IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S272/2016

BETWEEN:

SZTAL
Appellant

and

Minister for Immigration and Border Protection and Anor
Respondents

No. S273/2016

SZTGM
Appellant

and

Minister for Immigration and Border Protection and Anor
Respondents

FIRST RESPONDENT'S SUBMISSIONS

Part I – Certification

1. These submissions are in a form suitable for publication on the internet.

Part II – Statement of issues

2. The issue raised by these appeals is whether:

   (a) the expression "intentionally inflicted" in the definition of "cruel or inhuman treatment or punishment" (**CITP**) in s 5(1) of the *Migration Act 1958* (Cth) (the **Act**); and

   (b) the expression "intended to cause" in the definition of "degrading treatment or punishment" (**DTP**) in s 5(1) of the Act; (the **Relevant Definitions**)

   require an actor to have an "actual, subjective" intention to inflict pain or suffering, or whether the expressions can be satisfied where an actor would have knowledge that his or her acts or omissions would cause pain or suffering in the ordinary course of events.

3. The appeals should be dismissed because the Full Federal Court correctly held that the expression "intentionally inflicted" requires an actor to have an "actual, subjective" intention to inflict pain or suffering. That is the ordinary meaning of the words. There is no good reason to depart from that ordinary meaning, and thereby

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to equate knowledge that a result will occur in the ordinary course of events with an intention to cause that result.

Part III – Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth)

4. The first respondent (the **Minister**) considers that notices are not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV – Statement of contested material facts

5. The appellants' summary of the material facts is incomplete.

6. The appellants applied for Protection visas on the basis that they had left Sri Lanka owing to a well-founded fear of persecution. Those claims were rejected, and that rejection was not challenged. However, in addition to their claims under the Refugees Convention, the appellants also claimed that, because they left Sri Lanka in a manner that contravened the *Immigrants and Emigrants Act 1945* (**IE Act**), there was a risk that they would be exposed to a short period of detention on remand following their return to Sri Lanka. They claimed that this risk was itself sufficient to entitle them to Protection visas, notwithstanding the rejection of their refugee claims, because of the generally poor conditions in Sri Lankan prisons.

7. The Tribunal accepted that each of the appellants was likely to be charged under the IE Act for having left Sri Lanka unlawfully,[1] and ultimately fined an amount between $40AUD and $811AUD.[2] It was satisfied that, by reason of their unlawful departure, following their return to Sri Lanka the appellants would "be held in remand for a short period, from between one day to several days".[3] However, the Tribunal made no finding that the appellants would be detained in a prison. On the contrary, it referred to country information to the effect that "persons charged with illegal departure are held in police custody at the CID Airport Office for up to 24 hours during the investigation period. They are then produced before the Magistrate's Court and released on bail".[4]

8. The Tribunal did note that "[p]ersons needing to be held for more than 24 hours, because they arrived on a weekend or public holiday, are transferred to the nearby Negombo Prison Remand Unit until the Magistrates Court is in session".[5] However, the Tribunal's findings summarised above as to duration and location of detention

1 Tribunal (SZTAL) at [63], [65], [73]; Tribunal (SZTGM) at [48], [50], [54].
2 Tribunal (SZTAL) at [83]-[84]. Tribunal (SZTGM) at [70].
3 Tribunal (SZTAL) at [74]; Tribunal (SZTGM) at [55].
4 Tribunal (SZTAL) at [64]; Tribunal (SZTGM) at [49].
5 Tribunal (SZTAL) at [64]; Tribunal (SZTGM) at [49].

suggest that, in the ordinary course of events, on return to Sri Lanka the appellants would not be sent to prison at all.

9. Further, even if they were transferred to a prison for a day or two, the Tribunal made no finding to the effect that they would experience "deplorable conditions" at that prison. While it referred in general terms to country information that referred to "concerns" about prison conditions in Sri Lankan prisons,[6] the Tribunal's finding was that, if detained, the appellants "may suffer anxiety and discomfort".[7]

Part V: Statement in relation to applicable provisions

10. The Minister accepts as correct the statutes referred to the appellants' list.

Part VI: Argument

11. The appellants submit that the plurality should have found that the expression "intentionally inflicted" in the definition of CITP will be satisfied if an actor had knowledge that pain and suffering would follow from his or her acts or omissions in the ordinary course of events. That submission should not be accepted.

12. While the precise issues raised by these appeals are technical, the practical result that would follow from acceptance of the appellants' argument creates immediate doubts as to its correctness. If the appellants' argument be correct, then assuming that prison conditions in Sri Lanka are as poor as is claimed, the consequence would be that many people who left Sri Lanka and made refugee claims that have been rejected would nevertheless be entitled to Protection visas, because of the risk that they may be detained for a day or two, in the same conditions that generally prevail in Sri Lankan prisons, as a result of their breach of a valid law of general application. The Court should not readily accept that the Act is properly construed as having that result. Nor, to the extent that it is relevant, should it accept that international law obliges Australia not to return a person to his or her country or origin in the circumstances just described.

13. While the specifics of the argument are different, the appellants' argument is reminiscent of that unanimously rejected by this Court in *Minister for Immigration and Border Protection v WZAPN*[8] (where, in the companion case of *WZARV*, the Court rejected an argument that short term detention on return to Sri Lanka constituted a "threat to liberty" and therefore "serious harm" under s 91R of the Act).

