

Before the High Court

Minister for Immigration and Border Protection v SZSCA: Should Asylum Seekers Modify their Conduct to Avoid Persecution?

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Abstract

The High Court of Australia's landmark 2003 decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* held that decision-makers are not permitted to impose any requirement upon asylum seekers to 'act discreetly' in order to avoid persecution. Since that time, both Australian and international courts have grappled with the wider implications of this principle. The current appeal in *Minister for Immigration and Border Protection v SZSCA* tests the application of the S395 discretion prohibition to cases involving a change of occupation and imputed opinion. Accordingly, it will establish whether the potential of an asylum seeker to modify their behaviour can be part of the assessment of refugee status. The case is also expected to illuminate the relationship between the discretion prohibition and the relocation principle under refugee law. It therefore raises questions about the key function of the *Refugee Convention*, which is to protect a person who has lost the protection that a citizen would normally receive from his or her State. As such, the outcome of this case has the potential to influence decision-making in Australia and internationally.

I Introduction

The appeal in *Minister for Immigration and Border Protection v SZSCA*¹ provides the High Court of Australia with an opportunity to settle a significant question in refugee law: can an applicant for refugee status be denied that status on the basis that they could change their behaviour to avoid persecution? A starting point for analysing this issue is that the protection offered under the 1951 *Refugee Convention* ('the Convention')² to persons fleeing harm is circumscribed. Article 1A(2) of the Convention provides that a refugee is a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality,

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¹ See Minister for Immigration and Border Protection, 'Appellant's Submissions', Submission in *Minister for Immigration and Border Protection v SZSCA*, S109/2014, 20 June 2014 <http://www.hcourt.gov.au/assets/cases/s109-2014/SZSCA_App.pdf> ('Appellant's Submissions').

² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention').

membership of a particular social group or political opinion'. I refer to these reasons as reflecting 'protected attributes' or 'characteristics' in the Convention.³

The current appeal raises a new question in refugee law as to whether an asylum seeker can be expected to avoid persecution by changing behaviour that has led to the *imputation* of a protected characteristic under the Convention, but which does not directly result in concealment or modification of that protected characteristic. On the facts in this appeal, the specific question is whether an asylum seeker engaged in a particular occupation can be expected to change that occupation if it gives rise to an *imputation*, rather than an *expression* of, a political opinion. The Minister for Immigration is appealing from a decision of the Full Court of the Federal Court of Australia in which the Court was divided on this question.⁴ The majority held that the Refugee Review Tribunal (RRT) had erred in deciding that the applicant could avoid persecution by changing his occupation. In doing so, Robertson and Griffiths JJ relied on a previous decision of the High Court of Australia in the landmark and widely cited case of *Appellant S395/2002*.⁵ In that case, the High Court held, by majority (McHugh, Kirby, Gummow and Hayne JJ), that it was not permissible to require an asylum seeker to 'act discreetly' or otherwise modify their behaviour where to do so would result in limitations on expression of one of the fundamental rights protected by the *Refugee Convention* (hereinafter 'the discretion prohibition').⁶ In doing so, the judgments indicated that the central question to be asked is whether an applicant faces a well-founded fear of persecution in the light of what he or she *will* do upon return, not what he or she *should* do.⁷

The question of avoidance of persecution in the present appeal also engages another key aspect of refugee law: the principle of relocation. According to this principle, if a person is found to face a well-founded fear for a Convention reason in their country of origin, they may not be found to be a refugee if there is a place *within* their country of origin in which they do not face such a fear and to which they can reasonably be expected to relocate.⁸ This test has operated in Australian refugee law for some 20 years. Thus, the idea that a refugee can be expected to act to avoid persecution is not a new one. The difference is that under relocation the avoidance of persecution requires moving to another area, rather than suppressing a

³ Similarly, Kirby J in *SZATV* refers to 'the fundamental attributes of human existence which the specified grounds in the Refugees Convention are intended to protect and uphold': *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 49 [102] (Kirby J) ('*SZATV*'). See also James C Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *New York University Journal of International Law and Politics* 315, 378 which refers to the 'five forms of protected status'.

⁴ *Minister for Immigration and Border Protection v SZSCA* (2013) 308 ALR 18 (Robertson and Griffiths JJ in the majority; Flick J dissenting) ('*SZSCA Full Federal Court*').

⁵ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ('*S395*').

⁶ *S395* (2003) 216 CLR 473, 489–90 [41] (McHugh, Kirby JJ); 500 [80] (Gummow, Hayne JJ).

⁷ *S395* (2003) 216 CLR 473, 492 [50] (McHugh and Kirby JJ); 500–01 [80]–[82] (Gummow and Hayne JJ).

⁸ For an in-depth discussion of this principle — sometimes also referred to as the 'internal protection alternative' — see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014), 332–61.

belief. The question at issue in the present appeal is whether this type of requirement should apply to situations outside the scope of a relocation assessment.

