FEDERAL COURT OF AUSTRALIA

CXO16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 17

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| Appeal from: | *CXO16 v Minister for Immigration & Anor* [2018] FCCA 2574 |
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| File number: |  |
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| Judge: | **WHEELAHAN J** |
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| Date of judgment: | 16 January 2020 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – whether the Immigration Assessment Authority considered the reasonableness of the appellant relocating to Kabul – Authority did not examine the security situation in Kabul for the purposes of considering reasonableness of relocation – appeal allowed. |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H, 5J, 36(2)(a), 36(2)(aa), 36(2B), 473CB, 473CC, 473DB, 473DD, 473EA |
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| Cases cited: | *CIT17 v Minister for Immigration and Border Protection* [2018] FCAFC 150  *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280  *Minister for Immigration & Border Protection v EEI17* [2018] FCAFC 166; (2018) 261 FCR 461  *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32; 253 FCR 526  *Minister for Immigration and Border Protection v Nguyen* [2017] FCAFC 149; 254 FCR 522  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 363 ALR 599  *Minister for Immigration & Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67  *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323  *MZACX v Minister for Immigration and Border Protection* [2016] FCA 1212  *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307  *MZYQU v Minister for Immigration and Citizenship* [2012] FCA 1032; 206 FCR 191  *MZZJY v Minister for Immigration and Border Protection* [2014] FCA 1394  MZZZA v Minister for Immigration and Border Protection [2015] FCA 594  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1  *Politis v Commissioner of Taxation* [1988] FCA 739; 16 ALD 707  *R (on the application of HN and Others) v Secretary of State for the Home Department* [2015] UKUT 00437 (IAC)  *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437  *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18 |
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| Date of hearing: | 25 February 2019 |
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| Category: | Catchwords |
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| Counsel for the Appellant: | Ms G A Costello |
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| Solicitor for the Appellant: | Asylum Seeker Resource Centre |
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| Counsel for the First Respondent: | Mr R Knowles |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Solicitor for the Second Respondent: | The second respondent filed a submitting appearance |

ORDERS

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|  | | VID 1265 of 2018 |
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| BETWEEN: | CXO16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | WHEELAHAN J |
| DATE OF ORDER: | 16 January 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
2. The appeal be allowed.
3. The orders of the primary judge made 12 September 2018 be set aside and in lieu thereof it be ordered that –
   1. A writ in the nature of certiorari issue quashing the decision of the second respondent made 23 September 2016;
   2. A writ in the nature of mandamus issue to the second respondent to review the delegate’s decision pursuant to s 473CC of the *Migration Act 1958* (Cth) according to law.
   3. The first respondent pay the applicant’s costs of the proceeding to be taxed in default of agreement.
4. The first respondent pay the appellant’s costs of the appeal to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

## Introduction

1. The appellant is a young man who is an Afghani national and a Shia Muslim. His father was of Hazara ethnicity, but his mother is not. He claims that he is identified as Hazara due to his father’s ethnicity. He was born in Iran where his family had moved to due to the fighting in Afghanistan. In 2010 or 2011, he and his family were deported from Iran and went to Afghanistan where he resided in Kandahar, which was his mother’s home area. In 2013 the appellant left Afghanistan and arrived at Christmas Island. He claimed that he left Afghanistan about two months after his father went missing, and that he feared returning.
2. In October 2015, the appellant lodged an application for a XE-790 Safe Haven Enterprise visa which was refused by a delegate of the Minister in June 2016. The delegate’s decision was then referred to the Immigration Assessment Authority which, in a decision published on 23 September 2016, affirmed the delegate’s decision. The Authority did not accept all of the appellant’s claims. In particular, by reference to social media accounts and activity, the Authority did not accept that the appellant’s father was missing, but found that he was living in Kabul and was in contact with all family members, including the appellant and his siblings. For detailed reasons that the Authority gave, it did not accept that the appellant engaged the definition of “refugee” in s 5H(1) of the *Migration Act 1958* (Cth), and in consequence the appellant did not engage the criterion for a protection visa in s 36(2)(a) of the Act.
3. In considering complementary protection, the Authority accepted that there was a real chance that the appellant would suffer significant harm for the purposes of s 36(2A) of the *Migration Act* if he were to return to Kandahar because there was a real chance that if he returned there, he might be killed or physically harmed due to his imputed political opinion. This finding directed attention to s 36(2B)(a) of the Act. For the purposes of s 36(2B)(a), the Authority was not satisfied that there would be a real risk that the appellant would suffer significant harm in Kabul, and found that it was reasonable for the appellant to relocate to Kabul.
4. The appellant applied for judicial review of the Authority’s decision in the Federal Circuit Court of Australia. That application was dismissed by the primary judge on 12 September 2018. The appellant has brought an appeal against orders of the Federal Circuit Court. The issue on appeal is whether the Federal Circuit Court was in error in its consideration of whether the Authority dealt correctly with the question whether it was reasonable for the appellant to relocate to Kabul having regard to a claimed risk of generalised violence in Kabul, as reflected in the sole ground of appeal –

The learned Judge erred in failing to find that the decision of the Immigration Assessment Authority (**IAA**) was affected by jurisdictional error in that the IAA failed to properly address the second limb of the relocation test in s 36(28) of the *Migration Act 1958* (Cth), specifically in relation to whether the risk of generalised violence made it unreasonable for the appellant to relocate to Kabul.

## The information before the Authority

1. The Authority’s statutory function under s 473DB of the *Migration Act* was to review the delegate’s decision based upon the material given to the Authority by the Secretary under s 473CB of the Act, and any new information that the Authority was authorised to consider pursuant to s 473DD of the Act. The material that the Secretary was required to give to the Authority included the material that was provided by the appellant to the delegate. The appellant’s representative provided a written submission to the delegate dated 11 February 2016. In that submission, objections to relocation to Kabul were addressed in the following terms –

**Relocation to Kabul**

We note that the delegate has suggested that Kabul would be a safe place for [CXO16] to relocate if he were to return to Afghanistan. We must strongly contend that relocation throughout Afghanistan is not a viable option for our client and that as a young Shia Hazara whose relations work for international companies, as returning from a western country and as a failed asylum seeker, there is a real risk that [CXO16] will suffer persecution throughout the entirety of the country, including Kabul.

Furthermore, [CXO16’s] father was in true conflict with his family over the land that he owned, but was denied for having married a Baloch woman. [CXO16] fears that because he is the oldest man in the family, his father’s problems will be redirected at him. He believes that his father’s family, who live in Kabul, would feel threatened by him and therefore might harm him if he were to move to Kabul. As [CXO16] described in his Statement of Claims, some members of his family suspect that an explanation for his father’s disappearance could be this ongoing dispute over the piece of land in Parwan. Unfortunately the motive for his disappearance is unknown but if this were the reason, [CXO16’s] life would be in great danger in Kabul.

Additionally, there is wealth of country information in the recent months demonstrating what a dangerous city Kabul has become which you will find below.

