

## 6 RELOCATION

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### INTRODUCTION

In deciding whether a person meets the criteria for a protection visa, a question may arise as to whether they can relocate within their country of reference to avoid a real chance of persecution or a real risk of significant harm. This question arises in considering whether a person is owed protection obligations under the Refugees Convention for the purposes of s.36(2)(a) of the *Migration Act 1958* (the Act) for pre-16 December 2014 visa applications. It also arises in considering whether a person meets the ‘complementary protection’ criterion in s.36(2)(aa) regardless of the date of the visa application, and is informed by the jurisprudence developed in relation to the Convention.<sup>1</sup>

However, this question and the associated principles are not applicable in deciding whether a person is a ‘refugee’ under s.5H(1) of the Act for a protection visa application lodged on or after 16 December 2014.<sup>2</sup>

<sup>1</sup> See Chapter 10 of this guide for further explanation of the complementary protection criterion, which incorporates a relocation test in s.36(2B)(a) of the *Migration Act 1958*.

<sup>2</sup> The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135) amended s.36(2)(a) of the Act to remove reference to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a ‘refugee’. ‘Refugee’ is defined in s.5H, with related definitions and qualifications in ss.5(1) and 5J-5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s.2 and item 28 of Schedule 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543). Section 5H(1), as qualified by s.5J(1)(c) requires that the real chance of persecution relates to all areas of the receiving country. Unlike the relocation principle as developed under the Convention, there is no scope to consider the reasonableness of requiring a person to move to an area that is free from a real chance of persecution. For further details, see Chapter 3 of this Guide.

## THE RELOCATION PRINCIPLE

The definition of ‘refugee’ contained in Article 1 of the *Convention Relating to the Status of Refugees 1951* (the Convention) is, for visa applications made prior to 16 December 2014, drawn into and qualified by Australian municipal law by the Act. It requires asylum seekers to be outside their country owing to a well-founded fear of being persecuted for certain specified reasons and unable or, owing to that fear, unwilling to avail themselves of the protection of their country or, if stateless, unable or, owing to that fear, unwilling to return to the country of habitual residence. The Convention does not expressly exclude a person who, although having a well-founded fear of persecution in their home region, might nevertheless reasonably relocate to a safe area within their country.<sup>3</sup> However, such an exclusion has been distilled from the text of the Convention definition.

The ‘internal relocation principle’<sup>4</sup> was accepted by the Full Federal Court in 1994 in *Randhawa v MILGEA* on the basis that ‘[t]he focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country’.<sup>5</sup> The Chief Justice reasoned that:

If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.<sup>6</sup>

The High Court has confirmed as a general proposition that, depending on the circumstances of the particular case, it may be reasonable for an applicant to relocate in their country to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution.<sup>7</sup> Similarly, it may be reasonable for an applicant to remain in a place in that country where he or she will be safe.<sup>8</sup>

Thus, in determining whether an applicant is a person in respect of whom Australia has protection obligations, it may be necessary to consider whether the applicant might

<sup>3</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Kirby J at [48], per Gummow, Hayne and Crennan JJ at [11]-[12]. Contrast §208.13 of the United States Code of Federal Regulations and Article 8 of the European Union’s Directive 2004/83/EC: see *SZATV* at [13]-[14].

<sup>4</sup> Also known as the ‘internal flight alternative’ and ‘internal protection alternative’. For further discussion see e.g. UNHCR *Guidelines on international protection: ‘Internal Flight or Relocation Alternative’ within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 23 July 2003 (‘*Internal Flight Guidelines*’); DIMIA, ‘The Internal Flight Alternative: An Australian Perspective: a paper prepared as a contribution to the UNHCR’s Expert Roundtable Series’, *Interpreting the Refugees Convention – an Australian Contribution* (DIMIA, 2002), at 105-122; H Storey, ‘From Nowhere to Somewhere: An Evaluation of the UNHCR Second Track Global Consultations on International Protection: San Remo 8-10 September 2001 Experts Roundtable on the Internal Protection/Relocation/Flight Alternative’, Conference Paper, IARLJ Conference, Wellington, NZ, 22-25 October 2002; International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative (1999) 21(1) *Michigan Journal of International Law* 131 (Michigan Guidelines); J Hathaway and M Foster, ‘Internal protection/relocation/flight alternative as an aspect of refugee status determination’ in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), at 357-417; G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> edition, 2007) at 123.

<sup>5</sup> *Randhawa v MILGEA* (1994) 52 FCR 437 at 440-1.

<sup>6</sup> (1994) 52 FCR 437 at 441.

<sup>7</sup> *SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* (2007) 233 CLR 51.

<sup>8</sup> *MIBP v SZSCA* (2014) 254 CLR 317.

reasonably relocate to or remain in a region within their country, free of the risk of persecution.

### Textual foundation

The concept of an internal relocation alternative is not a stand-alone principle of refugee law, or an independent test in the determination of refugee status.<sup>9</sup> Rather, it is an integral part of the Convention definition. In Australia, the textual source of a relocation rule is to be found in the requirement that the applicant is outside of his or her country of nationality *owing to a well-founded fear* of persecution. In *SZATV v MIAC*, the majority of the High Court approved of the following explanation:

[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.<sup>10</sup>

Thus, if it is not reasonable for a person who has a well-founded fear in part of a country to relocate to another part, then the person's fear of persecution in relation to the country as a whole is well-founded.<sup>11</sup> Conversely, if it is reasonable for the applicant to relocate to another part of the country then that applicant's fear is not well-founded.

The same considerations apply when the decision-maker identifies an area where an applicant may be safe, provided they remain there. In *MIBP v SZSCA*, the High Court stated:<sup>12</sup>

By analogy with the internal relocation principle, given the existence of a place within his country of nationality where the respondent would have no well-founded fear of persecution, it could not be concluded that he is outside Afghanistan and unable to return to that country owing to a well-founded fear of persecution if it could reasonably be expected that he remain in Kabul and not travel outside it. As in *SZATV*, it is the question of what may reasonably be expected of the respondent which must be addressed.<sup>13</sup>

<sup>9</sup> UNHCR, *Internal Flight Guidelines*, above n 4, at [2].

<sup>10</sup> *Januzi v SSHD* [2006] 2 AC 426 at 440, cited with approval in *SZATV v MIAC* (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ (Callinan J agreeing) at [19]. Kirby J appears to have adopted a similar approach, albeit placing more emphasis on the narrower term 'well-founded fear' (see [78] and [98]). The High Court declined to reconsider its approach in *MIBP v SZSCA* (2014) 254 CLR 317 per French CJ, Hayne, Kiefel and Keane JJ at [23]-[24]; see also Gageler J at [40]. The joint judgment in *SZATV* indicated at [20] that the reference in that passage to the unavailability of protection is best understood as referring not to the phrase 'the protection of that country' in the second limb of the definition, but to the broader sense of the term identified in *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [20], namely, the international responsibility of the country of nationality to safeguard the fundamental rights and freedoms of its nationals. In *SZATV*, Kirby J observed that other textual foundations for the relocation test had also been suggested: at [50]-[63].

<sup>11</sup> *Randhawa v MILGEA* (1994) 52 FCR 437 at 443.

<sup>12</sup> *MIBP v SZSCA* (2014) 254 CLR 317 per French CJ, Hayne, Kiefel and Keane JJ at [20]-[30]; see also Gageler J at [39]-[46]. This case concerned a truck driver in Afghanistan who the Tribunal found could avoid persecution by remaining in Kabul and not driving trucks outside it. The case of *MZZFM v MIBP* [2014] FCA 1379 (Davies J, 16 December 2014) was distinguished from *SZSCA* on the basis that the reviewer had addressed the issue of whether the appellant could work solely in Kabul and there was an evidentiary foundation for the finding that he could: at [36]. In *AFD15 v MIBP* [2015] FCCA 3175 (Judge Smith, 4 December 2015) at [23], the applicant's fear of persecution was connected to a region where she had not lived for more than 10 years and to which there was no indication she wanted to return, but the Court nevertheless held that the Tribunal fell into an error of the kind in *SZSCA*.

<sup>13</sup> *MIBP v SZSCA* (2014) 254 CLR 317 per French CJ, Hayne, Kiefel and Keane JJ at [25].

The complementary protection criterion in s.36(2)(aa) expressly incorporates a relocation test in s.36(2B)(a), which provides that there is taken not to be a real risk that a person will suffer significant harm if it would be reasonable for them to relocate to an area of the country where there would not be a risk of such harm. However, it is unclear whether the principle that a decision-maker must consider the reasonableness of an applicant remaining in a safe area would apply in this context.<sup>14</sup>

### When does the issue of relocation arise?

An assessment of the fear of persecution in most cases centres on the location where the applicant will return or be returned. In many cases, this will be what is commonly referred to as an applicant's 'home area' or 'home region'. Identifying a home area or region may help in determining where a person will return or be returned to, but it is not, in and of itself, the answer to the question which must be asked.<sup>15</sup> The High Court has cautioned against using these descriptors as though they were statutory terms, as they are not derived from the Convention.<sup>16</sup> This is reinforced by the fact that it is not uncommon for people to have lived in more than one place (for example because they have been displaced) or to have no identifiable home area.<sup>17</sup>

A decision-maker must assess the place or places to which the applicant is *likely* to return.<sup>18</sup> If the decision-maker finds the applicant faces a real chance of persecution (or significant harm) in that place or those places, the decision-maker must look at *any other places* in the country of reference where they do not face those risks, and consider the issue of relocation.<sup>19</sup> Where an applicant does not face a real chance of persecution (or significant harm) in the place or places to which they will return or be returned, the question of reasonableness of relocation generally does not arise.

A decision-maker may accept that an applicant will return to a place where they face a real chance of persecution (or significant harm), whether or not it is claimed directly by the applicant. However, the decision-maker may not accept such a claim and instead find that the applicant will more likely than not return to a place where such a risk of harm does not

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<sup>14</sup> The reasoning of High Court majority in *MIBP v SZSCA* (2014) 254 CLR 317 centred on the wording of the Convention concerning being outside one's country and unable to return to it owing to a well-founded fear of persecution (per French CJ, Hayne, Kiefel and Keane JJ at [25]). In contrast, s.36(2)(aa) refers to the real risk of significant harm arising as a *necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country*. It is unclear how this wording would give rise to the kind of principle described in *SZSCA*.

<sup>15</sup> *CSO15 v MIBP* (2018) 260 FCR 134 at [42].

<sup>16</sup> *CR1028 v The Republic of Nauru* [2018] HCA 24 (Bell, Gordon and Edelman JJ, 13 June 2018) per Gordon and Edelman JJ (Bell J agreeing) at [45].