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6 Tribunal (SZTAL) at [70]-[72]; Tribunal (SZTGM) at [61]-[63].
7 Tribunal (SZTAL) at [79]; Tribunal (SZTGM) at [64].
8 (2015) 254 CLR 610 at 628 [46].

14. In summary, the Minister submits that the plurality of the Full Court was correct in finding that the above consequences do not follow, because the expressions "intentionally inflicted" and "intended to cause" that are used in the Relevant Definitions require an actor to have an "actual, subjective intention" to inflict pain or suffering, or to cause extreme humiliation. That is the preferable construction because:

(a) *First*, it reflects the ordinary meaning of the words of the Relevant Definitions. Many cases of high authority recognise that the ordinary meaning of "intention" (when used in the context of an intention to bring about a result) focuses on whether a person *meant* to achieve that result. That is not to be equated with whether a person had knowledge of the consequences of his or her actions in the ordinary course of events. Even if the word "intention" is *capable* of bearing a different and wider meaning (absent an express definition that extends its meaning), there is nothing to suggest that in defining CITP Parliament departed from the ordinary meaning of the word.

(b) *Second*, there is no inconsistency between that interpretation and the purpose of the regime established by ss 36(2)(aa), s 36(2A) to (2C), together with the Relevant Definitions (the **Complementary Protection Regime**).

(c) *Third*, the origins of the phrase "intentionally inflicted", and the international jurisprudence concerning torture and CITP, do not support any different conclusion because:

(i) The Complementary Protection Regime constitutes a code, which contains its own definitions, with the result that it does not assist in applying that regime to ask how the relevant international obligations would apply in the relevant circumstances.[9]

(ii) To the extent that the Relevant Definitions draw on international law, the first step is nevertheless to ascertain what the Australian law is, meaning "*what and how much* of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment *adopts, qualifies or modifies the instrument.*"[10]

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9 *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at 215 [18].

10 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 71 [61] (emphasis added).

(iii) As a matter of international law, the intentional infliction of harm is *not* an element of the concept of CITP (unlike the position with respect to torture), meaning that the Complementary Protection Regime does not align exactly with Australia's international obligations. Further, while the intentional infliction of harm is an element of torture, it is not settled that that element can be satisfied by anything short of a specific intent to cause severe pain or suffering.

Statutory text and structure

15. The task of construction begins and ends with the statutory text, which must of course be read in context.[11] Such context includes the general policy and purpose of the provision under consideration,[12] which must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.[13]

16. The key provision of the Complementary Protection Regime is s 36(2)(aa) of the Act, which specifies one criterion for the grant of a Protection visa. That criterion is met if the Minister is satisfied that there are "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". "Significant harm" is defined in s 5 by reference to s 36(2A) of the Act to include torture, CITP and DTP, each of which is defined in s 5(1).

17. The definitions of torture and CITP direct attention to an act or omission "by which" the perpetrator "intentionally inflicted" pain or suffering on a person.[14] It was not disputed in the Court below that those phrases contained an element akin to specific intent to cause a result.[15] As Brennan J explained in *He Kaw Teh v The Queen*, "special or specific intent is an intent to cause the results to which the intent is expressed to relate".[16]

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11 See, e.g., *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *R v Maloney* (2013) 252 CLR 168 at 291-292 [324].

12 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

13 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26].

14 The appellants accept there is no difference between "intentionally inflicted" and the phrase "intended to cause" that is used in the definition of DTP: see Appellants' submissions fn 21.

15 [2016] FCAFC 69 at [48].

16 (1985) 157 CLR 523 at 569-570 (emphasis added).

The ordinary meaning of "intention"

18. The legal meaning of statutory text usually accords with its ordinary meaning.[17]

19. In *Zaburoni v The Queen* (***Zaburoni***),[18] Kiefel, Bell and Keane JJ referred with approval to prior authority that recognised that "[t]he ordinary and natural meaning of the word 'intends' is to mean, to have in mind." Applying that ordinary meaning, their Honours held that "to engage in conduct knowing that it will probably produce a particular harm is reckless ... [F]oresight of risk of harm is distinct in law from the intention to produce that harm".[19] They later observed that "knowledge or foresight of result, *whether possible, probable or certain*, is not a substitute in law for proof of a specific intent".[20] Thus, foresight that conduct will produce a particular result as a "virtual certainty" is of evidentiary significance, but the trier of fact must nevertheless be satisfied that the accused "meant to produce the particular result".[21] In a similar vein, Gageler J observed that "[t]he intention to be proved was an actual subjective intention to achieve that result as distinct from awareness of the probable consequences of his actions".[22] The widest interpretation of intention was adopted by Nettle J, who was prepared to treat knowledge of an "inevitable or certain consequence" as sufficient to establish intention.[23] That, of course, is a far stricter test than that advanced by the appellants, who submit that "intent" can be established simply by knowledge that a result will occur in the ordinary course of events.[24]

20. The plurality applied the very meaning of "intention" that was adopted in *Zabrouni*, and in other cases of high authority that deny that knowledge of a probable consequence can be equated with intention.[25] In referring to those cases, the plurality did not overlook the fact that those cases were decided in the different context of the potential imposition of punishment under the criminal law.[26] Their Honours recognised, however, that notwithstanding that difference in context, the

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17 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

18 (2016) 256 CLR 482 at [8], quoting *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418, and approving that observation at [10].

