and [39] above because it fails to consider not only whether but also why the respondent would take that step and the threat which caused it where the Tribunal's task was to decide whether the respondent had a well-founded fear of persecution.

63 In our opinion in the present case the Tribunal did not consider, in assessing whether the respondent's fear of persecution was well-founded, what may happen to the respondent if returned to Afghanistan but limited itself to what the respondent could reasonably do if so returned. But the second threat which had been made by the Taliban caused the respondent to give up the activity in question and to flee Afghanistan. This underlines the error in the Tribunal's approach of looking at what the respondent could do rather than what he would do if returned in that the Tribunal did not examine why the respondent would not earn his living as he had previously done. As the Minister accepted, the respondent modified the behaviour that he claimed was the cause of the threats against him by ceasing to work as a truck driver, selling his truck and leaving Afghanistan.

64 We therefore do not accept the Minister's submission that *S395* is distinguishable because the expected changed behaviour described by the Tribunal did not involve "abnegation of an attribute" which exposed the respondent to persecution. In the present case the threat had been made and the Taliban was proceeding on the basis that the respondent had the political opinion of being a supporter of foreign agencies. In those circumstances the central importance in the submissions on behalf the Minister on the imputed nature of the political opinion was misplaced.

65 Secondly, we do not accept the Minister's argument that the primary judge erred in rejecting the Minister's contention that there was no error on the part of the Tribunal in expecting the respondent to change his occupation and live/stay in Kabul [as a jeweller] because his previous occupation as a truck driver did not involve a core aspect of his identity, beliefs or lifestyle. Although the parties made no reference to the source of that terminology, it appears to relate to the concept as considered by the Supreme Court of the United Kingdom in *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 (***RT (Zimbabwe)***). As noted at [41] of that decision, the Home Secretary sought to distinguish the Supreme Court's earlier decision in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 (***HJ (Iran)***). *HJ (Iran)* had adopted and applied the reasoning of the majority of the High Court in *S395*. In *HJ (Iran)*, the Supreme Court also referred to and applied a distinction between conduct which interfered "at the margin, rather than the core" of a protected right under the Refugees Convention. The Home Secretary's analysis of that distinction was expressly rejected by the Supreme Court in *RT (Zimbabwe)* at [42]-[52]. Lord Dyson (with whom Lord Hope, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson and

Lord Reed agreed) did so on the following bases (which reflected the particular facts of the relevant matters on appeal):

(a) the right not to hold a particular political opinion is itself a fundamental right which is protected by the Convention and a person is not required to express a false support for a political regime in order to avoid persecution;

(b) the Home Secretary's suggested distinction between a core/marginal belief was unworkable in practice and threatened to introduce a "fine and difficult distinction" which was "likely to be productive of much uncertainty and potentially inconsistent results"; and

(c) the distinction was in any event based on a misunderstanding of the Supreme Court's earlier decision in *HJ (Iran)* and the acceptance there of the reasoning of the New Zealand Refugee Status Appeal Authority in Refugee Appeal No. 74665/03. That reasoning was to the effect that the "being persecuted" standard of the Refugees Convention was not engaged if the right sought to be exercised by the asylum seeker was not "a core human right". Lord Dyson gave examples of the kind of activity which were at the margins of a protected right under the Refugees Convention, which included prohibiting a homosexual from adopting a child on the ground of his or her sexual orientation or denying transsexuals or homosexuals the right to marry. As Lord Dyson emphasised at [50], the determination of whether an applicant's proposed or intended action lay at the core of a right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution because it focused attention "on the important point that persecution is more than a breach of human rights".

66 In our view, the distinction between the "core" as opposed to the "margins" of a fundamental human right has limited if any relevance to an imputed political opinion of the sort which the Tribunal found arose here and where a generalised threat had crystallised into a specific threat to kill the respondent. In the circumstances where the imputation arose solely because of the Taliban's perception of the respondent's particular truck driving activities as indicating that he was a supporter of the Afghan government and/or foreign aid agencies and where for that reason the Taliban had informed the local council people "to take firm action as soon as possible to get rid of this apostate, criminal person", we consider that the primary judge was correct to find at [105] that, given the Tribunal's specific finding at R[120] that

those particular activities gave rise to the Refugees Convention's protection of an imputed political opinion, there was no room to expect or require the respondent to change those activities so as to bring his case within *NALZ* or the "resolution" of the relocation principle outlined in *SZATV*. This is all the more so in circumstances where the respondent said that, if he were returned to Afghanistan, he would resume those very same activities in order to support his family and thereby expose himself to the real chance of persecution which the Tribunal had accepted at R[119] confronted him by reason of an imputed political opinion.