<sup>17</sup> *CR1028 v The Republic of Nauru* [2018] HCA 24 (Bell, Gordon and Edelman JJ, 13 June 2018) per Gordon and Edelman JJ (Bell J agreeing) at [46]; *CSO15 v MIBP* (2018) 260 FCR 134 at [38].

<sup>18</sup> *CSO15 v MIBP* (2018) 260 FCR 134 at [45].

<sup>19</sup> *CSO15 v MIBP* (2018) 260 FCR 134 at [46]-[47]. The Court held that at this final step, there must be an assessment of the reasonableness and practicability of the particular individual living in that new place. Issues of reasonableness and practicality are discussed further below.

arise.<sup>20</sup> Such a finding should have a logical and probative evidentiary basis, for example a previous connection to that 'safe' place through work or study.

Where an applicant claims that, even if they are found not to have a well-founded fear of being persecuted in the area to which they would ultimately return, they will be harmed while attempting to access that region (for example after being returned to the nearest international airport), or that it will be difficult for them to do so, the courts have held that the relevant question is whether any fear of harm the applicant may face in accessing their ultimate destination amounts to a well-founded fear of being persecuted for a Convention reason.<sup>21</sup> Such cases do not raise an issue of 'relocation'.

However, this principle is subject to some qualifications. As the High Court held in *MIBP v SZSCA*, where a decision-maker finds that an applicant will not have a well-founded fear of persecution so long as he or she remains in a particular area, it will be necessary to consider whether it would be reasonable to expect the applicant to do so.<sup>22</sup>

As indicated above, an applicant may have lived in more than one place or have connections to more than one part of their country of reference. Nonetheless, a decision-maker is required to determine, as a question of fact, where that person *will return or be returned to*.<sup>23</sup> If the applicant faces a real chance of persecution (or significant harm) in that area, the decision-maker must consider whether the applicant could reasonably relocate to avoid that harm. This is regardless of whether the applicant may have a connection to a part of the country where he or she would not face that harm.<sup>24</sup> The connection an applicant has to the

<sup>20</sup> *CAR15 v MIBP* [2019] FCAFC 155 (Allsop CJ, Kenny and Snaden JJ, 9 September 2019) at [38]-[39]. In *CAR15* the Full Federal Court's reasons suggest that the Tribunal would not have needed to consider reasonableness of relocation (and would not have erred) if it had, in fact, found that the appellant child (who was born in Australia) would have returned to the Nigerian city of Lagos, where her parents had previously lived and worked, as opposed to either of her parent's home villages, where the appellant faced a real chance / risk of harm. This contrasts with the earlier Federal Circuit Court judgment in *EBA16 v MIBP* [2018] FCCA 3665 (Judge Riethmuller, 12 December 2018), where the applicant gave evidence that she had fled violence and the destruction of her property in a particular neighbourhood of Tripoli, and had lived with her brother in a safer neighbourhood for two and a half months prior to coming to Australia. The Tribunal found that the violent neighbourhood had ceased to be her 'home area' and concluded that there was no real chance she would suffer harm in her brother's neighbourhood or 'another part of Tripoli' on return to Lebanon. The Court held that the Tribunal erred in failing to consider the reasonableness of relocation, and that the relocation test must proceed by reference to the place from which the applicant fled the relevant harm (at [27]). However, the Court's approach appears to be inconsistent with the Full Federal Court judgments in both *CSO15* and *CAR15*. Nonetheless it is likely that the application of the principle in *CSO15* will be subject to further judicial consideration in the context of particular factual scenarios such as those that arose in *EBA16*.

<sup>21</sup> *SZQEN v MIAC* (2012) 202 FCR 514 at [38]-[40]; *SZQKE v MIAC* [2012] FCA 514 (Cowdroy J, 18 May 2012) at [54]; *SZQXE v MIAC* [2012] FMCA 643 (Barnes FM, 27 July 2012) at [81]; *SZRBA v MIBP* [2013] FCCA 1361 (Judge Cameron, 24 September 2013) at [62] (appeal allowed on a different basis: *SZRBA v MIBP* [2014] FCAFC 81 (Siopsis, Perram and Davies JJ, 7 July 2014)). Note that in upholding an appeal in *SZQXE v MIAC* [2012] FCA 1292 (Flick J, 21 November 2012), Flick J appears to have treated the case as one involving an issue of relocation rather than return to the claimant's home area. However, the Court nonetheless stated that the matter had been correctly determined by the Federal Magistrate.

<sup>22</sup> *MIBP v SZSCA* (2014) 254 CLR 317.

<sup>23</sup> *CSO15 v MIBP* (2018) 260 FCR 134 at [42].

<sup>24</sup> Previously, the courts had held that the issue of moving from one 'home area' to another was not one of 'relocation' and did not require consideration of reasonableness: *SZQEN v MIAC* (2012) 202 FCR 514 at [38]-[40]. However, in *CRI028 v The Republic of Nauru* [2018] HCA 24 (Bell, Gordon and Edelman JJ, 13 June 2018) the High Court held that *SZQEN* should not be followed to the extent it suggested that the concept of a 'home area' or 'home region' were terms derived from the Convention, to which meaning could and must be given; and that it was unhelpful and distracting for the decision-maker to focus on whether a particular area was a 'home area' and treat that label as eliminating the need to consider the reasonableness of the proposed relocation: per Gordon and Edelman JJ (Bell J agreeing) at [44]-[45]. See also *CSO15 v MIBP* (2018) 260 FCR 134 at [54], where the Court commented in *obiter* that if the appellant had clearly indicated an intention to return to a home area where he had a well-founded fear of persecution, it would have needed to consider

other 'safe' area will likely be relevant to an assessment of reasonableness, but will not mean that reasonableness can be presumed.

Further, where an applicant has a connection to more than one area, depending on the nature of the claims, it may be necessary to consider whether it is reasonable for them to *remain* within the area to which they would return and not travel to the other areas that they have a connection with, in order to avoid a real chance of persecution or significant harm in those areas, consistent with the approach taken in *MIBP v SZSCA*.<sup>25</sup>

For an applicant who has never lived in their country of reference, consideration should nonetheless be directed towards where they will return or be returned to, and whether they would face a real chance of persecution or significant harm there. Deciding on that location will be a question of fact for the decision-maker, to be assessed in the circumstances of each case.<sup>26</sup> If an applicant has no connection with any particular part of the country such that they would, in fact, choose to return there, then it would appear that the presence of an accessible area within that country where there is no real chance of the feared persecution will be determinative of the applicant's claims.<sup>27</sup> In such cases, the question is whether the applicant faces a real chance of persecution (or significant harm) in the place to which they will be returned, rather than one of 'relocation'. Again, however, if the applicant must remain in that area in order to be safe, then a question of reasonableness may arise as discussed in *MIBP v SZSCA*.<sup>28</sup>

## APPLYING THE RELOCATION TEST

While there may be different ways of approaching the question of relocation, and while the various issues overlap, the starting point in considering relocation is generally whether the

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whether there were other parts of Pakistan to which he might reasonably be expected to relocate, including his other 'home region': at [54].

<sup>25</sup> *MIBP v SZSCA* (2014) 254 CLR 317.

<sup>26</sup> In the following judgments, the Courts found no error in the approach taken by the decision-maker on the facts of each case, but they should be treated with some caution given that they focused on the existence of a 'home area' as opposed to an area where an applicant would return or be returned. In *SZRKY v MIAC* [2012] FMCA 942 (Cameron FM, 18 October 2012) the Court found no error in the Reviewer considering firstly the chance of the claimant suffering persecution in the area where he was born, despite having left that area, and Afghanistan, as an infant (upheld on appeal: *SZRKY v MIAC* [2013] FCA 352 (Cowdroy J, 19 April 2013). Similarly, the Court in *SZRBA v MIBP* [2013] FCCA 1361 (Judge Cameron, 24 September 2013), observed at [45] that as Ghazni was the applicant's home area that he had left as a child, and the area that he might be expected to return, it would not have been inappropriate to have first considered whether the applicant had a well-founded fear of persecution there – although the Court also found no error in the Reviewer's approach in testing the applicant's fear of persecution in Afghanistan by reference to the whole country (appeal allowed on a different basis: *SZRBA v MIBP* [2014] FCAFC 81 (Siopis, Perram and Davies JJ, 7 July 2014). Compare *SZQZN v MIAC* [2012] FMCA 939 (Barnes FM, 11 October 2012) where the claimant had been born outside his country of nationality, Afghanistan, and had never been there. The Court found that it was open to the Reviewer, based on the claims and evidence, to have considered firstly the chance of persecution in Kabul rather than in the rural area in which the claimant's family had lived before departing Afghanistan.

<sup>27</sup> See *SZQZN v MIAC* [2012] FMCA 939 (Barnes FM, 11 October 2012) at [49], however this judgment needs to be treated with some caution given its emphasis on the absence of a 'home area' as opposed to an area to which the applicant would return or be returned.

<sup>28</sup> *MIBP v SZSCA* (2014) 254 CLR 317.

feared persecution is localised and, if so, whether it would be reasonable to expect the applicant to seek refuge in another part of the same country.<sup>29</sup>

### Whether the feared persecution is localised

The factum upon which the relocation principle operates is that there is an area in the applicant's country where he or she may be safe from harm.<sup>30</sup> Thus, the issue of whether it would be reasonable to expect an applicant to relocate only arises if the circumstances indicate that there is an area where, objectively, there is no appreciable risk of the occurrence of the feared persecution, that is, where the feared persecution is localised rather than nation-wide.<sup>31</sup>

As the High Court observed, in some cases different treatment in matters like race or religion may be encountered in various parts of a country so that in some parts there is insufficient basis for a well-founded fear of persecution; but in other cases the conduct or attribute of the individual which attracts the apprehended persecution may not be susceptible of a differential assessment based upon matters of regional geography.<sup>32</sup> For example, in *MIMA v Khawar*<sup>33</sup> the applicant's case was that in Pakistan violence against women as a social group was tolerated and condoned, not merely at a local level by corrupt, inefficient, lazy or under-resourced police, but as an aspect of systematic discrimination.

