HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

Matter No M17/2015

MINISTER FOR IMMIGRATION AND BORDER PROTECTION — APPELLANT

AND

WZAPN & ANOR — RESPONDENTS

Matter No P10/2015

WZARV — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

Minister for Immigration and Border Protection v WZAPN
WZARV v Minister for Immigration and Border Protection
[2015] HCA 22
17 June 2015
M17/2015 & P10/2015

ORDER

Matter No M17/2015

1. *Appeal allowed.*

2. *Set aside the declaration of the Federal Court of Australia made on 3 September 2014.*

3. Set aside orders 5 and 6 of the orders of the Federal Court of Australia made on 3 September 2014 and, in their place, order that:

(a) order 2 of the orders of the Federal Magistrates Court made on 31 January 2013 be set aside; and

(b) the appeal be otherwise dismissed.

4. The appellant is to pay the first respondent's costs of the appeal to this Court.

Matter No P10/2015

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC with L T Brown for the appellant in M17/2015 and the first respondent in P10/2015 (instructed by Australian Government Solicitor)

S E J Prince with P W Bodisco for the appellant in P10/2015 (instructed by Rasan T Selliah & Associates)

R M Niall QC with A F Solomon-Bridge for the first respondent in M17/2015 (instructed by Maddocks)

Submitting appearances for the second respondent in both matters

CATCHWORDS

Minister for Immigration and Border Protection v WZAPN
WZARV v Minister for Immigration and Border Protection

Migration – Refugee status – Section 91R(1)(b) of *Migration Act* 1958 (Cth) provides persecution must involve "serious harm to the person" – Section 91R(2)(a) lists "threat to the person's life or liberty" as instance of serious harm – Where person faces period or periods of temporary detention – Whether that constitutes "threat to liberty" amounting to serious harm, without qualification as to severity of threat.

Migration – Refugee status – Section 91R(1)(a) of *Migration Act* 1958 (Cth) requires Refugees Convention reason to be "essential and significant reason" for persecution – Where Federal Court held there was failure to accord procedural fairness to claimant – Whether independent merits reviewer failed to draw claimant's attention to relevant issue or information – Whether no fair opportunity to address argument that could materially affect assessment.

Words and phrases – "persecution", "serious harm", "threat to life or liberty".

Migration Act 1958 (Cth), ss 91R(1)(a), 91R(1)(b), 91R(2)(a).
Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967), Art 1A(2).

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. In each of these two appeals from single Justices of the Federal Court of Australia, which were heard together, the claimant for a protection visa contends that he is a refugee from persecution in the country of his nationality or former habitual residence. Each will be referred to as a "claimant" in these reasons.

2 At issue in each appeal is whether, for the purposes of s 91R of the *Migration Act* 1958 (Cth) ("the Act"), the likelihood of temporary detention of a person for a reason mentioned in the Refugees Convention[1] is, of itself and without more, a threat to liberty within the meaning of s 91R(2)(a) of the Act. Each claimant argued that the likelihood of any detention is such a threat, and therefore an instance of serious harm for the purposes of s 91R(1)(b) of the Act, irrespective of the frequency, length or conditions of that detention and its consequences for the detainee.

3 In the matter involving the claimant WZAPN, the Federal Court of Australia (North J) upheld[2] this argument on appeal from the Federal Magistrates Court. The argument was not advanced by the claimant WZARV in the Federal Circuit Court[3] nor on appeal to the Federal Court[4], but special leave was granted to WZARV in order to afford him the opportunity to rely on the view taken by North J, should that view be upheld in this Court.

4 In *SZTEQ v Minister for Immigration and Border Protection*[5], the Full Court of the Federal Court of Australia (Robertson, Griffiths and Mortimer JJ) rejected the argument which had been upheld by North J in *WZAPN*. The Full Court held[6] that "s 91R(2)(a) should not be construed as meaning that any deprivation of liberty constitutes serious harm for the purposes of s 91R(1)(b)

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1 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

2 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [44]-[45].

3 *WZARV v Minister for Immigration* [2013] FCCA 1556.

4 *WZARV v Minister for Immigration and Border Protection* (2014) 144 ALD 82.

5 [2015] FCAFC 39.

6 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [154].

and Art 1A(2)" of the Convention. The Full Court was of the view[7] that "'liberty' is a nuanced concept which takes its meaning from the context in which it appears, namely the requirement that the persecution involve serious harm".

5 These appeals are not the occasion for a comprehensive consideration of what is encompassed by the phrase "a threat to liberty" in s 91R(2)(a) of the Act. The critical question is whether the likelihood of future episodes of temporary detention constitutes a threat to liberty within s 91R(2)(a) of the Act, irrespective of the circumstances and consequences of that detention for the person seeking refugee status. The text of s 91R of the Act, understood in its context, is determinative[8] of this question. The decision of the Full Court in *SZTEQ* was correct, and North J's construction of s 91R(2)(a) in *WZAPN* cannot be sustained.

6 To explain why that is so, it is convenient to begin by setting out separately the factual and procedural background to each matter, and then proceed to a consideration of the terms of s 91R and a discussion of the arguments agitated by the parties.

7 These appeals arise out of applications in the Federal Magistrates Court and the Federal Circuit Court (as it became) for judicial review of recommendations of Independent Merits Reviewers who were part of a process established with respect to offshore entry persons to inform the exercise of the ministerial discretion under s 46A of the Act to determine whether or not an offshore entry person claiming to be a refugee may be permitted to apply for a protection visa. The nature of the process, its connection to the exercise of the ministerial statutory powers, and the way in which federal judicial review is engaged were explained in *Plaintiff M61/2010E v The Commonwealth*[9].

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7 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [59].

8 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14 [33]; [2006] HCA 53; *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1 at 17 [48]; [2006] HCA 60; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

9 (2010) 243 CLR 319; [2010] HCA 41.

Background – *Minister for Immigration and Border Protection v WZAPN*

8 The claimant in this matter is a stateless Faili Kurd who was born in Iran, and for whom Iran is his former habitual residence. He is between 26 and 30 years of age. He arrived in Australia on 21 July 2010 as an "offshore entry person", as that expression was then defined in s 5(1) of the Act. He applied for a refugee status assessment ("RSA") and, on 27 September 2010, an RSA officer concluded that he did not qualify for refugee status.