67 Thirdly, we do not consider that the majority judgments in *NALZ* support the Minister's contentions. *NALZ* involved an Indian national who claimed to have a well-founded fear of persecution owing to suspected connections with the Liberation Tigers of Tamil Eelam (LTTE), a Sri Lankan separatist movement which was an unlawful organisation in India. That suspicion was said to be founded on his involvement in selling electrical goods to the LTTE. During the hearing before the Tribunal, the appellant was asked if he would be safe from harm if he returned to India but refrained from selling electrical goods to Sri Lankan nationals. He responded by saying that that is the work which he liked. The Tribunal was satisfied that the appellant could avoid future arrests by not selling electrical goods to Sri Lankan nationals and it was not unreasonable for him to avoid arrest by so doing.

68 Justices Emmett and Downes dismissed the appeal, while Madgwick J dissented.

69 Justice Emmett rejected the appellant's reliance on *S395*. His Honour stated at [46] that the following two factors were relevant in considering whether the rationale in *S395* applied equally to the circumstances of the appeal:

(a) there was an assumption underlying the majority's approach in *S395* that, wherever the relevant conduct under consideration might occur in Bangladesh, the consequences would be the same. No issue of relocation arose in *S395*, however, Emmett J observed that requiring an asylum seeker to relocate, in circumstances where it was reasonable to do so, did not involve the asylum seeker modifying beliefs or opinions or hiding membership of a particular social group if such beliefs, opinions or membership were the source of persecution; and

(b) there was a clear finding in *S395* that homosexual men in Bangladesh constituted a particular social group for the purposes of the Refugees Convention, whereas in the present case, there was no suggestion that the appellant feared persecution by reason

of any opinion or belief that he held, nor did he suggest that he feared persecution by reason of his membership of a particular social group.

70 Justice Emmett held that the Tribunal's decision was not inconsistent with *S395* because there was no expectation that the appellant would cease behaviour that caused the authorities to impute a political opinion to him or to identify him as a member of a particular social group. Rather, at most, the appellant was expected to cease behaviour that caused the authorities to impute illegal conduct to him. In an important passage at [50], Emmett J stated:

> The Tribunal made no finding that the appellant's selling of generators and other electrical goods to Sri Lankan nationals was behaviour that expressed a political opinion or which identified him as a member of a particular social group. The most that the appellant said, when asked why he should not stop selling goods to Sri Lankan nationals, was that it was what he liked to do. **As a consequence, the appellant is not expected to cease behaviour that caused the authorities to impute a political opinion to him** or to identify him as a member of a particular social group. *At most, he is expected to cease behaviour that caused the authorities to impute illegal conduct to him*. (Emphasis added in penultimate sentence, original emphasis in final sentence).

71 In a separate judgment, Downes J also dismissed the appeal. In doing so, his Honour distinguished *S395* on the bases that having regard to the facts in *NALZ*:

(a) the expected changed behaviour would avoid creating a wrongful perception of membership of a protected class; and

(b) the conduct involved trading with an unlawful organisation.

72 Justice Madgwick's dissent turned on his Honour's view that the principles established by *S395* applied not only to cases of actual but also imputed membership of a Convention class.

73 For the following reasons, we reject the Minister's submission that the majority approach in *NALZ* applied to the circumstances here so as to distinguish *S395*. It is convenient to deal separately with the judgments of Emmett and Downes JJ because their reasoning is not identical.

74 No issue of relocation was presented by the facts in *NALZ*, and Emmett J's reference to the principle of relocation is to be understood in the context of his Honour seeking to reconcile the rationale of the majority judgments in *S395* with other cases which did involve a requirement of relocation. The resolution was that, while in a relocation case the asylum seeker was required to do something i.e. relocate where it was reasonable to do so, this did

not require the asylum seeker to modify the conduct which is the source of the feared persecution. In *SZATV* at [94], Kirby J stated that this aspect of Emmett J's reasoning in *NALZ* "offers an acceptable way of reconciling this Court's holding in *S395* with the by now well settled line of authority in Australia and elsewhere, recognising the existence of a consideration of internal relocation, where that course would be reasonable in the country of nationality".