1. It is the last paragraph of the above extract which is relevant to the issues on appeal. The submission then set out country information which referred to attacks happening throughout Afghanistan directed to members of the Hazara ethnic minority, and to the general volatility of the situation in Afghanistan. The submission made a general challenge to the reliability of DFAT information, citing a reference to the opinion of Professor William Maley referred to in a passage from a decision of the Administrative Appeals Tribunal, and in a sentence quoted in an extract of a report cited in a decision of the United Kingdom Upper Tribunal, *R (on the application of HN and Others) v Secretary of State for the Home Department* [2015] UKUT 00437 (IAC) at [24]. On the question of relocating to Kabul, the submission cited a passage from a 2015 decision of the Refugee Review Tribunal –

However this deteriorating security situation… must raise the question of whether Kabul is a reasonable place for a person to relocate in terms of personal security. In addition, as a Shia the applicant may also be at greater risk of harm as a result of renewed attacks in Kabul (whether by Taliban or other insurgent groups including ISIS) targeting Shia places of worship.

1. Later, the submissions addressed further the situation in Kabul –

**Persecution of Shia Hazaras in Kabul**

We submit that should the case officer conclude that Kabul is safe for [CXO16], he would be making an incorrect determination. Firstly, many individuals may narrowly consider only Kabul province, an area, that has largely remained unaffected by sectarian violence since the 1990s, and not Kabul city, an area yielding both the highest population within Afghanistan, as well as the highest rate of violence. Secondly, the ethnic makeup of the region is commonly misconceived, as being equally shared between Tajiks, Pashtuns and Hazaras.

It is important to note that Kabul province houses 15 districts including Kabul city. These districts are all largely rural, and more than half of the province is mountainous or semi-mountainous. The major ethnic groups within Kabul province are Tajik, Pashtun and Hazara. According to UNHCR district profiles, Pashtuns, dominate the southern and eastern districts of Surobi, Paghman, Chaharasyab, Bagrami, Deh Sabz, Khak-e Jabber and Musayi, and Tajik dominate the northern districts of Istalif; Kalakan, Mir Bacha Kot, Shakardara and Qarabagh. To this extent, Shia Hazaras represent the clear minority in these areas.

The overwhelming majority of persons in Kabul province live within Kabul city. Kabul is by far the biggest city in Afghanistan, and given the massive returnee-population and influx of both internally displaced persons (IDPs) and economic migrants, it is also one of the fastest growing. Importantly, it is also the most violent. It is considered that from September 2013 to August 2014 there were 250 violent incidents - an increase of more than 51 incidents in one year. While the exact number of civilian casualties in the city is unknown, UNOCHA ranked Kabul city as the highest within Afghanistan, with between 151 to 234 casualties from 1 September 2013 to 31 August 2014. From 1 January to 13 September 2015, Kabul city saw 217 security incidents, including 68 explosions. There were between one and four suicide attacks every month from January to July, and six in August 2015 which killed 55 people and injured more than 330.

A risk analysis conducted in 2015 by Aon, who specialise in risk management pertaining to insurance, points to very troubling statistics. The risk analysis draws from statistical data and demonstrates that previous areas thought to be safe in Kabul are now being targeted by groups such as the Taliban.

In Afghanistan, the Taliban and affiliated groups targeted foreign civilians particularly at previously safe sites in Kabul around the presidential elections in April. The level of insurgent and terrorist violence in 2014 resulted in the highest number of civilian casualties since the US-led invasion in Afghanistan in 2001. The elections themselves were marred by violence but resulted in the first democratic transfer of power in Afghanistan. The emergence of Islamic State affiliates in 2015 and the fragmentation of Taliban and Al-Qaeda-linked elements points to changing local dynamics in the threat in 2015 and may undermine government efforts at initiating peace talks.

While this article might point to the fact that the Taliban are targeting foreigners in Kabul, there is plenty of additional COI that supports the argument that the Taliban are also targeting Hazara/Shias in Kabul. The salient point to draw from this is that the Taliban have operational capacity in what is deemed a ‘safe province’. If the Taliban, a sworn enemy of Shia Hazaras, who have a protracted history of murdering Hazaras, have occupational capacity in Kabul, this area cannot be deemed a viable long-term safe solution for [CXO16]. What is also important to note from the above extract is that the number of civilian causalities is at its highest number since the US-led invasion in 2001. This clearly depicts the deteriorating security situation that is Afghanistan.

…

**Kabul generally**

In the last two years, Kabul has become an extremely dangerous city, notably for Shias, but more widely for all the inhabitants of Afghanistan’s capital city. Attacks have multiplied and death tolls have risen drastically.

A UN Security Council report released in September 2015 states that the security situation in Afghanistan remains unstable. It states in particular that:

...recent months have been marred by heavy fighting and civilians continue to suffer greatly in the conflict. In August a spate of attacks by antigovernment forces led to large number of civilian casualties in Kabul and elsewhere. In Kabul more than 40 people were killed and over 300 wounded on 7 August in three separate attacks.

…

[citations omitted]

1. The submission referred to five reports of bombings in Kabul in the previous months, and then cited a report of an Afghani journalist –

…

Regarding daily life in Kabul, the same Afghan journalist explained: People have limited their movements and they do so especially after a bombing. For a few days or weeks people try avoiding going out too much, but at the end of the day you have to come out, you will have to go to the market. But, as an example, the incident in which more than 200 people were wounded, many of them had scratches from glass etc... It happened at lam and most of the injured were sleeping at home. From now, we do not feel safe even at home anymore. We feel like there could be a bomb or incident at any time that happens in a residential area.

[citation omitted]

1. The submission then cited travelling advice from DFAT’s website –

Serious large-scale terrorist incidents, including suicide bombings and attacks using vehicle-borne improvised explosive devices, occur regularly throughout Afghanistan. The frequency of attacks in Kabul, including in the most heavily fortified areas of the capital has increased significantly in 2015 and further attacks are to be expected.

There are credible reports of an imminent attack in Kabul city. We also continue to see credible reports that terrorists have plans to target venues frequented by foreigners, including diplomatic missions, airports, hotels, shopping centres, military facilities and government buildings. The Kabul international airport and roads leading to it are often subject to attack.

Serious and large-scale terrorist incidents, including suicide bombings and vehicle-borne improvised explosive attacks, occur regularly in Afghanistan. Terrorists tend to target areas and venues with a high concentration of Afghan security forces, such as checkpoints and government ministries. There have been several recent major attacks in Kabul, including in the most heavily fortified areas of the capital.

[citation omitted]

1. The appellant made a submission in writing to the Authority dated 20 July 2016 of four pages. The appellant’s submission to the Authority focussed on the delegate’s adverse credibility findings, and requested that he be able to address the Authority in person at an oral hearing.
2. The Authority wrote to the appellant on 9 September 2016 seeking his comment regarding country information concerning bombings in Kabul in July 2016. After setting out the information, the Authority’s letter stated (inter alia) –

This information is relevant to your case because it may lead the IAA to conclude that future attacks upon Kabul’s Shia population are likely to be infrequent, and not to such an extent as to pose a real chance of risk of harm to you. This is may form part of the reason for affirming the decision under review.

You are invited to provide the following information in writing:

* Information as to why it would not be reasonable for you to relocate to any other areas of Afghanistan apart from those places you claim you will suffer harm.

1. The appellant’s representatives responded by letter dated 23 September 2016 containing a submission, which was sent to the Authority by email dated Friday 23 September 2016 at 3.20pm. In relation to the safety of Kabul, the submission stated –

**Safety of Kabul**

The IAA letter cites country information regarding attacks by Islamic State in Khorasan Province (**ISKP**) and Wilayat Khorasan (**WK**) against Kabul’s Shia population, and states that this information ‘may lead the IAA to conclude that future attacks upon Kabul’s Shia population are likely to be infrequent, and not to such an extent as to pose a real chance of risk of harm to you’. The Applicant’s response to this statement is threefold.