Considerable care needs to be taken when assessing the available information to determine whether the apprehended fear is localised:

In the nature of things, country information available to refugee adjudicators is often expressed at a high level of generality. It may not extend in sufficient detail to establish, in a convincing way, the differential safety of other towns, districts or regions of the one country. ... where otherwise a relevant "fear" is shown, considerable care will need to be observed in concluding that the internal relocation option is a reasonable one when, by definition, the applicant has not taken advantage of its manifest convenience and arguable attractions.<sup>34</sup>

<sup>29</sup> In *SZSRQ v MIBP* [2014] FCCA 2205 (Judge Manousaridis, 25 September 2014) the Court considered that there are two distinct questions which a decision-maker must address in considering the relocation principle. Firstly, whether there is a different region in the country where, objectively, there is no appreciable risk of the occurrence of the feared persecution; and if so, whether it is reasonable, in the sense of practicable, to expect the applicant to be sent to that other region (at [45]). The same reasoning was adopted by his Honour in *SZSTE v MIBP* [2015] FCCA 178 (Judge Manousaridis, 30 January 2015) at [32] and the concept of the two 'limbs' to the relocation test has also been accepted in other judgments, e.g. *MZZJY v MIBP* [2014] FCA 1394 (Judge Davies, 18 December 2014) at [21]. A different approach was taken in *MZZYC v MIBP* [2014] FCCA 2166 (Judge Burchardt, 13 October 2014) where the Court considered that the better view is there is only one relocation test, which is whether it is reasonable in the sense of practicable for the applicant to relocate (at [49]). However, the difference in approaches does not appear to be of any practical significance. The Court stated that the Tribunal's formulation of the test (as two questions) did not of itself suggest any error, and it is plainly reasonable to decide whether a person will face the same persecution throughout an entire country, because if they do, it is clear that they will attract Convention protection (at [59]). This judgment was upheld on appeal in *MZZYC v MIBP* [2015] FCA 1426 (Davies J, 17 December 2015) but the Court observed that the relocation test involved two questions (at [18]).

<sup>30</sup> *MIBP v SZSCA* (2014) 254 CLR 317 per French CJ, Hayne, Kiefel and Keane JJ at [25].

<sup>31</sup> In *BUY15 v MIBP* [2016] FCCA 1736 (Judge Smith, 20 July 2016) at [21], the Court observed that there is no difference of substance between an appreciable risk and a real chance or real risk of harm. Undisturbed on appeal: *BUY15 v MIBP* [2017] FCA 22 (Gleeson J, 31 January 2017).

<sup>32</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [26].

<sup>33</sup> (2002) 210 CLR 1 at [25].

<sup>34</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Kirby J at [82].

When considering whether the apprehended fear can properly be regarded as localised, it will often be relevant to have regard to whether the source of the persecution feared is the state, or by contrast, a non-state agent.

**Where the persecutor is the state**, relocation will not be an option in many cases. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely that a victim of persecution in one place will be similarly vulnerable in another place within the state. However, there is no absolute rule, and each case must be considered in the light of its own particular facts.<sup>35</sup>

**Where the persecutor is a non-state agent**, internal relocation will not be an option if there is a risk that the non-state actor will persecute the applicant in the proposed area. This will depend on a determination of whether the persecutor is likely to pursue the applicant to the area and if so, whether state protection from the harm feared is available there.<sup>36</sup>

Where an applicant has a well-founded fear of being persecuted on more than one basis, it would be necessary to establish that all those fears are localised.<sup>37</sup> It should also be remembered that the issue of whether an applicant's well-founded fear of being persecuted is localised may extend beyond consideration of the initial fear or fears, to whether the applicant would be exposed to other and different risks of being persecuted in the area of

<sup>35</sup> *Januzi v SSHD* [2006] 2 AC 426 at [21] per Lord Bingham. See also at [48]-[49] per Lord Hope. Note that harm by specific individuals such as local government officials is not necessarily 'localised' such as to require express consideration of the relocation principle. See, for example, *MIMA v Jang* [2000] FCA 1075 (Wilcox J, 4 August 2000) where Wilcox J held that the Tribunal did not err in finding that the applicant's fear was well-founded without giving express consideration to the specific question of whether there was some part of China in which the applicant would be safe. Although the applicant's claims related to the enforcement of a law by local provincial officials, the Court was satisfied that the Tribunal had cited country information that indicated the persecutory law was a national law and therefore the harm was not localised.

<sup>36</sup> UNHCR, *Internal Flight Guidelines*, above n 4, at [7]. In *Perampalam v MIMA* (1999) 84 FCR 274, Burchett and Lee JJ found that the Tribunal failed to examine the evidence to determine whether the LTTE's extortion demands would cease if the appellant moved a quarter of a mile away to her daughter's home, or if she attempted to resettle where she had a son, but no other family or friends to provide protection. Their Honours further held that the Tribunal had failed to consider whether a woman suspected of collusion with the LTTE in one area might not continue to be similarly suspected and interrogated in another area: at 243. See also *MIBP v AHL15* [2017] FCA 1178 (O'Callaghan J, 4 October 2017), where the Court held that although the applicants did not make a claim that electronic forms of communication such as the internet and social media could lead to them being found and harmed in India, the types of evidentiary questions which may be relevant to such a claim included whether they used the internet and social media, the particular platforms used, the measures available to provide a firewall of security or secrecy, the prevalence throughout India of these platforms, the existence of modern facial recognition searching, and the connection between perpetrators who are highly motivated to pursue them and cause them harm: at [27]-[28]. For discussion of state protection, see Chapter 8 of this Guide.

<sup>37</sup> See, for example, *NABM of 2001 v MIMIA* (2002) 124 FCR 375 at [19]-[21] in which the Full Court held that the Tribunal had failed to ask the correct question. While the Tribunal found the appellant had a well-founded fear of persecution in her home town for two Convention reasons, religion and imputed political opinion, in stating its views as to the reasonableness of relocation the Tribunal referred only to persecution for reasons of religion and failed to address whether she was at risk elsewhere in the country by reason of imputed political opinion; *SZQLM v MIAC* [2011] FMCA 921 (Smith FM, 9 December 2011) at [45]-[46] where the Court found that the Reviewer had 'sidestepped' consideration of an essential issue by moving directly from finding that there was a real but localised chance of the claimant being persecuted on the basis of a past incident, to considering the practicality of relocation, without addressing his more general claim to fear persecution as a Hazara Shia, a claim which was not necessarily susceptible of geographic isolation; and also *MZYKW v MIAC* [2011] FMCA 630 (Whelan FM, 18 August 2011) at [104] where the Court found that the Tribunal, although accepting that the applicant had a well-founded fear of persecution in his home area for reasons of religion and political opinion, had failed to properly consider another claim to fear persecution on the basis of his membership of a particular social group, and so erred by then inadequately considering whether he would be persecuted for that reason if he relocated elsewhere.

relocation.<sup>38</sup> If so, the applicant's well-founded fear of being persecuted could not be said to be localised in the relevant sense.

Whether or not it is necessary to identify a specific place in which an applicant can relocate or live is discussed further below.

### **Behaving 'discreetly' to avoid persecution**

A well-founded fear of being persecuted could not properly be regarded as localised if relocating carried with it the need to avoid persecution by living 'discreetly'. In *SZFDV v MIAC*, the High Court emphasised that:

it would not be a "reasonable" adaptation of the behaviour of an applicant ... to expect the applicant to return to the country of nationality and to abdicate, or repudiate, a fundamental right of the kind included in the list of Refugees Convention-related grounds of "persecution".<sup>39</sup>

As McHugh and Kirby JJ explained in *Appellant S395/2002 v MIMA*, the Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps, reasonable or otherwise, to avoid offending the wishes of the persecutors.<sup>40</sup>

Thus, in the context of relocation, it cannot be a reasonable adjustment, contemplated by the 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 Convention are intended to protect and uphold.<sup>41</sup> In *SZATV v MIAC*, the Tribunal had found that, although the applicant may not be able to work as a journalist (which had been the source of the feared persecution in his home region), internal relocation was a realistic option for him. The High Court unanimously held that the Tribunal had, in effect, impermissibly expected him to move elsewhere, not work as a journalist, and live discreetly so as not to attract the adverse attention of the authorities in his new location, lest he be further persecuted by reason of his political opinions.<sup>42</sup>

<sup>38</sup> See UNHCR, *Internal Flight Guidelines*, above n 4 at [7]. As to the risk of lesser harms, or risks that are unrelated to the Convention definition, see the discussion of 'reasonableness' below.

<sup>39</sup> *SZFDV v MIAC* (2007) 233 CLR 51 at [33] per Kirby J referring to *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [40] per McHugh and Kirby JJ, and at [80] per Gummow and Hayne JJ.

<sup>40</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [40], cited with approval in *SZATV v MIAC* (2007) 233 CLR 18 at [28]. For further discussion of S395, see Chapter 11 of this Guide.

<sup>41</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [102] per Kirby J. The UNHCR, *Internal Flight Guidelines*, above n 4, make a similar point at [19]: 'Claimants are not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution in the internal flight or relocation area'.

<sup>42</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ at [32]; per Kirby J at [100]-[103]. Similar errors were found in *SZBKQ v MIMIA (No.2)* [2005] FMCA 717 (Driver FM, 10 June 2005) and *SZCBT v MIMA* [2007] FCA 9 (Stone J, 12 January 2007). In *SZBKQ* the Tribunal reasoned that the applicant could avoid the risk of harm by relocating to an area where she was not known and where her Roma ethnicity would not be apparent, that is, she could avoid the risk of harm by hiding her ethnicity. In *SZCBT* the Tribunal had found that the appellant had a reputation as a troublemaker (because of his letter writing) and that it was likely that this was at the root of his past treatment. That being so, the Court held it was not sufficient to find that those responsible for that treatment would not seek him out in other parts of Egypt. It was necessary for the Tribunal to ask if the appellant is likely to continue with the conduct that marked him as a troublemaker in the past and, if so, whether that conduct would, in the future, evoke a similar response from others. It was not entitled to base its prediction on an expectation that the appellant would modify his behaviour on his return to his country. See also *SZQMT v MIAC* [2012] FCA 840 (Flick J, 10 August 2012) at [25]-[27] where the Federal Court found that by failing to resolve the applicant's claim that she was a lesbian, the Tribunal 'sidestepped' proper consideration of the

On the other hand, where relocation would not involve surrender of fundamental rights of the kind protected by the Convention categories, it may be open to conclude that relocation is a reasonable option.<sup>43</sup> Minds may differ on the question of whether a fundamental right is affected. For example, in *SZFDV v MIAC*<sup>44</sup> the appellant's agitation respecting working conditions at a timber mill and other activities as a Communist Party member had brought him into trouble in his local region. The majority held that it was open to the Tribunal to find, as it did, that the appellant could safely relocate to another region and that it would not be unreasonable to expect him to do so. In his dissenting judgment, Kirby J held that the Tribunal's decision contemplated the appellant's abandonment of his political opinions in India in the only place where it was relevant and important to him to hold and express those opinions, and that relocating and 'opting out of the relevant political discourse' amounted to a negation or abdication of a basic right expressed in the Convention.<sup>45</sup>

The cases suggest that the consideration of reasonableness of relocation should not require any modification of conduct which is related to a fundamental right of the kind protected by the Convention.<sup>46</sup>

### Whether relocation is reasonable in all the circumstances

It is widely accepted that even where the feared persecution is localised, a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him or her to do so.<sup>47</sup> The High Court has endorsed this proposition, explaining that what is reasonable, in the sense of practicable, must depend upon the particular circumstances of the applicant and the impact upon that person of relocating within their country.<sup>48</sup> As Kirby J stated, the supposed possibility of relocation will not detract from a 'well-founded fear of persecution' where any such relocation would, in all the circumstances be unreasonable.<sup>49</sup>

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reasonableness of her relocating within India. The Court cautioned that care should be taken before endorsing an approach whereby the Tribunal can sidestep consideration of the reasons why a person may choose to pursue one course of conduct over another and choose to not fully and openly practice one's religious belief or sexuality.

