# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

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**Matter No S272/2016**

SZTAL — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

**Matter No S273/2016**

SZTGM — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

*SZTAL v Minister for Immigration and Border Protection*
*SZTGM v Minister for Immigration and Border Protection*
[2017] HCA 34
*6 September 2017*
S272/2016 & S273/2016

**ORDER**

**Matter No S272/2016**

*1. Appeal dismissed.*

*2. The appellant pay the first respondent's costs.*

**Matter No S273/2016**

*1. Appeal dismissed.*

*2. The appellant pay the first respondent's costs.*

On appeal from the Federal Court of Australia

**Representation**

S B Lloyd SC with B Mostafa for the appellant in each matter (instructed by Fragomen)

S P Donaghue QC, Solicitor-General of the Commonwealth with M J Smith for the first respondent in each matter (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent in each matter

## CATCHWORDS

**SZTAL v Minister for Immigration and Border Protection**
**SZTGM v Minister for Immigration and Border Protection**

Migration – Protection visa – Complementary protection – Cruel or inhuman treatment or punishment – Meaning of "intentionally inflicted" – Degrading treatment or punishment – Meaning of "intended to cause" – Where Refugee Review Tribunal found appellants would likely be imprisoned for short period if returned to Sri Lanka – Where prison conditions in Sri Lanka may not meet international standards – Where definition of "cruel or inhuman treatment or punishment" in s 5(1) of *Migration Act* 1958 (Cth) requires intentional infliction of pain or suffering – Where definition of "degrading treatment or punishment" in s 5(1) of *Migration Act* requires intention to cause extreme humiliation – Whether Sri Lankan officials intend to inflict pain or suffering or cause extreme humiliation – Whether intention established by knowledge or foresight of pain or suffering or extreme humiliation.

Words and phrases – "complementary protection regime", "cruel or inhuman treatment or punishment", "degrading treatment or punishment", "foresight of result", "intended to cause", "intention", "intentionally inflicted", "oblique intention".

*Migration Act* 1958 (Cth), ss 5(1), 36.
*Criminal Code* (Cth), s 5.2(3).

1 KIEFEL CJ, NETTLE AND GORDON JJ. The relevant provisions of the "complementary protection regime" of the *Migration Act* 1958 (Cth) ("the Act") and the background to their inclusion in the Act in 2012 are set out in the reasons of Edelman J. The regime gives effect to Australia's non-refoulement obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) ("the CAT") and the International Covenant on Civil and Political Rights (1966) ("the ICCPR"). At the same time, it addresses what was a lengthy and time consuming process relating to the grant of a protection visa to a non-citizen who was not a refugee[1].

2 A criterion for the grant of a protection visa under s 36(2)(aa) of the Act is that the applicant is a non-citizen in Australia in respect of whom

> "the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm".

3 The relevant circumstances stated in s 36(2A) as constituting "significant harm" are that the non-citizen would be subjected to "torture", "cruel or inhuman treatment or punishment" or "degrading treatment or punishment"[2].

4 "[C]ruel or inhuman treatment or punishment" is relevantly defined in s 5(1) of the Act as an act or omission by which "severe pain or suffering, whether physical or mental, is *intentionally inflicted* on a person" (emphasis added). As Edelman J explains[3], this definition is not taken from the ICCPR. The ICCPR did not provide a definition. It did not expressly require that pain or suffering of the requisite degree be intentionally inflicted; nor has it subsequently been interpreted as importing such a requirement. The definition of "cruel or inhuman treatment or punishment" in s 5(1) is a partial adaptation of the definition of "torture" in s 5(1), which is clearly enough derived from the definition of "torture" in Art 1 of the CAT, which, in turn, speaks of "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain purposes such as obtaining information or a confession, or intimidating or coercing the person or a third person.

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**1** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 February 2011 at 1356.

**2** *Migration Act* 1958 (Cth), s 36(2A)(c), (d) and (e).

**3** At [78].

5 Section 5(1) also defines "degrading treatment or punishment" for the purposes of the Act. It means an act or omission that causes and is *intended to cause* extreme humiliation which is unreasonable. That definition, like the definition of cruel or inhuman treatment or punishment in s 5(1), is not taken from the ICCPR. The ICCPR does not expressly require that humiliation of the requisite degree be intentionally caused; nor has it subsequently been interpreted as importing such a requirement.