The Independent Merits Reviewer

9 The claimant sought review of that assessment by an Independent Merits Reviewer ("IMR"). Before the IMR, the claimant's case centred on his fear of harm arising from persistent detention and interrogation at the hands of the Basij, a paramilitary force of vigilantes whose activities are tolerated by the government of Iran. One period of detention to which he had been subjected lasted for 48 hours; otherwise, the periods did not exceed 12 hours. The claimant did not claim to have been physically harmed while detained, although he suffered extreme verbal abuse. It was claimed that this treatment was due to his ethnicity and his membership of a particular social group. The detail of the claimant's treatment was summarised by the IMR:

> "The Basij were based in a mosque and had places for interrogation within the village, where he had been taken as much as 30 to 40 times for periods in excess of 2 hours; once for 48 hours and often for 12 hours; he was released after bribes were paid by Iranian citizen friends. He might be detained daily, weekly or monthly.
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> Whilst he has never been physically assaulted, he has been questioned interminably about his lack of identity and the fate of his parents; he has been shouted at, sworn at and called a 'bitch', which he finds particularly offensive. He was given no food or water. He was taken by car and made to walk back. This could be by either the police or the Basiji."

10 On 10 August 2011, the IMR recommended that the claimant not be recognised as a person to whom Australia owes protection obligations under the Convention. The IMR did not accept that the claimant faced serious harm should he return to Iran. The IMR found that:

> "[T]here is a real chance that the claimant will be questioned periodically, and probably detained for short periods when he fails to produce identification, in the reasonably foreseeable future should he return to Iran, but having regard to the guidance provided by s 91R(2)(a), (b) and/or

(c), I do not accept that the frequency or length of detention, or the treatment he will receive whilst in detention will involve serious harm within the meaning of the Act."

11 Having so found, the IMR went on to conclude that, even if the risk of future detention did involve a real chance of the claimant suffering "serious harm", that harm would not be "for the essential and significant reason of a convention ground" as required by s 91R(1)(a). This conclusion was set aside[10] by North J in favour of the claimant on the basis that it was attended by a failure to accord the claimant procedural fairness. It is convenient to refer in more detail to this aspect of the IMR's decision in the course of the discussion of that issue later in these reasons.

The Federal Magistrates Court

12 The claimant applied, under s 476 of the Act, for an injunction against the Minister and his officers to restrain them from acting upon the recommendation of the IMR, arguing, among other things, that the IMR had misapplied s 91R(2)(a) of the Act. The claimant argued that no additional requirements or considerations as to the quality of the detention should have been added to the assessment of whether a person's liberty was threatened. Lucev FM held[11] that the IMR's construction of s 91R(2)(a) of the Act was correct, and that the recommendations were not affected by jurisdictional error.

13 The claimant also argued that the correct characterisation of the group to which he belongs is "undocumented Faili Kurds living in Iran". Lucev FM held[12] that it was immaterial whether the IMR erred in recommending that the claimant was not a member of a particular social group for the purposes of the Convention because even if "undocumented Faili Kurds living in Iran" were a particular social group for the purposes of the Convention, any harm that the claimant fears upon return to Iran would be a consequence of laws of general application in relation to undocumented persons, whether Faili Kurd or not.

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10 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [75].

11 *WZAPN v Minister for Immigration* [2013] FMCA 6 at [84].

12 *WZAPN v Minister for Immigration* [2013] FMCA 6 at [109].

The Federal Court

14 The claimant sought an extension of time within which to appeal to the Federal Court from the decision of the Federal Magistrates Court. North J granted the extension and allowed the appeal instanter. His Honour upheld[13] the claimant's contention that Lucev FM had erred in failing to hold that the IMR had applied the wrong test to determine whether the claimant was at risk of serious harm within the meaning of s 91R(1)(b) and (2)(a) of the Act. In addition, his Honour held[14] that the IMR had failed to afford the claimant procedural fairness in relation to the consideration of s 91R(1)(a) of the Act.

15 As to the first ground, North J said[15]:

> "The conclusion from the language and structure of s 91R(2) is 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."

16 His Honour's reasoning[16] proceeded on the footing that the interpretation of s 91R(2)(a) is informed by international human rights standards, so that a decision-maker must ask "whether the deprivation [of liberty] was on grounds and in accordance with procedures established by law, whether the detention was arbitrary, and whether the applicant was treated with humanity and respect for the inherent dignity of the person."[17]

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13 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [17], [45].

14 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [64]-[65].

15 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [30].

16 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [31]-[43].

17 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [42].

17 North J went on to conclude[18]:

> "In taking the 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.
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> By making a qualitative assessment of the nature and degree of the harm experienced by the applicant when asking whether the threat to the applicant's liberty was sufficiently significant, the reviewer in the present case applied the wrong test in the application of s 91R(2)(a), and thereby fell into jurisdictional error."

18 As to the procedural fairness ground, his Honour held[19] that the IMR's alternative conclusion, that any serious harm was not for the essential and significant reason of a Convention ground, was vitiated by a failure to afford the claimant procedural fairness. The basis for this conclusion will be discussed later in these reasons.

19 In the upshot, North J allowed the appeal and declared that the IMR made jurisdictional errors "by failing to apply the correct test to determine whether the applicant was at risk of serious harm", and "by failing to accord the applicant procedural fairness in the consideration whether s 91R(1)(a) of the … Act applied in this case."

20 The Minister appealed to this Court pursuant to special leave granted by Hayne and Nettle JJ on 13 February 2015. Both grounds on which North J decided the case against the Minister were challenged.

Background – *WZARV v Minister for Immigration and Border Protection*

21 In this matter, the following summary of the factual background is drawn from the judgment of McKerracher J in the Federal Court of Australia[20].

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18 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [44]-[45].

19 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [64]-[65].

20 *WZARV v Minister for Immigration and Border Protection* (2014) 144 ALD 82.

22 The claimant is a Sri Lankan citizen who entered Australia by boat and was taken to Christmas Island on 7 November 2010. On 12 December 2010, the appellant had an entry interview. Later, he applied for an RSA.

23 In the course of the entry interview, the claimant claimed that he was of Tamil ethnicity, born in the Northern Province of Sri Lanka in 1985. He claimed that he was forced to do one day's training with the Liberation Tigers of Tamil Eelam ("LTTE") in 2008. He also claimed that he was injured in a bomb blast later that year. In 2009, he worked as a security guard for the United Nations High Commissioner for Refugees ("UNHCR"). In 2010, he was employed by a non-governmental organisation ("NGO"), the Swiss Foundation for Mine Action, to remove land mines. The claimant claimed that he was detained by the Sri Lankan Army ("SLA") in 2009, but that his father managed to pay a bribe in order to secure his release. He also claimed that he was apprehended while waiting at a bus shelter on 10 June 2010, detained and beaten. He claimed that, after this detention, SLA officers came to his house on a number of occasions asking for him.