<sup>43</sup> *SZDPB v MIMIA* [2006] FCAFC 110 (Spender, French and Cowdroy JJ, 3 July 2006) at [25], citing *NALZ v MIMIA* (2004) 140 FCR 270, held that requiring relocation in circumstances where it is reasonable to do so does not of itself involve the person modifying beliefs or opinions or hiding membership of a particular social group, if such beliefs, opinions or membership is the source of persecution. See also *SZLVG v MIAC* [2008] FCA 1674 (Jagot J, 8 December 2008), where it was held that it was open to the Tribunal to find that the inability to participate in the activities of a local party, given their localised nature, was not such as to make relocation unreasonable. The Tribunal did not base its conclusion on the impermissible view that the applicant could live 'discreetly' outside West Bengal and thereby avoid persecution. It accepted that the applicant would not be able to participate in the activities of a particular political party (which did not operate outside West Bengal) but found that he would be able to participate in politics with respect to the issues of interest to him.

<sup>44</sup> (2007) 233 CLR 51.

<sup>45</sup> *SZFDV v MIAC* (2007) 233 CLR 51 at [42].

<sup>46</sup> See also the comments of Gageler J in dissent in *MIBP v SZSCA* (2014) 254 CLR 317 at [35]-[39].

<sup>47</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (UNHCR, reissued 2019) ('*Handbook*') at [91].

<sup>48</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [24].

<sup>49</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Kirby J at [97].

### ***Should or would reasonably relocate?***

The reasonableness test is commonly understood as excluding from refugee status a person who, although having a well-founded fear of persecution in their home region, ‘could reasonably be expected to relocate’<sup>50</sup> to a safe region within their country, in the sense that they *could* avail themselves of protection by relocating within their country.<sup>51</sup> As Hathaway and Foster have explained, ‘since primary recourse should always be to one’s own state, refugee status is appropriately denied where internal protection is available within the applicant’s own state’.<sup>52</sup>

So understood, the inquiry focuses on whether it would be objectively reasonable for a decision-maker to expect (require) an applicant to relocate within their country. Thus, whilst the wishes of an applicant may be a relevant consideration in some circumstances, the applicant’s attitude to the possibility of relocation is not determinative of the question whether relocation is reasonable. In *Abdi v MIMA*<sup>53</sup> the applicant had asserted that, as a matter of choice, he would not seek to avail himself of the protection of his country of origin. The Full Federal Court stated:

It follows, in our view, from what was said in *Randhawa*, and from a proper understanding of the terms of the Convention definition, that unwillingness to return (not based on well-founded fear of persecution for a Convention reason) cannot of itself (nor can consequences that follow entirely from that unwillingness) convert into a refugee an applicant who would not otherwise be entitled to international protection. That is simply an application of the well established principle that third countries are obliged to give international protection only in circumstances where national protection is not available.<sup>54</sup>

Similarly, relocation will not be considered to be unreasonable simply because an applicant has a subjective fear which is not well-founded.<sup>55</sup>

It has been argued before the High Court, and accepted by Justice Kirby, that the High Court’s decision in *Appellant S395/2002 v MIMA*<sup>56</sup> compels the conclusion that it is impermissible to superimpose on a person an *obligation* to act reasonably by relocating

<sup>50</sup> *Januzi v SSHD* [2006] 2 AC 426 per Lord Bingham of Cornhill at 440, cited with approval in *SZATV v MIAC* (2007) 233 CLR 18 at [19].

<sup>51</sup> *Randhawa v MILGEA* (1994) 52 FCR 437 at 440-441 per Black CJ.

<sup>52</sup> James C Hathaway and Michelle Foster, *Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) pp.332-333. See also, e.g., Hathaway and Foster, above n 4, at 359: ‘Thus, courts in most countries have sensibly required asylum seekers to exhaust reasonable domestic protection possibilities as a prerequisite for the recognition of refugee status’. For example, in *Thirunavukkarasu v Canada (MEI)* 1993 109 DLR (4<sup>th</sup>) 682 it was stated at 687-8 that ‘if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so. ... [T]he question is whether, given the persecution in the claimant’s part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. [In other words] would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad’: see *Januzi v SSHD* [2006] 2 AC 426 at [12].

(2000) 61 ALD 101.

<sup>54</sup> *Abdi v MIMA* [2000] FCA 242 (Whitlam, Lehane and Gyles JJ, 10 March 2000) at [13] approving the view of the primary judge in *Abdi v MIMA* [1999] FCA 1253 (O’Connor J, 10 September 1999) at [13]. In *Darshan Singh v MIMA* [2000] FCA 1858 (Kiefel J, 15 December 2000) Kiefel J stated at [35] that a claimant’s personal circumstances are not relevant to assessing the availability of internal protection beyond their capacity to provide some reflection on the genuineness of access an applicant may have to protection within his country of origin - the ‘range of realities’ relevant to reasonableness of relocation in *Randhawa*.

<sup>55</sup> *Kelly v MIMA* (unreported, Federal Court of Australia, Hely J, 9 December 1998) at [6]-[7]. Note that in *MZYYS v MIAC* [2012] FMCA 1149 (Riley FM, 4 December 2012) the Court rejected an argument that the Tribunal in that case had applied the wrong test by asking whether it was not unreasonable (rather than whether it was reasonable) for the applicant to relocate.

<sup>56</sup> (2003) 216 CLR 473.

within their country, rather than asking whether, acting reasonably, the person would in fact relocate.<sup>57</sup> While there appears to be no express consideration of this argument in the joint judgments in *SZATV v MIAC*<sup>58</sup> and *SZFDV v MIAC*,<sup>59</sup> their Honours' reasoning strongly suggests that they do not share Justice Kirby's view of the reach of S395.<sup>60</sup> Overall, it does not appear that the majority view represents such a departure from the concept of relocation as generally understood, that is, as involving consideration whether protection from the feared persecution is reasonably available in an objective sense within the applicant's country. However, it should be emphasised that, depending on the facts of the particular case, what the High Court said in S395 about 'discretion' may be relevant to a consideration of whether an applicant's fear can properly be regarded as localised.<sup>61</sup>

### **Factors relevant to reasonableness of relocation**

The High Court has emphasised that the Convention is concerned with persecution in the defined sense, not with living conditions in a broader sense, and that the Convention was not directed to such matters as differential living standards in various areas of the country of nationality, whether attributable to climatic, economic or political conditions.<sup>62</sup> In *SZATV v MIAC*, the High Court endorsed the view of the UK House of Lords in *Januzi v SSHD*, that the question of whether it would be unduly harsh for a claimant to be expected to live in a place of relocation within the country of nationality is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights.<sup>63</sup> In harmony with the way the relocation test has been grafted onto the Refugees Convention, the decision of the House of Lords in that case was expressed to take decision-makers back to the text and to the Refugees Convention's purpose to provide protection against specified *persecution* and nothing else.<sup>64</sup>

However, this does not mean that only factors amounting to persecution are relevant to the relocation test. It is clear from the authorities that there may be circumstances where factors

<sup>57</sup> See, for example, *SZATV v MIAC* (2007) 233 CLR 18 at [99] where his Honour stated that 'one of the key requirements insisted upon by both joint reasons in S395, was that the Tribunal must consider how *in fact* the refugee applicant will act if returned to the country of nationality. Necessarily, this must be considered in cases where the internal relocation postulate is raised, bearing in mind that the applicant will be expected to act reasonably. However, the focus remains on the refugee applicant personally and what *in fact* might occur.' (original emphasis). See further *SZFDV v MIAC* (2007) 233 CLR 51 at [31]: '[T]he focus of attention in refugee applications is not, as such, upon what it might be reasonable, in an abstract sense or as part of a theoretical taxonomy, for the appellant, if returned to the country of nationality, to do in order to escape persecution: This is not the correct approach, whether the case involves the suggestion of "living discreetly" as a homosexual man in Bangladesh (as in S395), or moving to another part of the country of India to avoid the claimed persecution...' (footnotes omitted). In *SZFDV* his Honour held that the Tribunal had erred in this respect. In *SZATV* he also suggested that the Tribunal had fallen into this error but found it unnecessary to reach a concluded view: at [95]-[100].

<sup>58</sup> *SZATV v MIAC* (2007) 233 CLR 18.

<sup>59</sup> *SZFDV v MIAC* (2007) 233 CLR 51.

<sup>60</sup> In particular, Lord Hope of Craighead's formulation in *Januzi v SSHD* [2006] 2 AC 426, 'whether it would be unduly harsh for a claimant to be expected to live in a place of relocation', cited with approval in the joint judgment in *SZATV v MIAC* (2007) 233 CLR 18 at [25], does not appear to be consistent with Kirby J's analysis. In *SZFDV v MIAC* (2007) 233 CLR 51, the majority found no error in the Tribunal reasoning that protection obligations 'may not be owed if I was satisfied [the applicant] could safely travel to and reside in another location in India' and further, that 'I may expect him to safely relocate if I was satisfied it was reasonable in all the circumstances to expect him to do so'.

<sup>61</sup> See above, under 'Whether the feared persecution is localised'.

<sup>62</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ at [25], citing *Januzi v SSHD* [2006] 2 AC 426 per Lord Bingham at 447 and Lord Hope of Craighead at 457.

<sup>63</sup> *Januzi v SSHD* [2006] 2 AC 426 at 457 as quoted in *SZATV v MIAC* (2007) 233 CLR 18 at [25].