19 (2016) 256 CLR 482 at [10].

20 (2016) 256 CLR 482 at [14] (emphasis added).

21 (2016) 256 CLR 482 at [15].

22 (2016) 256 CLR 482 at 502 [55].

23 (2016) 256 CLR 482 at 503-504 [66]-[68].

24 Appellants' submissions at [19], [26], [54].

25 See, e.g. *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 570; *R v Crabbe* (1985) 156 CLR 464 at 468-469; *R v Moloney* [1985] AC 905; *R v McKnoulty* (1995) 77 A Crim R 333 at 345 (NSWCCA), holding that a "serious misdirection" had occurred where the concept of intent was equated with foresight of a probable consequence. These cases are discussed by the plurality at [2016] FCAFC 69 at [50]-[53].

26 [2016] FCAFC 69 at [59].

criminal cases applied statutes that used the word "intention" in a way that "reflected the natural and ordinary meaning" of the word.[27] Thus, the "natural and ordinary meaning of intentional infliction is actual subjective intention by the actor" to bring about the result.[28] The plurality was correct in treating the criminal cases as being of some assistance, because those cases did not turn on considerations peculiar to the criminal law, but instead on the ordinary and natural meaning of the word "intention".

21. Contrary to the appellants' submissions, the relevance of the above cases is not limited to an examination of what the word "intent" is *capable* of meaning. Those cases bear on what Parliament should be understood to have meant when it used the phrase "intentionally inflicts" in the Relevant Definitions. As Kiefel, Bell and Keane JJ said in *Zaburoni,* "foresight of risk of harm is distinct in law from the intention to produce that harm".[29] Parliament should be taken to have understood that distinction.

22. It is, of course, possible for Parliament to define the word "intent" in a way that departs from its natural and ordinary meaning. That has been done in the Commonwealth Criminal Code.[30] But there is no rule of interpretation that a court should not apply the ordinary and natural meaning of a word in one Act because Parliament has defined the same word, in a different Act, in a way that departs from in its ordinary and natural meaning. The plurality were therefore correct to reject the appellants' submission that the Criminal Code is relevant to the interpretation of the words "intentionally inflicts" in the Act.[31]

Structure

23. Structurally, the definitions of CITP and DTP point against any intention that those definitions correspond exactly with the equivalent concepts at international law. Both definitions expressly exclude an act or omission "that is not inconsistent with Article 7 of the Covenant". The effect of those words is that Art 7 of the International Covenant on Civil and Political Rights (**ICCPR**) sets *the outer boundary* of CITP or

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27 [2016] FCAFC 69 at [59], discussing *R v Ping* [2006] 2 Qd R 69 at [29], approved in *Zaburoni* (2016) 256 CLR 482 at [11]-[12].

28 [2016] FCAFC 69 at [59].

29 [2016] HCA 12; (2016) 90 ALJR 492 at [10] (emphasis added)

30 Criminal Code s 5.2(3). The appellants are, however, mistaken in submitting (at [59]) that the definition of "intention" in the Code applies to the criminal offence of torture. The offence of torture created by s 274.2 of the Criminal Code does not specify a fault element for the physical element of the infliction of pain and suffering (which, as the appellants concede, is a physical element involving a result). In the absence of a specified fault element for that physical element, the Code expressly specifies that the relevant fault element is recklessness: Criminal Code s 5.6(2). Accordingly, the Code definition of "intention" in s 5.2(3) does not apply to the offence of torture.

31 [2016] FCAFC 69 at [67].

DTP. That drafting is inappropriate if Parliament's intention was that the definitions exactly correspond to Art 7.

24. The point was of potential significance in this case because, contrary to the appellants' assertion that it is "trite" that poor prison conditions may constitute a breach of Art 7,[32] the Full Federal Court had doubts on that front. There is in fact considerable divergence in the international decisions concerning the relationship between Art 10 of the ICCPR (which specifically concerns prison conditions) and Art 7, and the Full Court requested supplementary submissions on this topic. The Minister, having summarised the competing lines of authority in the requested supplementary submissions,[33] declined to submit that poor prison conditions could not breach of Art 7, and in light of that position the Full Court did not decide the point.[34] Accordingly, this Court need not decide whether the outer boundary set by reference to Art 7 is reached in this case. But the existence of that outer boundary tends against the proposition that, within that boundary, the definition of CITP was intended to correspond precisely with the meaning of Art 7.

The purpose of the Complementary Protection Regime

25. As a general proposition, the construction that best achieves a statute's purpose is to be preferred over other interpretations.[35] Often, however, there is a question as to the *extent* to which legislation seeks to pursue a particular purpose. In such cases, it is an error to make an *a priori* assumption[36] that the identified purpose is pursued to the greatest possible extent.[37] "Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling."[38] Accordingly, where that statutory language limits the reach of particular legislation, effect must be given to that language.

26. The appellants submit that Relevant Definitions should be construed consistently with two purported purposes of the Complementary Protection Regime: first, a purpose to "align" Australia's Protection visa processes with Australia's international obligations of non-refoulement;[39] secondly, that the purpose of the Complementary

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32 See the appellants' submissions at [53].
33 See [2016] FCAFC 69 at [31]-[34].
34 See [2016] FCAFC 69 at [66].
35 Section 15AA of the *Acts Interpretation Act 1901* (Cth).
36 See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26].
37 *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632 [40], citing Gleeson CJ's comment in *Carr v Western* Australia (2007) 232 CLR 138 at 143 [6].
38 *Ibid.*
39 Appellants' submissions at [17], [18], [46].

