FEDERAL CIRCUIT COURT OF AUSTRALIA

SZSCA v MINISTER FOR IMMIGRATION & ANOR *[2013] FCCA 464*

Catchwords:
MIGRATION – Application for review of decision of Refugee Review Tribunal – alleged failure by the Tribunal to ask the right question or apply the correct test – alleged failure by the Tribunal to consider, or misconstruing, a claim or integer of a claim – Tribunal fell into error by expecting the applicant to modify his behaviour if he returned to Afghanistan – jurisdictional error – declaration made.

Legislation:
Migration Act 1958 (Cth), ss.36, 476

Cases cited:
S395/2002 v Minister for Immigration & Multicultural Affairs [2003] HCA 71; 216 CLR 473; 203 ALR 112
VFAC v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 367
*NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [*2005] HCA 29; (2005) 216 ALR 1
SZATV v Minister for Immigration and Citizenship [2007] HCA 40
Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389; [2003] HCA 26
NALZ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 320
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No.2) [2004] FCAFC 263; (2004) 144 FCR 1
Harjit Singh Randhawa v Minister for Immigration, Local Government and Ethnic Affairs [1994] FCA 1253; (1994) 52 FCR 437
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
SZCBT v Minister for Immigration and Multicultural Affairs [2007] FCA 9
SZMCD v Minister for Immigration & Citizenship & Anor [2009] FCAFC 46; (2009) 174 FCR 415
SGBB v Minister for Immigration & Multicultural Affairs [2003] FCA 709; (2003) 199 ALR 364
SZHKA v Minister for Immigration and Citizenship [2008] FCAFC 138
Minister for Immigration & Ethnic Affairs v Guo Wei Rong [1997] HCA 22; (1997) 191 CLR 559
Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62;

(1989) 169 CLR 379
Abebe v The Commonwealth of Australia [1999] HCA 14; (1999) 197 CLR 510

Applicant:	SZSCA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2446 of 2012
Judgment of:	Judge Nicholls
Hearing date:	4 April 2013
Date of Last Submission:	4 April 2013
Delivered at:	Sydney
Delivered on:	7 June 2013

REPRESENTATION

Counsel for the Applicant:	Mr P Reynolds
Solicitors for the Applicant:	Fragomen Solicitors
Counsel for the Respondents:	Mr J Smith
Solicitors for the Respondents:	Minter Ellison

ORDERS

(1) A writ in the nature of certiorari issue, quashing the 26 September 2012 decision of the second respondent affirming the decision of the delegate of the first respondent to refuse the grant of a protection visa to the applicant.

(2) A writ in the nature of mandamus issue, remitting the matter to the second respondent and requiring it to determine according to law the application made to it by the applicant for review of the decision of the first respondent's delegate.

(3) The first respondent pay the applicant's costs set in the amount of $10,000.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 2446 of 2012

SZSCA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made on 25 October 2012, pursuant to s.476 of the *Migration Act 1958* (Cth) ("the Act"), and amended on 4 January 2013, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal"), made on 26 September 2012, which affirmed the decision of the delegate of the first respondent to refuse the grant of a protection visa to the applicant.

Background

2. The applicant is a citizen of Afghanistan and is of Hazara ethnicity (Court Book – "CB" – CB 2). He arrived in Australia as an "offshore entry person" on 21 February 2012 (CB 4).

Claims to Protection

3. With the assistance of legal representatives, the applicant applied for a protection visa on 29 April 2012 (CB 1). Attached to that application

was a Statutory Declaration by the applicant, dated 4 May 2012, outlining his claims to protection (CB 60 to CB 63). Relevantly, in 2007 the applicant became a "self employed truck driver" ([6] at CB 60). The applicant claimed that he had been threatened by the Taliban while working as a truck driver and transporting construction materials ([12] – [14] at CB 61). The applicant claimed that a political opinion had been imputed to him in support of foreign organisations, or the government, due to his work ([15] at CB 61 and [22] at CB 62). The applicant also claimed that, due to his ethnicity and Shia Muslim religion, he feared serious harm by the Taliban ([20] at CB 62).

4. Further, the applicant claimed that, after discovering that he had continued to drive his truck, and due to the alleged association with the government or foreign agencies, the Taliban had threatened him in a letter given to him ([15] at CB 61). He claimed that if he returned to Afghanistan he would be unable to work as a truck driver anymore and would be deprived of "basic needs" ([18] at CB 62). Further, that the authorities would be "unable and unwilling" to protect him ([24] at CB 63). He provided an untranslated copy of the letter that he claimed had been provided to him by another driver warning him of this (CB 64 to CB 66).

The Delegate

5. The applicant attended an interview with the delegate on 4 May 2012 (CB 83). The delegate refused the grant of a protection visa to the applicant. He was informed of the delegate's decision by letter dated 19 June 2012 (CB 68). With reference to country information, the delegate was not satisfied that the applicant had a well founded fear of being persecuted based on his Hazara ethnicity (CB 86).

6. Further, while the delegate did accept that the applicant had been threatened by the Taliban on one occasion, the delegate did not accept that the applicant's life had been threatened by letter (CB 87 to CB 89). The delegate accepted that travel by road in Afghanistan, and in the applicant's claimed home district of Jaghori, was difficult and large stretches were under Taliban control. However, the delegate did not accept that the applicant would be targeted if he returned and "had the option of undertaking other employment" in his district (CB 90.5).

The Tribunal

7. The applicant applied to the Tribunal for review of the delegate's decision on 4 July 2013 (CB 96 to CB 101). The applicant's representative submitted further material on 9 August 2012 (CB 128 to CB 130) and written submissions on 4 September 2012 (CB 165) and 13 September 2012 (CB 169 to CB 177). The applicant and his representative attended a hearing before the Tribunal, by videoconference, on 7 September 2012 (CB 165).

8. On 26 September 2012 the Tribunal affirmed the delegate's decision. The applicant was notified of that decision, by letter sent to his representative, on 27 September 2012 (CB 179 to CB 180).

9. The Tribunal found that the "applicant did not face a real chance of persecution…as a Hazara and a Shia" ([110] at CB 197). Further, in relation to the specific threat from the Taliban, the Tribunal did not accept that Afghan truck drivers were such a group that would be specifically persecuted, or that "working as a truck driver [was] a core aspect of the applicant's identity or beliefs or lifestyle" ([130] at CB 200). Specifically, that on the applicant's own evidence he had other skills, as a jeweller, through which he could earn a living (see CB 133.5 and [130] at CB 200). However, the Tribunal did accept that the Taliban ([115] at CB 198):

> *"…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"*

10. Further, the Tribunal did accept that the applicant would face serious harm if he was intercepted on the roads again.

11. However, the Tribunal did not accept that the applicant could not remain in Kabul, instead of returning to Jaghori ([126] at CB 199). Further, the Tribunal found that the applicant's home region was Kabul, not Jaghori, as he had lived in Kabul for several years. As a result, the Tribunal found that the question of "relocation" did not arise ([127] at CB 199). As a result, the Tribunal was not satisfied that the applicant would face serious harm in his "home region (Kabul)" ([134] at CB 201).