First, the relevant legal test for well-founded fear is whether there is a ‘real chance’ of being persecuted. In *Chan v MIEA*, Dawson J stated: ‘... a fear can be well-founded without any certainty, or even probability, that it will be realized.... A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent’. It is incorrect to substitute this test with one of likelihood or, posited by the IAA, whether the risk is ‘infrequent’.

Secondly, frequent and significant attacks against civilians are attributable to a range of factors:

* 60 per cent of all civilian casualties to Anti-Government Elements (**AGEs**), including:

*...those who identify as ‘Taliban’ as well as individuals and non-State organised armed groups taking a direct part in hostilities and assuming a variety of labels including the Haqqani Network, Hezb-e­Islami, Islamic Movement of Uzbekistan, Islamic Jihad Union, Lashkari Tayyiba, Jaysh Muhammed, groups identified as ‘Daesh’ and other militia and armed groups pursuing political, ideological or economic objectives ...*

* 23 per cent of civilian casualties to Pro-Government Forces;
* 13 per cent of civilian casualties to ground engagements between AGEs and Afghan national security forces jointly attributed to both parties; and
* 4 per cent of civilian casualties to unattributed explosive remnants of war.

UNHCR acknowledges the complex and ‘complicated’ nature of security threats in Afghanistan, including:

*...proliferation of AGEs with various goals and agendas, including notably the emerging threat from ISIS-affiliated groups, combined with intra-insurgent violence has farther complicated the security situation Pro-government armed groups are also reported to undermine the government’s authority in their areas of influence and are increasingly associated with human rights violations.*

Thirdly, a recent attack in Kabul on 23 July 2016, demonstrates that Hazaras are the target of terrorist attacks. Other reliable, up-to-date sources of information indicate that Kabul is an unsafe option for relocation. For example, the United Nations Assistance Mission in Afghanistan (**UNAMA**) noted the ‘particular’ suffering faced by civilians in Kabul, reporting that 62 per cent of civilian casualties in 2016 were a result of suicide and complex attacks. In respect of the general situation faced by returnees, UNHCR reports that:

*In the Kabul Informal Settlements (KIS), designated sites of protracted IDPs, returnees and other urban poor targeted for humanitarian assistance, 80 per cent of a population of about 55,000 people are reportedly severely or moderately food insecure. Within this context, urban IDPs are more vulnerable than the non-displaced urban poor, as they are particularly affected by lack of access to social services and livelihood opportunities, with negative repercussions on food security and social protection mechanisms. The lack of adequate land in urban areas and a lack of affordable housing often forces new and protracted IDPs to reside in informal settlements without an adequate standard of living and limited access to water and sanitation. Antiquated land tenure policies and lack of security of tenure are reported to leave IDPs and other inhabitants of informal settlements vulnerable to continuous threats of evictions and secondary displacement. Land grabbing, including of land allocated for returning refugees or IDPs, reportedly represents an additional obstacle.*

Furthermore, the Australian Government advises against travel to Afghanistan, and Kabul in particular, due to the increasing frequency of terrorist attacks. It advises that the international airport, roads leading to the airport and roads in and around Kabul are regularly under threat of such attacks.

If forced to return, the Applicant’s status as an IDP without family connections in Kabul (see further below) would therefore put him at heightened risk of persecution for the reasons outlined above.

1. Under the heading “reasonableness” the appellant’s representatives advanced the following submissions –

**Reasonableness**

As invited in the IAA letter, in addition to the above information regarding proposed areas for relocation, the following information demonstrates why it would not be reasonable for the Applicant to relocate to another area of Afghanistan outside his ‘home area’.

UNHCR has outlined that the following considerations must be taken into account in respect of internal relocation in Afghanistan:

*(i) The volatility and fluidity of the armed conflict in Afghanistan in terms of the difficulty of identifying potential areas of relocation that are durably safe; and*

*(ii) The concrete prospects of safely accessing the proposed area of relocation, taking into account the risks associated with the widespread use of [improvised explosive devices (****IEDs****) and landmines throughout the country, attacks and fighting taking place on roads, and restrictions on civilians’ freedom of movement imposed by AGEs.*

As UNHCR has observed in an April 2016 report:

*...many Afghans who have returned in previous years are reported to have been unable to reintegrate into their home communities, resulting in significant secondary displacement, mostly to urban areas. Returnees reportedly experience severe difficulties in rebuilding their lives in Afghanistan. An estimated 40 per cent of returnees are reportedly vulnerable with poor access to livelihood, food, and shelter. Obstacles to return for both IDPs and returning refugees include on-going insecurity in their areas of origin; loss of livelihoods and assets; lack of access to health care and education; and difficulties in reclaiming land and property.*

UNHCR goes on to state that there is no relocation alternative available in Afghanistan ‘in areas affected by active conflict, regardless of the actor of persecution’. More specifically:

*UNHCR considers that the only exception to the requirement of external support are single able­bodied men and married couples of working age* ***without identified specific vulnerabilities*** *[emphasis added (in the submission)].*

Although the Applicant is a single able-bodied male, relocation within Afghanistan is neither safe nor reasonable, particularly on account of the following specific vulnerabilities.

1. The submission then addressed the appellant’s Hazara ethnicity and Shia faith, his lack of relevant work experience, his youth and vulnerability, his claim of lack of family connections, and the likely perception that he was westernised.

## The Authority’s decision

1. The Authority emailed its decision and reasons to the appellant’s representative on Friday 23 September 2016 at 5.24pm, which was a little over two hours after receiving the appellant’s response to the Authority’s invitation to comment on country information. By its decision, the Authority accepted that there was a real risk that the appellant would face serious harm due to his imputed political opinion as a returnee from the West should he return to Kandahar, where there was a strong Taliban presence. However, the Authority was not satisfied that the appellant would face such a risk if he returned to Afghanistan by relocating to Kabul, and found that it was reasonable for the appellant to relocate to Kabul.
2. The arguments presented by the parties to this appeal turn on what the Authority decided, and whether the Authority took account of the risk of violence in Kabul in determining whether it was reasonable that the appellant return to Kabul.
3. At [62], the Authority referred to its finding that there was not a “real chance” that the appellant would face serious harm in Kabul by reason of the specific claims that he had made and stated that for the same reasons, for the purposes of s 36(2B) of the *Migration Act*, it was not satisfied that there was a “real risk” of such harm. Those reasons included its consideration of country information at [51] –

51. I accept country information which indicates that insurgent groups continue to target high profile groups and places in Kabul, including government institutions, political figures, ANDSF, personnel associated with coalition forces, other security services, international organisations and diplomatic representatives of some countries. However the applicant does not have any profile or association with these groups and although he may be identifiable as a Shia Hazara returnee who has lived in Iran and a Western country I am not satisfied this will bring him to the attention of insurgents in Kabul. Although the recent attack was on a high profile protest, and demonstrates the capacity of ISKP/ISIS to undertake high profile attacks in isolated circumstances, it is not indicative of an increased risk to a Shia of mixed ethnicity who may be identified as Hazara living in Kabul. While I accept that there continue to be security issues in Kabul, I am not satisfied of the likelihood of ISIS or any other group, being able to perpetrate further attacks against the Shia community such as to establish that the applicant as a Shia of mixed ethnicity who may be identifiable as Hazara, not engaged in such activities, will face a real chance of serious harm in Kabul.