The Tribunal's findings

6 The Refugee Review Tribunal ("the Tribunal") found that, if the appellants were returned to Sri Lanka, their country of origin, and if they were arrested and charged under the laws of that country because they had left it illegally, they would likely be held in remand for a short period, which may be one day, several days or possibly two weeks. The Tribunal accepted that prison conditions in Sri Lanka are poor and may not meet international standards by reason of matters such as overcrowding, poor sanitary facilities and limited access to food.

7 The issue before the Tribunal, relevant to these appeals, was whether, in sending the appellants to prison, Sri Lankan officials could be said to intend to inflict severe pain or suffering or to intend to cause extreme humiliation. The Tribunal concluded that the element of intention was not satisfied. The country information before it indicated that the conditions in prisons in Sri Lanka are the result of a lack of resources, which the Sri Lankan government acknowledged and is taking steps to improve, rather than an intention to inflict cruel or inhuman treatment or punishment or to cause extreme humiliation.

8 The Federal Circuit Court (Judge Driver) considered[4], correctly in our view, that the Tribunal is to be understood to have concluded that "intentionally inflicted" in the definition of "cruel or inhuman treatment or punishment" connotes the existence of an actual, subjective, intention on the part of a person to bring about suffering by his or her conduct. His Honour considered the same to be true with respect to the words "intended to cause" in the definition of "degrading treatment or punishment". His Honour found no error in that

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**4** *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 at [49]; *SZTGM v Minister for Immigration and Border Protection* [2015] FCCA 87 at [29].

reasoning, and a majority of a Full Court of the Federal Court (Kenny and Nicholas JJ)[5] agreed. Buchanan J dismissed the appeals on other grounds.

9 Amongst the cases concerning the meaning of "intention" to which Kenny and Nicholas JJ in the Full Court referred was *R v Willmot (No 2)*[6], where Connolly J said[7] that "[t]he ordinary and natural meaning of the word 'intends' is to mean, to have in mind". In *Zaburoni v The Queen*[8] a majority of this Court adopted that statement as to the ordinary meaning of "intends" as correct and rejected an argument that the word requires an assessment of a person's foresight of the consequences of his or her action.

Intentionally inflicted or caused

10 The appellants contend that the conditions of "intentional infliction of pain or suffering" or "intentionally causing extreme humiliation" are satisfied if a person does an act knowing that the act will, in the ordinary course of events, inflict pain or suffering, or cause extreme humiliation. On this argument, clearly enough, intention involves an assessment of the foresight of the consequences of an act. No detailed submissions were made by the parties in these appeals about the debate, in England, regarding the concept of "oblique intention"[9]. It is therefore unnecessary to enter into that debate for the purposes of these reasons.

11 Applying the appellants' construction to the present cases, it is said that, if officials in Sri Lanka were to cause the appellants to be detained, those officials would intend to inflict pain or suffering or cause extreme humiliation because they must be taken to be aware of the conditions giving rise to such harm in the prisons to which the appellants would be sent.

12 The meaning of "intention" for which the appellants contend is the second, alternative, meaning of "intention" with respect to a result in s 5.2(3) of the

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**5** *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 580 [68].

**6** [1985] 2 Qd R 413.

**7** *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418.

**8** (2016) 256 CLR 482; [2016] HCA 12.

**9** *R v Hyam* [1975] AC 55; *R v Matthews* [2003] 2 Cr App R 30.

*Criminal Code* (Cth)[10]. This meaning also appears in the definition of "intention" given in the Rome Statute of the International Criminal Court (1998)[11]. The first meaning given in s 5.2(3) accords with the ordinary meaning adopted in *Zaburoni*.

13 The appellants also rely upon certain international law sources, including a decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia[12] and cases which follow it, as supporting the meaning for which they contend.

14 The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose[13]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense[14]. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

15 In *Zaburoni*, the plurality held that a person is ordinarily understood to intend a result by his or her action if the person means to produce that result. What is involved is the directing of the mind, having a purpose or design. So

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**10** Section 5.2(3) provides: "[a] person has intention with respect to a result if he or she means to bring it about *or is aware that it will occur in the ordinary course of events*" (emphasis added).

**11** 2187 UNTS 90, Art 30(2)(b) (entered into force on 1 July 2002).

**12** *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002).

**13** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

**14** *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

understood, intention refers to a person's actual, subjective, intention[15], as the Tribunal and Kenny and Nicholas JJ in the Full Court concluded.