The arguments raised in the current appeal can be distilled to two main issues that will be analysed in this column. First, can the principles enunciated in *S395* be distinguished in cases involving imputed opinions not directly involving suppression of a Convention attribute? Second, to what extent should the discretion prohibition and relocation be reconciled? I will address these in turn after an examination of the context in which the appeal arises.

II The Context of the Decision

A *Facts and Findings at First Instance*

The refugee applicant at the centre of this litigation is a self-employed truck driver from Kabul in Afghanistan. The basis upon which the applicant put his case before the Department of Immigration and the RRT is somewhat contested.⁹ The main submission of the applicant was that from approximately January 2011 he began transporting building and construction materials between Kabul and Jaghori. This was not for any political purpose, but ‘because he was paid more’.¹⁰ The applicant claimed that a political opinion had been imputed to him as a supporter of foreign organisations or the Afghan Government, because of this work. He also claimed that he faced persecution by reason of membership of a particular social group (which is a ground of persecution under the *Refugee Convention*).¹¹

The findings of the Tribunal are the focus of the current appeal. The RRT 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]’.¹² It did, however, find that such persons may be imputed with a political opinion supportive of the Afghan Government and/or non-governmental aid organisations, and that the applicant would face a real chance of serious harm if he was again intercepted on the roads by the Taliban.¹³ Nevertheless, the RRT was also satisfied that he could change his employment and thereby avoid the activities that were giving rise to the imputed opinion, finding 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’.¹⁴ The RRT also determined that he

⁹ It appears the applicant submitted a statutory declaration with his application to the Department of Immigration in which he claimed, among other things, to fear persecution due to his ‘imputed and actual political opinion: as a supporter of foreign agencies’: see *SZSCA Full Federal Court* (2013) 308 ALR 18, 24 [20]. However, the applicant did not raise submissions before the Tribunal about holding an ‘actual’ opinion: *SZSCA v Minister for Immigration and Citizenship* [2013] FCCA 464 (7 June 2013) [126] (Nicholls J) (‘*SZSCA Federal Circuit Court*’).

¹⁰ *SZSCA Full Federal Court* (2013) 308 ALR 18, 24 [21].

¹¹ RRT decision, as summarised in *SZSCA Full Federal Court* (2013) 308 ALR 18, 24 [21].

¹² *Ibid* 25 [25].

¹³ *Ibid* 25–6 [25].

¹⁴ *Ibid* 19 [3] (Flick J).

had other employment options due to his 'long-established skills making jewellery', a trade that he had worked in for 24 years previously.¹⁵

B *Arguments on Appeal*

On appeal from the RRT to the Federal Circuit Court, the applicant argued that he should not be expected to modify his conduct or alter his means of earning a livelihood due to the principles set out in *S395*.¹⁶ The Federal Circuit Court upheld the refugee applicant's arguments, finding that in its conclusions on behaviour modification, the RRT had committed jurisdictional error in a manner impermissible under *S395*.¹⁷ The Minister appealed that decision to the Full Federal Court, arguing that the Tribunal's approach was not contrary to the *S395* principles.¹⁸ As noted above, a majority of the Full Federal Court dismissed the Minister's appeal based on its application of *S395* to cases of imputed political opinion. In dissent, Flick J distinguished *S395*, holding that it is open for the RRT to conclude that, in some circumstances, a claimant could cease to engage in particular conduct that is the source of the political opinion being imputed to him¹⁹ so as to avoid persecution.

Before the High Court, the Minister for Immigration seeks to appeal the Full Federal Court decision based on two main legal arguments: first, that the current case can be distinguished from *S395*; and, second, that requirements as to reasonable adjustment of conduct set out in the relocation test can be applied.²⁰ In response, Counsel for the refugee applicant has argued that *S395* is directly applicable to this case and therefore the question of modification of behaviour is not relevant.²¹ I now turn to discuss these two arguments in detail.

III *Avoiding Persecution by Changing Behaviour: S395*

A *The Facts and Findings in S395*

In considering whether a person has a well-founded fear of persecution, it is often necessary to ascertain how an applicant will behave in the reasonably foreseeable future. In the past 10 years, there has been a recognition, both in Australia and elsewhere, that asylum seekers should not be expected to take reasonable steps to avoid persecution. This principle was first espoused by the High Court of Australia

¹⁵ Ibid.

¹⁶ *SZSCA Federal Circuit Court* [2013] FCCA 464 (7 June 2013) [13], [17].

¹⁷ Ibid [107]–[108], [114].

¹⁸ For full details of the Minister's appeal to the Full Federal Court, see *SZSCA Full Federal Court* (2013) 308 ALR 18, 24 [18].

¹⁹ Where that did not in fact form part of the way in which his political opinions were being expressed.