1. The Authority then stated at [62] –

62. I have found that there is not a real chance that the applicant will face serious harm in Kabul due to the land dispute, his imputed political opinion as a returnee from the West, as a Shia Hazara of mixed ethnicity or due to his grandfather’s previous employment. As the ‘real risk’ test imposes the same standard as the ‘real chance’ test, for the reasons stated above I am also not satisfied that there is a real risk of the applicant suffering significant harm on the return to Kabul for those reasons.

1. As to the risk of generalised violence, the Authority stated at [63] –

63. Given the current security situation in Afghanistan, I have given consideration to whether there is a real risk of significant harm due to generalised violence in Kabul. Country information indicates that there was a marked increase in security incidents in Kabul in 2015; however DFAT assesses that the primary targets are government institutions, political figures, the Afghan National Defence and Security forces (ANDSF), personnel associated with NATO’s Resolute Support Mission and other coalition forces, other security services, international organisations and diplomatic representatives of some countries. Despite this, these attacks cause significant casualties among civilian bystanders in addition to those being targeted. The Afghan government maintains effective control over Kabul, and a range of counter-measures have been put in place to prevent and respond to insurgent attacks. Although these measures provide a deterrent and ANDSF are quick to respond, attacks are still common. People associated with the government or the international community are at a significantly higher risk than ordinary Afghans in Kabul, but I have concluded the applicant does not have such a profile in Kabul. I am therefore not satisfied that there is a real risk of him facing significant harm on the basis of the general security situation in Kabul.

[citations omitted]

1. The Authority then turned to the question whether it was reasonable for the appellant to relocate to Kabul at [64]-[66] –

64. I have therefore considered whether it is reasonable for the applicant to relocate to Kabul on return. The applicant’s representative submitted to the delegate that the applicant left Afghanistan as a teenager and has never lived in Kabul. He could not reasonably relocate to Kabul where he has no family links he can rely on. The applicant would be vulnerable to exploitation and harm as he has never worked and it would be near impossible for him to find work or live there. At interview the applicant stated that he had relatives from his father’s side in Kabul but would not be able to obtain support from them as they are not on good terms with his family. In addition he would not be accepted as Hazara by the Hazara community who would regard him as Pashtun. Nor would he be accepted by the Pashtun community which would regard him as Hazara. In the IAA submission of 23 September 2016, the applicant’s representative referred to the UNHCR guidelines, stating that although the applicant is a single able bodied male, relocation is not safe or reasonable as he is a Shia Hazara who is easily recognisable; he has spent a significant time as a minor in Australia where he is currently completing year 12 education; he has never worked and has not undertaken any training to enable him to access employment in Afghanistan, nor would he have the social connections to enable him to survive financially without employment.

65. UNHCR advised that many internally displaced people end up in large urban centres which have limited absorption capacity and where access to services remains a major concern. Kabul has seen the largest population increase with 70% of the population being estimated to live in informal settlements which are poorly located and under-serviced. I have had regard to the UNHCR recommendations for considering the reasonableness of relocation referred to by the applicant’s representative, indicating that the only exceptions for the requirement of external support are single able bodied men and married couples of working age without identified specific vulnerabilities. Such persons may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control. DFAT has also advised that traditional extended family and tribal community structures are the main protection and coping mechanisms for people in Afghanistan, however in practice, lack of financial resources and employment opportunities are the greatest constraints to successful internal relocation which is generally more successful for single men of working age although lack of family or tribal networks for single men can impact on their ability to reintegrate into the Afghan community. However the financial situation of Kabul residents and their employment opportunities are also reportedly worsening.

66. The applicant is a young able bodied man of working age. He is unmarried and has no children. I accept that he arrived in Australia as a 15/16 year old, is now only 18 years of age and has spent the majority of his life outside Afghanistan. He is currently completing education to Year 12 level in Australia, is literate in Dari, Farsi and has gained literacy of English in Australia. The applicant has no work experience but has demonstrated resilience in travelling from Afghanistan to Australia as an 15 year old and does not present with any health problems or other specified vulnerabilities identified by UNHCR as requiring durable support. Although the applicant claims to have no family support in Kabul I am satisfied that his father has been living in Kabul and quite possibly his mother and siblings. Whilst I accept that living conditions in Kabul would not be without difficulties, the applicant has close family links in Kabul which I am satisfied he would be able to utilise to obtain their support. During the protection interview the applicant indicated that he is in regular contact with his family in Afghanistan. Although the applicant has not resided in Kabul previously, he is an able bodied male of working age who has family residing in Kabul as support, and who would be able to assist him in establishing himself in Kabul. Taking into account the applicant’s personal circumstances I find it reasonable for the applicant to relocate to Kabul.

## The decision of the Federal Circuit Court

1. In the Federal Circuit Court the appellant advanced two arguments in relation to the Authority’s finding that it was reasonable for the appellant to relocate to Kabul. *First,* the appellant submitted that the Authority had failed to consider appropriately the opinions of Professor Maley, which were referred to in the submissions that the appellant made to the delegate and to which reference is made in [6] above. *Second*, the appellant submitted that the Authority did not address the situation of generalised violence in Kabul in determining that relocation to Kabul by the appellant was reasonable.
2. In relation to the first issue, the primary judge held at [52]-[53] that not everything is required to make its way into the reasons of a decision-maker if the reasons are to be kept to a reasonable length, and that the opinions of Professor Maley were not so significant as to warrant specific consideration in the Authority’s reasons.
3. In relation to the second issue, the primary judge concluded at [60] –

The [Authority] considered in some detail the nature of the generalised violence in Kabul at [63], and, importantly, the reasons that it did not impact upon the applicant for the purpose of assessing the risk of significant harm. In this case those reasons also bear upon whether or not the applicant would be safe in Kabul, in that he was not in the category of persons who were likely to be targeted in this regard. Having regard to the nature of the reasons as a whole it appears to me that the [Authority] has sufficiently identified this issue when referring to whether or not it was safe for him to go to Kabul and concluding at the end of [66] that, ‘Taking into account the applicant’s personal circumstances’, the IAA found that it was ‘reasonable for the applicant to relocate to Kabul’.

## The submissions on appeal

### The appellant’s submissions

1. On appeal, the appellant submitted that while the Authority stated at [63] that it was not satisfied that there was a real risk of the appellant facing significant harm on the basis of the security situation in Kabul, it did not consider whether the general security situation and the risk of violence in Kabul meant that it was unreasonable to relocate there. The appellant submitted that the Authority did not for that purpose refer to those parts of the appellant’s submissions to the delegate and to the Authority that referred to the volatility and fluidity of armed conflict in Afghanistan.
2. The appellant submitted that while the Authority had at [62] considered whether the appellant faced a real risk of significant harm due to generalised violence in Kabul, and had concluded that he did not, it did not consider whether the general security situation or risk of violence in Kabul meant that it would be reasonable to live there. The appellant claimed that the Authority did not adequately consider submissions made by the appellant including about the volatility and fluidity of armed conflict in Afghanistan, about violence targeting Hazaras reportedly intensifying, or that the frequent and significant attacks against civilians were attributable to a range of factors. The appellant claimed that the Authority had also failed properly to engage with evidence provided by the appellant from Professor William Maley.
3. The appellant submitted that the test of whether it would be reasonable for someone to relocate to Kabul is a different test from whether there is a risk of significant harm, and that the Authority had not considered both tests. The Authority had only considered the dangers of living in Kabul in relation to considering the appellant’s chance of experiencing significant harm. It did not address the appellant’s claims and objections to relocation at a factual level (the appellant referred to *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307, per Mortimer J at [70]). The appellant submitted that the Authority did not directly address each of the issues raised by the appellant except in respect of considering the likelihood of him suffering a real chance of serious harm. While the Authority considered whether the risk of violence gave the appellant a well-founded fear of significant harm, it did not address the necessary consideration of whether the risk of violence in Kabul made it reasonable to conclude the appellant could relocate there.
4. The appellant submitted that the Authority’s failure to address the issue of whether it was reasonable to relocate to Kabul as required by s 36(2B)(a) of the Act was jurisdictional error.