12. Further, the Tribunal was not satisfied that the applicant satisfied the complementary protection criterion (s.36(2)(aa) of the Act). The Tribunal held that, as the applicant did not face significant harm in his "home region" of Kabul and that the real risk that he faced did not "[arise] in all areas of the country", he did not face a real risk of significant harm ([136] – [137] at CB 201).

Application before the Court

13. The application before the Court, as amended, is as follows

> *"1. The Tribunal fell into jurisdictional error by failing to ask the right questions and / or applying the wrong test.*
>
> *Particulars*
>
> > *a. In dealing with the Applicant's claim as to whether he faced persecution if returned to Afghanistan, the Tribunal was obliged to ask itself what the Applicant would do upon return to Afghanistan.*
> >
> > *b. However, in this case the Tribunal impermissibly dealt with the Applicant's claims by considering whether he could avoid persecution by refraining from engaging in certain behaviour: [130] of the Tribunal's Decision.*
>
> *2. The Tribunal engaged in jurisdictional error by misconstruing or failing to consider a claim or component integer thereof made by the Applicant or squarely raised by the material before it.*
>
> *Particulars*
>
> > *a. The Applicant claimed that he feared persecution by reason of membership of a particular social group, being 'truck drivers whom transport goods for foreign agencies' (CB62 at [21]) or 'Afghan truck drivers who transport goods relating to government and foreign organisations (CB157 at [108]). The Tribunal failed to consider these claims but, rather, only addressed a broader claim concerning 'Afghan truck drivers as such' (CB197 at [115]).*
> >
> > *b. The Applicant claimed that he feared persecution by reason of his actual political opinion, namely a support of foreign agencies (CB62 at [22]). The Tribunal did not address any fear of persecution on the part of the Applicant by reason of his actual political opinion at all.*

c. The Applicant claimed that a reason that he had closed his silver jewellery business was because of a lack of demand for silver jewellery (CB134 at [14]). The Tribunal failed to consider this component integer of the Applicant's claim when concluding that his 'long-established skills making jewellery' gave him 'real options' of returning to the jewellery business upon his return to Afghanistan (CB200 at [130]).

d. The Applicant claimed that the security situation in Afghanistan was declining (see for example CB148 at [80]-[83]) However, in assessing whether the Applicant had a well-founded fear upon his return to Afghanistan, the Tribunal did not consider this component integer of his claim (instead, it only examined evidence concerning the current security situation in Afghanistan).

3. The Tribunal engaged in jurisdictional error by misconstruing the applicable law, asking itself the wrong question and/or applying the wrong test

Particulars

In determining whether the Applicant held a well-founded fear of persecution, the Tribunal was obliged to ask itself whether there was a 'real chance' that the Applicant would be persecuted. However, rather than apply this 'real chance' test, the Tribunal variously applied more stringent tests:

a. At CB196 [108], the Tribunal asked itself whether it was satisfied that the material consulted provided 'independent corroboration' of certain claims which was a test that was more stringent than the 'real chance test' and impermissibly imposed a requirement that country information independently corroborate a claim for it to reach the requisite state of satisfaction.

b. At CB198 [122], the Tribunal asked itself whether it had seen 'compelling evidence' that established certain claims, which was a test that was more stringent that the 'real chance test' and impermissibly imposed a requirement that claims be demonstrated via 'compelling' evidence rather than evidence capable of demonstrating the claim beyond a real chance."

14. Before the Court the applicant did not press ground three of the amended application.

Before the Court

15. At the final hearing Mr P Reynolds of counsel appeared for the applicant. Mr J Smith of counsel appeared for the Minister. The Court had before it the Court Book and written submissions filed on behalf of both parties.

The Applicant's Submissions

16. Ground one asserts jurisdictional error on the basis of a failure to ask the right question and/or applying the wrong test. The applicant's attack however can best be understood as deriving from what the High Court said in *S395/2002 v Minister for Immigration & Multicultural Affairs* [2003] HCA 71; 216 CLR 473; 203 ALR 112 ("*S395*") (see, in particular, at [40] – [43] per McHugh and Kirby JJ and at [82] – [83] per Gummow and Hayne JJ) (see also *VFAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 367 ("*VFAC*") at [32] – [35] per Weinberg J).

17. In short, the applicant's assertion is that the Tribunal, unlawfully, expected him to modify his behaviour to avoid persecution. That is, to avoid persecution by not working as a truck driver. The applicant's complaint is that there is no support for the proposition that the Tribunal can impose any requirement as to what it "expects" an applicant to do to avoid persecution, as opposed to finding that an applicant "would" actually behave in a particular way. The assertion is that the Tribunal fell into error because it did the former.

18. The applicant submitted that, even when read fairly, the Tribunal's decision record reveals that its reasoning fell into this error in the following way, and with particular reference to [126] at CB 199 to [134] at CB 201.

19. Of particular note was the Tribunal's finding at [127] (at CB 199) that: "The issue of relocation does not arise as such" and its finding at [130] (at CB 200) that:

> *"Nor does the Tribunal accept that the claimant 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 applicant would continue to be targeted at all unless he continued to transport construction materials). The Tribunal does not accept that the applicant 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 applicant 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 applicant 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 applicant 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 applicant's identity or beliefs or lifestyle which he should not be expected to modify or forego."*

20. In all therefore, the applicant's position is that the Tribunal imposed a requirement that the applicant could engage in employment other than driving trucks. Further, it proceeded on the basis that it was reasonable to impose that requirement. That was said, by the applicant, to be contrary to *S395*.

21. The applicant said that the language used by the majority in *S395* was "unequivocal" (see, in particular, at [40] – [43] per McHugh and Kirby JJ and [82] – [83] per Gummow and Hayne JJ). He relied on the proposition that a Tribunal falls into jurisdictional error if it makes a finding that a person "could" avoid harm by engaging, or not engaging, in certain behaviour (again with reference to *S395*).

22. The applicant noted that this can be contrasted with a situation where a Tribunal makes a finding that an applicant "would" not behave in a certain manner on return (*NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29; (2005) 216 ALR 1 ("*NABD*") especially at [10] – [11] per Gleeson CJ and [168] per Hayne and Heydon JJ).

23. The applicant pointed to *VFAC* (per Wienberg J) as containing a helpful summary of the principles set out in *S395* (see, in particular, at [32] – [33] of *VFAC*).

24. In his submissions, the Minister relied to some extent on the relevant principles to be derived from *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 ("*SZATV*"). That is, the "resolution" of the perceived conflict between "relocation" principles (it is reasonable for an applicant to relocate where it is safe) and requiring an applicant to "modify" his behaviour. The applicant's position is that, in the current case, the Tribunal "expressly found" that relocation was not an issue in the current case and, therefore, the principles relating to relocation do not apply in the current circumstances.

25. The applicant focused particularly (although by no means exclusively) on [130] (at CB 200) of the Tribunal's decision record to argue that the Tribunal's reasoning there was "directly contrary" to the principles arising from *S395*.