<sup>64</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [72].

other than harm amounting to persecution will make relocation unreasonable. In *MZYQU v MIAC*, the Court held that the Reviewer had erred when considering the reasonableness of relocation by excluding any harm that was not serious harm amounting to persecution within the meaning of s.91R(1)(b) of the Act.<sup>65</sup> Subsequent cases have confirmed that although a risk of serious harm may be relevant to whether relocation is reasonable, it is not the only level or kind of harm which could affect the reasonableness of relocation, and there is no requirement that harm rise to the level of 'serious harm' or that it be the result of 'systematic and discriminatory conduct' in order to render relocation unreasonable.<sup>66</sup> Similarly, an applicant does not have to show that there is a Convention reason behind every difficulty or danger which makes relocation unreasonable.<sup>67</sup>

The range of factors that may be relevant in any particular case to the question of whether relocation is reasonable will be largely determined by the case sought to be made out by an applicant, but may include matters arising implicitly from the evidence. Relevant considerations are likely to include the applicant's particular circumstances as well as conditions in the country. See discussion under ['The applicant's particular circumstances'](#) for further details.

Even where a factor has been considered in assessing the risk of harm, it may require separate consideration in relation to its impact on the reasonableness of relocation. For example, in *SZSSY v MIBP*<sup>68</sup> the Tribunal had accepted that the applicant was identifiable as a Shia, that he wished to continue to practise his religion, that he would be perceived as an opponent of the Taliban and other Sunni extremists, that there had been large scale

<sup>65</sup> *MZYQU v MIAC* (2012) 206 FCR 191 at [61]. In that case, the Court found that the failure to include the risk of generalised violence or harm due to personal circumstances in the list of relevant factors weighing against the reasonableness of relocation indicated that the Reviewer had incorrectly excluded any harm that was not serious harm as required by s.91R(1)(b) from consideration. A similar error was identified in *MZZSJ v MIBP* [2015] FCCA 264 (Judge Riley, 11 February 2015) at [43].

<sup>66</sup> See e.g. *SZQXW v MIAC* [2013] FMCA 10 (Nicholls FM, 22 January 2013); *SZSSM v MIBP* [2013] FCCA 1489 (Judge Driver, 11 November 2013) at [88]-[90]; *MZZHK v MIBP* [2014] FCCA 86 (Judge Riethmuller, 23 January 2014) at [4] where the Court held that the factors which may show that it is unreasonable to expect a person to relocate do not necessarily have to amount to harm of the type that would be within the ambit of the Refugee Convention or the complementary protection provisions. See also *MZZKM v MIBP* [2014] FCCA 24 (Judge Riethmuller, 17 January 2014) at [11], [24]-[27], where the Court found that while there may well be considerable overlap between 'a risk of significant harm' in the context of complementary protection and facts and circumstances that may make it unreasonable to relocate, the test of whether factors relevant to the consideration of whether relocation was unreasonable is not the same test as the test of 'a real risk of significant harm'. In contrast, the Court in *SZRKY v MIAC* [2012] FMCA 942 (Cameron FM, 18 October 2012) held that the practicability of relocation is to be determined by reference to whether it involves a real chance of persecution: at [26] (upheld on appeal: *SZRKY v MIAC* [2013] FCA 352 (Cowdroy J, 19 April 2013); special leave to appeal refused: *SZRKY v MIAC* [2013] HCATrans 249 (11 October 2013)). However, given the weight of authority to the contrary, this judgment should be treated with caution.

<sup>67</sup> *Perampalam v MIMA* (1999) 84 FCR 274 at 283-285. See also *Modh v MIMA* [2000] FCA 1865 (Gyles J, 18 December 2000) in which the Court found it was an error of law to conflate the well-founded fear test and reasonableness test by requiring that the reason why a claimant cannot reasonably relocate be related to a Convention reason. This appears to be consistent with what was said in *SZATV v MIAC* (2007) 233 CLR 18, both in the joint judgment and by Kirby J. In *MZYQH v MIAC* [2011] FMCA 888 (Whelan FM, 17 November 2011) the Court went as far as to say (at [131]) that the question of the reasonableness of relocation can only involve consideration of factors which are not the applicant's Convention characteristics. While this prescriptive approach is arguably inconsistent with High Court authority including *SZATV v MIAC* (2007) 233 CLR 18 and *MIEA v Wu Shan Liang & Ors* (1996) 185 CLR 259, it appears that the Court was simply making the uncontroversial point that it would never be reasonable for a person to relocate to an area where they would be exposed to persecution for a Convention reason. In that case, although the Tribunal's reasoning was unclear, it appeared to have considered whether the applicant would be denied treatment for his psychological condition for a Convention reason, which the Court held to be the wrong question for the purpose of considering the reasonableness of relocation. See also *AZABR v MIAC* [2011] FMCA 825 (Lindsay FM, 31 October 2011) at [22], upheld on appeal: *AZABR v MIAC* [2012] FCA 448 (Mansfield J, 4 May 2012); and *AZACC v MIBP* [2013] FCA 1448 (White J, 24 December 2013) at [46]-[49].

<sup>68</sup> *SZSSY v MIBP* [2014] FCA 1144 (Jagot J, 28 October 2014).

attacks on Shia Muslims in Karachi, and that the authorities were unable or unwilling to stop those attacks. The Court held that these were the ‘practical realities’ the applicant would face and the Tribunal was required to consider them in determining whether he could reasonably be expected to relocate outside of Karachi, but instead it had considered them only in addressing the question of whether the applicant was at risk of harm in Karachi.<sup>69</sup>

Similarly, in *MZZJY v MIBP*, the Court held that the Tribunal had conflated the two ‘limbs’ of the relocation test (i.e. ‘appreciable risk’ and ‘reasonableness’) and failed to consider the practical realities facing the applicant as a person at risk of attack because of his religion.<sup>70</sup> It observed that the same considerations do not necessarily apply to both limbs, and the Tribunal’s conclusion that the chance of harm was not more than remote dealt only with the question of appreciable risk, and not with the question of whether it was reasonable in the sense of practical to expect the applicant to live in Karachi faced with a risk of violence and where he would lack protection from the authorities.<sup>71</sup> However, in a later judgment, the Court did not consider the reasoning in *MZZJY* to preclude the Tribunal from using a finding that there was a remote prospect of an applicant suffering harm as part of its grounds for deciding relocation is reasonable.<sup>72</sup>

### The applicant’s particular circumstances

What is ‘reasonable’, in the sense of ‘practicable’, must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation.<sup>73</sup> The applicant’s own particular circumstances must therefore be carefully considered. Relevant factors may include age and life experience, sex, health, disability, family responsibilities and relationships, social or other vulnerabilities, financial difficulties or other problems in travelling to or residing in the new place, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, civil status, skills, educational, professional and work background and opportunities, available or realizable assets, previous stay or employment in the proposed region, any past persecution and its psychological effects.<sup>74</sup> They may also include the demonstrated ability to live and

<sup>69</sup> *SZSSY v MIBP* [2014] FCA 1144 (Jagot J, 28 October 2014) at [22], [26]. See also *SZSRQ v MIBP* [2014] FCCA 2205 (Judge Manousaridis, 25 September 2014) and *SZSTE v MIBP* [2015] FCCA 178 (Judge Manousaridis, 30 January 2015).

<sup>70</sup> *MZZJY v MIBP* [2014] FCA 1394 (Davies J, 18 December 2014) at [21].

<sup>71</sup> *MZZJY v MIBP* [2014] FCA 1394 (Davies J, 18 December 2014) at [21]. In contrast, see *MZZID v MIBP* [2014] FCCA 1121 (Judge O’Dwyer, 30 May 2014), where the Court held that there was no error because although considerations of reasonableness were intermingled with the question of violence, there was significant and ample indication that the Tribunal addressed the issue of the reasonableness, in the sense of practicality, of the applicant relocating: at [40].

<sup>72</sup> *MZZZA v MIBP* [2015] FCA 594 (Mortimer J, 16 June 2015) at [42].

<sup>73</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ at [24].

<sup>74</sup> UNHCR, *Internal Flight Guidelines*, above n 4 at [25]; *Januzi v SSHD* [2006] 2 AC 426 at [20]. See e.g. *Ashraf v MIMA* (unreported, Federal Court of Australia, Tamberlin J, 14 November 1997) - the applicant’s educational qualifications, language ability, age, and family connections; *Umerleebe v MIMA* (unreported, Federal Court of Australia, Marshall J, 28 August 1997) - the absence of family ties, the applicant’s previous residence, education, ability to support himself in Australia and employment prospects; *Woldie v MIMA* (unreported, Federal Court of Australia, Foster, Lee and RD Nicholson JJ, 16 July 1998) at 7 - specific objections to the place of relocation and problems involved in going to it, including associated financial difficulties; *Abdi v MIMA* [2000] FCA 242 (Whitlam, Lehane and Gyles JJ, 10 March 2000) - the applicant’s education and skills, the means to return, the potential to reintegrate, the acceptance of other clans, and the stability in the region; *NNN v MIMA* [1999] FCA 1290 (Madgwick J, 15 September 1999) - the applicants’ health, means and safety; *SZHEP v MIAC* [2007] FCA 1219 (Finn J, 13 August 2007) - the applicant husband’s employment experience and language abilities; *NAIZ v MIMIA* [2005] FCAFC 37 (Branson, RD Nicholson and North JJ, 11 March 2005) - the applicant’s age, marital and employment status, and the practical realities with respect to accommodation and care;

work in other countries including Australia, which may indicate resourcefulness, resilience and flexibility to be able to resettle in a foreign milieu.<sup>75</sup> Thus, for example:

In some circumstances, having regard to the age of the applicant, the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable. In each case, the personal circumstances of the applicant; the viability of the propounded place of internal relocation; and the support mechanisms available if an applicant has already been traumatised by actual or feared persecution, will need to be weighed in judging the realism of the hypothesis of internal relocation.<sup>76</sup>

However, these matters should not be treated as a checklist to be considered in every case.<sup>77</sup> The range of factors that will be relevant in any particular case will be largely determined by the case that the applicant seeks to be made out and other matters that may arise on the material.<sup>78</sup>

The decision-maker must address any factors that the applicant may raise in regard to the reasonableness of relocation.<sup>79</sup> While the decision-maker's task is informed by what an applicant puts forward, it is not necessarily confined to those matters.<sup>80</sup> However, there is no obligation on a decision-maker to make its own further inquiries about the reasonableness of

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*Franco-Buitrago v MIMA* [2000] FCA 1525 (Tamberlin J, 27 October 2000) – the applicant son's ill health, and the availability of medical facilities; *SYLB v MIMIA* [2005] FCA 942 (Branson J, 8 July 2005) – the applicant's past harm, mental, psychological and physical conditions, availability of health services, family or other support; *AZAEH v MIBP* [2015] FCA 414 (Kenny J, 6 May 2015) at [34] – circumstances of dependent children who were not themselves applicants for protection; *SZTJO v MIBP* [2015] FCCA 1921 (Judge Barnes, 20 July 2015) – the applicant's psychological conditions, specifically depression and post-traumatic stress disorder.

