MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZAPN & ANOR (M17/2015)

Court appealed from:	Federal Court of Australia [2014] FCA 947
Date of judgment:	3 September 2014
Date special leave granted:	13 February 2015

The first respondent (WZAPN) arrived in Australia on 21 July 2010. He is a stateless Faili Kurd who was born in Tehran. He claimed to fear persecution if he returned to Iran by reason of his Kurdish ethnicity and membership of a particular social group, namely, stateless persons, undocumented Faili Kurds living in Iran; stateless Faili Kurds; or undocumented refugees living in Iran. He claimed that he had been detained by the police and the Basiji (a religious/political group charged with the protection of Islamic values in Iran) from time to time, once for 48 hours but on other occasions for no more than twelve hours. He had never been physically assaulted, although he had suffered extreme verbal abuse.

WZAPN's application to the appellant (the Minister) to be granted refugee status was rejected on 27 September 2010. Although the Minister accepted there was a real chance that WZAPN would be questioned periodically and probably detained for short periods in the reasonably foreseeable future should he return to Iran, he did not accept that the frequency or length of detention, or the treatment WZAPN would receive whilst in detention would involve serious harm within the meaning of s 91R of the *Migration Act* 1958 (Cth).

WZAPN's application for judicial review was dismissed by the Federal Magistrates Court (Lucev FM), but his appeal to the Federal Court (North J) was successful. North J noted that s 91R(2)(a) defines 'serious harm' as including 'a threat to the person's life or liberty'. Section 91R2(a) does not stipulate any qualitative element of the harm, however, in contrast to the other paragraphs in s 91R(2). For example, in paragraphs (b), (c) and (d) physical harassment, physical ill-treatment and economic hardship each must be significant. His Honour concluded from the language and structure of s 91R(2) that serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty.

This conclusion was confirmed by other considerations. In construing s 91R, His Honour noted that the construction which accords with Australia's obligations under the Refugees Convention should be favoured. Thus, a decision-maker faced with a claim based on persecution arising from a threat to a person's liberty should ask whether the deprivation was on grounds, and in accordance with procedures, established by law, whether the detention was arbitrary, and whether the appellant was treated with humanity and respect for the inherent dignity of the person. In taking this human rights approach, there is no place for a qualitative assessment of detention affecting the right to liberty for it to constitute an infringement of that right.

North J held that by making a qualitative assessment of the nature and degree of the harm experienced by WZAPN when asking whether the threat to his liberty was sufficiently significant, the Minister applied the wrong test in the application of s 91R(2)(a), and thereby fell into jurisdictional error.

The grounds of appeal include:

- The Federal Court erred in holding that ss 91R(1)(b) and 2(a) of the *Migration Act* 1958 (Cth) preclude a decision-maker from making a qualitative assessment of the nature and degree of the harm feared when determining whether a risk that a person will be detained if returned to his or her country of origin involves “serious harm” in the form of a “threat to liberty”.

The respondent has filed a Notice of Contention on the ground that the Federal Court erred in law by failing to hold that the second respondent (the independent merits reviewer) committed jurisdictional error by asking himself the wrong question, identifying the wrong issue and/or coming to an irrational conclusion in finding that the law or policy of general application which authorised the claimed questioning and detention was appropriate and adapted to achieving a legitimate object.

This appeal will be heard together with the appeal in *WZARV v. Minister for Immigration and Border Protection & Anor* (P10/2015).