26. Of particular note were the following phrases and parts of [130] (at CB 200):

> *"…It is also not clear that the applicant would continue to be targeted at all **unless he continued to transport construction materials**."*
>
> *"…The Tribunal does not accept that the applicant 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 his home region of Kabul"*
>
> *"The Tribunal is satisfied that the applicant **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 applicant has long established skills making jewellery…**giving him real options**…"*
>
> *"Nor, given his employment history, does the Tribunal accept that working as a truck driver is a core aspect of the applicant's identity or belief or lifestyle which he should not be **expected to modify or forego.**"*
>
> [Emphasis added.]

27. The applicant saw each of these parts, and their totality, as imposing an expectation on the applicant that he could avoid harm by variously choosing not to transport construction materials, not working as a truck

driver by obtaining alternate employment (as, for example, in the jewellery trade) and only driving trucks between Kabul and Jaghori. Further, that he could change this truck driving behaviour because it was not so important to him that he should not be expected to do something other than drive trucks.

28. Ground two essentially asserts that the Tribunal failed to consider four integers, or components, of the applicant's claims. He relies variously on (at [30] of his written submissions) *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 ("*Htun*") at [42] per Allsop J (with whom Spender and Merkel JJ agreed), *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389; [2003] HCA 26 ("*Dranichnikov*") at [22] – [24], [27] per Gummow and Callinan J, [88] – [89] per Kirby J and [95] per Hayne J.

29. First, the applicant submitted that he claimed to fear persecution because of his membership of a particular social group, as well as on the basis of actual and imputed political opinion.

30. In relation to membership of a particular social group, the applicant's complaint is that the Tribunal only considered a broad claim of "Afghan truck drivers as such" ([115] at CB 197). That was as opposed to the narrower groups claimed by the applicant in his Statutory Declaration: "Afghan truck drivers who transport good for foreign agencies" ([21] at CB 62) or "Afghan truck drivers who transport goods relating to the government and foreign organisations" ([108] at CB 157, with reference to particular one of ground two).

31. Second, in his Statutory Declaration that accompanied his application for a protection visa, that applicant claimed to fear harm because of actual political opinion ([22] at CB 62). The applicant submitted that the Tribunal did not deal with that "claim".

32. Third, the applicant also asserts in ground two that the Tribunal failed to consider that the reason he closed his jewellery business was because of a lack of demand for silver jewellery. The Tribunal was said to have failed to consider that claim when finding that the applicant's relevant jewellery making skills gave him "real [employment] options" ([130] at CB 200).

33. Fourth, ground two asserted that the Tribunal did not consider his claim that the security situation in Afghanistan was "declining" (with reference to [80] at CB 191 to [83] at CB 192).

The Minister's Response

34. The Minister's response to ground one sought to distinguish the current case from *S395*. His response to ground two varied depending on each individual particular. A number of elements are central to the Minister's submissions.

35. First, the Minister submitted that the Tribunal's reasoning, and those parts of its decision record impugned by the applicant now, could only be properly understood by reading the Tribunal's analysis in the context of the whole of the decision record. In particular, it needed to be viewed in the context of the claims made, and as they were developed, by the applicant. This reasoning was applied by the Minister to both grounds. The Minister's view of the expansion of the applicant's case before the delegate, and the Tribunal, is as follows.

36. The applicant's claims were initially set out in a Statutory Declaration accompanying his protection visa application (CB 60 to CB 63). The key, and relevant, parts were as follows. While travelling between Kabul and Jaghori in 2009 he saw evidence of the Taliban "control" of the road. That is, bodies of those who worked for and with government agencies left by the side of the road ([9] – [10] at CB 61).

37. The applicant's claims were that he worked as a truck driver, was never harmed by the Taliban because he did not have a mobile phone or work for government agencies or foreign agencies ([11] at CB 61).

38. However, in January 2011, he started carrying construction materials between Kabul and Jaghori because he was paid more to do so. He was stopped by the Taliban, who searched his truck. They formed the view that because he was carrying plaster he worked for the government. They threatened to kill him ([12] – [13] at CB 61).

39. Given the lack of work and the need to support his family, the applicant continued to transport building materials. He avoided being caught by asking other drivers the location of any Taliban checkpoints between

Jaghori and Kabul ([14] at CB 61). Nevertheless, in November 2011 he was given a letter from the Taliban addressed to him which threatened him with death because of what was said to be his association with government and foreign agencies ([15] at CB 61).

40. The Minister's position on [130] (at CB 200) of the Tribunal's decision record (which sits at the heart of the applicant's attack) is as follows.

41. First, [130] sits in the middle of the Tribunal's analysis under the heading of "Kabul". At this part of its analysis therefore the Tribunal was concerned with what would happen to the applicant if he were to return to Kabul.

42. Third, in this context therefore, [129] and [130] (at CB 200) of the Tribunal's reasons are also directed to the question of whether or not the applicant would be safe in Kabul. In [129] (at CB 200) the Tribunal noted that "the Taliban do not seem to have been aware that the applicant was living in Kabul".

43. The Minister's position was that at [130] (at CB 200) the Tribunal dealt with (and rejected) the claims made by the applicant as they related to the question of his return to Kabul. The Minister saw the critical elements in this analysis as being as follows. The Tribunal did not accept that the applicant was a high profile target who would be pursued by the Taliban throughout Afghanistan. It did not accept that the applicant would be "constrained" to continue working as a truck driver.

44. In relation to the word "constrained" the Minister submitted that the Tribunal expressed itself in this fashion because it was in answer to the applicant's claim. It was not some expectation, or imposition, as to the applicant's future conduct. The Minister submitted that the Tribunal had already noted that the applicant was no longer working in Kabul as a truck driver. [I note that, in support of this submission, the Minister did not refer to a specific paragraph in the Tribunal's decision record.]

45. In this light, the Tribunal then reasoned that the applicant could reasonably obtain employment in Kabul and would, in those circumstances, not be obliged to travel between Kabul and Jaghori to make a living. The Tribunal explained this by finding that the applicant

had long established skills as a jeweller and did not accept that he would be prevented from working as a jeweller by reason of lack of capital and the like as claimed by the applicant.

46. The Minister's submission up to this point of the Tribunal's reasoning was that all of these findings were directed to dealing with the claims as made and not an imposition of some expectation.

47. The Minister did concede however that the language of the last sentence of [130] (at CB 200) did give rise to some difficulty:

> *"Nor, given his employment history, does the Tribunal accept that working as a truck driver is a core aspect of the applicant's identity or beliefs or lifestyle which he should not be expected to modify or forego."*

48. However, the Minister also submitted that that sentence, again, needed to be read in context. First, the applicant's attempt to read all of [130] (at CB 200) by saying that the word "expected", as used in the last sentence, imbues the paragraph with an "expectation" that the applicant would change his job. The Minister rejected that by saying that the paragraph was directed to dealing with the applicant's claims as made.

49. Second, the Minister's submission was that what the Tribunal was attempting to do in the last sentence was to consider whether the applicant changing jobs was, in and of itself, persecution. In this sense, the Tribunal noted that truck driving was not a "core aspect of the applicant's identity" and that truck driving was not a matter "protected" by the Refugees Convention.