16 In *Zaburoni*, Nettle J reasoned in a way different from the plurality. In his Honour's view[16], it logically followed that an accused could be said to intend to bring about a result where he or she foresaw that his or her actions would have an inevitable or certain consequence. The plurality in *Zaburoni* acknowledged[17] that evidence that a person understood that a particular result was an inevitable consequence may go a long way towards proving intent, but held that it was not to be equated with it. Given that conclusion, the manner in which Nettle J reasoned in *Zaburoni* now stands rejected.

17 The context of the Act does not tell against the ordinary meaning of "intention" accepted in *Zaburoni*. To the contrary, the fact that the element of intention is contained in the definition of "torture", from which the definitions in question are derived, tends to confirm it. A perpetrator of torture, clearly enough, means to inflict suffering because it is part of his or her ultimate purpose or design to subject the victim to pain and suffering in order, for example, to obtain a confession.

18 It is, of course, possible that words taken from an international treaty may have another, different, meaning in international law. In such a case their importation into an Australian statute may suggest that that meaning was also intended to be imported[18]. But as Edelman J explains[19], there is no settled meaning of "intentionally" to be derived from any international law sources. In particular, the decisions of the International Criminal Tribunal for the former Yugoslavia, to which this Court was referred, do not provide any settled meaning.

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**15** *Zaburoni v The Queen* (2016) 256 CLR 482 at 489 [11] per Kiefel, Bell and Keane JJ (citing *R v Reid* [2007] 1 Qd R 64 at 93 [93]), see also at 501 [55] per Gageler J.

**16** *Zaburoni v The Queen* (2016) 256 CLR 482 at 504 [66].

**17** *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [15].

**18** *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265; [1982] HCA 27.

**19** At [84]-[89].

19 Similarly, the decision of the European Court of Human Rights ("the ECHR") in *Kalashnikov v Russia*[20], which was referred to in argument before this Court, does not assist with respect to the meaning of "intention" in s 5(1) of the Act. At issue in that case was whether the applicant being subjected to appalling prison conditions in Russia for almost five years amounted to a violation of Art 3 of the European Convention on Human Rights ("the European Convention"), which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". The concepts of "torture", "inhuman treatment or punishment" and "degrading treatment or punishment" are not further defined in the text of the European Convention. The factual dissimilarities of *Kalashnikov* may be put to one side. The argument put by Russia appears to have been similar to that put forward by the first respondent with respect to the intention of Sri Lankan officials, namely, that the Russian authorities had no intention of causing physical suffering to the applicant or harming his health, but rather the unsatisfactory conditions of detention, which the government was doing its best to improve, were owing to economic reasons and were experienced by most detainees[21]. The ECHR rejected that argument, holding that a lack of intention to humiliate or debase the applicant could not rule out a violation of Art 3 so far as concerns degrading treatment. Treatment has been deemed by the ECHR to be "degrading" when it is such as to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. The existence or otherwise of a purpose to do as such was treated only as "a factor to be taken into account"[22]. Since Art 3 was violated by degrading treatment, which does not require a positive intention under ECHR case law, the ECHR's reasoning in *Kalashnikov* does not shed light on the meaning of intention as used in the definitions in s 5(1) of the Act.

20 Turning to the *Criminal Code*, the alternative definition of "intention" in s 5.2(3) does not form part of the context in which the complementary protection regime of the Act and the definitions contained in it are to be considered.

21 The *Criminal Code* definition of "intention" was enacted in 1995 to apply to all Commonwealth offences. An offence of torture was inserted into the *Criminal Code* in 2010[23] and that existing definition of intention applied

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**20** (2003) 36 EHRR 34.

**21** *Kalashnikov v Russia* (2003) 36 EHRR 34 at 607 [93]-[94].

**22** *Kalashnikov v Russia* (2003) 36 EHRR 34 at 611 [101].

**23** *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* 2010 (Cth).

automatically to it. No inference can be drawn about the definition being considered particularly appropriate to acts of torture and therefore to the other conduct which constitutes "significant harm".

