

BETWEEN: **WZARV**
Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**
First Respondent

**IMOGEN SELLEY IN HER CAPACITY AS
INDEPENDENT MERITS REVIEWER**
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I PUBLICATION

1. This document is in a form suitable for publication on the Internet.

Part II ISSUES

2. The central issue in this appeal is whether, for the purposes of s 91R of the *Migration Act 1958* (Cth) (the **Act**), the detention of a person for a reason mentioned in the Convention¹ necessarily constitutes "serious harm", irrespective of the frequency, length or conditions of that detention.²

Part III SECTION 78B NOTICES

3. The First Respondent has considered whether notices should be given under s 78B of the *Judiciary Act 1903* (Cth), and concluded that no such notices are necessary.

Part IV FACTUAL BACKGROUND

4. The Appellant (**WZARV**) left Sri Lanka lawfully in July 2010 using his own passport.³

¹ Meaning the *Convention Relating to the Status of Refugees 1951*, as amended by the *Protocol Relating to the Status of Refugees 1967*.

² The central issue in this appeal is relevantly the same as the central issue in proceeding M17 of 2015: *Minister for Immigration and Border Protection v WZAPN*, which is to be heard together with this appeal. Where convenient, the Minister will adopt the submissions he has lodged in that appeal rather than repeating them.

³ IMR reasons [38], [211].



5. On 7 November 2010, WZARV arrived on Christmas Island. By reason of that arrival, he became an "offshore entry person" (as then defined in s 5 of the Act).⁴ For that reason, s 46A(1) of the Act prevented him from lodging a valid application for a visa. He did, however, apply for a refugee status assessment (**RSA**). In that application, WZARV claimed to fear harm in Sri Lanka based on his Tamil ethnicity, because the authorities would suspect he was an LTTE supporter because he had done a day's training with the LTTE in 2008 and had assisted injured LTTE fighters, and because he had worked for two NGOs during 2009 and 2010.⁵
6. On 21 April 2011, an RSA officer concluded that WZARV was not a refugee.
- 10 7. WZARV sought review of the RSA officer's assessment from an Independent Merits Reviewer (**IMR**). He elaborated on the harm that he claimed to have experienced in Sri Lanka during his interview with the IMR. Nevertheless, the IMR rejected all WZARV's claims of past harm because she did not accept that he was a credible witness.⁶
8. The IMR raised the question of the treatment of failed asylum seekers returning to Sri Lanka in a letter dated 22 May 2012 that she sent to WZARV after the hearing. The content of that letter is relevantly extracted in the IMR's reasons at [113] as follows:

Treatment of asylum seekers returning to Sri Lanka

20 The Australian Department for Foreign Affairs and Trade (DFAT) advised on 15 December 2011 that it has no confirmed reports of asylum seekers returning to Sri Lanka being mistreated, whether returning voluntarily or involuntarily. It confirmed that in 2009, one man was arrested and charged with a people smuggling offence under Sri Lankan law after being removed from Australia. It also investigated a complaint made by the man that he had been mistreated at Colombo Airport (beaten round the ears) but found the complaint to be unsubstantiated. DFAT noted that the allegations had been widely reported in the media by Amnesty International. DFAT also advised that it ensures that people do not (sic) arrive on weekends and then experience detention at the airport because of CID's inability to check the person's criminal background with local police.

30 Further, the Australia, British and Canadian High Commission in Sri Lanka have reported that all Sri Lankans returning are subject to the same screening and admission process on arrival at the International Airport, regardless of whether or not they are returning voluntarily and regardless of ethnicity. This process involves interviews with the Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigations Department. The British High Commission reports that returnees are able to pass through the airport after routine checks are carried out on their identity and documentation. The Canadian High Commission reports that it is aware of only four instances of people being detained on arrival and in each case, the reason was the person's outstanding criminal charges, not their ethnicity or asylum seeker status.

⁴ Department's Refugee Status Assessment record page 1.7.

⁵ IMR reasons [45] to [62].

⁶ Ibid [196] to [202].

Depending on the weight the reviewer gives this information, she could infer in the event the claimant were to return to Sri Lanka, he would pass through the airport without being mistreated. (emphasis added)

9. In response to that letter, WZARV “repeated claims that the authorities were suspicious of him before he left Sri Lanka and his attempts to seek asylum would raise their suspicions, leading to his detention and likely death”.⁷ WZARV’s migration agent also submitted extracts of country information and emphasised the risks of being a failed asylum seeker.⁸

10. The IMR discussed the relevant country information exhaustively at [153] to [177] of her reasons. She accepted that upon WZARV’s arrival back in Sri Lanka the authorities might suspect that he had claimed asylum in Australia, because his return would be known to be involuntary.⁹ It was in this context that the IMR then found that:¹⁰

... it is likely that the Department of Immigration and Emigration, State Intelligence Service and Criminal Investigation Branch would interview the claimant on his arrival and that he will be met by an Australian Government official at the airport who will be able to assist the claimant while he remains in the airport. I find that the authorities will want to ascertain the claimant’s reasons for departing Sri Lanka, what [he] has been doing during his absence, whether he is involved in people smuggling, whether he has had any involvement in or sympathies with the LTTE or more broadly the Tamil separatist movement.

I find that they will not allow the claimant to leave the airport until he passed a police check. I note the Australian and Danish Governments advise that police checks are usually completed in a matter of hours. The *Canadian Law and Society Trust et al* confirm that checks may be completed in a matter of hours but also advise they can take months because the person’s family cannot be contacted and police records that could attest to their legitimate address and non-involvement in criminal activity have been misplaced during the conflict. However, I note that in the claimant’s case delays are unlikely because his main family members are residents of Vavuinya and he has his National ID card and reference from the Grama Servagar confirming his Vavuniya residency. I also note the claimant has no police record of a nature that would be of concern to the authorities (emphasis added).