24 An RSA officer interviewed the claimant in relation to his claims on 26 January 2011. The RSA officer did not accept the claimant's account of the events that led to his departure from Sri Lanka, and so was not satisfied that the claimant was a person to whom Australia owed protection obligations. On 21 April 2011, the claimant was informed that he had been assessed as not meeting the Convention definition of a refugee.

The Independent Merits Reviewer

25 On 10 May 2011, the claimant applied to have the decision of the RSA officer reviewed by an IMR. By letter dated 21 September 2012, the IMR recommended that the claimant was not a person to whom Australia owed protection obligations. The IMR found that the claimant did not have a profile that indicated he would be suspected of being an LTTE supporter. The IMR was satisfied that there was only a remote chance that the claimant would face harm as a result of his Tamil ethnicity, work for NGOs or training with the LTTE, and that there was no indication that he was at risk of "significant harm".

26 Relevantly for present purposes, the IMR accepted, based on country information, that it was likely the claimant would be interviewed by Sri Lankan authorities at the airport upon his return, but that it is usual for such questioning to be completed in a matter of hours.

The Federal Circuit Court

27 The claimant sought judicial review of the IMR's recommendation in the Federal Circuit Court. The claimant was not represented on the hearing of his application. On 14 October 2013, Judge Burchardt rejected[21] the claimant's application, holding that the IMR's reasoning was open on the facts.

The Federal Court

28 The claimant appealed the decision of Judge Burchardt to the Federal Court. On 22 August 2014, McKerracher J dismissed his appeal. Three grounds of appeal were raised, but none of those grounds is presently relevant. The judgment of McKerracher J was delivered before the judgment of North J in *WZAPN*.

29 After the judgment in *WZAPN* had been delivered, the claimant sought special leave to appeal to this Court on the ground that, on North J's construction of s 91R(2)(a) of the Act, the IMR had failed properly to apply s 91R(2)(a) of the Act in his case. On this basis, the claimant was granted special leave to appeal on 24 February 2015 by Hayne and Nettle JJ.

30 The claimant argued that because he will be subject to detention upon arrival in Sri Lanka, and thus deprived of his liberty for a time, the IMR's decision is affected by error in its finding that the claimant would face no "serious harm" upon return to Sri Lanka.

The Act and the Refugees Convention

31 The arguments agitated by the parties in this Court are best understood after reference to the material provisions of the Act and the relevant provision of the Convention.

32 Section 36(2) of the Act, which deals with the grant of protection visas, provides that a criterion for the grant of a protection visa is that the applicant is a non-citizen "to whom … Australia has protection obligations under the Refugees Convention".

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21 *WZARV v Minister for Immigration* [2013] FCCA 1556 at [75].

33 Article 1A(2) of the Convention applies to any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

34 Section 91R of the Act relevantly states:

"(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.

(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."

35 It is noteworthy that the language in which each of the conditions in s 91R(1) is expressed calls for a qualitative judgment in order to determine whether it is satisfied in any given case. Thus par (a) speaks of "the essential and significant reason ... for the persecution", par (b) speaks of "serious harm", and par (c) speaks of "systematic and discriminatory conduct." It is also to be noted that s 91R(2) sets out a non-exhaustive list of instances of serious harm "for the purposes" of s 91R(1)(b).

The claimants' arguments

36 The claimants' arguments in relation to s 91R may now be considered. While there were some differences in the arguments presented on behalf of each of the claimants, there was a degree of overlap so that for the sake of coherent discussion it is convenient to refer particularly to the arguments articulated on behalf of WZAPN that reflected the position common to each claimant.

37 The substantial point of difference between the claimants was that counsel for WZAPN sought to distance the case made on behalf of his client from the factual circumstances of WZARV's case. Counsel for WZAPN, in urging that there is a meaningful difference between the two cases, was disposed to accept that restrictions on movement in terms of passport control at an airport do not involve a loss of liberty.

38 Counsel for WZARV sought to deal with what he identified in oral argument as the "potential for absurdity" if even the most anodyne restriction of a person's freedom of movement were to be regarded as a loss of liberty amounting to persecution, by pointing to the conditions in s 91R(1) other than s 91R(1)(b) as "mechanisms by which the absurdity of results of a strict approach to liberty … can be avoided." This attempt to avoid the acknowledged potential for absurdity cannot avail the claimant.

39 As the text of s 91R(1) of the Act indicates, it is the existence of persecution under Art 1A(2) of the Convention that is the "premise for the engagement"[22] of s 91R. Accordingly, even if a well-founded fear of persecution might otherwise be said to be established in terms of Art 1A(2) of the Convention, Art 1A(2) is nevertheless taken not to apply unless each of the three

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22 *SZWAU v Minister for Immigration and Border Protection* [2015] HCATrans 002 at line 714.

conditions specified in s 91R(1) is met. Absent a positive conclusion that each of the conditions following the word "unless" is satisfied, a claimant will fail in his or her claim for protection under the Act. The condition stated in s 91R(1)(b) that the persecution feared by a claimant involves "serious harm to the person" must be satisfied.

40 It is convenient to deal with the other arguments advanced on behalf of the claimants in relation to s 91R(2)(a) by reference to considerations of text and context.

Textual considerations

41 It has already been noted that each of the conditions in s 91R(1) requires the making of a qualitative judgment. The application of s 91R(2)(a) for the purposes of s 91R(1)(b) also requires a qualitative judgment, involving the assessment of matters of fact and degree. In *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs*[23], Gleeson CJ and Kirby J explained that "threat" in s 91R(2)(a) of the Act refers to "likelihood of harm" so that "[t]he decision-maker is required to consider future persecution that involves serious harm, and one instance of such serious harm is a threat to life or liberty. The decision-maker is to decide the risk of future harm". Because not all risks involve the same degree of likelihood or the same level of apprehended harm, the task of the decision-maker under s 91R(2)(a) involves making an assessment of the risk of future harm to a person. In that assessment, the decision-maker may be required to balance the likelihood of harm to the person against the gravity of the feared harm to the person should likelihood become fact.

42 The claimants argued that the text of s 91R(2)(a) indicates that no such evaluative exercise is required because a threat to liberty is to be regarded, of itself and without more, as an instance of serious harm. WZAPN argued that "threat to liberty" means the risk of a *loss* of liberty. Further, it was said that the collocation in s 91R(2)(a) of a threat to liberty and a threat to life is an indication that the risk of a loss of liberty is serious harm because it is placed on the same level of seriousness of harm as a threat of the loss of life. These contentions do not advance the claimants' position.