22 The alternative definition of "intention" in s 5.2(3) of the *Criminal Code* reflects a policy choice concerning criminal responsibility. It appears from the Explanatory Memorandum to the Criminal Code Bill 1994[24] that those proposing it were well aware that it went against the view that awareness of, or foresight of, result is, at best, evidence of intention. The Explanatory Memorandum in that regard referred to *R v Moloney*[25]. In that case, Lord Bridge of Harwich firmly expressed the view that, as an element of any offence involving specific intent, foresight of consequences "belongs, not to the substantive law, but to the law of evidence"[26]. This accords with the reasoning of the plurality in *Zaburoni*.

23 When the complementary protection regime was inserted in the Act in 2012 it would have been a simple enough matter to have adopted the *Criminal Code* definition of "intention" if it had been thought appropriate to its purposes, but there is no reference to that definition and nothing to suggest that it was considered to be appropriate. Applying the alternative meaning of "intention" would have the consequence that the ambit of the protection afforded by the complementary protection regime of the Act would be wider than the ordinary meaning of that word would allow. It is not immediately obvious that it was thought necessary or desirable to meet Australia's obligations under the CAT or the ICCPR in this way.

24 Statutes *in pari materia*, in the sense that they deal with the same subject matter along the same lines, may form part of the context for the process of construction. Acts of this kind are said to form a kind of code or scheme, which arises from the degree of similarity involved[27]. Without this feature there is no warrant to transpose the meaning of a word from one statute to another or to

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**24** Australia, Senate, Criminal Code Bill 1994, Explanatory Memorandum at 14.

**25** [1985] AC 905.

**26** *R v Moloney* [1985] AC 905 at 928.

**27** Jones, *Bennion on Statutory Interpretation: A Code*, 6th ed (2013) at 553.

assume, where the same words are used in a subsequent statute, that the legislature intended to attach the same meaning to the same words[28].

25 The *Criminal Code* and the Act are not statutes *in pari materia*. The *Criminal Code* and the Act in its complementary protection provisions have in common that they give effect to Australia's obligations under the CAT, but they do so in different ways and for different purposes. The *Criminal Code* makes persons criminally responsible for acts of torture in the same way as they may be responsible for other offences involving intent. The provisions of the complementary protection regime in the Act offer protection against the return of a non-citizen to a country where the Minister has substantial grounds for believing that the person will be at risk of significant harm, by the grant of a visa enabling the person to stay in Australia. The Act is not concerned with whether country officials should be held criminally responsible but with the reality of the risk of harm from them. That risk is assessed by reference to what those officials might be understood to intend with respect to a non-citizen if the non-citizen is returned to that country.

26 The reference in the Act to "intentionally inflicting" and "intentionally causing" is to the natural and ordinary meaning of the word "intends" and therefore to actual, subjective, intent. As *Zaburoni* confirms, a person intends a result when they have the result in question as their purpose.

27 An intention of a person as to a result concerns that person's actual, subjective, state of mind. For that reason, as the plurality in *Zaburoni* were at pains to point out[29], knowledge or foresight of a result is not to be equated with intent. Evidence that a person is aware that his or her conduct will certainly produce a particular result may permit an inference of intent to be drawn, but foresight of a result is of evidential significance only. It is not a substitute for the test of whether a person intended the result, which requires that the person meant to produce that particular result and that that was the person's purpose in doing the act.

Intention applied

28 In the present cases the question for the Tribunal was whether a Sri Lankan official, to whom knowledge of prison conditions can be imputed,

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**28** *Lennon v Gibson Howes Ltd* (1919) 26 CLR 285 at 287; [1919] AC 709 at 711-712; *Coverdale v West Coast Council* (2016) 90 ALJR 562 at 570 [43]; 330 ALR 424 at 434; [2016] HCA 15.

**29** *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [14]-[15].

could be said to intend to inflict severe pain or suffering on the appellants or to intend to cause them extreme humiliation by sending them to prison. That question was to be answered by the application of the ordinary meaning of "intends", as the Tribunal concluded.

29 As has been explained, evidence of foresight of the risk of pain or suffering or humiliation may support an inference of intention. In some cases, the degree of foresight may render the inference compelling[30]. But in the present matters, having regard to the evidence before the Tribunal (including evidence about what the Sri Lankan authorities might know), the Tribunal was entitled to conclude that it was not to be inferred that the Sri Lankan officials intended to inflict the requisite degree of pain or suffering or humiliation.