### Minister’s submissions

1. The Minister submitted that the appellant’s argument was not made out, and that at first instance, the primary judge was correct to hold that the Authority’s findings on reasonableness of relocation did not give rise to jurisdictional error. In particular, the Minister submitted that the primary judge was correct to find that on a fair reading of the Authority’s decision, the Authority had had regard to the appellant’s claims that he could not safely and reasonably relocate to Kabul. The material passages of the Authority’s reasons are set out at [17] to [20] above. The Minister relied on the following features of the Authority’s reasons –
2. The Authority’s consideration of the question of reasonableness at [64] onwards (see [20] above) should not be divorced from the Authority’s consideration of the general security situation in Kabul, which the Authority addressed at [63]. The findings at [63] were to be read with the findings at [62] by which it concluded that it was not satisfied that there was a real risk of the appellant suffering significant harm upon relocation to Kabul, picking up the reasons for which the Authority found that there was not a real chance that the appellant would face serious harm for the purposes of considering the criterion in s 36(2)(a) and the definition of “refugee” in s 5H and s 5J of the *Migration Act*.
3. At [64] of its reasons, the Authority referred to a submission by the appellant’s representative that he would be vulnerable to exploitation and “harm”, which should be understood as picking up the appellant’s objections to relocating to Kabul.
4. Later in [64] of its reasons, the Authority referred to a submission by the appellant’s representative that relocation would not be “safe or reasonable”.
5. At [65] of its reasons, the Authority addressed the UNHCR guidelines relating to the reasonableness of relocation, which was a further indication that the Authority had taken into account the question of the appellant’s safety in considering the question of reasonableness.
6. At [66] of its reasons, the Authority stated that it accepted that “living conditions in Kabul” would not be without difficulties, which was also apt to pick up the considerations that the Authority addressed at [63].
7. And later in [66] of its reasons, the Authority concluded that taking into account the appellant’s “personal circumstances” it was reasonable for the appellant to relocate to Kabul.

## Consideration

1. Questions akin to those raised by the appellant’s ground of appeal have been addressed in a number of previous appeals to this Court: ***MZYQU*** *v Minister for Immigration and Citizenship* [2012] FCA 1032; 206 FCR 191 (Dodds-Streeton J); ***MZZJY*** *v Minister for Immigration and Border Protection* [2014] FCA 1394 (Davies J); **MZZZA** v Minister for Immigration and Border Protection [2015] FCA 594 (Mortimer J); ***MZACX*** *v Minister for Immigration and Border Protection* [2016] FCA 1212 (Kenny J); *Minister for Immigration and Border Protection v* ***DZU16*** [2018] FCAFC 32; 253 FCR 526 (Robertson, Murphy and Kerr JJ); and ***CIT17*** *v Minister for Immigration and Border Protection* [2018] FCAFC 150 (Collier, Markovic and Lee JJ).
2. As indicated by the Authority’s reasons, the Authority found for the purposes of s 36(2)(a) of the *Migration Act* that the appellant was not a person to whom it was satisfied Australia had protection obligations because the appellant was a “refugee”, as defined by s 5H and 5J of the Act. That was because the Authority was not satisfied that the appellant had a well-founded fear of persecution that related to the whole of Afghanistan, as it found that the appellant would not face a real chance of significant harm if he returned to Kabul. As I stated earlier, that finding directed attention to the complementary protection criterion in s 36(2)(aa), which provides –

(2) A criterion for a protection visa is that the applicant for the visa is:

…

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm;

1. The criterion in s 36(2)(aa) of the Act is subject to s 36(2B), which provides –

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

1. For the purposes of the three alternative criteria in s 36(2B), the Authority considered only whether s 36(2B)(a) was engaged. In *DZU16* the Court framed the statutory question arising under s 36(2B)(a) at [117] –

In our opinion, the statutory question for the Authority was whether it was satisfied that it would be reasonable for the respondent to relocate to an area of Afghanistan where there would not be a real risk that he will suffer significant harm: see s 36(2B)(a).

1. In *MZACX*, Kenny J at [35] identified that two stages of inquiry arise under s 36(2B)(a): (1) whether there was an appreciable risk of the occurrence of the feared persecution at some other place; and (2) if not, whether the relocation to that place was reasonable. Her Honour stated at [35]-[37] –

35 In considering the possibility of relocation within a visa applicant’s country of nationality, the first question that arises is whether, objectively, there is no appreciable risk of the occurrence of the feared persecution in another part of that country. If there is an appreciable risk, then the issue of relocation for a particular applicant is concluded. If, however, there is no appreciable risk of the feared persecution at some other place in the country of nationality, the issue of relocation can be further explored. At this point, as indicated earlier, the question is whether the relocation of the visa applicant to that place is “reasonable”, in the sense of “practicable”, having regard to the particular circumstances of the applicant and the impact upon the applicant of relocation to that place. In answering this question, it may be relevant to include different or lower risks of harm faced by the applicant at a suggested place in assessment of the reasonableness of relocation in the particular circumstances of the case. Issues of risk of harm arise at these two stages of inquiry, although each stage of the inquiry has a different focus. Jurisdictional error may arise where a Tribunal conflates the two stages of the inquiry, as *MZYQU* 206 FCR 191 and *MZZJY* [2014] FCA 1394 illustrate.

36 In *MZYQU* 206 FCR 191, Dodds-Streeton J held (at [61]) that there was jurisdictional error in treating a risk of serious harm (within s 91R(1)(b) of the Migration Act) as the only kind of harm that could affect the reasonableness of relocation. Her Honour explained (at [55] and [60]):

Consistently with *SZATV*, factors such as “other and different risks in the propounded place of internal relocation” ... may be relevant, albeit not mandatory, considerations when determining the reasonableness of a proposed relocation.

...

The I[ndependent] M[erits] R[eviewer] did not consider the impact of the risk of harm in the form of generalised violence or harm (of an unspecified nature or level) due to personal circumstances on the reasonableness of the appellant’s relocation. By inference, the IMR proceeded on the basis that unless the harm were serious within the meaning of s 91R(1)(b), it was unnecessary to do so.

37 In *MZZJY* [2014] FCA 1394 Davies J held that the Tribunal had erred in considering whether the applicant in that case could relocate within Pakistan to avoid persecution. Her Honour said (at [16] and [21]):

The applicant’s primary contention in support of the proposed ground of appeal is that the FCC erred in not finding that the Tribunal, in assessing the reasonableness of the applicant relocating to Karachi, was obliged, but failed, to consider the risk of the applicant suffering harm having regard to the particular circumstances of the applicant. It was argued that the Tribunal wrongly conflated the two limbs of the relocation test, namely “appreciable risk” and “reasonableness”, by failing to address the personal circumstances of the applicant in addressing the question whether it was reasonable, in the sense of practicable, for the applicant to relocate to Karachi in the face of a risk of the applicant suffering sectarian and generalised violence, however remote...