<sup>75</sup> See, for example, *Hehar v MIMA* (1997) 48 ALD 620 at 624 where the husband and sons had all obtained employment in Australia, indicating resilience and flexibility to be able to re-settle in a foreign milieu, they were well-educated, the husband had been able to establish a successful and profitable business, and the wife had been employed as a professional officer in the Indian public service. See also *Kelly v MIMA* (unreported, Federal Court of Australia, Hely J, 9 December 1998) at 6; and *SZDPB v MIMIA* [2006] FCAFC 110 (Spender, French and Cowdroy JJ, 3 July 2006) at [28]-[29]. Contrast *SZIED v MIAC* [2007] FCA 1347 (Moore J, 30 August 2007) where the Court held that the Tribunal erred in rejecting the applicant's claim that he would be compelled to return to his family farm if returned to Colombia by relying on his abandonment of the farm, in circumstances where his flight was to escape persecution. More is required than the mere fact of journeying from one's home country to Australia, even in difficult circumstances: *MZACX v MIBP* [2015] FCCA 681 (Judge Driver, 24 April 2015) at [82].

<sup>76</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Kirby J at [80]-[81] (footnotes omitted).

<sup>77</sup> *SZSUY v MIAC* [2014] FCCA 1 (Judge Driver, 31 January 2014) at [40].

<sup>78</sup> *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 443; per Whitlam J at 453. See also *Woldie v MIMA* (unreported, Federal Court of Australia, Foster, Lee and RD Nicholson JJ, 16 July 1998); *Al Asam v MIMA* [2001] FCA 127 (RD Nicholson J, 23 February 2001) at [52]-[56]; *Murugesu v MIMA* [2000] FCA 1411 (Heerey J, 10 October 2000); *MZYXP v MIBP* [2013] FCA 1352 (Kenny J, 12 December 2013) at [79]; *AZAEH v MIBP* [2015] FCA 414 (Kenny J, 6 May 2015) at [21]. In *Woldie*, the Court stated at 7: '...reasonableness of relocation can become a specific issue to be specifically addressed if it becomes so in the course of the proceedings. This may be because it is expressly raised by an applicant by his putting specific arguments against his being required to relocate, for instance, in the nature of specific objections to the place of relocation, problems involved in going to it, financial difficulties associated with travelling to or residing in the new place and the like'. In *Murugesu* the Court held that the Tribunal was not obliged to explore matters which were not raised, such as the applicant's relationship with relatives who were in the area: at [31]. In contrast, the Court in *SZCLY v MIAC* [2009] FMCA 569 (Barnes FM, 26 June 2009) held that the Tribunal erred by failing to give proper consideration to the practical realities facing the applicant regarding his family circumstances and psychological condition should he seek to relocate. These factors had been considered in relation to the risk of persecution generally, but not in relation to the reasonableness of relocation: at [126]-[128]. As to the level of consideration required, see, for example, *SZLWB v MIAC* [2009] FCA 1067 (Besanko J, 23 September 2009), at [38].

<sup>79</sup> *Woldie v MIMA* (unreported, Federal Court of Australia, Foster, Lee and RD Nicholson JJ, 16 July 1998) at 7. See, for example *SZJLL v MIAC* [2008] FMCA 1119 (Barnes FM, 11 August 2008) at [97] where the Court found the Tribunal erred in that it did not address the obstacles to relocation raised by the applicant; *SZHZZ v MIAC* [2008] FCA 556 (Gyles J, 29 April 2008) which held the Tribunal erred in failing to consider the practicality of relocation for the applicant on the basis of membership of the relevant particular social group and the applicant's circumstances in the new location; and *AZACC v MIBP* [2013] FCA 1448 (White J, 24 December 2013) which held that the Reviewer erred in considering the claimant's circumstance as a minor living away from his family. Note that in terms of accessing the place of relocation, the circumstances are those which exist at the time the assessment is made, at which time the applicant is outside their country of origin. Thus, the question will be whether the applicant can access the safe region from the place to which they will return, rather than from the place where they have been found to have a fear of persecution: see *AZABO v MIAC* [2012] FCA 525 (Finn J, 23 May 2012) at [21]-[24].

<sup>80</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [58].

relocation in circumstances where there are no other obvious impediments to relocation.<sup>81</sup> Further, it is not incumbent on the decision-maker to independently raise, investigate and address in detail or exhaustively, the possibilities which might arise in connection with various objections to relocation, nor to specifically explain why it is considered that any difficulties recognised in country information would not apply to the applicant.<sup>82</sup> For example, in *MZACX v MIBP* the Court observed that there was no duty on the Tribunal to elaborate upon every aspect of the practical application of relocation, such as the types of jobs for which the applicant could apply and the likelihood of his securing those jobs.<sup>83</sup> Nonetheless, given that what is reasonable and practical for a person involves a fact intensive assessment, the decision-maker should ensure the information they refer to supports the factual findings.<sup>84</sup>

### Child applicants

In *CAR15 v MIBP*, the Full Federal Court found that an infant child applicant (who was born in Australia to Nigerian parents) could not reasonably relocate from either of her parent's home villages in Nigeria to Lagos as she had no independent agency of her own, and that the Tribunal erred by conflating the reasonableness of her relocating with that of her parents. The Court indicated that there are likely to be very few cases where it is reasonable for a child to reasonably relocate, and that it is difficult, although not impossible to conceive of circumstances in which the Tribunal could properly find that a child would have open to it a reasonable opportunity to relocate.<sup>85</sup> The Court did not explore the boundaries of this concept, for example, whether the situation may be different for a 17 year old applicant who has previously lived and worked in various parts of his or her home country. This issue is likely to be the subject of further judicial consideration.

<sup>81</sup> *SZMZV v MIAC* [2009] FCA 1380 (Bennett J, 26 November 2009) at [20].

<sup>82</sup> *MZYQU v MIAC* (2012) 206 FCR 191 at [81]. Also see *MZZJV v MIBP* [2013] FCCA 1902 (Judge Riley, 20 November 2013) at [15]-[16]; and *MZZEH v MIMAC* [2013] FCCA 1282 (Judge Hartnett, 27 September 2013) at [26], citing *SZMCD v MIAC* (2009) 174 FCR 415 at [124] (leave to appeal refused in *MZZEH v MIBP* [2014] FCA 603 (Jessup J, 2 June 2014)). Similarly, in *MZYSP v MIAC* [2012] FMCA 447 (Turner FM, 14 May 2012) at [4], [12] the Court re-iterated that the decision-maker is only required to take into account those circumstances which have been raised by the applicant, or which clearly arise on the material (upheld on appeal in *MZYSP v MIAC* [2012] FCA 869 (North J, 7 August 2012), special leave application dismissed *MZYSP v MIAC* [2012] HCATrans 264 (Crennan J, 24 October 2012)). In *AZABO v MIAC* [2011] FMCA 772 (Brown FM, 27 October 2011) at [117] (upheld on appeal in *AZABO v MIAC* [2012] FCA 525 (Finn J, 23 May 2012)), the Federal Magistrates Court appeared to go somewhat further, concluding that the Reviewer was limited to the material put before him and that it would not be reasonable for him to anticipate concerns not specifically raised by the applicant, such as the hypothetical issue of travel between his home province and the capital. A similar conclusion was reached by the Court in *SZSUUY v MIAC* [2014] FCCA 1 (Judge Driver, 31 January 2014) at [42]. See also *MZZQV v MIBP* [2014] FCCA 1912 (Judge Whelan, 29 August 2014) where the Court found that, in assessing the applicant's claim that it was not reasonable to relocate because he would be subject to discrimination based on his ethnicity, it was reasonable for the Tribunal to focus on matters the applicant raised as manifestations of that discrimination: at [59]. Although the judgment was subsequently overturned, this particular aspect of the reasoning was not disturbed: *MZZQV v MIBP* [2015] FCA 533 (Baker J, 29 May 2015). These cases contrast somewhat with the judgment in *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017), in which the Federal Court held that the decision-maker's task is to form a state of satisfaction on the basis of all the material before them, including what might reasonably be known because of their experience and expertise, and the material regularly provided to decision-makers for the purposes of making decisions about Australia's protection obligations: at [58].

<sup>83</sup> *MZACX v MIBP* [2015] FCCA 681 (Judge Driver, 24 April 2015) at [77].

<sup>84</sup> In *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017), the Federal Court held that generalities will not suffice in this assessment, and there must be a sufficiently detailed array of information about the individual (and any family members) and about the putative safe location: at [51]; see also [55]. In *DFZ16 v MIBP* [2017] FCCA 2427 (Judge Smith, 2 November 2017), the Federal Circuit Court commented that the level of scrutiny referred to in *MZANX* is not universally applicable, and that what is required depends on the facts of each case, as per *Randhawa v MILGEA* (1994) 52 FCR 437: at [51]-[54].

<sup>85</sup> *CAR15 v MIBP* [2019] FCAFC 155 (Allsop CJ, Kenny and Snaden JJ, 9 September 2019) at [35]-[37].

## Country conditions

In relation to country conditions, relevant factors may include living conditions in the area of proposed relocation and whether the area of relocation is practically, safely and legally accessible.<sup>86</sup> Thus, for example:

[I]nternal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven. Nor if the evidence indicates that there are other and different risks in the propounded place of internal relocation; or where safety could only be procured by going underground or into hiding; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation.