50. In summary therefore, the Minister sought to present the Tribunal's relevant reasoning as being directed to whether the applicant, on return, was going to live and work in Kabul and whether it would be safe for him to do so. The question posed by the Tribunal, therefore, was said to be whether it would amount to persecution, in and of itself, if the applicant would cease working as a truck driver.

51. The Minister sought to explain his approach in these proceeding and to explain the Tribunal's approach with specific reference to a number of authorities.

52. The Minister said that the Tribunal's approach could be distinguished with reference to the "homosexual claims" in *S395* or the "proselytising claim" in *NABD*. In *S395* the Tribunal found that the applicant in that case could avoid persecution if he were to return to his home country and live discreetly. The Tribunal did not ask whether that was persecution in and of itself. In *NABD*, the Tribunal answered the question what would the applicant in that case do on return. It found that, given that he had not proselytised in Australia, he would not do so if he returned.

53. The Minister's key submission was that the current case is a "different case" to *S395*. He submitted that the Tribunal's approach "fits more closely with the principle in relocation". In this sense, the key factual differences with *S395* are important. For example, driving trucks, unlike homosexuality, is not part of the applicant's nature or character. Nor for that matter is it an actual political opinion that he needs to express, or a religious belief. Therefore, that raises the question of why the applicant would not go back to Kabul and work as jeweller. The principle of relocation was said to equally apply to these circumstances.

54. The Minister's submission depends on understanding the resolution of what is said to be, on its face, the apparent inconsistency between *S395* and *SZATV*. That "inconsistency" was said to be as follows. *S395* posits that a person cannot be expected to act in a particular way to avoid persecution. That was explained by the Minister, in oral submissions, as "a refugee is a refugee regardless of what you expect him to do when he goes back." However the "argument" in *SZATV* was that, in the context of relocation, a person might reasonably be expected as in this case, to go to a location where he is not going to be harmed.

55. The "inconsistency" is simply that relocation relies not on what the applicant is *going* to do, but on what it is reasonable to *expect* him to do.

56. In a factual sense the Minister says that there are important points of distinction between the circumstances of the two cases. First, in *S395* the harm feared related to all of the relevant country. The second distinction can be derived from the reason as to why the person was

outside the relevant country. That is, why he left Afghanistan instead of pursuing relocation in Afghanistan.

57. In his submissions the Minister drew from what Emmett J said in *NALZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 320 ("*NALZ*") and, as was "apparently" approved by Kirby J in *SZATV* at [92] – [94]:

> *"[92] NALZ was a case concerned with an Indian national who claimed a well-founded fear of persecution owing to suspected connections with a Sri Lankan separatist organisation. The suspicion was claimed to be founded on his religion as a Muslim and his engagement in the business of selling electrical goods to Sri Lankan nationals. The Tribunal refused refugee status. It concluded that the applicant's religion was immaterial. As to his occupation, it concluded that 'the appellant could avoid future arrest by not selling electrical goods to Sri Lankan nationals.' It decided that it would not be 'unreasonable for him to avoid arrest by so doing.' The question was whether this was but an impermissible variation on the theme of 'acting discreetly'. A majority (Emmett and Downes JJ) thought not. However, the third judge, Madgwick J considered that the Tribunal's reasoning involved the very kind of error that S395 had identified.*
>
> *[93] In rejecting this argument, in NALZ, Emmett J suggested two reasons for distinguishing S395. The first, he concluded, was a factual one, namely that the sexual orientation of the applicants in S395 could not be removed, by reasonable action or otherwise, anywhere within Bangladesh. The source of the persecution was thus nation-wide and generalised. In this sense it was like that faced by persons in the class found to exist in Khawar (unprotected women in Pakistan). Secondly, Emmett J concluded that the suggested adjustment in NALZ (ceasing to sell electrical goods) did not involve, in itself, surrender of fundamental rights of the kind protected by the Refugees Convention categories.*
>
> *[94] Accepting that any question of 'reasonable' adjustment (as in a propounded internal relocation) will raise issues on which minds may sometimes differ, the reasoning of Emmett J 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. Such relocation will be a permissible hypothesis, open to the decision-maker, where it is neither contrary to the facts (ie, there is a local rather than nation-wide*

source of persecution) nor contrary to the essential purpose of the Refugees Convention (which denies, as unreasonable, an 'adjustment' that would involve undermining the central purpose of the Refugees Convention of protecting the important, but limited, grounds of 'persecution' specified in the Refugees Convention)."

[Footnotes omitted.]

58. This latter point can be emphasised with reference to what Downes J said in *NALZ* (a part of the majority) at [59]:

> *"... The Refugee Convention protects persons from persecution for attributes over which they have no real control. Beliefs fall within its purview. Unlawful trading does not."*

59. The Minister's position is that, in the present case, the Tribunal properly addressed the question of whether the applicant's circumstances fell within the protection offered by the Refugees Convention. It dealt with both the issue of whether the applicant had any control over whether he was a truck driver and whether driving a truck constituted a "belief" in the sense explained above.

60. The Minister submitted, in seeking to understand the nature of the applicant's claims and in answer to both grounds of the application now before the Court (in particular two to ground two), it was important to note that, at its highest, the fear of harm claimed here was of imputed political opinion. The bare reference to "actual political opinion", as expressed solely in one document, stands in stark contrast to the remainder of the presentation of the applicant's claims.

61. The applicant's key assertions were a claim to fear harm because of membership of a particular social group namely, truck drivers who transport goods for foreign agencies ([21] at CB 62) and imputed political opinion, namely as a supporter of foreign agencies and the government ([22] at CB 62).

62. Before the delegate, the submissions made on the applicant's behalf stated that (CB 84.8):

> *"The applicant's IAAAS representative verbally submitted at the PV interview that the applicant has a well founded fear of*

persecution for reasons of his race, religion, and membership of a particular social group as a truck driver."

63. Further, the delegate noted (CB 85.5):

> *"The applicant also fears that he will be harmed or mistreated for reasons of his membership of a particular social group as a truck driver carrying goods for foreign agencies. He also fears harm for reasons of his political opinion due to his perceived support of foreign agencies."*

64. The Minister also pointed to the following in the delegate's decision.

1. At CB 87.6 to CB 87.7:

> *"...He was asked why driving along the roads would be more dangerous for him than for others. He said because he is from the Hazara minority he would be at more risk. He was asked why he could not relocate to Kabul, given that he lived there from 2007 until 2011, and that he said earlier in the interview that his two brothers owned land there. He said that even in Kabul he would be found and threatened by the Taliban.*
>
> *The applicant explained that he had no choice but to drive a truck as he had to support his family. He said he was stopped many times in Qarabagh along the main road. He made sure he had no government documents with him but he had to carry construction materials as he had to support his family. When he was last stopped by the Taliban in January 2011 he was stopped along the way to Jaghori from Kabul whilst transporting construction materials from shopkeepers."*

2. At CB 87.8 to CB 87.9:

> *"Country information indicates that persons associated with the Afghani government or construction projects associated with foreign non-government organisation or foreign governments may be at risk from anti-government elements (5.9). While I accept that the applicant did carry construction materials, including cements and stones, for reasons outlined below, I do not accept that the applicant's minor association with foreign agencies resulted in him having a profile as a supporter of the government or foreign organisations or that consequently he was against the Taliban"*

3. At CB 89.2 to CB 89.3:

"In light of this information, and given that the applicant did not have a prominent profile as a supporter of foreign agencies or of the government, I consider that the chance – that he would be specifically targeted in the reasonably foreseeable future for his past role in transporting these personnel – to be remote.