Protection Regime is "protective in nature".[40] Neither of these purposes broaden the Relevant Definitions in the way that the appellants contend.

The first purpose: "alignment" with international obligations

27. The appellants' submission on the alignment of domestic law and international obligations rests almost entirely upon observations made by the Minister in the Second Reading speech that accompanied the Amendment Act.[41]

28. While the Second Reading speech does refer to "alignment" of the Protection visa process with Australia's international obligations, that was a general statement about the Complementary Protection Regime as a whole. Both the Second Reading Speech and the Explanatory Memorandum say little about the Relevant Definitions,[42] and nothing about the intent requirements.

29. In those circumstances, the Minister's general statement about "aligning" the Protection visa regime with Australia's non-refoulement obligations are of no real assistance in resolving the question of interpretation that arises in this case. In particular, those general statements cannot fairly be read as conveying that the Complementary Protection Regime was intended to be fully congruent with Australia's non-refoulement obligations, because plainly it was not. That is most obvious from s 36 (2C) of the Act, which expressly exclude from the Complementary Protection Regime some cases where Australia may have non-refoulement obligations. But once that is accepted, it follows that the Minister's general statements about "alignment" with international obligations were not pitched at a level that provides an accurate reflection of the operation of the regime in all cases. That illustrates the force of this Court's repeated reminders that "extrinsic material cannot be relied upon to displace the clear meaning of the text"[43] and that "reading the Explanatory Memorandum and the Second Reading Speech is much less helpful than reading the legislation itself".[44]

30. The appellants submit that the Second Reading Speech demonstrates that, in enacting definitions of CITP and DTP, Parliament was using its "best effort to define these concepts, which are not defined in international law" in a way that accords

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40 Appellants' submissions at [17], [24] and [43].

41 Second Reading, Migration Amendment (Complementary Protection) Bill 2011, *Hansard*, 24 February 2011, p 1356 (**Second Reading**).

42 In relation to the Relevant Definitions, the Minister said only that they would not "expand the relevant concepts in a way that goes beyond current international interpretations": Second Reading, Migration Amendment (Complementary Protection) Bill 2011, *Hansard*, 24 February 2011, p 1357. The Minister did not say that the regime implemented those concepts to their full extent.

43 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47].

44 *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 277 [74].

with their international meaning.[45] They contend that the plurality erred because its approach created a disjunction between the Complementary Protection Regime and Australia's non-refoulement obligations.[46]

31. Two points may be made in response. *First*, as Lander, Jessup and Gordon JJ correctly observed in *Minister for Immigration v MZYYL*, "the Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions".[47] Their Honours pointed out that the "significant harm" test used in s 36(2)(aa) differs from that used by the Human Rights Committee in making decisions applying the ICCPR, and they pointed out that this had the consequence that it is "neither necessary nor useful to ask how the [Convention Against Torture] or any of the international law treaties would apply to the circumstances of this case", because the case is "governed by the applicable provisions of the Act".[48] While the appellants submitted in the Court below that *MZYYL* was plainly wrong, the plurality of the Full Court correctly rejected that submission.[49]

32. *Second*, the existence of disjunction between the full extent of Australia's non-refoulement obligations and the ambit of the Complementary Protection Regime is not surprising, and does not reveal error. Such a disjunction equally exists between the Protection visa regime and the Refugees Convention itself, for whenever a person is refused a Protection visa as a result of any criterion *other than* the criterion found in s 36(2), the effect is that a Protection visa is denied to a person with respect to whom Australia may have non-refoulement obligations.[50] Further, and of greater practical significance, s 46A(1) of the Act operates so that unauthorised maritime arrivals cannot access the Protection visa regime at all in the absence of a favourable exercise of Ministerial discretion under s 46A(2). Those two examples illustrate that in many situations the Act leaves Australia's compliance with its non-refoulement obligations dependent upon an exercise of ministerial discretion, rather than upon the Protection visa regime.

33. The Act has long operated in that way. Indeed, the exercise of discretionary powers by the Minister (informed by international treaty obligation assessments that are directed to the possible exercise of personal powers such as those conferred by

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45 See appellants' submissions at [52].
46 See appellants' submissions at [18], [45].
47 (2012) 207 FCR 211 at 215 [18].
48 (2012) 207 FCR 211 at 215 [20].
49 [2016] FCAFC 69 at [64].
50 See, e.g., *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1 at 38 [43].

ss 195A or 417 of the Act) was the mechanism by which Australia complied with its non-refoulement obligations under the Convention Against Torture (**CAT**)[51] and ICCPR for decades prior to the enactment of the Complementary Protection Regime.[52] That remains the mechanism by which Australia can comply with those obligations in those circumstances where the Complementary Protection Regime does not apply (as was expressly recognised in the Second Reading speech).[53]

The second purpose: the protective nature of the Complementary Protection Regime

34. The appellants contend that the Relevant Definitions should be construed broadly because they have a protective purpose. However, no support is called in aid of this proposition from the legislation, the extrinsic materials or the relevant authorities. Instead, the appellants seek to conflate the protective nature of the broader Complementary Protection Regime, in those cases where it applies, with the purpose of the definition of "significant harm".