I accept the submission for the applicant that the Tribunal conflated the two limbs of the relocation test, namely “appreciable risk” and “reasonableness”, by finding that the applicant could be reasonably expected to relocate to Karachi “where there is not an appreciable risk of the occurrence of the feared persecution”. In *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 Gummow, Hayne and Crennan JJ stated that what is “reasonable” in the sense of practicable must depend upon the particular circumstances of the visa applicant and the impact upon that person of relocation of the place of residence within the country of nationality. This criterion was recently affirmed by the High Court in *Minister for Immigration and Citizenship v SZSCA* [2014] HCA 2014. In the present case, the Tribunal dealt with the position of Shias generally in Karachi but did not consider the practical realities facing the applicant, as a person at risk of attack in Karachi because of his religion. In so doing, the Tribunal wrongly elided the question posed by the “reasonableness” criterion with the inquiry, is there a lack of “appreciable risk” of harm? The conclusion that the chance of harm is not more than remote dealt only with the consideration as to whether objectively there is an appreciable risk of persecution for a Convention reason in Karachi, but did not deal with the question as to whether it is reasonable, in the sense of practical, to expect the applicant to live there faced with a risk of violence and where he would lack protection from the authorities, as the Tribunal accepted. The same considerations do not necessarily apply to both limbs. The fact that the risk of harm may be remote does not necessarily answer the question whether it is reasonable, having regard to the personal circumstances of the applicant, to expect the applicant to face that risk. The Tribunal was obliged to consider the practical realities for the applicant in determining whether it is reasonable to expect him to relocate. It did not do so, and in failing to do so fell into jurisdictional error.

1. At [38], Kenny J stated that while the decisions in *MZYQU* and *MZZJY* were different from the case before her Honour in some respects, they illuminated the argument advanced by the appellant. At [39], Kenny J stated that whether the primary judge had erred depended, at least in part, on the claims that had been made by the appellant before the Refugee Review Tribunal concerning the reasonableness of relocation. At [44], Kenny J observed that the Tribunal in its reasons had addressed the primary issue, which was whether there was an appreciable risk of the occurrence of feared persecution in Islamabad or Rawalpindi, which the Tribunal had identified as places of relocation, and determined that there was not. Her Honour stated that this left open another issue, which was whether there was nonetheless a different level of risk of harm on account of the appellant’s Shia Muslim and Turi identity that militated against his relocation, when all the circumstances were considered. In respect of that issue, Kenny J held at [46]-[49] –

46 There is only one statement in paragraph [47] that touches on the second issue of whether, given some level of risk, it was reasonable in his circumstances to relocate to one of the cities. This is the stated conclusion that:

While the Tribunal considers that there is less than a remote chance of the applicant being targeted on the basis of his Shia religion or as a member of the Turi tribe from Parachinar or being caught up in generalised or sporadic violence which may occur in the country including in Islamabad and Rawalpindi, the Tribunal finds it is reasonable for the applicant to relocate to these urban centres in these circumstances.

47 There is, however, no prior acknowledgement in the Tribunal’s reasons that a risk of harm as a result of ethnically and religiously motivated violence might, as the appellant claimed, militate against relocation, bearing in mind all the circumstances of his particular case. It is true that the Tribunal in fact stated that it did not accept that, in Islamabad or Rawalpindi, the appellant would face a heightened risk because of his status as a “renewed Turi shopkeeper in Parachinar”. As noted above, however, the appellant relevantly claimed that he would face a risk of harm as a result of ethnically and religiously motivated attacks if he were to relocate to Islamabad or Rawalpindi and that this circumstance was relevant to the reasonableness of his relocation to those places. It will be recalled that the Tribunal accepted that: (1) the appellant faced “a real chance of persecution” in his home area of Pakistan because of his religion and ethnicity (and thus had a well-founded fear of persecution on those grounds in that area); (2) the appellant’s religion, ethnicity, tribal identity and origins were identifiable from his accent, identity documents, spelling of his name and the way he practised his religion; (3) there had been attacks, including in November 2013, on Shias in Rawalpindi; (4) there may have been some instances of the kidnapping of Turis in Islamabad and Rawalpindi in 2011; and (5) there had been incidents of violence against Shias and there will be further attacks against Shia targets in various parts of the country. As to (4), the Tribunal stated that it did not accept that there was a “real chance” that the appellant would be the victim of such crime, having regard to the size of the population and the limited number of reports over time. The Tribunal also referred to the existence of Turi political rallies as the basis for not accepting that the appellant’s profile as a Turi or Turi Shia would lead to a “real chance” of serious harm away from his home region or “adversely impact on his ability to relocate”.

48 The fact that a risk of serious harm, or that a person may be the victim of ethnically motivated crime, is remote does not answer the question whether it is reasonable, having regard to all the circumstances of a visa applicant, that the applicant face that risk. Further, the Tribunal did not directly address the appellant’s claim that he would face a risk of harm, particularly during attendance at Shia Muslim mosques or participation in religious festivals. In considering whether or not it was reasonable for the appellant to relocate to Islamabad or Rawalpindi, the Tribunal was obliged, as Davies J said in *MZZJY* [2014] FCA 1394 at [21], to consider the practical realities for him.

49 Instead, in this case, the Tribunal’s analysis persistently confused the issue of whether there was no appreciable risk of the occurrence of the feared persecution in Islamabad or Rawalpindi with the different issue of whether the risk of harm by reason of his Shia Muslim or Turi identity militated against relocation in all the circumstances of his case. The conclusion in paragraph [47] cannot be untied from this confusion. Indeed, the extent of the confusion is emphasised by the fact that the statement set out in [17] above (that there is less than a remote chance of the appellant being targeted on the basis of his Shia religion or as a member of the Turi tribe from Parachinar or being caught up in the generalised or sporadic violence which may occur in the country including in Islamabad and Rawalpindi) does not appear to flow out of the Tribunal’s preceding analysis. Instead, this further confusion only emphasises the Tribunal’s failure to consider whether relocation was reasonable, having regard to all the circumstances of the appellant’s case, including whether the appellant faced a risk of harm in these cities by reason of his religion or ethnicity. The failure to address this question resulted in jurisdictional error.

1. In *CIT17*, the Court stated at [74] that the parties to that appeal did not dispute the principles essayed by Kenny J in *MZACX*, and stated at [76] that for present purposes the Court accepted those principles as being correct.
2. In *DZU16* at [110] the Court recorded a submission by the Minister that insofar as *MZACX, MZYQU* and *MZZJY* suggested that consideration must always be given to the risk of generalised violence when assessing the reasonableness of relocation, they were wrong as they descended to a greater level of particularity than was called for, and they should not be followed: cf, *CIT17* at [74]-[75], where the Full Court appears to treat the Minister’s submissions in *DZU16* as observations by the Court.
3. In *DZU16*, the Full Court considered a challenge by the Minister to a finding by the primary judge that the Authority had failed to consider whether the established risk of generalised violence in the place of relocation, Mazar-e-Sharif in Afghanistan, rendered it unreasonable (as opposed to unsafe) to relocate. In upholding the Minister’s challenge, the Full Court distinguished each of *MZYQU* (Dodds-Streeton J)*,* *MZZJY* (Davies J), and *MZACX* (Kenny J).
4. As to *MZYQU*, the Full Court in *DZU16* observed at [134] that it concerned an earlier form of the legislation, namely s 91R(1) of the *Migration Act* (since repealed). Section 36(2) of the *Migration Act* (as then in force) gave effect to the definition of “refugee” in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol. Under that form of the legislation, the reasonableness of relocation arose as a matter of inference from the more generally stated provisions of the Convention definition: *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18 at [11] (Gummow, Hayne and Crennan JJ). Section 91R of the Act qualified the Convention definition of “refugee” by requirements that included that the persecution involved serious harm to the person. The decision-maker’s error which Dodds-Streeton J identified in *MZYQU* was in impliedly treating the level of harm referred to in s 91R(1)(b) as being the only level of harm that was capable of being relevant to the reasonableness of the relocation: see *MZYQU* at [54], [58]-[60]. As to that conclusion, the Full Court in *DZU16* stated at [135] –

In our opinion, the same conclusion cannot be drawn in relation to the reasoning of the Authority in the present appeal, given the terms of s 36(2B)(a) which refer to “an area of the country where there would not be a real risk that the non-citizen will suffer significant harm”. This is the concept the Authority applied at [48]-[50] of its reasons.