²⁰ *Appellant's Submissions*, Submission in *Minister for Immigration and Border Protection v SZSCA*, S109/2014, 20 June 2014 <http://www.hcourt.gov.au/assets/cases/s109-2014/SZSCA_App.pdf>.

²¹ *SZSCA, 'First Respondent's Submissions'*, Submission in *Minister for Immigration and Border Protection v SZSCA*, S109/2014, 11 July 2014 <http://www.hcourt.gov.au/assets/cases/s109-2014/SZSCA_Res.pdf>.

in the influential judgment in *S395*.²² The appellants, male citizens of Bangladesh, claimed to have a well-founded fear of persecution in Bangladesh by reason of their homosexuality. The RRT accepted that the appellants were homosexual, and that homosexual men in Bangladesh are a particular social group for the purposes of the *Refugee Convention*. However, it found that they had not in the past suffered serious harm by reason of their sexual identity, observing that they had 'clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now'.²³ On appeal, the High Court, by a majority (McHugh, Kirby, Gummow and Hayne JJ), found that the RRT had erred on the basis that they asked the wrong question.²⁴ Put simply, the only relevant question to be asked is what the applicant *will* do upon return, not what they *should* do. Thus, McHugh and Kirby JJ stated:

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.²⁵

Similarly, Gummow and Hayne JJ held that requiring an applicant for protection to live discreetly is 'both wrong and irrelevant to the task to be undertaken by the Tribunal'.²⁶

One of the key issues to be resolved in the current appeal in *SZSCA* is the broader application of *S395* to imputed, rather than held, opinions or identities. It is therefore necessary to establish whether the principles espoused in *S395* are limited in any respect. There are two points to note here.

First, the statements of the High Court in *S395* need to be interpreted in light of the facts of that particular case. The factual scenario in *S395* involved the suppression of a fundamental, immutable characteristic of a person (sexual identity) in a context where the expression of such identity was liable to criminal prosecution.²⁷ It is not readily apparent that the discretion prohibition is directly applicable to situations in the current appeal where the applicant is being asked to change his occupation (driving trucks) in order to avoid persecution.

Second, both joint judgments focused on the *holding* of particular beliefs that are linked to a Convention ground. For instance, in the joint judgment of McHugh and Kirby JJ, their Honours stated:

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

²² *S395* (2003) 216 CLR 473.

²³ RRT decision cited in *S395* (2003) 216 CLR 473, 474.

²⁴ The dissenting judgments of Gleeson CJ, Callinan and Heydon JJ were based on the fact that the applicants' case before the RRT did not indicate that they would do anything other than continue to act discreetly upon return to their country of origin.

²⁵ *S395* (2003) 216 CLR 473, 492 [50].

²⁶ *Ibid* 501 [82].

²⁷ Evidence before the RRT was that the *Penal Code 1860* (Bangladesh) makes homosexual intercourse a criminal offence (s 377): *S395* (2003) 216 CLR 473, 482 [12].

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.²⁸

Gummow and Hayne JJ made similar statements in their joint judgment.²⁹ The reference in both joint judgments to the *holding* of beliefs and opinions is significant. The evidence upon which the RRT made its decision in the current appeal was that the applicant did not hold the relevant political opinion.³⁰ Rather, his occupation gave rise to such an imputation. Thus, in the present case the person is being asked to modify an activity that gives rise to an imputed political opinion, not to alter his beliefs. The rationale for the discretion prohibition in S395 is that an asylum seeker cannot be expected to suppress an identity or belief protected by the Convention as that would defeat the very purposes of the Convention. How can such a rationale apply to the present case on appeal? In particular, how can one ‘conceal’ an imputed political opinion?

B Cases That Have Applied S395

Subsequent Australian and international cases have affirmed that the discretion prohibition set out in S395 applies to other *Refugee Convention* grounds, including political opinion.³¹ It is therefore clearly established under Australian law that applicants for refugee status should not be expected to change their political opinions in order to avoid persecution. However, there is no case on point establishing that this principle applies to those whose behaviour gives rise to an *imputed* political opinion only.³²

Some guidance can be taken from the way in which S395 has been applied in subsequent cases — both in Australia and internationally. It is significant that Australian cases applying S395 have couched the discretion principle in terms of the fundamental rights protected in the *Refugee Convention*, which results in some

²⁸ S395 (2003) 216 CLR 473, 489–90 [41] (emphasis added).

²⁹ S395 (2003) 216 CLR 473, 500.

³⁰ See above n 9.

³¹ See, eg, *NAJO v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 356 (31 March 2004) (Moore J); *SZBQV v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1242 (22 September 2004) (Jacobson J). For an extensive list of cases, see Refugee Review Tribunal, ‘A Guide to Refugee Law in Australia’ (Commonwealth of Australia, June 2014) 11–29 <<http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-refugee-law.aspx>>.