An inability or unwillingness on the part of the national authorities to provide protection in one part of the country may make it difficult to demonstrate durable safety in another part of that country.<sup>87</sup>

Some observations of the England and Wales Court of Appeal also provide guidance:

Relocation in a safe haven will not provide an alternative to seeking refuge outside the country of nationality if, albeit that there is no risk of persecution in the safe haven, other factors exist which make it unreasonable to expect the person fearing persecution to take refuge there. Living conditions in the safe haven may be attendant with dangers or vicissitudes which pose a threat which is as great or greater than the risk of persecution in the place of habitual residence. One cannot reasonably expect a city dweller to go to live in a desert in order to escape the risk of persecution. Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is 'outside the country of his nationality by reason of a well-founded fear of persecution'. ... [T]he test of whether an asylum seeker could reasonably have been expected to have moved to a safe haven ... involves a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker.<sup>88</sup>

Some cases and commentaries have expressed the view that the protection of the Convention extends not only to protection from Convention-related persecution but also to protection from other human rights violations and deprivations.<sup>89</sup>

However, this view has not been endorsed by the High Court in Australia. As noted earlier, the joint judgment in *SZATV v MIAC* indicated agreement with the view expressed in *Januzi v SSHD* that the Convention is concerned with persecution in the defined sense, and that the Convention was not directed to such matters as differential living standards in various areas of the country of nationality, whether attributable to climatic, economic or political conditions.<sup>90</sup> As Kirby J observed in *SZFDV v MIAC*, the Convention grounds do not cover

<sup>86</sup> UNHCR, *Internal Flight Guidelines*, above n 4 at [7]. The Guidelines place this question under the head of 'relevance' rather than 'reasonableness'. Note that in relation to accessibility, in *SZQXE v MIAC* [2012] FCA 1292 (Flick J, 21 November 2012) at [27] Flick J commented that the fact that, when considering an applicant's ability to access a particular area, the fact that a route may be 'long and arduous', for example, does not of itself render the taking of that route 'unreasonable'.

<sup>87</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Kirby J at [80]-[81] (footnotes omitted). In *MZYPW v MIAC* [2012] FCAFC 99 (Flick, Jagot and Yates JJ, 11 July 2012) at [9], Flick and Jagot JJ confirmed that these factors are not to be construed as a statutory list of considerations which must necessarily be taken into account in every case.

<sup>88</sup> *E v SSHD* [2003] EWCA Civ 1032, [2004] QB 531, cited with approval in *Januzi v SSHD* [2006] 2 AC 426 at [13].

<sup>89</sup> For example, in *Randhawa v MILGEA* (1994) 52 FCR 437, Black CJ at 442 and Beaumont J at 450-451 endorsed the following passage from Hathaway: '... where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized': Hathaway, *Law of Refugee Status* (Butterworths, 1991) at 134. See also, e.g., *Al-Amidi v MIMA* [2000] FCA 1081 (Lee J, 4 August 2000).

<sup>90</sup> *SZATV v MIAC* (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ at [25], citing *Januzi v SSHD* [2006] 2 AC 426 per Lord Bingham at 447 and Lord Hope of Craighead at 457. In *AZABQ v MIAC* [2012] FCA 446 (Mansfield J, 4 May 2012) at [30] the Court stated that their Honour's reference to Lord Hope's observations was in a specific context and that it should not be taken as correct that relocation within a country is reasonable if that relocation routinely exposes the person concerned to a significant risk of serious harm.

the whole gamut of individual human rights guaranteed by international law. They single out only those basic grounds of persecution that the Refugees Convention treats as central.<sup>91</sup>

Nevertheless, that does not mean that the level of human rights or economic conditions prevailing in the applicant's country will never be relevant to the enquiry as to whether relocation is a reasonably available option.

In *Januzi*, Lord Bingham quoted as 'helpful' UNHCR Guidelines indicating that where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, an assessment will be required of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.<sup>92</sup>

His Lordship also cited UNHCR Guidelines relating to economic conditions which state that:

If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable ... to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable.<sup>93</sup>

before citing further commentary on socio-economic factors stating that:

if life for the individual ... in the [proposed region] would involve economic annihilation, utter destitution or existence below a bare subsistence level ... or deny "decent means of subsistence", that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned ... Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from relatives, friends or even governmental or non-governmental sources, cannot be excluded.<sup>94</sup>

In *MZANX v MIBP*, the Federal Court made *obiter* comments that living standards regarding health, housing, education, employment, liberty and freedom of speech were the kinds of matters that decision-makers must look to in considering whether relocation is reasonable and practicable.<sup>95</sup> It also commented that while lesser living standards, including those far below that experienced in a Western country, will not render relocation unreasonable, it is unreasonable to expect a person to relocate to a place where they must exist 'below at least

<sup>91</sup> *SZFDV v MIAC* (2007) 233 CLR 51 at [33].

<sup>92</sup> UNHCR, *Internal Flight Guidelines*, above n 4, at [28], quoted with approval by Lord Bingham in *Januzi v SSHD* [2006] 2 AC 426.

<sup>93</sup> UNHCR, *Internal Flight Guidelines*, above n 4, at [29]-[30], quoted with approval by Lord Bingham in *Januzi v SSHD* [2006] 2 AC 426 at [20]. The Guidelines go on to state that '[i]f, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level. If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. ... A person should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship'. Note, however, that denial of access to land, resources or protection for a Convention reason may amount to persecution in any event.

<sup>94</sup> *Januzi v SSHD* [2006] 2 AC 426 at [20] citing H. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 *International Journal of Refugee Law* 499, at 516.

<sup>95</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [61].

an adequate level of subsistence'.<sup>96</sup> The reasoning in *Januzi* and *MZANX* indicates that deprivation of human or socio-economic rights is not itself sufficient – the effect of the deprivation of those rights must reach a sufficiently high level such that relocation is unreasonable in the circumstances of the particular case.

In *Januzi v SSHD*, Lord Bingham also observed that the reasonableness or otherwise of conditions prevalent in the proposed area of relocation should be considered in the context of the conditions in that country as a whole:

Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle [an applicant] to escape, not only from that persecution, but from the deprivation to which his home country is subject.<sup>97</sup>

and Lord Hope stated that:

[I]f the possibility of internal relocation is raised, the relevant comparisons are between those in the place of relocation and those that prevail elsewhere in the country of [the applicant's] nationality... the comparison between the asylum-seeker's situation in [the country in which asylum is being sought] and what it will be in the place of relocation is not relevant for this purpose.<sup>98</sup>

This view also appears to be supported by UNHCR Guidelines cited with approval in *Januzi* which indicate that, when considering whether relocation is reasonable, conditions in the area of relocation 'must be such that a relatively normal life can be led *in the context of the country concerned*' (emphasis added).<sup>99</sup>

Similarly, in *MZANX*, the Federal Court made *obiter* comments that although 'utopian aspirations, or Westernised standards' ought not be imposed, 'standards commensurate with reasonable expectations of the local community in which an applicant is expected to live would be appropriate'.<sup>100</sup> The Court went on to endorse the following expression of the standard by Lord Hope in *Januzi*:

The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there *judged by the standards that prevail in his country of nationality generally*, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there. (Emphasis added.)<sup>101</sup>

These comments may provide some guidance for decision-makers in considering specific claims regarding living or human rights standards in the relocation area raised by an applicant or arising on the material before it.

<sup>96</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [60], citing UNHCR, *Internal Flight Guidelines*, above n 4, at [29], also quoted with approval by Lord Bingham in *Januzi v SSHD* [2006] 2 AC 426 at [20].

<sup>97</sup> *Januzi v SSHD* [2006] 2 AC 426 at [19] per Lord Bingham of Cornhill. However, his Lordship went on to qualify that it would be different if the lack of rights posed a threat to the applicant's life or other grave harm.

<sup>98</sup> *Januzi v SSHD* [2006] 2 AC 426 at [46] per Lord Hope of Craighead. His Lordship stated that such comparison may, however, be relevant to assessing other human rights obligations.

<sup>99</sup> UNHCR, *Internal Flight Guidelines*, above n 4, at [29]-[30], quoted with approval by Lord Bingham in *Januzi v SSHD* [2006] 2 AC 426 at [20].

<sup>100</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [61].

## Specifically identifying an area to which the applicant can relocate

Generally speaking, it is not necessary to identify a specific place in which an applicant can relocate or live.<sup>102</sup> Rather, the consideration of reasonableness of relocation may be done in one of two ways depending on the circumstances of the case.<sup>103</sup>

One approach is the identification of particular safe localities, that is, finding that there is no real chance of the feared persecution in a specific locality or localities. The second approach is the delimiting of a local area of risk, that is, a finding that the feared persecution is localised to a particular area, which results in the conclusion that the rest of the country is safe.<sup>104</sup>

To find that the feared persecution is localised, the decision-maker must be satisfied that the real chance of persecution facing an applicant if returned to the country of nationality would be localised to a particular area, so as to allow a geographic distinction in relation to other areas presenting only a lesser risk of the feared persecution. No more particular precision is needed in all cases when defining the geographic areas of a localised real chance of persecution, nor when defining the areas of lesser or no risk.<sup>105</sup>

Provided there is sufficient information to determine whether relocation is reasonable, it will often be sufficient to do no more than identify generally areas that are outside the place of localised harm. As with other aspects of relocation, this will depend upon the applicant's individual circumstances. For example, in *Umerleebe v MIMA* the Court considered that the Tribunal was not expected to determine exactly where the claimant would live or to find a

<sup>101</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [61], citing *Januzi v SSHD* [2006] 2 AC 426 at [47] per Lord Hope of Craighead.

<sup>102</sup> *SZQBC* [2011] FMCA 563 (Smith FM, 18 July 2011) at [36]; *SZOJV v MIAC (No.2)* [2012] FMCA 29 (Nicholls FM, 20 January 2012) at [64], [70], upheld on appeal: *SZOJV v MIAC* [2012] FCA 459 (Siopis J, 4 May 2012); *SZSUY v MIAC* [2014] FCCA 1 (Judge Driver, 31 January 2014) at [41]; *Montes-Granados v MIMA* [2000] FCA 60 at [10]. See also *Ahmad v MIMA* (unreported, Federal Court of Australia, Sundberg J, 20 May 1997) at [12]; *W404/01A v MIMA* [2002] FCA 540 (R.D. Nicholson J, 3 May 2002) at [23] which was upheld on appeal: *W404/01A of 2002 v MIMIA* [2003] FCAFC 255 (French, Lee and Carr JJ, 14 November 2003).

<sup>103</sup> *SZSQH v MIAC* [2013] FCCA 817 at [9]-[13] (Judge Driver, 15 July 2013) (upheld on appeal, *SZSQH v MIBP* [2013] FCA 1195 (Tracey J, 8 November 2013)), citing *SZOJV v MIAC (No.2)* [2012] FMCA 29 (Nicholls FM, 20 January 2012) at [64]-[65] (upheld on appeal in *SZOJV v MIAC* [2012] FCA 459 (Siopis J, 4 May 2012); special leave to appeal refused in *SZOJV v MIAC* [2012] HCASL 115) and *SZQBC v MIAC* [2011] FMCA 563 (Smith FM, 18 July 2011). The contentions to the Court in *SZSQH* referred to s.36(2B)(a) of the Act, the consideration of relocation in respect of complementary protection. Judge Driver's reasoning appears applicable to consideration of relocation under both the refugee and complementary protection criteria. For further discussion of complementary protection see Chapter 10 of this Guide.