43 The claimants' argument speaks of a loss of liberty as meaning any intrusion upon a person's freedom, but to say that s 91R(2)(a) speaks of a risk of the loss of liberty is also apt to evoke a contrast between the loss of liberty in a

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23 (2006) 233 CLR 1 at 4-5 [1]-[3].

comprehensive sense and a temporary diminution in the enjoyment of some aspect of liberty. In addition, to say that s 91R(2)(a) places a threat of a loss of a person's liberty on the same level of serious harm as a threat to a person's life is to offer encouragement to the conclusion that the risk in each case is of a comprehensive and catastrophic loss: the loss of human life in one case, and the loss of liberty in the sense of the independent human autonomy that makes life worth living in the other.

44 That conclusion would be fatal to the case advanced by the claimants because on no view could the harassment that each fears be characterised as a loss of liberty in the sense of a catastrophic destruction of his autonomy as a human being. But it is not necessary to accept that conclusion in order to reject these aspects of the claimants' argument. In particular, it is not necessary to conclude that a loss of liberty for the purposes of s 91R(2)(a) is the catastrophic loss of all, or substantially all, of those aspects of free human agency which may collectively be referred to as liberty. If it is accepted that the reference to loss of liberty in s 91R(2)(a) is not to a catastrophic loss of all the aspects of human autonomy but to a loss of some such aspect, as the claimants urge, then it is also necessary to accept that some losses of liberty have more serious consequences for the person affected than others.

45 To resolve the question before the Court, it is enough to say, in light of the collocation of threats to life and liberty in s 91R(2)(a), that the question of whether a risk of the loss of liberty constitutes "serious harm" for the purposes of s 91R(1)(b) requires a qualitative judgment. This qualitative judgment will include an evaluation of the nature and gravity of the loss of liberty. Whether the likelihood of detention in any case rises to the level of serious harm instanced by s 91R(2)(a) is a question which invites a consideration of the circumstances and consequences of that detention.

46 The circumstances of likely detention identified by the claimant in *WZARV* serve to highlight the dissonance between the collocation of threats to life and liberty in s 91R(2)(a) and the construction of the paragraph on which the claimants' arguments depend. As has been seen, WZARV seeks to base his claim for refugee status on the likelihood that he will be detained for some hours upon his arrival at the airport of his country of nationality. A decision-maker required to apply s 91R(2)(a) would be entitled to regard detention at an airport for an hour or two as not being a loss of liberty of the same level of seriousness as the loss of a human life. Counsel for WZARV was right to perceive that it borders on the absurd to suggest otherwise.

47 WZAPN argued that, whereas the other paragraphs of s 91R(2) include a qualitative element, a threat to liberty is provided in s 91R(2)(a) as an instance of

serious harm irrespective of qualitative considerations. It was said that a "threat" to liberty, without more, is sufficient to constitute serious harm. Moreover, s 91R(2) is an inclusive definition of "serious harm" designed to enlarge the ordinary meaning of the words, and the expression "threat to liberty" should not be read down by reference to "serious harm". It was said that to require a "significant" threat to liberty, as the IMR did, would be contrary to this approach.

48 The first difficulty with this aspect of the argument for the claimants is that s 91R(2) does not purport to define the term "serious harm to the person". This is not a case which engages the proposition for which this Court's decisions in *Wacal Developments Pty Ltd v Realty Developments Pty Ltd*[24] and *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[25] stand as authority, that it is impermissible "to construe the words of a definition by reference to the term defined"[26]. Section 91R(2) does not seek to define "serious harm"; rather, it provides instances of the serious harm referred to in s 91R(1)(b) by way of an aid in its application.

49 It is true that s 91R(2)(a) does not contain a qualifying adjective, such as "significant", but, like the other provisions of s 91R(2), it provides guidance towards the determination of whether the persecution which the person claims to fear involves serious harm for the purposes of s 91R(1)(b). As Crennan J, when a judge of the Federal Court of Australia, said in *VBAS v Minister for Immigration and Multicultural and Indigenous Affairs*[27]:

> "Subsections 91R(1)(b) and (2) do not replace the test of 'persecution' with a test of 'serious harm'; rather, those provisions require an applicant to have a well-founded fear of *persecution involving serious harm*." (emphasis in original)

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24 (1978) 140 CLR 503; [1978] HCA 30.

25 (1994) 181 CLR 404; [1994] HCA 54.

26 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.

27 (2005) 141 FCR 435 at 442 [18].

50 These observations were referred to with evident approval by Gleeson CJ and Kirby J in *VBAO*[28]. They accord with the view of Gummow J in the same case[29], where his Honour said, in an illuminating passage:

> "It is trite to observe that the six paras (a)-(f) of s 91R(2) should be considered together; they all take their colour from the specification of 'serious harm' in the opening words of the sub-section. That phrase in turn may be traced to judicial statements such as that of Mason CJ in *Chan* to which reference has been made. His Honour also used the adjective 'significant' to describe a detriment or disadvantage which answers the description of persecution. The phrase 'a threat' to life or freedom was used in *Chan* by Dawson J. The term 'significant' qualifies the physical harassment, physical ill-treatment and economic hardship spoken of in paras (b), (c) and (d) of s 91R(2). The consequence of an action or state of affairs spoken of in paras (d), (e) and (f) must be one which 'threatens the person's capacity to subsist'.
>
> This reading of the whole of the text of s 91R(2) suggests that no less an element of comparable gravity is involved in the stipulation of a threat to the life or liberty of the person in question. More is required than a possibility which is capable of instilling a fear of danger to life or liberty." (footnotes omitted)

51 It is also noteworthy that s 91R(2)(b) lists "significant physical harassment" as an instance of serious harm. Temporary detentions of a person fall naturally within the description of physical harassment, and so readily within s 91R(2)(b). Because that is so, it is unnecessary to engage in the awkward shoehorning of cases of harassment involving episodes of temporary detention into s 91R(2)(a) in order to give effect to Australia's obligations under the Convention. Moreover, to treat any detention as falling within s 91R(2)(a) rather than s 91R(2)(b) would deprive s 91R(2)(b) of much of the operation it could be expected to have. Further, a determination whether temporary detention amounts to *significant* physical harassment obviously requires a decision-maker to consider the gravity and frequency of the incidents in which harassment is said to have occurred: that task is indisputably one of fact and degree. It may be said in a given case that the risk of physical harassment involving detention is so severe as to be properly described as a threat to the life or liberty of a person. But to say

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28 (2006) 233 CLR 1 at 5 [3].