35. Undoubtedly, a purpose of the Complementary Protection Regime is to provide one mechanism by which Australia can protect persons who are at risk of harm if returned to their countries of origin. The persons who are to be protected in that way are those who meet the criterion for the grant of a Protection visa set out in s 36(2)(aa). The protection they receive is indirect, because the grant of a visa has the consequence that such persons are no longer exposed to removal from Australia as unlawful non-citizens. Importantly, however, the Complementary Protection Regime does not confer protection on persons who do not meet the criterion in s 36(2)(aa). The purpose of the Complementary Protection Regime is not universally or prospectively protective. The Relevant Definitions are a component of the threshold criteria by which Parliament decided the class that should be eligible for protection through the Protection visa mechanism, and those (most obviously being those who fall within s 36(2C)) whose cases must be addressed in other ways. There is no warrant for treating the protective operation of the regime in those cases to which it applies as *extending* the ambit of the regime. Were that the proper approach, there should be many cases adopting that same approach to the interpretation of the key legal concepts in refugee law, but that is not the approach

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51 The full title is *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. It entered into force for Australia on 7 September 1989.

52 See McAdam, J, "Australian Complementary Protection: A Step-By-Step Approach" (2011) 33 *Sydney Law Review* 687 at 689.

53 Second Reading, p 1358.

this Court has taken in resolving questions as to eligibility for a Protection visa in other contexts.[54]

International legal materials

The origins of the expression "intentionally inflicted"

36. Torture, being "the deliberate infliction of severe pain or suffering on a powerless victim, usually a detainee, for a specific purpose, such as the extraction of a confession or information,"[55] is one of the gravest human rights violations. It is therefore unsurprising that, when that concept was first defined in an international treaty,[56] that definition included a strict mental element, being the intentional infliction of harm. Thus, Art 1(1) of the CAT defines torture as:

> ... any act by which severe pain or suffering, whether physical or mental, is *intentionally inflicted* on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

37. Plainly the words "intentionally inflicted" in the definition of "torture" in s 5(1) of the Act have their origin in the Art 1 of the CAT. The appellants accept this.[57] So much is confirmed by the Explanatory Memorandum (**Explanatory Memorandum**) to the Bill that became the *Migration Amendment (Complementary Protection) Act 2011* (Cth), which introduced the Complementary Protection Regime.[58] While the intentionality requirement in the definition of torture undoubtedly derives from the CAT, that is of limited relevance to the issue in this case, because the appellants do not claim to be at risk of torture. The appellants' claim is that there is a real risk that they will experience CITP if returned to Sri Lanka. Yet, despite their claim to be at risk of CITP, their submissions substantially ignore CITP when addressing the meaning of the words "intentionally inflicted", focusing instead on the international jurisprudence concerning torture. That focus is apt to obscure the critical issue because, whatever correspondence may exist between the definition of torture in s 5 of the Act and Australia's non-refoulement obligations concerning torture under the CAT, for the reasons that follow there is no such correspondence in relation to CITP.

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54 See, e.g., *Minister for Immigration v Border Protection v WZAPN* (2015) 254 CLR 610 at [68]-[71].

55 See the preface to Nowak, M and McArthur, E, *The United Nations Convention Against Torture: A Commentary* (2008) at (vi).

56 Nowak, M and McArthur, E, *The United Nations Convention Against Torture: A Commentary* (2008) at 28.

57 See appellants' submissions at [19(b)].

58 Explanatory Memorandum at [52].

The definition of CITP

38. The Explanatory Memorandum records that CITP is "exhaustively defined"[59] in s 5(1) of the Act. That definition is said to "derive"[60] from the ICCPR. However, while Art 7 of the ICCPR creates international obligations in relation to CITP, it does not define that concept (whether by reference to intention, or otherwise). In those circumstances, it is plain – in marked contrast to the position with torture – that in defining CITP Parliament did *not* enact words drawn from a pre-existing definition in a treaty. Nor, importantly, did it frame that concept by reference only to the international jurisprudence, because it defined CITP in a way that included elements that have no parallel in the international jurisprudence concerning CITP.

39. Consistently with that submission, the words "intentionally inflicted" in the definition of CITP were drawn not from jurisprudence concerning CITP, but from the definition of *torture* in Art 1 of the CAT. The appellants now concede that to be the case.[61] It appears that this mental element was included so as to ensure consistency between the definitions of CITP and torture in s 5 of the Act.[62] However, the important point for present purposes is that that mental element was *not* included in order to reflect or codify international jurisprudence interpreting Art 7. The UN Human Rights Committee has not indicated that there is any intention requirement with respect to CITP under Art 7. The same is true of the jurisprudence of the European Court of Human Rights on the equivalent, and similarly worded, prohibition in Art 3 of the European Convention on Human Rights (**ECHR**).[63] Under both treaties, a State can contravene its obligations with respect to CITP *whether or not* the State or its agents had any intention to inflict CITP.[64]

40. Of particular relevance to the present appeals, in *Kalashnikov v Russia*[65] the European Court of Human Rights considered a complaint that conditions of detention in a Russian jail contravened Art 3. The Court recorded that:[66]

> The Government argued that the applicant's conditions of detention could not be regarded as torture or inhuman or degrading treatment. The conditions did not

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59 See paragraphs [15] (CITP), [21] (DTP) and [48] (torture) of the Explanatory Memorandum.