1. As to *MZZJY*, the Full Court in *DZU16* stated at [136] that Davies J had held that the fact that a risk of harm in the place of relocation may be remote did not necessarily answer the question whether the relocation was reasonable, having regard to the personal circumstances of the applicant, to expect the applicant to face that risk. The Tribunal had fallen into jurisdictional error in failing to consider the practical realities for the applicant in determining whether it was reasonable for him to relocate. At [137], the Full Court in *DZU16* distinguished *MZZJY* on the ground that in the case before it, on a fair reading of the Authority’s reasons, it did not err in its application of the relevant criterion whether it would be reasonable for the respondent to relocate to a place where there would not be a risk of significant harm. The Full Court held that, in effect, the Authority had found that there was no specific or generalised risk and also considered the practical realities of relocation for the respondent.
2. As to *MZACX,* the Full Court in *DZU16* at [138] stated that Kenny J had held at [49] that the Tribunal failed to consider whether relocation was reasonable, having regard to all the circumstances of the appellant’s case, including whether the appellant faced a risk of harm in the cities of Islamabad or Rawalpindi by reason of his religion or ethnicity, and that the failure to address that question resulted in jurisdictional error. At [139], the Full Court in *DZU16* distinguished *MZACX* on the ground that, in effect, the Authority in *DZU16* found that there was no specific or generalised risk, and had also considered the practical realities to the respondent of relocation. In that respect, it is significant that the conclusion of the Authority in *DZU16* was as follows –

61. Considering all the circumstances, I am satisfied it would be reasonable for the applicant to relocate to an area of the country such as Mazar-e-Sharif where there would not be a real risk that the applicant will suffer significant harm.

1. The Full Court in *DZU16* held at [139] that these words included what the Authority had said earlier.
2. In *CIT17*, the Full Court held in relation to reasons of the Authority having similar but not identical characteristics to the reasons of the Authority considered in *DZU16*,that the Authority had not erred in its consideration of whether it was reasonable for the appellant to relocate to Mazar-e-Sharif in Afghanistan. In *CIT17*, the Authority had concluded at [77] of its reasons –

I note the representative’s concerns about the relocation options being a durable solution and economically viable. I note that insecurity has affected Mazar-e-Sharif, however I found that such incidents were infrequent and that the applicant would not face a real chance or real risk of serious or significant harm on the basis of targeted harm or generalised violence or criminality either within the city or while accessing it upon returning. I have considered the applicant’s personal circumstances and I am satisfied it is reasonable for the applicant to remain in Mazar-e-Sharif, a place where he will be able to secure shelter, employment and services upon return even in the absence of an initial familial or otherwise familiar support network.

1. As to this conclusion by the Authority, the Full Court stated at [84]-[85] –

The consideration by the Authority of whether it would be reasonable for the appellant to relocate to Mazar-e-Sharif was detailed, appearing not only at [77] as submitted by the appellant but from [66]-[77] of the Authority’s reasons. The conclusion of the Authority at [77] must be read against the background of its analysis in those preceding paragraphs. The Authority clearly considered drawbacks for the appellant in relocating to Mazar-e-Sharif but concluded that, against the backdrop of the political and economic environment in the city as well as the personal circumstances of the appellant it had outlined, it was nonetheless reasonable for the appellant to relocate there.

The appellant submitted that the Authority accepted that there was risk to the appellant in relocating to Mazar-e-Sharif, as noted in the reasons of the Authority at [25] (militant attacks occur in Mazar-e-Sharif) and [39] (certain aspects of the conflict with the Taliban would affect Mazar-e-Sharif). However the conclusion of the Authority set out at [77] must be read taking into account the possible risks, as well as the view of the Authority that, notwithstanding some risk to the appellant in Mazar-e-Sharif, the appellant was not at risk of significant harm if he were to relocate to Mazar-e-Sharif (including both travelling to and remaining in Mazar-e-Sharif). This analysis, read further with the detailed examination of the Authority as to whether it was reasonable for ***the appellant*** to relocate to Mazar-e-Sharif, negates the appellant’s claim that the Authority failed to address the second limb of the relocation test in s 36(2B) of the Act, or that the Authority had erred in a manner akin to that identified in *MZACX*.

1. The issue raised by the appellant in the present case must turn on what the Authority stated in its reasons for the decision in this case: *DZU16* at [102]. Although the examination of other cases is useful for the purpose of examining how other judges have considered similar issues, decisions on questions of fact concerning the formulation of the Authority’s reasons in other cases do not have universal application, and do not stand as authority for any principle of law.
2. The Authority was required by s 473EA of the *Migration Act* to provide a written statement of its decision that set out the reasons for its decision, which is subject to the content required by s 25D of the *Acts Interpretation Act 1901* (Cth) in relation to material questions of fact. A court may but is not bound to infer that a matter not mentioned in the Authority’s reasons was not considered: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [69] (McHugh, Gummow and Hayne JJ). A court is not bound to draw the inference because the fact that something is not mentioned in the Authority’s reasons does not necessarily mean that it was not considered: *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [31] (French CJ and Kiefel J); *Minister for Immigration & Border Protection v EEI17* [2018] FCAFC 166; (2018) 261 FCR 461 at [47] (McKerracher, Gleeson and Burley JJ). In *Minister for Immigration & Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67 the Full Court (Katzman, Griffiths and Wigney JJ) stated at [34] –

The fact that a matter is not referred to in the Tribunal’s reasons, however, does not necessarily mean the matter was not considered by the Tribunal at all: *SZGUR* at [31]. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal’s reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its findings of material fact. But where a particular matter, or particular evidence, is not referred to in the Tribunal’s reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the applicant’s claims and the findings and evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight: *MZYTS* [[2013] FCAFC 114] at [52].