<sup>104</sup> For example, in *SZSEW v MIMAC* [2013] FCCA 1181 (Judge Cameron, 27 August 2013) the Reviewer had found that while there was a real chance that the applicant might suffer serious harm by non-state agents in the Kurram Agency, he could safely relocate to a variety of locations in Pakistan away from the Kurram Agency. The Court at [23] confirmed that the relocation doctrine is not necessarily concerned with one specific location to which relocation might be reasonable and at [26] that the Reviewer's finding was sufficient to discharge his obligation to consider whether the applicant had a well-founded fear of persecution throughout Pakistan. However, contrast the finding in *MZAGO v MIBP* [2015] FCCA 1305 (Judge F. Turner, 22 May 2015) that the Tribunal erred by failing to consider whether there was a 'safe haven' before considering whether it was reasonably practicable for the applicant to relocate: [56].

<sup>105</sup> *SZQBC v MIAC* [2011] FMCA 563 (Smith FM, 18 July 2011), at [36]. His Honour stated that the judgment of the High Court in *Plaintiff M13/2011 v MIAC* (2011) 277 ALR 667 does not require a decision-maker to identify an area of lesser risk in a country with any particular degree of precision before applying the principle of relocation. In *Plaintiff M13/2011*, Hayne J considered a decision in which the delegate had accepted that a Malaysian national had a well-founded fear of religious persecution by elements within her local community, but saw no reason why she would not be able to relocate in order to seek greater anonymity, distance from her aggressors, and adequate protection. The High Court held that the particular circumstances of the applicant were not considered in forming the opinion that she could relocate to avoid the risk of persecution. Because the delegate did not know from where the applicant would have to relocate, he did not correctly identify a question that had to be determined, being whether there was a real chance of the applicant suffering persecution

house or job for him. Instead, the question was to be approached by looking realistically and sensibly at the possibility of the person living elsewhere in his or her country of nationality, other than the area where he or she was at risk.<sup>106</sup> In contrast, in *MZANX v MIBP* the Court held that in determining whether relocation is reasonable there must be a sufficiently detailed array of information about the applicant and the putative safe location, and that an assessment must then be conducted of what the particular individual is likely to face in that particular location.<sup>107</sup>

Overall, these judgments demonstrate that in certain cases there may be sufficient information to determine whether relocation is reasonable without identifying a specific location, but in other cases it may be necessary to do so.

### Consideration of relocation as a preliminary issue

There is limited authority for the proposition that it may not always be necessary to determine whether an applicant has a well-founded fear of persecution based upon a Convention reason in some part of their country in cases where the applicant's claims can be readily answered by relocation, that is, where it can readily be established that they can relocate to a region where there is no appreciable risk of the occurrence of the feared persecution.

In *Syan v RRT* the Court held that it was permissible in the circumstances of that case to consider the issue of relocation without first determining whether the applicant had a well-founded fear of persecution based upon a Convention reason but rather, on the basis of an assumption that the applicant would otherwise satisfy the Convention definition.<sup>108</sup> Thus, in circumstances where an applicant's claimed history of persecution is localised, it may be sufficient to assume the truth of that history, without making positive findings about this, before turning to whether the applicant can reasonably relocate to a region where there is no appreciable risk of the occurrence of the feared persecution.<sup>109</sup> However, this approach has not been without criticism.<sup>110</sup>

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on account of her religious beliefs if she were to return to Malaysia.

<sup>106</sup> *Umerleebe v MIMA* (unreported, Federal Court of Australia, Marshall J, 28 August 1997) at 6.

<sup>107</sup> *MZANX v MIBP* [2017] FCA 307 (Mortimer J, 28 March 2017) at [51]. In *DFZ16 v MIBP* [2017] FCCA 2427 (Judge Smith, 2 November 2017), the Federal Circuit Court commented that the level of scrutiny referred to in *MZANX* is not universally applicable, and that what is required depends on the facts of each case, as per *Randhawa v MILGEA* (1994) 52 FCR 437: at [51]-[54].

<sup>108</sup> *Syan v RRT* (1995) 61 FCR 284. This proposition was confirmed in *Aras v MIEA* (1998) 50 ALD 797; see also *SZENJ v MIAC* [2007] FCA 734 (Downes J, 18 May 2007). Similarly, in *SZRKY v MIAC* [2012] FMCA 942 (Cameron FM, 18 October 2012), the Court stated that the Reviewer was mistaken in taking the view that it was mandatory to first consider whether the applicant had a well-founded fear of persecution in his home area and that it was only if he did that relocation had to be considered. Having left his country of origin as an infant, the applicant had only limited connection with any area within that country, and the Court commented that in the circumstances of that case the Reviewer could just as well have started his consideration by reference to any area of Afghanistan: at 533-534 (upheld on appeal: *SZRKY v MIAC* [2013] FCA 352 (Cowdroy J, 19 April 2013); special leave to appeal refused: *SZRKY v MIAC* [2013] HCATrans 249 (11 October 2013)). There appears to be nothing in the decision of the High Court in *SZATV v MIAC* (2007) 233 CLR 18 that would cast doubt on this approach. Contrast above n 4 *Michigan Guidelines*, at [12]; *Internal Flight Guidelines* at [6]; Hathaway & Foster at 370-371.

<sup>109</sup> *SZJSS v MIAC* [2007] FMCA 1495 (Smith FM, 13 September 2007) at [34]-[35]. See also *SZOJV v MIAC (No.2)* [2012] FMCA 29 (Nicholls FM, 20 January 2012) at [28]; [38] [45] where although critical of the Tribunal for proceeding on the

In general, an assessment of an applicant's history of persecution will usually be essential before consideration of issues of relocation to avoid a well-founded fear of persecution. This is because in many circumstances it is not possible to properly address the question of whether an applicant could live safely in another part of his or her country, without having first assessed the truth of the history of persecution claimed, the likelihood of its recurrence, and the risks arising from any recurrence.<sup>111</sup>

Conversely, it will not be necessary to consider relocation where the decision-maker has found that there is no well-founded fear of persecution.<sup>112</sup> Thus, the Tribunal does not have to decide the issue of relocation when a decision has been reached on an alternative basis, making the issue of relocation immaterial.<sup>113</sup>

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'safer' option of relocation rather than properly tackling the merits of the applicant's substantive factual claims, which had been rejected by an earlier constituted Tribunal, the Court found that that approach did not amount to error (upheld on appeal: *SZOJV v MIAC* [2012] FCA 459 (Siopis J, 4 May 2012); special leave to appeal refused: *SZOJV v MIAC* [2012] HCASL 115 (15 August 2012)). In *MZYVC v MIBP* [2013] FCCA 1769 (Judge O'Dwyer, 1 November 2013) at [17] the Court found that it was not necessary for the Reviewer to separately consider and determine the question of a well-founded fear of persecution in the applicant's home region as, should the Reviewer have made a positive finding then the next step was to consider relocation, a task that was undertaken. In doing so the question of the applicant's persecution in his home region was 'a redundant consideration and sterile exercise' as the Reviewer clearly found that he did not have a well-founded fear of persecution more generally in Sri Lanka.

<sup>110</sup> See, for example, *SZQMR v MIAC* [2011] FMCA 992 (Driver FM, 12 December 2011) at [43] (and on appeal *SZQMR v MIAC* [2012] FCA 122 (Collier J, 22 February 2012) at [22]); *SZOJV v MIAC (No.2)* [2012] FMCA 29 (Nicholls FM, 20 January 2012) at [28]; [38] [45], upheld on appeal: *SZOJV v MIAC* [2012] FCA 459 (Siopis J, 4 May 2012). In *SZSLG v MIAC* [2013] FCCA 600 (Judge Driver, 25 June 2013) (subsequently overturned, but on a different basis: *SZSLG v MIBP* (2013) 138 ALD 139) at [40] the Court went as far as to say that relocation arises for consideration only after an applicant has been found to be a refugee. On appeal, the Court in *SZSLG v MIBP* [2013] FCA 1185 (Collier J, 12 November 2013) at [25] went further to find that the Tribunal's failure to come to grips with the question of whether the appellant had a well-founded fear of persecution for a Convention reason went to the heart of its decision and as such, it was difficult to see how a finding of relocation could be made without a proper appreciation of the appellant's circumstances and whether there was a Convention reason for his well-founded fear of persecution. However, this appears inconsistent with High Court authority in *SZATV v MIAC* (2007) 233 CLR 18, discussed above, which makes clear that the principle of relocation has its foundation in the 'well-founded' fear requirement in Article 1 of the Refugees Convention. In *MZZVK v MIBP* [2014] FCCA 1914 (Judge Whelan, 29 August 2014), the Court considered the divergence in opinions between *Syan* and cases following it, and also *SZQMR v MIAC* [2012] FCA 122 (Collier J, 22 February 2012) and *SZSLG v MIBP* [2013] FCA 1185 (Collier J, 12 November 2013) and while it was not necessary to determine the issue, expressed a preference for the approach taken in *Syan* (at [67]). The judgment was upheld on appeal in *MZZVK v MIBP* [2016] FCA 854 (McKerracher J, 29 July 2016) with the Court also expressing a preference for the *Syan* line of authority at [38].

<sup>111</sup> *SZJSS v MIAC* [2007] FMCA 1495 (Smith FM, 13 September 2007) at [36]. In that case the Court found the Tribunal erred as the applicant's claimed relationship with his persecutors was more extensive and particular than the Tribunal had assumed when making its relocation finding, raising issues as to whether he was at risk from Maoists throughout Nepal by reason of his past dealings with that party, and also whether he would be at risk anywhere in Nepal at the hands of government authorities as a result of his past associations with Maoists.

<sup>112</sup> *Sabaratsingam v MIMA* [2000] FCA 261 (Whitlam, Lehane and Gyles JJ, 10 March 2000) at [13].

<sup>113</sup> *Alibanovic v MIMA* (unreported, Federal Court of Australia, Hill J, 15 September 1998) at 5. See also *Chenafa v MIMA* [1999] FCA 1432 (Tamberlin J, 13 October 1999) at [14]; *Chehaily-Soby v MIMA* [2001] FCA 880 (French J, 4 July 2001) at [24]. Whilst consideration of relocation in these circumstances will not of itself amount to error, it may suggest that the earlier finding that there is no well-founded fear was attended by doubt: *SZQLO v MIAC* [2012] FMCA 23 (Nicholls FM, 20 January 2012) at [65]. In *SZQSS v MIAC* [2012] FMCA 31 (Nicholls FM, 20 January 2012) at [123]-[133], the Court, while not finding error, was critical of the Tribunal unnecessarily making alternative relocation findings.