75 The second distinguishing feature identified by Emmett J concerned the fact that, unlike *S395*, where the two Bangladeshis claimed to be members of a particular social group for the purpose of the Convention, NALZ did not claim that he feared persecution by reason either of any opinion or belief which he actually held or his membership of a particular social group. That is to be distinguished from the position here because the Tribunal accepted in R[115] that the respondent's conduct in transporting construction or building materials gave rise to an imputed political opinion in the eyes of the Taliban. In our view, the Minister's appeal is not supported by Emmett J's judgment in *NALZ*. The Minister's position is inconsistent with the penultimate sentence in [50] of Emmett J's judgment because it involves an expectation or requirement that the respondent cease the behaviour which is the foundation for the imputed or attributed political opinion. For reasons given above, the Minister's argument is also inconsistent with *S395*.

76 As to the matters identified by Downes J in *NALZ* as distinguishing *S395* from the circumstances in *NALZ*, the first distinction was that *NALZ* did not involve changed behaviour to avoid persecution, but rather changed behaviour to avoid creating a wrongful perception of membership of a protected class. That is not the case here. The Tribunal accepted that the Taliban targets drivers carrying construction materials and that such persons might be imputed with a political opinion supportive of the Afghan government and/or non-governmental aid organisations (see R[115]).

77 The second distinguishing feature identified by Downes J related to the fact that NALZ's problems stemmed from his dealings with persons who were apparently associated with an organisation which was unlawful in India and it was open to NALZ to avoid those problems by choosing not to trade unlawfully. That is not the case here. There was no finding by the Tribunal, or any claim by the Minister, that the respondent's behaviour in transporting construction materials was unlawful.

78 Fourthly, in our view, the Minister's approach in this appeal impermissibly seeks to introduce a test of "reasonableness" into the assessment of whether there is a real chance that the respondent would be persecuted were he to be returned to Afghanistan, which is akin to the test of reasonableness which arises in cases involving relocation. The Minister submitted that alteration of occupation and alteration of the place of residence within the country of nationality, where each would be reasonable in the circumstances and would result in there being no well-founded fear of persecution, ought not to be treated differently. In other words, the Minister submitted that an analogy could be drawn between relocation and requiring the respondent to change his occupation and remain in Kabul.

79 The difficulty with 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. The rationale was explained by Kirby J in *SZATV* at [78]:

> In each case it is necessary to keep in mind the purpose, under the Refugees Convention, for which the reasonable possibility of relocation is being considered. It is not a free-standing prerequisite to individual entitlements under the Refugees Convention. Those entitlements arise on the refugee applicant's establishing a presence outside the country of nationality owing to a well-founded fear of being persecuted for Refugees Convention reasons. The postulated capacity to relocate is only relevant insofar as it casts light on the question whether the reason for being outside the country of nationality is a "well-founded" fear of the risk of persecution. A propounded "fear" might not be classified as "well-founded" if, instead of seeking protection from Australia, it would be reasonable for the applicant to rely on his or her country of nationality to afford the protection at home by the simple expedient of moving to another part of the country, free of the risk of persecution.

80 As Kirby J emphasised at [97], 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 specified Refugees Convention-based grounds of persecution, which it is the object of the Convention to prevent and which *S395* forbids (to similar effect, see *HJ (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*.

81 The distinction drawn by Kirby J in *SZATV* is well illustrated by the facts in that case. The appellant was a Ukrainian national who faced persecution in his home region in Ukraine on account of the expression of his political beliefs through journalism. The Tribunal found that it was reasonable for the appellant to relocate elsewhere in Ukraine and that it was not unreasonable for him to do so notwithstanding that he might not be able to work as a journalist elsewhere in Ukraine because to do so could bring upon him further persecution by reason of his political opinion. The Tribunal found that the appellant might be able to work in the construction industry in Ukraine, as he had done in Australia. The High Court unanimously held that this involved jurisdictional error. Justices Gummow, Hayne and Crennan said that the Tribunal's approach effectively required the appellant to move elsewhere in Ukraine and live "discreetly" so as not to attract the adverse interest of the authorities, lest he be further persecuted, an approach which was inconsistent with *S395* (see [28]-[32]).