29 (2006) 233 CLR 1 at 9 [19]-[20].

that is to acknowledge, emphatically, that the question is a matter of fact and degree dependent upon the circumstances of the detention.

52 Considerations derived from the context in which s 91R emerged, and is required to operate, support the conclusion that the application of s 91R(2)(a) for the purposes of s 91R(1)(b) requires an evaluation of the likely circumstances of the loss of liberty feared by the claimant.

Contextual considerations

Australian decisions on the Refugees Convention

53 As was said in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[30] by Gummow ACJ, Callinan, Heydon and Crennan JJ: "Australian courts will endeavour to adopt a construction of the Act … if that construction is available, which conforms to the Convention."

54 WZAPN argued that s 91R is drawn from earlier judicial statements in relation to the Convention to the effect that a threat to liberty is *per se* serious harm. It is true that, as Gummow J noted in *VBAO*[31], s 91R may be traced to dicta in *Chan v Minister for Immigration and Ethnic Affairs*[32], where Dawson J said "there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution". But it does not assist the claimants to point to these dicta because they do not resolve the question as to what is meant by a threat to freedom in this context. In particular, and importantly, Dawson J's observations do not suggest that the circumstances and consequences of a threat to freedom are irrelevant to whether the threat amounts to persecution.

55 In *Chan*, Mason CJ said[33]:

> "Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of

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30 (2006) 231 CLR 1 at 15 [34].

31 (2006) 233 CLR 1 at 9 [19].

32 (1989) 169 CLR 379 at 399; [1989] HCA 62.

33 (1989) 169 CLR 379 at 388.

> fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether *any* deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason." (emphasis in original)

56 Those observations do not support the claimants' argument. At the highest for the claimants, Mason CJ treated the question whether any deprivation of liberty would constitute persecution as an open question. His Honour went on to say[34]:

> "Discrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character."

57 It is far from clear that his Honour was speaking in this passage of the interruption of ordinary life by episodes of temporary detention, rather than of the kind of conditions to be encountered in the Gulag.

58 In *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[35], McHugh J said:

> "The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be described as persecution."

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34 (1989) 169 CLR 379 at 390.

35 (2000) 204 CLR 1 at 18-19 [55]; [2000] HCA 55.

59 WZAPN seized upon the reference by McHugh J to "unjustifiable imprisonment" as support for the view that any episode of harassment involving temporary detention invariably constitutes persecution for the purposes of the Convention. But the context in which McHugh J made this remark, and his Honour's observations made subsequently in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[36], make it clear that his Honour was not speaking of brief periods of temporary detention, but of arbitrary imprisonment the circumstances of which are such as to warrant the conclusion that it is intolerable. As McHugh and Kirby JJ said in *Appellant S395*[37]:

> "Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

60 Their Honours also said[38] that, in addressing the question whether a person had a well-founded fear of persecution, it was necessary to consider, among other things:

> "• the nature, severity and likely repetitiveness of the harm feared;
>
> • the extent to which, if at all, the individual will encounter the harm feared;
>
> …
>
> • the extent to which the individual can be expected to tolerate the harm without leaving or refusing to return to the country of nationality." (footnote omitted)

International jurisprudence

61 As the construction of s 91R may be informed by Art 1A(2) of the Convention, so may the meaning of the Convention be illuminated by consideration of the views of the courts of other countries in respect of the notion of persecution in the Convention.

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36 (2003) 216 CLR 473; [2003] HCA 71.

37 (2003) 216 CLR 473 at 489 [40].

38 (2003) 216 CLR 473 at 486 [31].

62 In *Islam v Secretary of State for the Home Department*[39], Lord Hoffmann stated that "[t]he Convention is about persecution, a well founded fear of serious harm", and Lord Millett stated[40] that "[t]he denial of human rights ... is not the same as persecution, which involves the infliction of serious harm."

63 Reference may also be made to decisions of courts of the United States and Canada, which hold that a short period of detention does not constitute persecution under the Convention. In *Vasili v Holder*[41], the United States Court of Appeals for the First Circuit held that detention of a short duration which is not accompanied by other forms of harm does not "rise to the level" of persecution. In *Velluppillai v Canada (Minister of Citizenship and Immigration)*[42], the Federal Court of Canada stated that it is "generally true" that short periods of detention will not constitute persecution, and concluded that it is necessary to consider any special circumstances (in particular in that case, the applicant's age).

Academic writings

64 WZAPN argued that there is a "scholarly consensus" that a threat to life or liberty *per se* amounts to persecution under the Convention because of the special importance which the rights to life and liberty enjoy under the Convention. In particular, it was said that North J was right to take a human rights based approach to construing the Convention, as suggested by this scholarly consensus.

65 There is no scholarly consensus that Art 1A(2) of the Convention does not require an evaluation of the circumstances and consequences of apprehended detention in order to determine whether it amounts to persecution. For example, Professor Goodwin-Gill has stated[43] that "persecution is ... very much a question

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39 [1999] 2 AC 629 at 655.

40 [1999] 2 AC 629 at 660.

41 732 F 3d 83 at 89-90 (2013).

42 [2000] FCJ No 301 at [15].

43 Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees", (1982) 3 *Michigan Yearbook of International Legal Studies* 291 at 298.

of degree and proportion". That view is quite inconsistent with the conclusion that a qualitative assessment of the risk of likely harm is irrelevant.

66 Given the reliance by North J[44] on Professors Hathaway and Foster in *The Law of Refugee Status*[45] as being supportive of his Honour's human rights approach, it is also pertinent to note that those learned authors[46] accept that the circumstances and consequences of the violation of a human rights norm are indeed relevant to whether a case of persecution is made out:

> "[I]nternational human rights law not only allows, but actually requires, careful scrutiny of particularized circumstances. … [C]ourts relying on human rights norms to identify serious harm for refugee law purposes have appropriately insisted, for example, that personal attributes such as 'age and frailty' may have an impact on the seriousness of harm". (footnote omitted)

67 In *SZTEQ*, the Full Court of the Federal Court reviewed[47] the academic writings on this issue, and identified a divergence, rather than a consensus, of views. Their Honours said[48]:

> "In our view, it is unnecessary for the purposes of this appeal to choose between the competing academic approaches to the analysis of what kind of conduct may constitute 'being persecuted' for the purposes of Art 1A. Whether or not the preferable analysis is to measure it against human rights norms, the point of referring to this approach in some detail here is to put beyond doubt that, on any view, the evaluation of whether what a person claims to fear is 'serious harm' will be a question of fact and degree, often complicated and quite specific to the individual concerned, and involving consideration of domestic and international justifications for

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44 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [38]-[41].