The country information above suggests people are targeted when actually caught in the act of supporting the government or NGOs. I am not satisfied that the Taliban will expend time and resources on specifically pursuing the applicant by keeping his name along with all the other people associated with NGOs or government employees. I am not satisfied that they would pursue him in Jaghori or in the Hazarajat where their influence is less significant. Furthermore, the applicant has the option of doing other work that would not attract the attention of the Taliban, such as work as a jeweller, given his twenty three year experience in this field."

65. The Minister submitted that, at its highest, all of the references pointed to an imputed, not actual, political opinion.

66. The applicant's representatives before the Tribunal made further submissions as set out at CB 132 to CB 164. The parts relied on by the Minister are:

1. Paragraph 14 at CB 134:

   "2007: Applicant becomes a truck driver

   *[14] In or around 2007, the Applicant's family had expanded to include 5 children. Due to a lack of demand for silver jewellery, the Applicant's business became less lucrative. Without any education and professional skills outside of jewellery making, he was unable to find meaningful employment with sufficient compensation in the local region. In order to financially support his expanding family, the Applicant sold his jewellery business and relocated to Dasht-e-Barchi, Kabul, Afghanistan ('**Dasht-e-Barchi**')."*

   [Footnotes omitted.]

2. Paragraph 44 at CB 138:

   "The issues arising in this review are as follows:

A. Was the Applicant threatened by the Taliban by way of a letter;

B. Is the Applicant's fear of persecution on account of his imputed political opinion, namely as pro-Western anti-Taliban supporter, well founded;

C. Is the Applicant's fear of persecution on account of his religion well founded;

D. Is the Applicant's fear of persecution on account of his race well founded;

*E. Is the Applicant's fear of persecution on account of his members hip (sic) of a particular social group ('**PSG**');*

F. Do the Applicant's cumulative circumstances place him at risk of persecution on return to Afghanistan; and

G. Is the Applicant entitled to complimentary (sic) protection?

3. Paragraph 56 at CB 141:

*"**B. Political opinion***

[56] The Applicant fears harm for reason of his imputed political opinion as a supporter of foreign organisations and the Afghan Government. This arises from his employment as a truck driver, transporting goods (including construction materials) between Kabul and Jaghori."

[Footnotes omitted.]

4. Paragraphs 64 and 65 at CB 144:

"[64] Secondly, the Deflate (sic) appears to assume that on return to Afghanistan, the Applicant would not resume work as a truck drive, and would not be required to transport construction materials that would impute him with a profile as the supporter of government and / or foreign organisations.

[65] Although the Applicant had previously been employed as a silver jeweller, due to a drop in demand, the income he received from such employment became insubstantial to raise his family…"

5. Paragraph 97 at CB 153:

" In respect of the Applicant's personal circumstances:

> *a. The Applicant has no family (other than his dependent children and wife), tribal connections, land, property or assets outside of Ghazni;*
>
> *b. The Applicant has no education;*
>
> *c. The Applicant is now 48 years old and unable to obtain employment which requires significant manual labour;*
>
> *d. The Applicant has spent considerable time outside Afghanistan. As a result he may have adopted a distinctly foreign set of mannerisms and customs, which may cause him significant difficulties in reintegrating into the Afghanistan community."*

6. Paragraphs 103 to 104 at CB 155:

*"[103] The Applicant fears harm in Afghanistan due to his membership of the following particular social groups ("**PSG**"):*

> *a. Afghan citizens who have departed Afghanistan illegally, fled to the West and lodged an application for asylum ('**Failed asylum seekers**'); and*
>
> *b. Afghan citizens who are truck drivers ('**Truck drivers**'):*

[104] It is also noted that the Applicant's race and religion also increase the risk that he will be targeted for persecution."

7. Paragraph 108 at CB 157:

"The Applicant is a member of a PSG, namely, Afghan truck drivers who transport goods relating to the government and foreign organisations."

8. Paragraph 112 at CB 158:

"Given the above, the Tribunal should find that the Applicant is at risk of persecution on account of being a member of a PSG of Afghan truck drivers."

9. Paragraph 113 at CB 158 to CB 159:

*"**E. Cumulative Circumstances***

> *[113] An assessment of refugee status requires the decision maker to have regard to the totality of the circumstances. The following factors place the Applicant at risk of persecution on return to Afghanistan:*
>
> > *a. his religion (Shia Muslim)*
> >
> > *b. his ethnicity (ethnic Hazara);*
> >
> > *c. his imputed political opinion (supporting the West and the Afghan government);*
> >
> > *d. his illegal departure from Afghanistan;*
> >
> > *e. his profession as a truck driver;*
> >
> > *f. that he fled to the West; and*
> >
> > *g. that he sought asylum."*

67. The Minister's position is that the applicant's claims, over time and even in the same submission, varied as to the characterisation of the Refugees Convention ground leading to persecutory harm as it arose from the truck driver circumstance. The Minister argued that the essence of the factual basis for the applicant's claim was that the applicant worked as a truck driver, he carried construction materials, he was identified by the Taliban as having done that, he was imputed with a political opinion and he received a death threat by letter.

68. The Minister emphasised that the applicant's articulation of the Refugees Convention nexus inherent in these claims differed as to imputed political opinion, actual political opinion or membership of a particular social group identified either as "truck drivers" or "truck drivers who carried particular construction materials.

69. The Minister also emphasised that the applicant's claims as last presented, and articulated, to the Tribunal provided an important platform for understanding the Tribunal's analysis.

70. In this regard the applicant attended a hearing before the Tribunal (see [60] at CB 189 to [76] at CB 191). The Minister drew attention to the following:

    1. Paragraph 64 at CB 189:

"Noting that the letter accuses the applicant of assisting the government and foreign organisations in the transportation of logistic and construction materials from Ghazni city to Jaghori and to Malestan districts, the Tribunal asked the applicant why there would still be a problem if he stopped doing that (which he had). The applicant replied that because he had done that job in the past, the Taliban had written that he should be harmed or killed."

2. Paragraph 66 at CB 190:

   "The Tribunal put to the applicant that, if he is in danger if he carries construction materials through Qarabagh to Jaghori, that does not explain why he would be at risk of the same harm while he remains in Kabul, where he had lived for some years. The applicant stated that while he was living in Kabul he had not been threatened by the Taliban but now he had been threatened by the Taliban and they can easily find him there."