³² *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270 (‘NALZ’) is not directly on point, but may be of guidance by way of analogy, as argued in the *Appellant’s Submissions* in the current appeal. *NALZ* dealt with an applicant of Indian citizenship who was suspected of connections with the Liberation Tigers of Tamil Eelam (the ‘LTTE’) due to his supply of electrical goods to Sri Lankan nationals. The majority of the Full Federal Court found that there was no nexus between the activity of illegal trading and a *Convention* ground.

suppression of that belief or opinion.³³ Likewise, international jurisprudence applying the discretion prohibition have been limited to beliefs and activities directly related to fundamental rights protected in the Convention. For instance, the United Kingdom (UK) Supreme Court has, in recent years, applied the S395 principles to cases involving sexual identity (*HJ Iran*)³⁴ and political opinion (*RT Zimbabwe*).³⁵ *HJ Iran* is significant as it was the first UK case to endorse the S395 principles and has been cited by both the majority of the Full Federal Court³⁶ and the *Appellant's Submissions* in the current appeal in *SZSCA*.³⁷ In relation to its application to imputed political opinion, there are two things to note about *HJ Iran*. First, the rationale of the discretion prohibition is to protect the fundamental rights of the asylum seeker, with Lord Hope DPSC referring to sexual identity as a 'core identity'.³⁸ Its applicability to a situation of imputation, where the applicant holds no political opinion is therefore doubtful. Second, Lord Hope DPSC delivering the leading judgment, stated that 'the single most important message to emerge from these [Australian] cases is the need for a careful and fact-sensitive analysis'.³⁹ This underscores the need to exercise caution in applying the S395 principles to different factual scenarios from those presented in that case.

Other jurisdictions have also placed the discretion prohibition squarely within the framework of fundamental rights and identity. In two recent cases, the Court of Justice of the European Union has rejected a concealment obligation on asylum seekers relating to expression of religious beliefs⁴⁰ and sexual identity.⁴¹ Similarly, jurisprudence in the United States, has held that a person should not be expected to change his sexual identity as part of refugee status determination, as it is a 'fundamental aspect of his human identity',⁴² and an 'integral part of human freedom'.⁴³ In all these cases, the issue in question was suppression of an identity or opinion held that was directly protected by a Convention ground. There is no indication that these cases can therefore be applied to an imputation case where the activity is not expressive of a protected attribute.

³³ See, eg, Emmett J of the Federal Court in *NALZ*, who concluded that the suggested adjustment (ceasing to sell electrical goods) did not involve, in itself, surrender of fundamental rights of the kind protected by the *Refugee Convention* categories: (2004) 140 FCR 270, 281–2 [49]–[50]

³⁴ *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 ('*HJ Iran*').

³⁵ *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 ('*RT Zimbabwe*').

³⁶ *SZSCA Full Federal Court* (2013) 308 ALR 18, 40 [80] (Robertson and Griffiths JJ).

³⁷ *Appellant's Submissions*, Submission in *Minister for Immigration and Border Protection v SZSCA*, S109/2014, 20 June 2014 <http://www.hcourt.gov.au/assets/cases/s109-2014/SZSCA_App.pdf> 15 [49]–[52].

³⁸ *HJ Iran* [2011] 1 AC 596, 622 [14].

³⁹ *Ibid* 629 [31].

⁴⁰ *Bundesrepublik Deutschland v Y (C-71/11)* (Court of Justice of the European Union, Grand Chamber, 5 Sept 2012).

⁴¹ *Minister voor Immigratie en Asiel v X (C-199/12)* (Court of Justice of the European Union, Fourth Chamber, 7 November 2013).

⁴² *Karouni v Gonzales*, 399 F 3d 1163, 1173 (9th Cir, 2005).

⁴³ *Ibid*.

C *The Application of S395 to Imputed Political Opinion*

S395 concerned a fundamental human right that goes to the heart of a person's identity. For a number of reasons, I am of the opinion that the principles in S395 can be distinguished from those raised by the facts in the present case. In doing so, I do not intend to question the principles espoused by the majority on the facts in S395. That case concerned applicants who directly feared persecution based on their membership of a particular social group (comprising homosexuals in Bangladesh). It involved the potential suppression of their sexual identity and conduct. The case currently on appeal in *SZSCA* is quite removed from S395. As Flick J noted at the Full Federal Court level:

'[i]t 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'.⁴⁴

Furthermore, it should be noted that while the principles in S395 have been applied in many subsequent cases in Australia and internationally, and have received broad support in academic writings, the scope of the underlying rationale for the judgment has been questioned. Indeed, two refugee law commentators, the highly regarded Professor James Hathaway and scholar Jason Pobjoy, have criticised aspects of the reasoning underlying the principles enunciated in S395 and *HJ Iran*, describing them as using 'confusing reasoning'⁴⁵ and having 'departed in critical ways from accepted refugee law doctrine'.⁴⁶ A detailed analysis of their 75-page article is beyond the scope of this discussion. However, put simply, their main argument is based on the nexus between the activity to be concealed or modified and the risk of persecution. They differentiate between those activities 'intrinsic' to the protected *Refugee Convention* grounds and those only 'marginally connected'.⁴⁷ They argue that if the activity that engenders the risk is intrinsic to one of the five forms of protected status, then refugee status must be recognised. However, where activities are 'no more than marginally connected to one of the forms of protected status', then the ensuing risk of persecution cannot reasonably be said to be "for reasons" of a Convention ground.⁴⁸ This would appear to support a finding in favour of the Minister in the current appeal in *SZSCA*, on the basis that the activity to be modified — driving trucks — is only marginally connected to a Convention ground (via imputation of an opinion).

It should be noted that the critique of the underlying reasoning undertaken in S395 by Hathaway and Pobjoy has been met with strong criticism from other scholars. Professor Guy Goodwin-Gill from the University of Oxford has described it as 'a rather curious response ... which will hardly have done protection much

⁴⁴ *SZSCA Full Federal Court* (2013) 308 ALR 18, 23 [15] (Flick J).

⁴⁵ Hathaway and Pobjoy, above n 3, 337.

⁴⁶ *Ibid* 331.

⁴⁷ *Ibid* 378.

⁴⁸ *Ibid* 378.

good'.⁴⁹ Others agree with aspects of the authors critique of S395, but adopt a different approach to the underlying legal reasons.⁵⁰

The basis upon which I seek to limit the application of the principles in S395 to SZSCA is different to that raised by the Hathaway and Pobjoy critique. The latter discusses the various ways in which a belief or identity can be expressed and to what extent those activities can be protected under the S395 principles. I do not seek to limit the S395 principles to core/marginal rights or to certain types of activities carried out as a result of an opinion or identity *actually held*. Rather, I assert that the discretion prohibition should only apply where there is an act of repression of an activity directly covered by a Convention ground. That is, using the facts for the current appeal, a discretion prohibition may apply to the person who is *in fact* transporting materials in Afghanistan to assist the Government because he *holds* a pro-government opinion. Change of occupation in this scenario *would* result in suppression of a political opinion that is actually held (the manifestation of which is assisting the Government by supplying them with construction materials).

Further, a distinction must be made jurisprudentially between the role of the activity as a link to the nexus clause in the refugee definition and its applicability to the S395 discretion prohibition. It is clear that the truck driving activity on the facts here supplies the nexus to a Convention ground because it results in *imputation* by the persecutor of a political opinion. However, the occupation of truck driving is a conduit for an imputation. It does not necessarily follow that this underlying activity is protected from modification. In some cases, an applicant's occupation may be found to be expressive of their identity or beliefs (eg the pastoral and preaching activities carried out by a priest in furtherance of a religious belief and vocation). The present appeal does not deal with such a case.

I now turn to the second major legal question raised by the current High Court appeal: the interaction between the 'relocation principle' and the principles from S395.

⁴⁹ Guy S Goodwin-Gill, 'Editorial: The Dynamic of International Refugee 'Law' (2013) 25 *International Journal of Refugee Law* 651, 664. See also counter-arguments to the Hathaway and Pobjoy approach in Ryan Goodman, 'Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line' (2012) 44 *New York University Journal of International Law and Politics* 407; John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution within Refugee Law' (2012) 44 *New York University Journal of International Law and Politics* 447.

⁵⁰ For instance, leading Harvard scholars Deborah Anker and Sabi Ardlan state that 'Hathaway and Pobjoy's thought-provoking article brings to light the Australian and UK courts' evasion of some key doctrinal issues and underscores the need for appropriate legal analysis': Deborah Anker and Sabi Ardlan, 'Escalating Persecution of Gays and Refugee Protection: Comment on "Queer Cases Make Bad Law"' (2012) 44 *New York University Journal of International Law and Politics* 529, 533.

IV Reconciling the Relocation Test and the 'Acting Discreetly' Requirement

A *The Relocation Test*

The appeal in *SZSCA* raises the important question of the interaction between the *S395* principles and those relating to relocation. I note that although the Tribunal in *SZSCA* did not approach the decision as one involving relocation as such,⁵¹ it is possible on a doctrinal level to take a holistic approach to interpretation of the refugee definition in the Convention that draws parallels between the relocation and discretion principles. Both relocation and the discretion prohibition arise under art 1A(2) of the *Refugee Convention* and thus are considered by decision-makers as part of an assessment of whether a person is a refugee.