45 2nd ed (2014) at 193-208, 239.

46 Hathaway and Foster, *The Law of Refugee Status*, 2nd ed (2014) at 198.

47 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [141]-[153].

48 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [153].

interference with, and limits placed on, the enjoyment of human rights in a particular country of nationality."

The Refugees Convention and the Act

68 Section 91R was not enacted to expand the scope of Australia's protection obligations beyond those undertaken by it under the Convention. In *VBAO*, Callinan and Heydon JJ said[49] that s 91R is a "manifestation of a statutory intent to define persecution, and therefore serious harm, in strict and perhaps narrower terms than an unqualified reading of [Art 1A(2)] might otherwise require", and that it was enacted to "raise the threshold of what can properly amount to 'serious harm', within the spirit of the Refugees Convention."[50]

69 It is significant in this regard that the Explanatory Memorandum accompanying the Bill that became the relevant amending Act (the *Migration Legislation Amendment Act (No 6)* 2001 (Cth)) stated[51] that the intention of s 91R(2) is to identify for protection only those people who "have a well founded fear of harm which is so serious that they cannot return to their country of nationality". Nothing in the Explanatory Memorandum suggests that detention considered apart from the severity of its circumstances for the person concerned might qualify as serious harm for the purpose of establishing a well-founded fear of persecution.

70 Section 91R is concerned, as is Art 1A(2) of the Convention, not simply with the violation of rights, but also with the seriousness of the harm suffered by a person as a result of the violation. That is consistent with the approach taken in the case law relating to the Convention to which reference has been made. As Professor Hathaway has said, modern refugee law rejects a human rights based model in favour of a narrower focus[52]. McHugh J explained that narrower focus

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49 (2006) 233 CLR 1 at 17 [49].

50 (2006) 233 CLR 1 at 14 [40] citing *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2004) 139 FCR 405 at 411 [35]-[38].

51 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 9 [25].

52 Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 148-151 cited in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 47-48 [139].

in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003*[53]:

> "In the Convention … the notion of persecution is not at large. Either expressly or by necessary implication or inference, the Convention controls and narrows the meaning of persecution for its purposes. … It is not to be supposed that the Convention required signatory States to give asylum to persons who were persecuted for a Convention reason but who were unlikely to suffer serious infringement of their rights as human beings. Thus, for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person[54]."

Summary

71 It is persecution, involving serious harm inflicted by the violation of fundamental rights and freedoms, from which the Convention and s 91R of the Act are concerned to provide asylum. Both the Convention and s 91R of the Act embody an approach which is concerned with the effects of actions upon persons in terms of harm to them. That approach is not engaged automatically upon the demonstration of any breach, or apprehended breach, of human rights in their country of nationality or former habitual residence.

Is the IMR's decision in *WZAPN* vitiated by a breach of procedural fairness?

72 As noted above, the IMR concluded that WZAPN did not qualify for refugee status on the alternative basis that his circumstances did not meet the requirement in s 91R(1)(a). It was argued that North J was correct to hold that the IMR's finding that the harm apprehended by WZAPN was not persecution for a Convention reason is vitiated by a want of procedural fairness.

73 The question that arises immediately is whether there is any utility in this argument. The conclusion that North J erred in his view of s 91R(2)(a) means that the claimant's application for refugee status was bound to fail however the s 91R(1)(a) issue might be resolved. In other words, even if the procedural

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53 (2004) 222 CLR 1 at 26 [73]; [2004] HCA 18.

54 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 20-21 [61]-[65], 32 [99].

fairness ground of the challenge to the IMR's decision were upheld, the claimant would nevertheless fail to establish his claim to refugee status[55].

74 WZAPN sought to meet this difficulty by arguing that the want of procedural fairness about which he complains infected the IMR's conclusion on the serious harm issue. It was also said that acceptance of his contentions on this aspect of the case would have utility in that it would serve to sustain the declaration made by North J as to the failure of the IMR to accord the claimant procedural fairness. These arguments are not compelling.

75 North J set aside the IMR's conclusion in relation to s 91R(1)(a) on the basis of his Honour's understanding of the following passage in the reasons of the IMR:

> "Furthermore, even if I accepted the questioning, detention and abuse there is a real chance the claimant will be subjected to, is sufficiently significant to amount to serious harm (which I do not); I am not satisfied it will be for the essential and significant reason of a convention ground.
>
> Country information indicates that State and de-facto authorities such as the Basij will stop and question people indiscriminately. Detention will follow if the person stopped is suspected of being involved in any illegal or immoral activity or otherwise presents some threat to State security.
>
> The inability to provide identification papers will attract further enquiries, but I do not consider such questioning and detention as described by the claimant to be persecutory, as I do not consider it to be discriminatory for a Convention reason. Even if people without identification papers could be regarded as a particular social group (which I do not accept), I do not consider such questioning and detention to be inappropriate in the sense discussed by the High Court in *Applicant S v MIMA*[56]."

76 On a fair reading of these reasons, it is apparent that the IMR concluded that any harassment that WZAPN might suffer would not be discriminatory conduct directed at him as a result of his membership of a particular social group.

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55 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [53].

56 (2004) 217 CLR 387; [2004] HCA 25.

North J concluded[57] that WZAPN was denied procedural fairness because the IMR failed to draw WZAPN's attention to the issue adverted to in the last sentence of this excerpt from the IMR's reasons. But that issue was one which required resolution only if it were found, contrary to the IMR's express conclusion in the preceding sentence, that WZAPN was at risk of discriminatory conduct because he is a member of a particular social group. That issue would arise on the basis that even discriminatory conduct for a reason specified by the Convention will not be within the Convention if it is justified by a local law which can be said to be appropriate and adapted to achieving some legitimate national objective[58]. The conclusion of North J that the IMR did not afford the claimant a fair opportunity to address that argument fixed upon the IMR's reference to this Court's decision in *Applicant S v Minister for Immigration and Multicultural Affairs*. In that case, Gleeson CJ, Gummow and Kirby JJ said[59]:

> "The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in *Applicant A*. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is 'appropriate and adapted to achieving some legitimate object of the country [concerned]'[60]."