Orders

30 In each matter the appeal should be dismissed and the appellant should pay the costs of the first respondent.

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**30** *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [15].

31 GAGELER J. A policeman arrests a person at an airport on suspicion of the person having committed a crime. The policeman does so because that is his job. That is where his job ends. The policeman knows that the person will be remanded in custody in a gaol and he knows that the conditions in the gaol will be appalling. There is nothing the policeman can do about that.

32 Does the policeman "intend" to subject the person to the appalling gaol conditions? Not obviously; not obviously not; and no amount of contemplating the abstract meaning of "intend" will supply the answer. The answer depends on why the question is asked.

33 The question is asked here in the implementation of the regime for "complementary protection" introduced into the *Migration Act* 1958 (Cth) by the *Migration Amendment (Complementary Protection) Act* 2011 (Cth). The question is asked for the particular purpose of applying the term "intend" – or more particularly its cognate terms "intended" and "intentionally" – as occurring in the statutory definitions of "cruel or inhuman treatment or punishment", "degrading treatment or punishment", and "torture"[31], subjection to any of which is defined to constitute a form of "significant harm"[32]. The expression "significant harm" as so defined is the critical expression within the statutory formulation of the criterion for a protection visa, as an alternative to the criterion that the applicant for the visa is a non-citizen in Australia "in respect of whom the Minister is satisfied Australia has protection obligations" because the person is a refugee[33], that the applicant for the visa is a non-citizen in Australia "in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm"[34]. The "protection obligations" to which that alternative criterion refers are relevantly those which Australia has under Art 7 of the International Covenant on Civil and Political Rights ("the ICCPR") in respect of cruel or inhuman treatment or punishment and degrading treatment or punishment and under Art 7 of the ICCPR and Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT") in respect of torture.

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**31** Section 5(1) of the *Migration Act*.

**32** Section 36(2A).

**33** Section 36(2)(a).

**34** Section 36(2)(aa).

34 Part of the difficulty encountered in answering the question in the present cases has been that competing answers have been presented at each level of the judicial hierarchy as a choice between what has been argued on the one hand to be a fixed "ordinary meaning" of the word "intentionally" as appearing in a domestic statute and what has been argued on the other hand to be a settled meaning in international law of the same word appearing as part of the definition of "torture" in Art 1 of the CAT. Much effort has been expended exploring whether the word has or has not acquired a settled meaning in international law. The word has not been shown to have a settled meaning in international law. But that does not exhaust the relevance of international law to the choice of statutory meaning, and it does not lead to the result that the statutory meaning of the word is left to be determined as an exercise in abstract linguistic analysis.

35 Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*[35]:

> "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

36 Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd*[36]:

> "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."

37 Both of those passages have been "cited too often to be doubted"[37]. Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the

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**35** (1985) 157 CLR 309 at 315; [1985] HCA 48.

**36** (1997) 187 CLR 384 at 408; [1997] HCA 2 (footnote omitted).

**37** See *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40 at 43 [5] and [7].

statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text"[38].

38 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies"[39].

39 Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation"[40] "is in that respect a particular statutory reflection of a general systemic principle"[41].

40 Exactly the same process of contextual construction is involved when the question is one of what content is to be given to a statutorily invoked concept which is expressed in words the ordinary or grammatical meaning of which is well-enough understood but insufficiently precise to provide definitive guidance as to how the concept is to be understood and applied in the particular statutory setting. An example is the varying senses in which the concept of causation might be invoked in statutory provisions which attribute responsibility for loss caused "by" or "because of" or "as a result of" contravention of different statutory norms. Because "one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule"[42], "[t]he application of a causal term

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**38** *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22]; [2014] HCA 12, quoting *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55.

**39** *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 557 [66]; [2014] HCA 9.

**40** Section 15AA of the *Acts Interpretation Act* 1901 (Cth).

**41** *Thiess v Collector of Customs* (2014) 250 CLR 664 at 672 [23].

**42** *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 31, cited in *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642 [45]; [2005] HCA 69.

in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose"[43].