60 See paragraphs [20] (CITP), [24] (DTP) and [51] (torture) of the Explanatory Memorandum.

61 See [19(b)] of the appellants' submissions.

62 Explanatory Memorandum at [16].

63 Art 3 of the European Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

64 *Price v United Kingdom* (2002) 34 EHRR 53; [2001] ECHR 458 at [24]. See also *Peers v Greece* (2001) 33 EHRR 51; [2001] ECHR 296 at [74]-[75]; *MSS v Belgium and Greece* (2011) 53 EHRR 2 at [220]; *C v Australia* (900/1999), ICCPR, A/58/40 vol II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at [8.5]; *Quinteros v Uruguay* (107/81), UN Doc CCPR/C/OP/2 (1990).

65 (2002) 36 EHRR 34.

66 (2002) 36 EHRR 34 at [93].

> differ from, or at least were no worse than those of most detainees in Russia. Overcrowding was a problem in pre-trial detention facilities in general. The authorities had had no intention of causing physical suffering to the applicant or of harming his health.

41. The Court further recorded that the Russian government "acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia".[67] The Court accepted that, in light of that evidence, "in the present case there is no indication that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3 (see *Peers v. Greece* cited above)."[68] The Court went on to find that degrading treatment was established.

42. United Kingdom courts have correctly accepted *Kalashnikov* as authority for the proposition that, in applying Art 3 of the ECHR, "it is not necessary that the authorities should have any intention to inflict suffering on the subject".[69]

43. The submission that, as a matter of international law, CITP does not include an element requiring the intentional infliction of harm, is confirmed by the academic commentary. For example:

    43.1 Professor McAdam has noted that the "intent" requirement in the definition of CITP in s 5 of the Act "imposes a higher test than international law and comparative jurisprudence in the European Court of Human Rights, EU Member States and Canada".[70]

    43.2 Joseph and Castan have pointed out that, while the Human Rights Committee has rarely undertaken a close examination of the intention requirement in relation to Art 7 of the ICCPR, there are cases where a contravention of Art 7 has been found where the perpetrator did not have any particular intention.[71]

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67 (2002) 36 EHRR 34 at [94].
68 (2002) 36 EHRR 34 at [101] (emphasis added).
69 See, e.g., *R(S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) at [199]; *Grant & Gleaves v Ministry of Justice* [2011] EWHC 3379 at [40].
70 McAdam, J, "Australian Complementary Protection: A Step-By-Step Approach" (2011) 33 *Sydney Law Review* 687 at 700.
71 Joseph, S and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, Third Edition (2013) at 219 [9.07].

43.3 Nowak has noted that an act that causes a certain minimum level of pain or suffering cannot be considered to be torture in the absence of intention, but that such an act *can* nevertheless constitute cruel or inhuman treatment for the purposes of Art 7 of the ICCPR.[72]

44. The appellants do not grapple with the authorities and commentaries summarised above, or with the content of Australia's non-refoulement obligations with respect to CITP (as opposed to torture) under international law more generally. In particular they do not refer to any material that would support the proposition that Australia's non-refoulement obligations with respect to *CITP* (as opposed to torture) are limited to cases where CITP is intentionally inflicted (as opposed to their discussion of cases concerning torture, which are addressed below).

45. In those circumstances, the appellants' submission that the interpretation that they advance should be preferred to the ordinary meaning of the word "intent" in order to "align" the Complementary Protection Regime with international law must be rejected. Instead, as the plurality correctly recognised, the enactment of the intent element in the definition of CITP supports the conclusion that Parliament must have been taken to have decided to utilise the mechanism of a Protection visa to give effect to only a subset of Australia's obligations under the ICCPR.[73] That is the inevitable consequence of Parliament's decision to define CITP and DTP in terms that add an "intent" requirement that has no equivalent in the international jurisprudence concerning those same concepts.

46. As Parliament has defined CITP in the manner addressed above, it would be wrong to interpret the definition of CITP in an attempt to make it co-extensive with the equivalent international concept. That is not to deny the presumption that domestic legislation should be construed in a manner which accords with Australia's international obligations if such a construction is open.[74] But in applying that presumption, the correct approach was explained in *NBGM v Minister for Immigration and Multicultural Affairs*, where this Court disapproved statements in the Federal Court that the Act should be read against the framework provided by the content and intended operation of the Refugees Convention. As Callinan, Heydon and Crennan JJ, with whom Gummow J agreed, observed:[75]

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72 Nowak, M, *UN Covenant on Civil and Political Rights ICCPR Commentary*, Second Edition (2005) at 161.

73 [2016] FCAFC 69 at [62].

74 See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34]; *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 630 [53].

75 (2006) 231 CLR 52 at 73 [69].

> The [Refugees] Convention does not provide any of the framework for the operation of the Act. The contrary is the case. That does not mean that the Convention in and to the extent of its application to Australia should be narrowly construed. It simply means that Australian law is determinative, and it is that which should be clearly ascertained before attention is turned to the Convention.

47. Their Honours earlier observed that: [76]

> It is appropriate to point out at this stage that to approach the matter in that way was to invert the steps which an Australian court should take in situations in which international instruments have been referred to in, or adopted wholly or in part by, enactments. The first step is to ascertain, with precision, what the Australian law is, that is to say *what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument.* The subsequent step is the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires. The first step is not, contrary to his Honour's express holding, to derive an understanding of the proper interpretation and operation of the Convention.