Much discussion of relocation has focused upon the textual basis of the relocation within the *Refugee Convention*.⁵² Australian jurisprudence has tended to place it within the 'well-founded fear' limb of the refugee definition. In *SZATV v Minister for Immigration and Citizenship*, one of the leading judgments on relocation in Australia, the joint judgment cited with approval a statement from the UK House of Lords in *Januzi*:

[I]f a person is outside the country of his nationality because he has *chosen* to leave that country and seek asylum in a foreign country, *rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution*, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason.⁵³

In the context of *SZSCA*, there are two points arising from the above statement. First, this statement explains relocation as a type of behaviour modification. As the *SZATV* joint judgment stated, a person will not be outside his country due to a well-founded fear if he *chooses* to seek asylum, rather than relocate to an area where he would *not* face a well-founded fear of persecution. Similarly, it can be said that the same approach could be taken to expecting an applicant to change an activity (such as an occupation) where such change was reasonable in the circumstances.⁵⁴ That is, utilising the terms of the statement cited in *SZATV* and referred to above, I would express the test as follows:

If a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, *rather than change an activity that is not expressive of any Convention attribute so that he*

⁵¹ RRT decision, cited in *SZSCA Full Federal Court* (2013) 308 ALR 18, 26 [25](f).

⁵² See, eg, *SZATV* (2007) 233 CLR 18, 34–7 [50]–[61] (Kirby J); Hathaway and Foster, above n 8, 335–42.

⁵³ *SZATV* (2007) 233 CLR 18, 25–6 [19] (Gummow, Hayne and Crennan JJ), citing with approval, *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, 440 (emphasis added).

⁵⁴ Where the activity is not reflective of a protected attribute or belief, but which has merely led to *imputation* of such an opinion, as is the case in *SZSCA*.

would have no well-founded fear of persecution, where the protection of his country would be available to him and where *he could reasonably be expected to change that behaviour*, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason.

Second, although much of the analysis of relocation has focused on the proper textual basis for relocation, this represents only a part of the analysis that must be undertaken in the context of a change of occupation situation such as *SZSCA*. In addition, regard should be had to the *effect* of applying the relocation test to see whether parallels can be made between that and the discretion prohibition. In my view, if one examines this, it is clear that both tests involve a change in behaviour by the applicant that avoids the persecution.⁵⁵ The relocation principle essentially requires the applicant to do something to avoid persecution — relocate to a ‘safe’ area — and thereby modify their behaviour (which may include very significant changes such as moving away from family and changing occupation).

B Relevant Case Law

There are two cases dealing with the application of relocation to change of occupation that are particularly relevant to the current case on appeal: *SZATV*⁵⁶ and *SZFDV v Minister for Immigration and Citizenship*.⁵⁷ I will discuss these in turn.

The High Court decision in *SZATV* is important as it is a relocation case that dealt with a change of occupation expressive of a political opinion. In *SZATV*, the applicant was a journalist from the city of Chernovtsy, Ukraine, who claimed a fear of persecution based upon his political opinion. The applicant had written a number of articles alleging corruption in regional government and had suffered harassment and violence as a result. The Refugee Review Tribunal found that the applicant had suffered persecution in the past due to his political opinions.⁵⁸ However, it found that internal relocation was possible for the applicant on the basis that the persecution he had suffered was localised to the Chernovtsy region, that he did not have an anti-government political profile generally in the Ukraine and would not be of adverse interest to authorities outside the Chernovtsy region.⁵⁹ In a passage that is relevant to *SZSCA*, the Tribunal found that while the applicant ‘may not be able to work as a journalist elsewhere in Ukraine ... he may be able to obtain work in the construction industry as he has done in Australia’.⁶⁰

⁵⁵ This is recognised by Flick J in *SZSCA Full Federal Court*: ‘many cases have recognised the fact that persecution may be avoided if a claimant can reasonably relocate’: (2013) 308 ALR 18, 22 [11].

⁵⁶ *SZATV* (2007) 233 CLR 18 (Gummow, Kirby, Hayne, Callinan and Crennan JJ).

⁵⁷ *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 (Gummow, Kirby, Hayne, Callinan and Crennan JJ) (*‘SZFDV’*). This case was heard together with *SZATV*.

⁵⁸ RRT decision, as summarised in *SZATV* (2007) 233 CLR 18, 22 [6].

⁵⁹ *Ibid* 22 [6]; 28–9 [30].

⁶⁰ RRT decision, as cited in *SZATV* (2007) 233 CLR 18, 28 [30].