41 The concept of intention is similarly insufficiently precise to allow its content in a particular statutory context always to be determined by reference merely to ordinary or grammatical meaning. That is particularly so where the question is whether a person "intends" a result which the person is aware will occur but which the person does not want to occur, either as an end in itself or as a means of achieving some other end. Does the dentist "intend" to cause pain to the patient? Does the judge who finds for the plaintiff knowing that the damages will bankrupt the defendant "intend" to bankrupt the defendant? Does the "strategic bomber" who drops the bomb on the enemy munitions factory "intend" to kill the children in the adjacent school? The answer will not be found in a dictionary, and neither common sense nor conceptual analysis can be expected to yield a single answer satisfying across a range of circumstances irrespective of why the question is asked[44].

42 Whether the concept of intention invoked in a particular statutory context is objective or subjective and, if subjective, whose and what state of mind will suffice to constitute the requisite intention will vary from statute to statute[45]. Where the question is one of subjective intention as to the result of conduct, "introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous"[46]. But whether a man or woman is to be taken subjectively to intend the known or expected consequences of his or her act is less susceptible of generalisation. Intention as to a result will sometimes require the purpose or design of bringing about the result[47]. At other times, intention as to result will sufficiently be found

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**43** *Comcare v Martin* (2016) 258 CLR 467 at 479 [42]; [2016] HCA 43.

**44** See generally Simester, "Moral Certainty and the Boundaries of Intention", (1996) 16 *Oxford Journal of Legal Studies* 445; Sir Anthony Mason, "Intention in the Law of Murder", in Naffine, Owens and Williams (eds), *Intention in Law and Philosophy*, (2001) 107.

**45** Cf *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 579-580 [39]-[41]; [2003] HCA 45.

**46** *Stapleton v The Queen* (1952) 86 CLR 358 at 365; [1952] HCA 56. See also *Smyth v The Queen* (1957) 98 CLR 163 at 166-167; [1957] HCA 24; *Parker v The Queen* (1963) 111 CLR 610 at 631-632; [1963] HCA 14.

**47** Eg *Zaburoni v The Queen* (2016) 256 CLR 482 at 488 [7]-[9], 501 [55]; [2016] HCA 12.

in willingness to act with awareness of the likelihood of the result[48]. Absent express legislative indication as to which of those, or perhaps other, alternatives is applicable in a given context, the choice between them becomes a matter of construction. Neither alternative can be dismissed simply on the basis that it lies beyond the ordinary meaning of intention.

43 Critical to making the constructional choice presented by the statutory text in the present context is the purpose for which the complementary protection regime was introduced. That purpose was identified at the time of introduction as being "to allow all claims by visa applicants that may engage Australia's *non-refoulement* obligations under the [identified] human rights instruments to be considered under a single protection visa application process, with access to the same transparent, reviewable and procedurally robust decision-making framework … available to applicants who make claims that may engage Australia's obligations under the Refugees Convention"[49]. The interpretation which would best achieve that identified purpose, and which is for that reason to be preferred to any other interpretation, is the interpretation which would more closely align the statutory criterion for the grant of a protection visa to Australia's obligations under Art 7 of the ICCPR and Art 3 of the CAT.

44 To prefer the interpretation of "intended" and "intentionally" in the relevant statutory definitions which would more closely align the statutory criterion for the grant of a protection visa to Australia's obligations under Art 7 of the ICCPR and Art 3 of the CAT is not to invert the process of interpretation in the manner criticised in *NBGM v Minister for Immigration and Multicultural Affairs*[50]. Rather, it is to endeavour to adopt from a range of potentially available constructions that which best allows the domestic statutory language to fulfil its statutory purpose. There is no question that "it is the words of the Act which govern"[51]; the question is, and remains throughout the requisite analysis, as to the meaning of those words.

45 The word "intentionally", as has already been mentioned, appears in the definition of "torture" in Art 1 of the CAT. The definition is framed relevantly to encompass "any act by which severe pain or suffering, whether physical or

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**48** Eg *Vallance v The Queen* (1961) 108 CLR 56 at 61; [1961] HCA 42; *Chandler v Director of Public Prosecutions* [1964] AC 763 at 804-805.

**49** Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 1.

**50** (2006) 231 CLR 52 at 71-72 [61]; [2006] HCA 54.

**51** *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 16 [34]; [2006] HCA 53.

mental, is intentionally inflicted on a person" for specified kinds of purposes. The word does not appear in Art 7 of the ICCPR, which states relevantly that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

46 Turning first to the context for the word as appearing in the statutory definition of torture within the complementary protection regime that is provided by the definition in Art 1 of the CAT, it is important to recognise that Australia's obligations under the CAT go beyond the obligation imposed by Art 3 not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". They include as well the obligation imposed by Art 4 to "ensure that all acts of torture are offences under its criminal law", irrespective of where those acts might be committed, to which effect is given by the creation of an offence of torture under the *Criminal Code* (Cth)[52].