1. The onus of sustaining an inference that the Authority did not take a material matter into account, or misunderstood the nature of the conditions in s 36(2B)(a) of the *Migration Act* such as to amount to a jurisdictional error, fell on the appellant: *SZGUR* at [67] (Gummow J).
2. I have given careful consideration to the reasons of the Authority as a whole, and I am mindful of the guidance of Lockhart J in *Politis v Commissioner of Taxation* [1988] FCA 739; 16 ALD 707 at 708, which was cited in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280 at 287 (Neaves, French and Cooper JJ), which was in turn cited in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ). That guidance is that in evaluating the reasons of an administrative decision-maker the Court should approach its task sensibly and in a balanced way, not reading passages from the reasons for decision in isolation from others to which they may be related, or taking particular passages out of the context of the reasons as a whole. And the Court should not construe the Authority’s reasons for its decision minutely and finely and with an eye keenly attuned to the perception of error. But as the Full Court (Flick, Barker and Rangiah JJ) observed in *Minister for Immigration and Border Protection v Nguyen* [2017] FCAFC 149; 254 FCR 522 at [34]-[36] in the context of the issues that arose in that appeal, to construe a decision-maker’s reasons by reference to what they do not address is not to construe them “with an eye keenly attuned to the perception of error” by reference to the manner in which the reasons resolved issues to which attention was directed.
3. Upon my review on appeal of the material that was before the primary judge, I have respectfully come to a different view from that taken by his Honour in relation to whether, for the purposes of considering whether relocation of the appellant to Kabul was reasonable, the Authority gave consideration to the appellant’s objections by reference to generalised violence in Kabul. I am persuaded that the Authority did not give such consideration, and that it fell into jurisdictional error.
4. As Kenny J identified in *MZACX* at [35]*,* there are two stages of inquiry under s 36(2B)(a) of the *Migration Act*. If the decision-maker determines that there is no real risk of significant harm, different or lower risks of harm faced by an applicant may be relevant to the evaluation of the reasonableness of relocation. *MZACX* was not doubted by the Full Court in *DZU16*, and the Full Court in *CIT17* accepted the principles in *MZACX* as being correct (see [35]-[36] above). In the present case, the appellant’s submissions to the delegate and his response to the Authority of 23 September 2016 squarely raised objections to relocation to Kabul by reference to the general security situation in Kabul in addition to those objections that were specific to the appellant’s circumstances. That such objections were raised by the appellant was accepted by the Authority, because it considered the substance of them at [63] of its reasons in the course of addressing the first logical limb of s 36(2B)(a), namely whether Kabul was a place where there would be a real risk of the appellant suffering significant harm, which is a concept that is given statutory content by s 36(2A). The Authority referred to some of the matters relevant to the appellant’s objections, namely: (1) a marked increase in security incidents in Kabul in 2015; (2) the attacks in Kabul causing significant casualties amongst civilian bystanders; and (3) that those attacks were still common despite the Afghan government maintaining effective control over Kabul and a range of counter-measures being put in place. There was no evaluation at [63] of the Authority’s reasons of whether the matters to which it referred, and which it accepted, affected whether it was reasonable for the appellant to relocate to Kabul. It might have been open to the Authority to consider the question of reasonableness within the context of [63], but it did not do so: cf *MZZZA* at [39], [41] (Mortimer J).
5. As a matter of text and structure, from [64] onwards the Authority’s reasons switch attention from the question of real risk that the appellant would suffer significant harm in Kabul to the question of reasonableness of relocation. There is nothing in the text of the Authority’s reasons from [64] onwards that addresses expressly the matters to which the Authority referred at [63]. As to the features of the Authority’s reasons relied on by the Minister I am not persuaded that, fairly read, they indicate that the Authority gave any consideration to the reasonableness of relocation having regard to the general security situation in Kabul, including the matters that the Authority accepted at [63]. As to each of those matters –
6. I do not consider that the reference to “exploitation and harm” at [64] of the Authority’s reasons (see [20] above) should be construed as a reference to the risk of the type of harm referred to at [63]. The full reference in [64] is to, “exploitation and harm *as he has never worked and it would be near impossible for him to find work or live there*” (emphasis added). This is set in the context of the references to the appellant’s age, and the claimed absence of his family in Kabul. In fact, I consider it would be unreasonable to construe the reference to “harm” in [64] as picking up the matters relating to the general security situation in Kabul that are the subject of [63].
7. Likewise, the reference to “safe and reasonable” in the latter part of [64] of the Authority’s reasons is shaped by what follows in the balance of [64], none of which relates to the general security situation in Kabul.
8. In relation to the reference by the Authority at [65] of its reasons to the UNHCR recommendations, the context of that reference is confined to the exception for relocation to able-bodied men and married couples of working age and without identified specific vulnerabilities. That consideration went to the question of relocation generally in Afghanistan. It did not address the specific objections to relocation to Kabul concerning the security situation there that were the subject of the appellant’s submissions to the delegate, and other information on which the appellant relied that was specific to Kabul, such as a report by the United Nations Assistance Commission in Afghanistan to which the appellant’s representative referred in the submission dated 23 September 2016 (see [12] above). That information was picked up and relied on by the appellant’s representative on the question of reasonableness of relocation (see [13] above).
9. As to the reference by the Authority at [66] of its reasons to living conditions in Kabul not being without difficulties, in context I do not construe that as referring to the type of generalised risks that are the subject of [63] of the Authority’s reasons. That is because at [66] the Authority thought that difficult living conditions were ameliorated because the appellant had “close family links in Kabul which I am satisfied he would be able to utilise to obtain their support”. It is difficult to conceive how family links could rationally affect the type of general security risks referred to by the Authority at [63], and I do not construe the Authority’s reasons as suggesting that they would.
10. I do not construe the reference by the Authority at the end of [66] to the appellant’s “personal circumstances” as being sufficient to indicate that the Authority had taken into account the general security situation in Kabul in evaluating whether it was reasonable for the appellant to relocate there. The personal circumstances to which the Authority referred at [66] are fairly understood to be those circumstances which the Authority specifically addressed, namely the appellant’s personal attributes such as his age, his family situation, his lack of work experience, the fact that he had never lived in Kabul, his ethnicity, and whether he had social connections in Kabul. In relation to this last aspect, the Authority at [66] found, contrary to the appellant’s claims, that his father was living in Kabul, and quite possibly his mother and siblings.
11. Finally, standing back and reading the Authority’s reasons as a whole I am persuaded that the Authority has examined the security situation in Kabul and the risk to civilians only for the purposes of considering whether there would not be a real risk that the appellant would suffer significant harm if he were to relocate to Kabul, and has not examined the security situation and the risk to civilians more generally for the purposes of considering the reasonableness of the relocation.
12. The Authority’s failure in the course of its review function under s 473CC of the *Migration Act* to consider the general security situation in Kabul for the purposes of evaluating the reasonableness of relocation was a failure to consider a significant objection to relocation which the appellant had squarely raised by the submissions made on his behalf to the delegate and to the Authority: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [58], [60]-[61]. Those submissions were part of the framework set up by the objections of the appellant to relocation to Kabul: see, *SZMCD v Minister for Immigration* at [124] (Tracey and Foster JJ), citing *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 443 (Black CJ, Whitlam J agreeing). Another conclusion is that in assessing the appellant’s objections to relocation to Kabul on the basis of the general security situation in Kabul, the Authority confined its consideration to only one limb of s 36(2B)(a) of the *Migration Act*, and thereby proceeded upon a legally erroneous appreciation of the dual criteria in s 36(2B)(a).
13. Had the Authority considered the question of reasonableness of the appellant relocating to Kabul having regard to the general security situation there, there was a realistic possibility of a different outcome on review, and therefore the error was material and was jurisdictional: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 363 ALR 599 at [45].

## Conclusions

1. The appeal should be allowed. The orders of the primary judge made 12 September 2018 should be set aside, and in lieu it should be ordered that a writ of certiorari issue quashing the decision of the Authority made 23 September 2016, and that a writ of mandamus issue to the Authority to review the delegate’s decision pursuant to s 473CC of the *Migration Act* according to law. Costs below and in this Court should follow the event.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wheelahan. |

Associate:

Dated: 16 January 2020