3. Paragraph 73 at CB 191:

   *"The Tribunal then turned to the issue of Kabul and discussed with the applicant material relating to both security and practical issues of living there (as set out below under the heading **Kabul**), noting that he had been established in Kabul since 2007 and his family remain there. In particular, the Tribunal noted that several reliable sources quoted in the recent well-documented Danish Immigration Service **Afghanistan: Country of Origin Information** report, state that it is most unlikely that a low-profile person would be pursued or tracked down by the Taliban in Kabul. The Tribunal also referred to material concerning ethnic networks in Kabul, including in the strongly Hazara area of Dasht-e Barchi (where he had lived for several years). The Tribunal observed that there are many thousands of Hazaras in Kabul from Jaghori district, which is not a very great distance from Kabul, and seemed clear there would be an extensive network in Kabul with links to Jaghori and to particular areas within Jaghori."*

   [Emphasis in original.]

4. Paragraph 74 at CB 191:

   "The applicant reiterated that his main fear is because of his problem with the Taliban; their agents will report that he is in Kabul so he does not feel safe being in Kabul."

71. The applicant's advisers were given time to make submissions on the issues that arose at the hearing. They did (CB 169 to CB 177).

72. The Minister saw the following as relevant ([28] at CB 176 to [30] at CB 177 of the applicant's post-hearing submissions to the Tribunal):

> ***"Would the Taliban continue to search for the Applicant if he returned to Afghanistan?***
>
> *[28] On the basis of country information provided in his and the Applicant's Post Hearing Submission, if the Applicant returns to Afghanistan and continued to work as a truck driver, there is a real chance that he would be subjected to serious harm by the Taliban on the roads connecting Kabul to Ghazni.*
>
> *[29] There is also evidence demonstrating that even if the Applicant returned to Afghanistan and did not continue to transport goods between Kabul and Jaghori, he would still fear a risk of significant harm. The Applicant's identity was ascertained by the Taliban through his Taskera and warning from at the Qarabagh checkpoint. As he failed to follow orders, the Taliban then commenced to releasing letter(s) to individuals. Given the search, there is a more than a remote chance that he would be found and harmed, whether or not he was in Kabul. In reaching this view, the Tribunal should be cognisant of the significant country information demonstrating that: 'the face of the Taliban has changed. New generations of Taliban leaders are young and tech-savvy and aware of community structures. They are different from the old Taliban guard. They are becoming more sophisticated in tracking people done (sic) and do this by several methods including such bugging telephones.' The 2010 UNHCR guidelines confirm that the Taliban has the capacity to target with ill-treatment individuals throughout Afghanistan.*
>
> *[30] Even if the Taliban were unable to find the Applicant, he is a 48 year old male with no education. Despite formerly possessing skills in jewellery making, he is unable to provide the capital or physically partake in the labour necessary to return to the business. Subsequently, he would be required to retake employment as a truck driver."*
>
> [Footnotes omitted. Errors in the original.]

73. The Minister drew from this that the applicant's advisers, relevantly, put three alternatives to the Tribunal. First, if the applicant returned to Afghanistan and resumed work as a truck driver he would be found by

the Taliban. Second, as a truck driver, even if he did not continue to carry the goods in question he would still be found by the Taliban. Third, even if the Taliban were unable to find him, given his age and education (despite his former skills as a jewellery maker), the applicant would still need to return to work as a truck driver given his lack of capital and physical limitations.

74. The Minister then asked the Court to read the Tribunal's analysis as against the presentation of these claims and evidence.

75. First, the Tribunal was not satisfied that Afghan truck drivers were persecuted simply for reason of being a particular social group ("Afghan truck drivers as such" – [115] at CB 197).

76. The Minister's position is that the Tribunal accepted that there was a fear that arose from the circumstances the applicant presented. It found as "plausible" that the applicant was told to "desist" from the activity claimed (that is, driving a truck). This was because the Tribunal also accepted that the Taliban "generally targets and discourages drivers carrying construction materials". Further, the Tribunal accepted that "such persons may be imputed with a political opinion supportive of the Afghan government and/or non-government aid organisations" ([115] at CB 198).

77. In all therefore the Tribunal accepted, and thereby addressed, the claim arising from any imputed political opinion.

78. Second, the Minister asked the Court to see the "limited" reference to "Afghan truck drivers" (at [115] at CB 198) as being responsive to the ever changing submissions presented by the applicant and his representatives. In this sense the Minister said that the term "Afghan truck drivers", as used by the Tribunal, included any of the iterations of particular social group as variously presented to it.

79. The Minister's submission therefore was that this was sufficient to answer the applicant's ground two at the first particular. That is, the claim of fearing harm on the basis of his truck driving activities, in whatever detail, was addressed.

80. The Minister also submitted an alternative proposition for there being no jurisdictional error evident in this regard. That is, the applicant

could not establish, in light of the circumstances presented, that there would have been any difference to the outcome even if the Tribunal had proceeded to consider whether there was a particular social group.

81. The Minister saw the applicant's problem as being that there was nothing in the circumstances presented by the applicant, either expressly or implied, to require consideration of whether being a member of any particular social group of truck drivers in Kabul, in and of itself, may have increased the risk of him being harmed in Kabul.

82. As to actual political opinion, the Minister argued that even though the use of the word "actual" (political opinion) was used in the applicant's Statutory Declaration, all the other material before the Tribunal, including his written claims, submissions and oral evidence, reveal that there were no facts alleged that went to support such an assertions.

83. The Minister's response to particular (c) of ground two was that the applicant's claim to fear harm was not based on, nor involved, the matter of his past silver jewellery business. That matter was relevant to the applicant's explanation as to why he and his family moved to Kabul. That aspect of his evidence therefore did not require consideration by the Tribunal in the way explained in such authorities as *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No.2)* [2004] FCAFC 263; (2004) 144 FCR 1 ("*NABE (No.2)*").

84. On the discrete question raised at particular (d) of ground two the Minister's position was that the Tribunal did address the claim of the deteriorating situation in Afghanistan as it related to the foreseeable future (see [134] at CB 201).

Consideration

85. The applicant's complaint in ground one is that the Tribunal fell into jurisdictional error by expecting that the applicant would avoid persecutory harm on return to Afghanistan by modifying, or refraining, from certain conduct. He relied on *S395* in support of this ground.

86. The Minister argued that the circumstances in this case are different to those in *S395*. This was explained, relevantly, as being that the conduct

in question was truck driving. Further, the applicant had already ceased working as a truck driver before leaving Afghanistan and therefore would, on return, do something else.

87. In the alternative, the Minister submitted that the Tribunal did consider whether the fact that the applicant would return and not work as a truck driver might amount to persecution. The Minister says that the Tribunal found that there was other work available to the applicant. Further, that the modification in the applicant's behaviour was not in relation to a "core aspect of his identity, beliefs or lifestyle" ([130] at CB 200). This was said to be a further point of distinction with *S395*.

88. The Minister submitted that the Tribunal's use of the words "should not be expected to modify" ([130] at CB 200) did not reveal error as identified in *S395* because the Tribunal's assessment of the applicant's claims did not involve expectations of his conduct on return to Afghanistan.

89. The Minister argued that this reflects the approach used in applying the principle of relocation in the Refugees Convention context. That is, based on expectations as to what an applicant should do on return.

90. The Minister pointed to *SZATV* where he says the High Court "reconciled" the principle in *S395* with the principle of relocation as explained in *Harjit Singh Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437. That is, that the latter principle arose from the causative element set out in Art.1A(2) of the Refugees Convention. That reconciliation can also be seen with reference to *NALZ* and what was said of the majority finding in that case, for example, by Kirby J in *SZATV* at [92] – [94] (see [57] above).