The High Court unanimously held that the Tribunal had committed an error of law in its use of relocation.⁶¹ This finding turned on the link between the applicant's occupation and the expression of his political opinion, with the Court noting that:

In the present case, public expression of political opinion was of particular significance for the appellant by reason of his activities in Chernovtsy as a journalist.⁶²

The Court therefore held that the Tribunal's approach was inconsistent with the S395 discretion prohibition:

The effect of the Tribunal's stance was that the appellant was expected to move elsewhere in Ukraine, and live "discreetly" so as to not attract the adverse interest of the authorities in his new location, lest he be further persecuted by reason of his political opinions. By this reasoning the Tribunal sidestepped consideration of what might reasonably be expected of the appellant with respect to his "relocation" in Ukraine.⁶³

The application of S395 to the relocation test in this case can be explained by the particular facts at issue in *SZATV*. In that case, the applicant's occupation as a journalist was expressive of a held political opinion (not merely one imputed to him because of his non-Convention related conduct). I agree that a case such as *SZATV* requiring an applicant to move to another region where he may have to change his occupation to avoid persecution would, in effect, result in suppression of his political opinions prohibited by S395. However, relocation to an area where the applicant may need to change his or her occupation does not *of itself* necessarily prevent use of the relocation principle. Rather, this will turn on whether that occupation is reflective of a protected attribute, such as religion or political opinion. Thus, for instance, a priest undertaking activities reflective of his religious belief could not be expected to relocate to another area to avoid persecution if this would require him or her to change occupation to one *not* reflective of his held religious beliefs (eg in the construction industry). This interpretation is consistent with the way in which Kirby J reconciles relocation with S395 in *SZATV*:

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.⁶⁴

In the other relevant case on relocation, *SZFDV*, the applicant was a citizen of India who had expressed political opinions in his home area. The High Court held (in a majority 4:1 decision) that the Refugee Review Tribunal had not fallen into error in its findings about whether relocation would involve abnegation of the

⁶¹ *SZATV* (2007) 233 CLR 18, 29 [32] (Gummow, Hayne, Crennan JJ); 49 [103] (Kirby J); 49 [108] (Callinan J).

⁶² *Ibid* 28 [29] (Gummow, Hayne, Crennan JJ), (emphasis added).

⁶³ *Ibid* 29 [32] (Gummow, Hayne, Crennan JJ).

⁶⁴ *Ibid* 47–8 [102] (Kirby J) (emphasis added). See also *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270, 281–2 [49]–[50] (Emmett J), cited by Kirby J in *SZATV* (2007) 233 CLR 18, 46 [93].

attribute for which the applicant had suffered harassment.⁶⁵ In contrast, Kirby J in dissent held that application of the relocation principle here was akin to a requirement to ‘act discreetly’ prohibited by S395.⁶⁶

There are two aspects of Kirby J’s dissent which are of interest to the current appeal in SZSCA. First, Kirby J reinforced his earlier findings in S395 by linking his findings to abdication of the Convention’s protected attributes:

Where the “discreet living” (moving to Kerala and opting out of the relevant political discourse) amounts to a negation or abdication of the relevant basic right expressed in the Refugees Convention, it is an error of jurisdiction effectively to impose that requirement in an applicant’s case.⁶⁷

This is important as the applicant in SZSCA is not being expected to abdicate any political opinion via a change in his occupation.

Second, Kirby J in *SZFDV* held the Tribunal had made a number of legal errors, one of which was that it did not ask whether the applicant *would*, as a matter of fact, relocate if returned, but rather asked whether the Tribunal *could* itself impose such an obligation on the applicant.⁶⁸ With respect, as argued throughout this column, the test for relocation does not ask what the applicant *would* do, but what he *could* do based on a concept of reasonableness.

C *Analysis: Parallels between Relocation and S395*

Under the current state of the law in Australia, the question asked under relocation is not whether an applicant *will* modify their behaviour (by relocating), but that he or she *should* (if it is found reasonable to do so). This is because a finding that the applicant can relocate relies only on an *assumption* that asylum seeker will, in fact, relocate to the safe region. Both relocation and S395 therefore deal with the question of behaviour modification and avoidance of persecution.⁶⁹ It is my view that an analogy can be drawn between the two doctrines. In doing so, the relocation principle illustrates that the question at issue in refugee status determination has never been simply ‘what will the applicant do on return?’ (as suggested in S395). Most major asylum host states, including Australia, use various limiting principles, including relocation, which impinge on that central question. Statements in the S395 jurisprudence that it is irrelevant to ask what the applicant *could* do, therefore represent only part of picture. It does appear under current law that requiring a person to change their behaviour *in some circumstances* is permissible if it falls outside the discretion prohibition established in S395 (and I submit that the current appeal does fall outside the remit of S395).

⁶⁵ *SZFDV* (2007) 233 CLR 51, 55–6 [15] (Gummow, Hayne, Crennan JJ); 64 [50] (Callinan J).

⁶⁶ Ibid 62 [41]–[42].

⁶⁷ Ibid 62–3 [42] (citations omitted).

⁶⁸ Ibid 61 [34].

⁶⁹ Indeed, the test for relocation in the United States *Code of Federal Regulations* (CFR) provides, in part, that ‘[a]n applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality ... if under all the circumstances it would be reasonable to expect the applicant to do so’: *Procedures for Asylum and Withholding of Removal — Establishing Asylum Eligibility*, 8 CFR § 208.13 (2014) (emphasis added).