77 The passage cited from *Applicant S* makes it clear that an inquiry into whether a law or policy is "appropriate" to some legitimate object of the country concerned is relevant only once it is concluded that the law or policy results in discriminatory treatment for a reason specified by the Convention. The IMR had not reached that conclusion. Indeed, he had concluded to the contrary. Accordingly, the IMR's reference to *Applicant S* did not warrant an attribution to the IMR of an error in deciding the case on the basis of the determination of a relevant issue of which the claimant had no notice.

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57 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [64]-[65].

58 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 at [75].

59 (2004) 217 CLR 387 at 402 [43].

60 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258; [1997] HCA 4.

78 The additional observation made by the IMR in the last sentence of the excerpt of his reasons was additional to, and in no way necessary to, his conclusion in respect of the issue under s 91R(1)(a). In *SZBYR v Minister for Immigration and Citizenship*[61], it was accepted that procedural unfairness in relation to one basis for a decision may infect an alternative basis for that decision; this is not such a case. Here the IMR's additional observation did not materially affect his assessment of whether the treatment of the claimant amounted to "serious harm". It was truly inconsequential.

79 The IMR's decision to reject the claimant's claim to refugee status was not affected by any want of procedural fairness; and so this aspect of WZAPN's appeal fails.

Conclusion and orders

80 In Matter No M17 of 2015, involving the claimant WZAPN, the appeal to this Court should be allowed. The declaration made by the Federal Court on 3 September 2014 should be set aside. Orders 5 and 6 made on that date (which allowed the appeal from Lucev FM and set aside his Honour's orders) should be set aside, except in so far as order 6 sets aside Lucev FM's order as to costs, and the appeal to the Federal Court should be otherwise dismissed.

81 In accordance with a condition of the grant of special leave, the Minister must pay WZAPN's reasonable costs of the appeal to this Court.

82 In Matter No P10 of 2015, involving the claimant WZARV, the appeal to this Court should be dismissed with costs.

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61 (2007) 81 ALJR 1190 at 1198 [29]; 235 ALR 609 at 618-619; [2007] HCA 26.

83 GAGELER J. Special leave to appeal was granted in these two cases to enable this Court to consider the correctness of the construction of s 91R(2)(a) of the *Migration Act* 1958 (Cth) ("the Act") adopted by North J, who alone constituted the Full Court of the Federal Court[62], in one of them[63]. Two events later occurred. The first in time was that an enlarged bench of the Full Court of the Federal Court (Robertson, Griffiths and Mortimer JJ) overruled North J in the course of deciding another case[64]. The second in time was that the Parliament repealed s 91R[65].

84 Notwithstanding those events, the appeals remain appropriate for consideration by this Court. That is because the question of construction which formerly arose under s 91R(2)(a) of the Act continues to arise under the newly enacted s 5J(5)(a) of the Act[66], and because that question is important to Australian implementation of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Refugees Convention").

85 The statutory language which gives rise to the question of construction occurs in the context of the statutory prescription of a precondition to a person meeting the definition of a "refugee" within Art 1A(2) of the Refugees Convention as that definition has been interpreted by the Parliament and implemented in the Act. The particular precondition is that the "persecution" feared by the person must involve "serious harm to the person"[67].

86 The statutory language in question specifies "a threat to the person's life or liberty" as the first of six "instances" of that "serious harm"[68]. The other specified instances are "significant physical harassment of the person"[69],

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62 Section 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth).

63 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947.

64 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [154].

65 Item 12 of Sched 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth).

66 Inserted by item 7 of Sched 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth).

67 Section 91R(1)(b). See now s 5J(4)(b).

68 Section 91R(2)(a). See now s 5J(5)(a).

69 Section 91R(2)(b). See now s 5J(5)(b).

"significant physical ill-treatment of the person"[70], "significant economic hardship that threatens the person's capacity to subsist"[71], "denial of access to basic services, where the denial threatens the person's capacity to subsist"[72], and "denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist"[73].

87 The prescription of that precondition was explained at the time of its introduction in 2001[74] to be part of a package of amendments designed to "restore" the application of the Refugees Convention in Australia "to its proper interpretation"[75], against the background of "[c]laims of persecution hav[ing] been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell short of the level of harm accepted by the parties to the Convention to constitute persecution"[76].

88 The language of "serious harm", like the language of "real risk"[77], derives from the classic explanation of Art 1A(2) of the Refugees Convention by Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs*[78]. Mason CJ said[79]:

> "When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being

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70 Section 91R(2)(c). See now s 5J(5)(c).

71 Section 91R(2)(d). See now s 5J(5)(d).

72 Section 91R(2)(e). See now s 5J(5)(e).

73 Section 91R(2)(f). See now s 5J(5)(f).

74 By item 5 of Sched 1 to the *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

75 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 2 [1]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30421.

76 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 8 [19].

77 See s 36 of the Act.

78 (1989) 169 CLR 379; [1989] HCA 62.

79 (1989) 169 CLR 379 at 388. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570; [1997] HCA 22.

> persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns."

Mason CJ relevantly added[80]:

> "The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether *any* deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason."

89 Subsequently, in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[81], McHugh J linked the requisite seriousness of the harm feared by a putative refugee to what he identified as the principal rationale of the Refugees Convention. The parties to the Convention, he said, "should be understood as agreeing to give refuge to a person when, but *only when*, he or she 'is outside the country of his [or her] nationality and is unable or, owing to such [well-founded] fear, is unwilling to avail himself [or herself] of the protection of that country'"[82]. Acknowledging the probable impossibility of framing an exhaustive definition of persecution for the purpose of the Convention, McHugh J explained it to be consistent with that identified rationale to understand persecution ordinarily to involve conduct which, amongst other things, both: (1) "constitutes an interference with the basic human rights or dignity of [a] person"; and (2) "is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned"[83].

90 The particular determination by an Australian court which the Parliament sought to address by introducing the statutory precondition for serious harm

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80 (1989) 169 CLR 379 at 388 (emphasis in original).

81 (2000) 204 CLR 1; [2000] HCA 55.

82 (2000) 204 CLR 1 at 21 [64], quoting in part Art 1A(2) of the Refugees Convention (emphasis in original).

83 (2000) 204 CLR 1 at 21 [65]. See also *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 486 [31]; [2003] HCA 71; *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 26 [73]; [2004] HCA 18; *HJ (Iran) v Home Secretary* [2011] 1 AC 596 at 621 [12].

appears to have been a decision of the Full Court of the Federal Court in 2000[84], which was treated by a single judge of the Federal Court in 2001 as authority binding him to accept a proposition which he acknowledged to be inconsistent with the explanation given by McHugh J in *Haji Ibrahim*[85]. The proposition was that: "unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant by reason of his race is persecution unless the impact of that conduct on the applicant is trivial or insignificant"[86].