91. It must be said that I found many elements in the Minister's argument to be attractive. His construction of the relationship of the various legal principles had some force. However this Tribunal decision was not, in my view, the appropriate vehicle to pursue this argument. Any such construction requires a sound foundation. The Tribunal's decision record in this case does not provide it.

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

93. The answer to the complaint posed by ground one of the application is to be found in a fair reading of the language used by the Tribunal in its decision record. The caution that Tribunal decision records should not be overzealously scrutinised with "an eye keenly attuned to the perception of error" is well understood (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at [30] per Brennan CJ, Toohey, McHugh and Gummow JJ). Of course, this does not mean that any ambiguity can simply be excused on this basis (*SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 per Stone J).

94. There was no attack by the applicant of the Tribunal's findings in relation to his claims to fear persecution on the basis of his being a Hazara, Shia or a returnee from the West. The attack was variously centred around the applicant's occupation as a truck driver.

95. In this regard, the Tribunal accepted, and was satisfied, that ([120] at CB 198):

> *"….the applicant would face a real chance of persecution for a Convention reason (imputed political opinion) if he were stopped at a Taliban checkpoint on the roads between Kabul and Jaghori or Malestan, and in particular in passing through Qarabagh district (but see para 126 and 127 below)."*

96. What subsequently follows at the parts of the Tribunal's analysis which are the subject of the attack ([126] at CB 199 to [134] at CB 201 under the heading of "Kabul") is the Tribunal's assessment of whether the applicant's fear was well founded if he were to return to Kabul where

he had been resident for some years before leaving Afghanistan. A place where his wife and children remain ([127] at CB 199).

97. It is here that the Tribunal's analysis becomes problematic. There is, of course, a difference between the use of infelicitous language and a stream of reasoning punctuated by some ambiguity and lack of clarity. Ultimately, the Court can only proceed on the actual language used and as it is understood, as best as it can, in the context of the circumstances presented and the totality of the Tribunal's analysis.

98. It is at this level that the Tribunal's analysis reveals error. The applicant presented his claim that he would drive a truck when he returned to Afghanistan. Further, that he had no other employment option in order to maintain his family.

99. In all, I agree with the applicant that, even on a fair reading, the Tribunal's approach was to say that the applicant did not have to drive a truck. In particular, that it did not accept that he would be "constrained" to continue working as a truck driver.

100. That was said to be on the basis that he not drive a truck "…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" ([130] at CB 200). Yet, the Tribunal's earlier finding was that the applicant "would face a real chance of persecution for a Convention reason (imputed political opinion) if he were stopped at a Taliban checkpoint *on the roads between Kabul and Jaghori and Malestan…*" ([120] at CB 198) [empahsis added]. That is, the risk was not limited to roads between Ghazni and Jaghori, but included roads between Kabul and Jaghori.

101. Plainly there is some contradiction, clearly ambiguity, and a lack of a clear finding here. The Tribunal's analysis appears to be that the applicant, on return to Afghanistan, would not be forced to drive trucks between Ghazni and Jaghori and that, to avoid persecution, he could drive trucks in the "region of Kabul". This, on its own, brings the Tribunal's analysis into the error identified in *S395*. That is, even without the contradiction with what was earlier found at [120] (at CB 198).

102. When read with what immediately preceded it, [130] (at CB 200), the result appears to be that he could (as opposed to would) avoid persecutory harm if he did not continue to transport construction materials. However it is unclear whether this restraint applied to the roads between Ghazni and Jaghori, or included the "region of Kabul".

103. Critically there is no finding that the applicant *would* not, on return to Afghanistan, drive a truck. In the absence of such a finding, the Tribunal's entire analysis can only be seen as proceeding on the basis that the applicant need not drive a truck. This is emphasised with the Tribunal's reference to the other "real options" available to the applicant from which he could choose, such as to avoid harm.

104. Contrary to the Minister's oral submissions, I do not see the last sentence at [130] (at CB 200) as being "the only sentence that gives rise to any difficulty". Difficulty arises far earlier in the Tribunal's analysis. In my view, the last sentence at [130] (at CB 200) simply emphasised the Tribunal's approach that the applicant "could" avoid harm by modifying his behaviour and not working as a truck driver.

105. That truck driving was not "a core aspect" of the applicant's "identity or beliefs or lifestyle" does not, given the link earlier established (at [120] at CB 198) between truck driving and a Refugees Convention ground (imputed political opinion), bring this case within what was said in *NALZ,* nor the "resolution" exposed in *SZATV*.

106. The Tribunal's analysis (at [130] at CB 200 in particular, but not confined there) is redolent of language that repeatedly points to characterising the Tribunal's analysis as positing what the applicant "could" do on return to Afghanistan, rather than what he "would" do. The absence of a clear, definitive finding by the Tribunal in its analysis simply reinforces this point.

107. While the part of the Tribunal's analysis headed "Kabul" may begin with the proposition that the applicant would return to Kabul, the use of such phrases (in [130] at CB 200) as "unless", "constrained", "could", "options" and "not be expected to modify", leaves the Tribunal's analysis in a state where the applicant could avoid harm by not driving a truck and instead taking up other employment options available to

him. It is the positing of that election, or modification in the applicant's behaviour, that reveals the error exposed in *S395*.

108. That is, the Tribunal proceeded to consider what *could* (not *would*) happen in Kabul (the applicant's "options") such that the applicant could avoid persecution. This brings this case squarely within *S395*. The "resolution" in *SZATV* requires, at least, clear findings of fact which are absent in the current circumstances.

109. The only reasonably clear finding of fact by the Tribunal here was that in the circumstances presented this was not a "relocation" case. The Tribunal's analysis, therefore, cannot be said to have been done in light of "relocation". That puts this case even further away from *SZATV* and *NALZ.*

110. The Minister's submission was that the Tribunal was dealing with the applicant's representative's submissions as to claims made by the applicant. That is clearly a reference to the submissions made after the Tribunal hearing (CB 169 to CB 177, see in particular CB 176 to CB 177 and also the Tribunal's "summary" at [77] at CB 191 to [84] at CB 192 and, in particular, [82] – [84] at CB 192).

111. There are certainly elements of this to be found in the Tribunal's analysis. However, in the face of the actual language of the Tribunal's analysis, it does not provide a satisfactory answer. In one sense, dealing with the applicant'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 & Citizenship & Anor* [2009] FCAFC 46; (2009) 174 FCR 415 at [124] per Tracey and Foster JJ.

112. For completeness, I note the Minister's submission at [44] above. In the absence of any specific reference being provided by the Minister, the only references that I could see in the Tribunal's decision record to the applicant's truck driving ceasing prior to his departure from Afghanistan were at [22] (at CB 184, with reference to the applicant's

claims), [30] (at CB 185, with reference to the applicant's claims) and [64] (at CB 189, with reference to the hearing before the Tribunal).