11. The IMR went on to find that WZARV had none of the risk factors likely to lead to mistreatment by the Sri Lankan authorities.¹¹ She found that, if WZARV told the authorities of his activities since leaving Sri Lanka, he would not be at risk of harm because of those activities.¹² The IMR also referred to country information as the basis

⁷ Ibid [120].

⁸ Ibid [126].

⁹ Ibid [205].

¹⁰ Ibid [206] and [207].

¹¹ Ibid [209].

¹² Ibid [210].

for a conclusion that Tamil men and returned asylum seekers were not exposed to a real chance of serious harm in Sri Lanka.¹³ The IMR concluded:¹⁴

10 In summary, whilst I accept that there are a number of factors that on their face suggest there might be some risk to the claimant of harm on his return to Sri Lanka, having examined them in further detail and cumulatively in relation to the claimant's particular circumstances, I find the risk of the claimant being arrested, detained, tortured or otherwise seriously harmed in Sri Lanka in the reasonably foreseeable future on suspicion of being involved or affiliated with the LTTE, for reasons of having been employed by an NGO and/or for reasons of his Tamil ethnicity, to be remote. (emphasis added)

12. It follows that the IMR found that the brief detention that WZARV was likely to experience whilst undergoing police checks at the airport did not amount to serious harm.¹⁵

Part V APPLICABLE PROVISIONS

13. The applicable legislative provisions are set out in the Annexure.

Part VI ARGUMENT

14. WZARV's appeal depends entirely on the correctness of the decision of the Federal Court of Australia in *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 (North J). The correctness of that judgment is the subject of the appeal in proceeding M17 of 2015 (the **WZAPN appeal**).

20 15. The Minister refers to his submissions dated 10 March 2015 and to his reply submissions dated 31 March 2015 in the WZAPN appeal in support of the submission that North J erred in holding that any deprivation of liberty necessarily constitutes "serious harm" for the purpose of s 91R(1)(b) of the Act irrespective of the frequency, length or conditions of that detention.

30 16. In paragraphs 56 to 58 of the Minister's submissions in the WZAPN appeal, the Minister refers to the anomalous consequences that would follow from North J's construction of ss 91R(1)(b) and (2). This appeal presents a stark example of those anomalous consequences, because the highest that WZARV's case rises is that he will have his liberty interfered with for a relatively short period of time at the airport on his return to Sri Lanka. There is no finding of any risk of mistreatment during any period of detention at

¹³ Ibid [212], [213].

¹⁴ Ibid [214].

¹⁵ The IMR had set out the relevant statutory provisions that governed her consideration of the Applicant's claims at [6]–[24] including, at [11]: "... the person must fear persecution. Persecution must involve 'serious harm' to the individual: s 91R(1)(b). The expression 'serious harm' includes, for example, a threat to life or liberty ...".

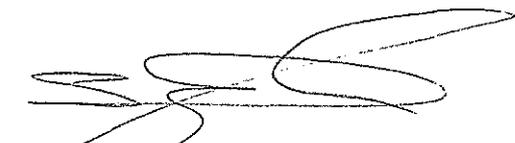
the airport, and no finding that WZARV's liberty is at risk of further interference in the future. In those circumstances, it would be absurd to conclude that WZARV was at risk of "serious harm" simply because the harm that he fears involves detention rather than one of the other forms of harm that must undoubtedly cross a threshold of severity before they are capable of amounting to persecution under the Convention.¹⁶

- 10 17. For reasons that are entirely consistent with those advanced by the Minister in the WZAPN appeal, in *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 a Full Court of the Federal Court (Robertson, Griffiths and Mortimer JJ) has recently held that *WZAPN* is incorrect. It is respectfully submitted that the Full Court of the Federal Court was right to so hold.
18. It follows that the IMR did not make a jurisdictional error in this case in concluding that WZARV's likely treatment at the airport on return to Sri Lanka would not amount to serious harm. While in this case the IMR did not expressly engage in a qualitative assessment of the features of WZARV's likely detention at the airport, it is nevertheless clear from the sections of the IMR's reasons that are quoted above that the IMR concluded that, while WZARV was likely to be detained for a matter of hours at the airport following his return from Australia (as is implicit in the reasoning in [207]), that detention did not constitute "serious harm" (as the IMR found in [214]). That finding was open to the IMR. This appeal should therefore be dismissed.

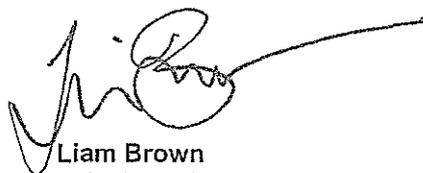
20 **Part IX TIME ESTIMATE**

19. The First Respondent estimates that it will require approximately 1.5 hours for the presentation of its combined oral argument in both this matter and the WZAPN appeal.

DATED: 31 March 2015



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¹⁶ See [22]–[35] of the Minister's submissions dated 10 March 2015 in M17 of 2015: *Minister for Immigration and Border Protection v WZAPN*.

ANNEXURE

Section 91R of the Act (as at 21 September 2012) was in the following form:

Persecution

- 10 (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
 - (b) the persecution involves serious harm to the person; and
 - (c) the persecution involves systematic and discriminatory conduct.
- 20 (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- 30 (3) For the purposes of the application of this Act and the regulations to a particular person:
- (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
- 40 disregard any conduct engaged in by the person in Australia unless:
- (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.