82 Similarly, Kirby J found that the Tribunal's approach involved jurisdictional error. Not only was that approach at odds with *S395*, but the Tribunal erred in relying on its finding that the appellant could relocate within Ukraine and also change his occupation so as to avoid persecution. As his Honour stated at [102]:

> In this approach, the Tribunal displayed a clear error in its understanding of the purpose of the Refugees Convention which includes that of safeguarding the appellant's right to have, and to express, his "political opinion" in Ukraine and not to be persecuted for it. That right is specifically within the protection of the Refugees Convention. It cannot be a reasonable adjustment, contemplated by that Convention, that a person should have to relocate internally by sacrificing one of the fundamental attributes of human existence which the specified grounds in the Refugees Convention are intended to protect and uphold.

83 *Morato* is of very limited assistance as that case concerned membership of a particular social group and whether a social group could be defined by reference to the *sole* criterion that its members were all those who had done an act of a particular character: see *Morato* at

405.2. Further, in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 242-243 Dawson J said of *Morato*:

> The distinction between what a person is and what a person does may sometimes be an unreal one. For example, the pursuit of an occupation may equally be regarded as what one is and what one does. At other times, the distinction may be appreciable but not illuminating. For example, the acts of conceiving and bearing a child may be what people do, but the result of those acts - that the persons involved are parents - is quite central to what they are.
>
> However, I think that Black CJ's remarks were directed more to the situation of a generally applicable law or practice which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation. For example, a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms. Viewed in that way, Black CJ's distinction between what a person is and what a person does is merely another way of expressing the proposition which I have already stated. (Footnotes omitted)

This passage was cited with approval in *Chen Shi Hai* at [15].

84 As to the Minister's reference to *Chen Shi Hai* at [26], in our view what was said there is remote from the facts of the present case. Their Honours were dealing with whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons and said that question may necessitate different analysis depending on the particular reason assigned for that conduct. Their Honours continued at [26] and [27]:

> The need for different analysis depending on the reason assigned for the discriminatory conduct in question may be illustrated, in the first instance, by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.
>
> The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups – for example, terrorist groups – which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views – for example, those who advocate violence or terrorism – differently from other members of society.

85 As we have mentioned above, the Minister relies on the respondent's "choice" or his modification of his behaviour that he claimed was the cause of the threats against him, ultimately by ceasing to work as a truck driver, selling his truck and leaving Afghanistan. As noted above, the Minister accepted in oral argument that these actions were motivated by the respondent's fear of persecution arising from the threat made in the Taliban's October 2011

letter. In not considering why the respondent had made the relevant "choices", the Tribunal made the same error as the High Court found in *S395*: see at [35] and [43] per McHugh and Kirby JJ and at [88] per Gummow and Hayne JJ.

86 This is closely related to the issue of reasonableness. We have already set out, at [54] above, the passage from the joint judgment of McHugh and Kirby JJ in *S395* where their Honours said 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. Their Honours said the fallacy underlying the approach is the assumption that the conduct of the person is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted rather than the threat of harm. We have also set out, at [55] above, the relevant reasoning of Gummow and Hayne JJ in *S395*. Here, if the respondent chose not to venture out of Kabul this would be because of the Taliban's threat to kill him or have others kill him by reason of what the Taliban saw as the respondent's political opinion. In our opinion the consequence is that the harmful action which gave rise to the well-founded fear of persecution was at the heart of the protected right. In those circumstances, in our opinion the Tribunal's reasoning and conclusion that the respondent could avoid the risk by making a reasonable choice establishes a jurisdictional error.

87 In *SKFB v Minister for Immigration & Multicultural Affairs* [2004] FCAFC 142, a relocation case referred to by the Minister, the submission which was rejected by the Full Court was that the reasoning in *S395* meant that to require a person to live in a safe part of his country, even when it is reasonable for him to do so to avoid persecution, avoids addressing the fundamental question that the Tribunal must consider, namely whether the applicant has a well-founded fear of persecution. The Full Court did not believe that the relocation principle required a person to modify their beliefs or opinions or to hide the fact that they were of a certain racial or national origin or member of a particular social group. If the relocation principle is applied that only means that the putative refugee is not at risk of persecution in his country of nationality. Nothing said by the High Court in *S395* cuts across this principle.