113. In any event, at its highest, it would appear that the applicant had stopped driving a truck before departing Afghanistan either for a period of "four months" ([22] at CB 185) or "10 days" ([30] at CB 185). In context, it appears to be that the applicant stopped driving a truck in preparation for his leaving for Australia ([30] at CB 185 and with reference to [28] of the applicant's representatives' written submissions at CB 136 – "…the Applicant sold his truck….in order to fund his escape from Afghanistan"). In the circumstances, it is difficult to see that that represents an election by the applicant, in the relevant sense, to cease driving a truck. Nor that, importantly, the applicant would not drive a truck if he were to return to Afghanistan.

114. In all the Tribunal's analysis reveals jurisdictional error. I can see no reason to refuse the applicant the relief that he claims. I will make orders accordingly.

115. It is not strictly necessary therefore to consider ground two in order to grant the relief the applicant seeks. However, given the parties made substantial submissions, it is appropriate that I do so. Ground two does not assist the applicant, it does not reveal jurisdictional error.

116. This ground essentially asserts that the Tribunal failed to consider four components of the applicant's claims.

117. The first is that the Tribunal failed to consider the fear of persecution by reason of membership of a particular social group variously described as: "truck drivers whom transport good for foreign agencies" ([21] at CB 62) and "Afghan truck drivers who transport goods relating to the government and foreign organisations" ([108] at CB 157).

118. The particulars refer to the applicant's claims as set out in his Statutory Declaration accompanying his protection visa application ("truck drivers whom transport goods for foreign agencies" – CB 62) and in his representatives submissions ("…Afghan truck drivers who transport goods relating to the government and foreign organisations" – CB 157).

119. The applicant claims that the Tribunal only considered the broader group of "Afghan truck drivers as such" ([115] at CB 197). He relies on what was relevantly said in *Dranichnikov* (at [22] – [24] and [27] per Gummow and Callinan JJ, [88] – [89] per Kirby J and [95] per Hayne J).

120. I agree with the Minister that the applicant's reliance on *Dranichnikov*, on its own, does not assist him. That is because, when regard is had to the totality of the claims made by the applicant and the context within which those statements were put, it is clear that the factual basis giving rise to the statements was that the applicant was a truck driver, who carried building materials, and that the Taliban imputed to him the characteristic of being pro foreign agencies and/or the government.

121. Contrary to the applicant's assertion, the Tribunal did deal with (and therefore, considered) the narrower groups to which he now refers. The reference to "Afghan truck drivers as such" (at [115] at CB 197) must be read in the context of what follows it.

122. While the Tribunal did not accept that truck drivers generally (the so called "wider group") would face persecution, it accepted that the applicant would face persecutory harm if he were to continue his truck driving activities in the area where he had done so previously.

123. While it is true that the Tribunal saw this as relevant to a matter of imputed political opinion, as the Minister in essence submits, distinctions between "broader" and "narrower" groups do not assist the applicant in circumstances where the underlying factual basis of the "narrower" group was addressed. In the current circumstances, whether described as imputed political opinion, or a member of the "narrower" group, the result at [120] (at CB 198) of the Tribunal's analysis would be the same. That is, as the Tribunal found, the applicant would face persecutory harm, in context, in his "original" home area.

124. The second particular to ground two asserts a failure to consider what the applicant says was an express claim to fear harm on the ground of actual (as opposed to imputed) political opinion. He refers to one word in the applicant's initial statutory declaration ([22] at CB 62):

> *"I also fear if I were to return to Afghanistan I will be harmed/mistreated for my imputed and **actual** political opinion: as a supporter of foreign agencies."*
>
> [Emphasis added.]

125. Plainly, the statement was made at that early stage of the protection visa application process. The applicant's reliance on *Htun* (at [42] per Allsop J (as he then was)) must also be seen in light of *NABE (No.2)* as the Minister submits (at [19] of his written submissions), and *SGBB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 709; (2003)199 ALR 364 at [18] per Selway J:

> *"The question, ultimately, is whether the case put by the appellant before the Tribunal has sufficiently raised the relevant issue that the Tribunal should have dealt with it."*

126. That statement ("actual political opinion") is not repeated anywhere in any of the applicant's subsequent submissions, interview with the delegate or hearing before the Tribunal. Nowhere in the representatives' long submissions is this matter raised again. In the circumstances, I cannot see that it can be said it was sufficiently raised before the Tribunal such that the Tribunal should have dealt with it.

127. In any event, it is also clear that the applicant's initial statement to this effect saw both actual, and imputed, political opinion as arising from one assertion: "as a supporter of foreign agencies" (as at [22] at CB 62). When plainly read with the paragraph that precedes it ([21] at CB 62) this links to "membership of a particular social group – truck drivers who transport goods for foreign agencies". That is, in any event and as set out above, what the Tribunal dealt with.

128. The third particular asserts that the Tribunal failed to deal with an express integer of the applicant's claims that he closed his jewellery business and became a truck driver in 2007 because of a lack of demand for silver jewellery.

129. The distinction between evidence and claims is important. The former is the articulation of the reasons as to why the applicant says he fears persecutory harm. The latter is the asserted factual basis on which those fears arise (*SZHKA v Minister for Immigration and Citizenship* [2008]

FCAFC 138 at [103] per Besanko JJ). Here, as a piece of evidence, the Tribunal acknowledged his jewellery occupation at [130] (at CB 200).

130. The applicant made no claim that he feared persecutory harm because of anything to do with the silver jewellery or jewellery making. Plainly the reference to his jewellery business, its closure and the lack of demand for silver jewellery was put forward as the applicant's explanation for his change of occupation and home location (CB 134 and CB 144). As the Minister submits, in these circumstances, it was not necessary for the Tribunal to consider it as a claim to fear persecutory harm in the future.

131. The fourth particular asserts that the Tribunal failed to deal with the deteriorating security situation in Afghanistan, a claim expressly made (CB 149). The matter of the deteriorating security situation was raised by the applicant's representatives in submissions to the Tribunal in relation to the applicant's claims to fear harm as a Hazara ([79] at CB 147 to [83] at CB 149).

132. The Tribunal addressed the applicant's claims in relation to his Hazara ethnicity (and Shia religion) ([95] at CB 194 and [104] at CB 196 to [110] at CB 197). It did not accept the applicant's claim that there was a well founded fear of persecution on the basis of his "simply" being a Hazara ([110] at CB 197). The Tribunal preferred country information before it to the applicant's assertions and submissions. The relevant test is forward looking, although the past is a guide to the future (*Minister for Immigration & Ethnic Affairs v Guo Wei Rong* [1997] HCA 22; (1997) 191 CLR 559, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 and *Abebe v The Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510).

133. The Tribunal's reference to "now or in the reasonably foreseeable future" (at [110] at CB 197) when read in context, particularly in the context of its orthodox description of the relevant test ([5] at CB 182 to [15] at CB 184) and the specific reference to country information ([96] at CB 195), is sufficient to show that it dealt with the claim. Particularly given that the Tribunal made reference to the representative's submissions (see [95] at CB 194).

Conclusion

134. In all, ground two is not made out. However ground one is sufficient to grant the relief sought. I will make orders accordingly.

I certify that the preceding one hundred and thirty-four (134) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Date: 7 June 2013