48. Those statements have particular resonance in the present case, given that attention to the text of Australian domestic law demonstrates that the Complementary Protection Regime has conferred an entitlement to a Protection visa on some, but not all, of the persons with respect to whom Australia has non-refoulement obligations, leaving compliance with the balance of Australia's obligations to be achieved through other means. That being the case, *NBGM* confirms that it would be an error to attempt to interpret the domestic law so as to prevent any disjunction between the domestic law and those international obligations.

The international decisions concerning torture

49. Rather than grappling with materials concerning CITP, the appellants focus on the definition in Art 1 of the CAT, and the requirement that torture cannot be proved unless severe pain or suffering has been "intentionally inflicted". They assert that the requisite intent for torture is established by proof that a person intends to perform an act knowing that doing so will cause severe pain or suffering in the ordinary course.[77] They then contend that, if that is the position for torture, then the same must be true for CITP, given that s 5 uses the same words in defining the intent requirement for torture and CITP.

50. The second step in that reasoning is not controversial. But the first step is, for it is not at all clear that the appellants' submissions about the intent requirement for torture are well-founded. None of the international decisions cited by the appellants

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[76] (2006) 231 CLR 52 at 71-72 [61] per Callinan, Heydon and Crennan JJ (Gummow J agreeing) (emphasis added). That approach was applied by Gordon J in *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [146].

[77] Appellants' submissions at [39].

contain any detailed examination of the intent requirement for torture.[78] They contain little analysis of the differences between intention to do an act, intention to cause a result, knowledge that a result is likely to occur, motive or desire. Further, the discussion of the intent requirement is frequently intermingled with the analysis of whether pain or suffering was inflicted for a prohibited purpose (that being another element of torture that does not exist in relation to CITP).[79] For those reasons, the international decisions are of, at most, limited assistance in analysing the meaning of the words "intentionally inflicts" where they appear in s 5 of the Act.[80]

51. The high point for the appellants is a single sentence in the decision of the Appeals Chambers of the ICTY in *Kunarac*.[81] In that case, the appellants challenged their conviction for torture, where the act that had caused the severe pain or suffering was rape. The Appeals Chamber recognised that "some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act." (at [150]). It went on to reject the appellants' argument that their intention in committing rape "was of a sexual nature", which they claimed was inconsistent with intent to commit torture. In rejecting that argument, the Chamber observed that it "wishes to assert the important distinction between 'intent' and 'motivation'", and that "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture" (at [153]). It was in that context

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78 This is particularly true of the non-binding views of the Committee Against Torture: see, e.g., *Salem v Tunisia*, Merits, Communication No 269/2005, UN Doc CAT/C/39/D/269/2005 (2007) at [16.4], where the United Nations Committee against Torture referred to evidence of "the physical injuries inflicted on the complainant, which can be characterized as severe pain and suffering inflicted deliberately by officials with a view to punishing him for acts he had allegedly committed and to intimidating him." This was accepted as constituting torture within Art 1 of the CAT. To similar effect see *Saadia Ali v. Tunisia*, Communication No. 291/2006, U.N. Doc. CCAT/C/41/D/291/2006 (2008) at [15.4]; *Niyonzima v Burundi*, Communication No. 514/2012, U.N. doc C/53/D/514/2012 (2014) at [3.2].

79 See, e.g., *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A (12 June 2002) (***Kunarac***) at [154]-[155].

80 For example, in the *Prosecutor v Anto Furund`ija (Appeal Judgment)* IT-95-17/1-A 21 July 2000, which was applied by the Appeals Chamber in *Kunarac* at [142]-[143], the Appeals Chamber of the ICTY (at [111]) identified the following elements of the crime of torture: "(i) ... the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition; (ii) this act or omission must be intentional ...". That formulation identifies the requisite intention as relating to the *act or omission* that causes severe pain or suffering, rather than upon whether the *result* (i.e. the infliction of pain or suffering) was intended. See *Kunurac* at [180], where the Appeals Chamber said that it "has rejected the argument that a species of specific intent is required"; Badar, M "Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (2006) 6 *International Criminal Law Review* 313 at 321; cf Hathaway, Nowlan and Spiegel, "Tortured Reasoning: The Intent to Torture Under International and Domestic Law" (2012) 52 *Virginia Journal of International Law* 791 at 801, stating: "[I]t is evident that torture under the Convention Against Torture is a specific intent crime — for both the act and state of mind are essential elements of the crime. The very definition of torture in the Convention Against Torture supplies the additional mens rea requirement: The accused must not only intend to inflict pain and suffering, but he must do so for a purpose prohibited by the Convention".

81 *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A (12 June 2002) (***Kunarac***). This sentence was applied by the trial chamber (which was bound by it) in *Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu* (Trial Chamber II), IT-03-66-T (30 November 2005) at [238].

that the Appeals Chamber then stated that "it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering" (at [153]).

52. In context, that observation provides little support to the appellants. Not only was the analysis extremely brief, but its focus was on the distinction between motive and intention (being the same distinction emphasised in *Zaburoni* at [17]). More importantly, the case did not involve any question of knowledge of a probable result in the ordinary course of events, because the Appeals Chamber had already emphasised that the infliction of severe pain and suffering is inherent in the act of rape. There is therefore no distinction between intention to rape and intention to cause severe pain and suffering. They are one and the same. For the above reasons, the ICTY's approach to intent, developed in the specific context of the consideration of rape and sexual violence as a form of torture, is of no real assistance in identifying the more widely accepted mental element for torture.