88 We see nothing of relevance in *SZDPB v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* [2006] FCAFC 110, another relocation case referred to by the Minister.

89 The Minister also referred to *SZATV,* a further relocation case. But it is to be recalled that the plurality said there, at [28], that the Tribunal in *S395* had not asked whether "discretion" was the price to be paid to avoid persecution and in that paragraph approved the statement by McHugh and Kirby JJ in *S395* at [40] that the Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. It is also to be noted that, even in relation to relocation, the appeal was argued by the Minister as involving the question of whether it was reasonable, in the sense of practicable, for the appellant to relocate to a region where, objectively, there was no appreciable risk of the occurrence of the feared persecution. The plurality said at [24] that what is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.

90 We also note that the Minister accepted that the Tribunal did not reject the claim that the respondent was a member of a particular social group of truck drivers who carry construction materials in Afghanistan. Contrary to the Minister's submission that this did not matter because the Tribunal accepted the claim of imputed political opinion, in our opinion it could not be said that the claim did not matter because if that social group were accepted as a matter of fact then carrying construction materials would be an element of that particular social group. In that event the Minister's contention based on the imputed nature of the respondent's political opinion would provide no answer because, it might be said, members of the group had to modify some attribute or characteristic of the group to avoid persecution. This shows that, depending on the facts, any division between the heads under which claims are made under the Convention has a potentially porous nature. We note in this respect that no notice of contention was filed by or on behalf of the respondent seeking to put in issue the reasoning of the primary judge at [123]. Nevertheless, in our opinion, at the level of analysis it shows that, contrary to the Minister's submission, little weight or emphasis can be given to the fact that, in this case, the Tribunal proceeded on the basis of its acceptance that the respondent's political opinion was imputed rather than by reference to his membership of a social group.

91 We note also that if this had been a relocation case, which the Tribunal said it was not, the Tribunal's reasoning may not have contained a sufficient analysis of whether it was

reasonable, in the sense of practicable, for the respondent to relocate to Kabul given his economic circumstances: compare *SZFDV* at [15] and *SZATV* at [24].

Complementary protection

92 The parties were given an opportunity to file short supplementary submissions addressing the question of the implications of the Minister's approach for a claim for complementary protection under s 36(2)(aa) of the Act. In particular, the Minister was asked to address the question of the relevance of the fact that the criteria in s 36(2)(aa) did not require a finding of a real chance of persecution for a Convention reason, but rather whether there would be a real risk that an asylum seeker will suffer significant harm should he be returned to his country of nationality.

93 In broad terms, the Minister emphasised that there is no Convention reason element in the complementary protection criteria in s 36(2)(aa) of that Act and that the Tribunal's decision on that question should stand because of the safety the Tribunal found that the respondent would have if he lived and worked in Kabul which meant that there was no real risk of significant harm if he were removed from Australia.

94 In response on this issue, the respondent emphasised that the Minister did not cite any authority to support his submission that the statutory task imposed by s 36(2)(aa) of the Act permits the Tribunal to require an applicant for complementary protection to take steps to avoid harm, nor was the respondent able to locate any such authority. The respondent submitted that the correct approach is for the Tribunal to first make findings as to what an applicant would likely do upon his or her return and only then ask itself whether, in the light of those findings, the significant harm would be a necessary and foreseeable consequence of removal.

95 In our view, these issues need not be resolved in order to dispose of the appeal. The Tribunal was not satisfied that the respondent was entitled to a protection visa on the basis of either ss 36(2)(a) or (aa) of the Act. The proceedings below were confined to the respondent's judicial review challenge to the Tribunal's findings in relation to his claims under s 36(2)(a) of the Act and did not extend to its findings concerning complementary protection under s 36(2)(aa). No application for leave was made in the appeal to have the issue of complementary protection dealt with as part of the appeal even though it was not

agitated below. Accordingly, we need not address that aspect of the Tribunal's decision and we make no comment on it.

Conclusion

96 The appeal should be dismissed with costs.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Robertson and Griffiths.

Associate:

Dated: 10 December 2013