91 The introduction of the statutory precondition of serious harm in 2001 can be seen in light of that history to have been a deliberate legislative return to the concept of persecution as expounded by Mason CJ in *Chan* and as elaborated by McHugh J in *Haji Ibrahim*. The six instances of serious harm specified in the Act can be seen in that light together to constitute a non-exhaustive list of instances in which, consistently with that exposition and elaboration, an interference with basic human rights or dignity will have the requisite degree of severity.

92 The critical statutory language of "a threat to the person's life or liberty" is reminiscent of the references in Arts 31 and 33 of the Refugees Convention to a territory or territories in which the "life or freedom" of a refugee has been or would be "threatened". There has been controversy as to the extent to which that language in Arts 31 and 33 can be taken to bear on the content of the reference in Art 1A(2) to a "well-founded fear of being persecuted"[87]. It is unnecessary to enter into that controversy save to note general acceptance by those engaged in it that the language of Arts 31 and 33 is appropriate to express at least the minimum content of the definition in Art 1A(2). That common ground was noted by Dawson J in *Chan*[88] and continues to be acknowledged in the discussion

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84 *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 855 at [45]-[48], approving *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 at [27].

85 *Kord v Minister for Immigration & Multicultural Affairs* [2001] FCA 1163 at [35], overruled in *Minister for Immigration and Multicultural and Indigenous Affairs v Kord* (2002) 125 FCR 68.

86 [2001] FCA 1163 at [36].

87 See generally Grahl-Madsen, *The Status of Refugees in International Law*, (1966), vol 1 at 193-197; Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (2011) at 1387-1389.

88 (1989) 169 CLR 379 at 399. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570.

of the concept of persecution in the United Nations High Commissioner for Refugees' Handbook[89].

93 There is an important similarity between the critical statutory language and the language in Arts 31 and 33. There is also an important difference.

94 The important similarity lies in the common invocation of the notion of a threat. The existence of a threat or of danger is a question of degree. Answering that question involves evaluation of not only the probability of an occurrence but also the severity of the consequence of such an occurrence.

95 The important difference lies in the statutory use of the word "liberty", in contrast to the use of the word "freedom" in Arts 31 and 33. Against the background of the prominence given in the Preamble to the Refugees Convention to the Universal Declaration of Human Rights (1948) and to the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination", the statutory reference to liberty can be seen to reflect a deliberate legislative choice to refer to a threat not to freedom at large but to the specific fundamental human right to liberty of the person. That fundamental human right is spelt out in Art 3 of the Universal Declaration of Human Rights and also in Art 9 of the International Covenant on Civil and Political Rights (1966). In that latter context, it has been explained[90]:

> "All human rights ultimately serve the realization of human freedom, even when, in accordance with their object and purpose, they may be assigned differing dimensions of liberty. Liberty of person, on the other hand, relates only to a very specific aspect of human liberty: the *freedom of bodily movement* in the narrowest sense. An interference with personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location".

96 Recognition of the statutory reference to a threat to liberty as a reference to a threat to the fundamental human right to liberty provides guidance in evaluating the *quality* of a constraint on bodily movement necessary to amount to an interference with liberty[91]. To avoid that label, a constraint on bodily

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89 United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (2011) at 13 [51].

90 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 160 (emphasis in original; footnote omitted).

91 Cf Hathaway and Foster, *The Law of Refugee Status*, 2nd ed (2014) at 239-240.

movement would ordinarily need: to occur "on such grounds and in accordance with such procedure[s] as are established by law"[92]; to not be "arbitrary"[93]; and to involve the person constrained being "treated with humanity and with respect for the inherent dignity of the human person"[94].

97 Yet the question remains as to the *extent* of the interference with a person's liberty that is necessary in order to amount to a threat to the person's liberty in the relevant sense. A recent commentary on Art 1A(2) of the Refugees Convention, which the Full Court of the Federal Court has quoted with agreement[95], observed: that "both refugee law and human rights law make clear that it is only if violations of human rights attain a sufficient severity or disproportionality that they amount to persecution or ill treatment"; that "[n]ot every violation of human rights will have equally serious consequences for different individuals"; and that "[t]here is broad acceptance of the need for the human rights approach to be applied contextually"[96]. The same commentary went on to conclude, in terms with which I agree: that, in the context of the Refugees Convention, persecution and protection are interdependent; and that persecution in that context is best understood in terms of "severe violations of international law norms, in particular international human rights norms"[97]. Those conclusions are wholly consistent with the concept of persecution as expounded by Mason CJ in *Chan* and as elaborated by McHugh J in *Haji Ibrahim*.

98 "It is trite to observe", as Gummow J put it in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs*[98], that the six specified instances of serious harm "all take their colour" precisely from the circumstance that they all happen to be specified as instances of the serious harm necessarily to be feared by a person if that person is to meet the definition of a refugee in Art 1A(2) of the Refugees Convention as that definition has been translated into

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92 Article 9(1) of the International Covenant on Civil and Political Rights (1966).

93 Article 9(1) of the International Covenant on Civil and Political Rights (1966).

94 Article 10(1) of the International Covenant on Civil and Political Rights (1966).

95 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 at [151].

96 Storey, "Persecution: Towards a Working Definition", in Chetail and Bauloz (eds), *Research Handbook on International Law and Migration*, (2014) 459 at 476.

97 Storey, "Persecution: Towards a Working Definition", in Chetail and Bauloz (eds), *Research Handbook on International Law and Migration*, (2014) 459 at 517.

98 (2006) 233 CLR 1; [2006] HCA 60.

the Act[99]. Gummow J concluded that the reference to a threat to the person's liberty is appropriately read, in the context of defining one of those instances of serious harm, as a reference to a threat of at least "comparable gravity" with the other five specified instances of serious harm[100]. I agree. Each of the specified instances of serious harm is to be read as referring to a category of detriment or disadvantage of a severity that the person threatened cannot be expected to tolerate.

99 The problem with the construction adopted by North J was not the adoption of a human rights standard for the purpose of determining whether a putative constraint on the freedom of bodily movement of a person would amount to an interference with liberty. The problem lay rather in treating that approach as leaving no place for a qualitative assessment of the nature and degree of that interference with liberty.

100 With these additional observations, I agree with the reasons for judgment of French CJ, Kiefel, Bell and Keane JJ.

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99 (2006) 233 CLR 1 at 9 [19].

100 (2006) 233 CLR 1 at 9 [20].