53. In addition to *Kunarac*, the appellants rely on Art 30 of the Rome Statute of the International Criminal Court.[82] That reliance is misplaced because that article contains an express definition that expands the ordinary meaning of intent. The expanded definition is necessarily irrelevant to the meaning of the words "intentionally inflicts" in Art 1 of the CAT, which the appellants concede was the source for the definition of 'torture' in s 5 of the Act, given that the CAT was drafted at least 15 years before the Rome Statute. Further, the Rome Statute was developed in the context of establishing individual criminal responsibility for torture (as a violation of the laws and customs of war and as a crime against humanity), in contrast to the CAT, which deals with the right to be free from torture as a human right to be guaranteed by the State.

54. Finally, Art 30 of the Rome Statute is expressly confined to crimes "within the jurisdiction of the Court" (including, relevantly, torture as a war crime or crime against humanity). Therefore, it is not applicable to the present case, which does not involve any allegations of potential war crimes or crimes against humanity.

55. Contrary to the appellants' submission, there is ample support for the view that the mental element of torture is satisfied only where an actor has an actual, subjective, intention to cause harm. In particular, Professor Manfred Nowak, a former United

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[82] Appellants' submissions at [42].

Nations Special Rapporteur on Torture, expressed the positon as follows in the leading commentary on the CAT:[83]

> Article 1 requires that severe pain or suffering must intentionally be inflicted on the victim in order to qualify as torture. Purely negligent conduct, therefore, can never be considered as torture. When a detainee is, for example, forgotten by the prison guards and slowly starves to death, such conduct certainly produces severe pain and suffering, but it lacks intention and purpose and, therefore, can 'only' be qualified as cruel and/or inhuman treatment. During the drafting, the *United States* wished to make this requirement stronger by referring to 'deliberately and maliciously' inflicting extremely severe pain or suffering. Since the US proposal was not adopted, the US Government ratified the Convention with the explicit 'understanding' that, 'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering'. This interpretation does, however, not seem to go beyond the requirement of intention as spelled out in the text of Article 1. (emphasis added)

56. To similar effect, Professor Cassese, a former President of the ICTY,[84] has recognised that:[85]

> [t]he requirements for *mens rea* may be deduced from the very nature of torture, as set out in the definition just referred to. It should be noted that article 1 of the [CAT] which has to a large extent become part of customary law, provides that the infliction of pain or suffering must be 'intentional'. It appears, therefore, that criminal *intent* (*dolus*) is always required for torture to be an international crime. Other less stringent subjective criteria (recklessness, culpable negligence) are not sufficient (except where superior responsibility is at stake) ...

Conclusion

57. The plurality in the Full Federal Court was correct in concluding that the expressions "intentionally inflicted" in the definition of CITP requires an actor to have an "actual, subjective intention" to inflict pain or suffering. That conclusion reflects not only the natural and ordinary meaning of the words "intentionally inflicted", but is consistent with the international understanding of Art 1 of the CAT (from which the expression is drawn). There is no warrant to depart from the ordinary meaning of the words that Parliament has used. In particular, the appellants' proposed construction does *not* align the definition of CITP in s 5 of the Act with international law, because Australia's non-refoulement obligations in relation to CITP under international law are not limited by any requirement that the relevant harm be intentionally inflicted. Accordingly, the presumption that domestic legislation should, where possible, be

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83 See Nowak, M and McArthur, E, *The United Nations Convention Against Torture: A Commentary* (2008) at p 74 [106]. See also at p 77, stating "[t]he intention must be directed at the conduct of inflicting severe pain or suffering as well as at the purpose to be achieved by such conduct"; Nowak, M "What Practices Constitute Torture: US and UN Standards" (2006) 28 *Human Rights Quarterly* 809 at 830; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, ¶ 30, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010) (prepared by M Nowak) at 13-14 [34].

84 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

85 Cassese, A, *International Criminal Law*, Second Edition (2008) at 152 (emphasis added).

construed in a manner which accords with Australia's international obligations does not assist the appellants. In any event, it is the text of the Act which governs.

58. The Complementary Protection Regime is a code. It confers an entitlement to a Protection visa only on those persons who fall within the Relevant Definitions. Those definitions should be applied in their own terms. It should not be held to be necessary for domestic decision-makers to embark upon time consuming and difficult attempts to ascertain the international legal position before decisions can be made under the Complementary Protection Regime.

59. Any protective purpose of the Complementary Protection Regime can apply, at most, to the persons who fall within those definitions, with the result that such a protective purpose can provide no warrant for expanding the class of persons who benefit from the protection. Any non-citizens with respect to whom Australia has non-refoulement obligations who do not fall within the terms of the Relevant Definitions will continue to be dealt with in the same way as occurred for decades prior to the enactment of the Complementary Protection Regime. The appellants do not suggest otherwise. For that reason, there is no basis to apprehend that Australia will breach its international obligations if, as it should be, the appeal is dismissed.

Part VII: Statement of the Minister's argument on the notice of contention or notice of cross-appeal.

60. Not applicable.

Part VIII: Oral argument

61. The Minister estimates that he will require two hours for presentation of oral argument.

Dated: 25 January 2017

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