I would therefore submit that 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 change non-Convention protected behaviour (for instance, by changing his or her occupation) so as to rely on his or her country of nationality to provide protection. In doing so, this does not require the applicant to ‘relocate internally’, which would be contrary to the principles set out in both *S395* and *SZATV*.⁷⁰ This is because in *SZSCA* the applicant does not *hold* the political opinion. Thus, there is no issue of interfering with the applicant’s right to have and express that opinion.

The Full Federal Court in *SZSCA* held 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’.⁷¹ In doing so, the majority emphasised that:

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*.⁷²

With respect, there is a contradiction in this statement. It refers to modification of behaviour which ‘involves’ any of the Convention grounds ‘which it is object of the Convention to prevent and which *S395* forbids’. However, it is not behaviour ‘involving’ any Convention ground that *S395* forbids. As stated above, the principle in that case has been understood as prohibiting suppression of an identity of belief actually held (including closely related activities expressing that identity or belief). In justifying its approach here, the majority of the Full Federal Court cites Kirby J in *SZATV* in support.⁷³ However, in the quoted passage Kirby J clearly states it is impermissible to require a person 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’.⁷⁴ As stated above, there was no evidence before the Tribunal in *SZSCA* that the applicant would have to sacrifice any opinion or belief specified in the *Refugee Convention* grounds due to the change in occupation.

V Conclusions

It will be of great benefit to refugee law practitioners and decision-makers to have clarification from the High Court about the application of the discretion prohibition

⁷⁰ See, eg, Kirby J in *SZATV* (2007) 233 CLR 18, 48–9 [101]–[102]:

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.

⁷¹ *SZSCA Full Federal Court* (2013) 308 ALR 18, 40 [79] (Robertson and Griffiths JJ).

⁷² *Ibid* 40 [80] (Robertson and Griffiths JJ) (emphasis added).

⁷³ *Ibid* 41 [82] (Robertson and Griffiths JJ).

⁷⁴ *Ibid* 41 [82] (Robertson and Griffiths JJ) (emphasis added), citing Kirby J in *SZATV* (2007) 233 CLR 18, 48–9 [102].

to cases involving imputed beliefs. In this respect, it will be important to have guidance about the scope of future application of the principles enunciated in *S395*.

At the heart of this case is whether applicants for asylum can reasonably be expected to avoid persecution by concealing the activities or identity in relation to which they fear persecution. Upon the facts, the questions are: in cases involving imputed political opinion, how can one hide a belief that is not, in fact, held? Why is limiting a non-protected activity (such as driving trucks) necessarily inconsistent with the Convention if it does not lead to interference with a fundamental human right protected by the *Refugee Convention*?

It is clear that the binding principles of law established by *S395* should apply to the situations involving expression of protected Convention attributes: race, religion, nationality, political opinion and membership of a particular social group. This is on the basis that an applicant asylum seekers should not be forced to renounce their identity or beliefs to avoid persecution. This would also apply to *closely* related activities and occupations — such as the activities undertaken by a priest in pursuance of a religious belief — but not where the activity is only related to the Convention ground because the persecutor has *imputed* such an opinion to the applicant due to the activity.

I also take the view that there is a fundamental difference between the nature of *held* and *imputed* political views that justifies treating these grounds differently in the context of the discretion prohibition. Australian case law has recognised that a person may be persecuted because of a political opinion *imputed* to them. In such a case, the protected identity is the political opinion and the activities leading to the imputation simply explain why that opinion has been attributed to the person. Thus, while the activities underlying an imputed political opinion are relevant to a finding as to Convention nexus, suppression of those underlying activities (such as driving a truck) do not *in and of themselves* meet the requirement of the *S395* principles.

I also argue that a more consistent, holistic interpretation should be taken of behaviour modification principles across international refugee law. Thus, on a doctrinal level, the statements in *S395* that rendered questions about what the applicant *could* do impermissible must be read in the context of relocation principles (which clearly allow such questions to be asked). Previous questions have been asked about the need to reconsider relocation principles in light of *S395*. This column asks the mirror of this question: should *S395* be limited in light of the reasonableness and modification principles used in relocation? The purpose of the Convention is to protect individuals from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Acceptance of a behaviour modification on the part of an asylum seeker, which does not result in any abnegation of a protected attribute, does not conflict with that purpose. Thus, where the suggested adjustment would not involve surrender of the attributes set out in the Convention grounds, it may be open to a decision-maker to find that behaviour modification is a reasonable option.

In expanding principles beyond the scope envisaged in previous cases, care must be taken to do so in a way that supports both a ‘good faith’⁷⁵ interpretation of the *Refugee Convention* and a coherent jurisprudential line of authority. In my view, the Full Federal Court majority’s application of S395 to an imputed belief represents an unwarranted extension of the principles set out in S395 and it is hoped that the High Court resists such an over-extension of this aspect of the Convention.

⁷⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).