47 Whereas the definition of torture within the complementary protection regime effectively adopts the language of the definition in Art 1 of the CAT, in referring to any act "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person", the *Criminal Code* operates to translate that language into a physical element and a fault element. The physical element of the offence of torture spelt out in the *Criminal Code* is relevantly that a perpetrator "engages in conduct that inflicts severe physical or mental pain or suffering" on a victim[53]. The corresponding fault element spelt out in the *Criminal Code* is that of "intention"[54]. The requisite intention will exist in either of two scenarios. One is where the perpetrator means to engage in the conduct and means to bring about infliction of severe physical or mental pain or suffering on the victim. The other is where the perpetrator means to engage in the conduct and is aware that infliction of severe physical or mental pain or suffering on the victim "will occur in the ordinary course of events"[55].

48 Admittedly, the two scenarios in which the requisite fault element of intention will exist are the product of application to the particular crime of torture of general principles of criminal liability set out in the *Criminal Code*. But application of those general principles of criminal liability to that crime can hardly be characterised as unthinking. Before insertion of the offence of torture into the *Criminal Code* by the *Crimes Legislation Amendment (Torture*

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**52** Division 274.

**53** Section 274.2(2)(a).

**54** Section 5.6(1).

**55** Section 5.2(1) and (3).

*Prohibition and Death Penalty Abolition) Act* 2010 (Cth), the same general principles of criminal liability had applied[56] to the crime of torture as then created by the *Crimes (Torture) Act* 1988 (Cth). Those general principles of criminal liability could easily have been modified. They were not. The effect of applying them was and remains to make the mental element of the crime of torture as defined in Australia correspond with the mental element of the crime of torture as defined in the Rome Statute of the International Criminal Court[57]. Australia is a party to the Rome Statute and Parliament has facilitated compliance with Australia's obligations through the enactment of the *International Criminal Court Act* 2002 (Cth).

49 Whilst it might be open to Parliament to adopt one approach to the definition of torture in Art 1 of the CAT in the legislative implementation of Australia's obligation under Art 3 of the CAT and another approach to the same definition in the legislative implementation of Australia's obligation under Art 4 of the CAT, for Parliament actually to do so would be strangely inconsistent. No reason appears for thinking that Parliament would have done so. In particular, no reason appears for attributing to Parliament a legislative intention to take a narrower view of torture for the purpose of protecting the victim than the view of torture it has expressly spelt out for the purpose of punishing the perpetrator.

50 Turning from the definition of torture within the complementary protection regime to the definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment respectively, there is no reason to think that Parliament adopted the same word or a cognate word in definitions introduced at the same time as part of the complementary protection regime yet intended that word to have a different meaning. The underlying notion of intention in each of the three definitions must be the same.

51 There is another and somewhat broader contextual reason to think that the wider notion of intention is appropriate. It lies in the scope of Art 7 of the ICCPR, to which the definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment are directed.

52 The proscription in Art 7 of the ICCPR that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is mirrored in the proscription in Art 3 of the European Convention on Human Rights that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In *Kalashnikov v Russia*[58], the European Court of Human Rights

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**56** See s 2.2 of the *Criminal Code*.

**57** 2187 UNTS 90, Art 30.

**58** (2003) 36 EHRR 34.

concluded that Art 3 had been violated by the gaoling of a prisoner for a long period in overcrowded and unsanitary conditions resulting in an adverse effect on his physical health. In reasoning to that conclusion, the European Court accepted that there had been "no indication that there was a positive intention of humiliating or debasing" the prisoner, saying that "although the question whether the purpose of the treatment was to humiliate or debase [the prisoner] is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Art 3"[59].

53 Treating the reasoning in *Kalashnikov v Russia* as transferable to Art 7 of the ICCPR, that reasoning indicates that a positive intention on the part of the perpetrator to bring about cruel, inhuman or degrading treatment or punishment is not essential to the occurrence of a violation. The reasoning indicates in turn that the introduction of the concept of intention into the statutory definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment might in some cases produce a result in which a victim of cruel, inhuman or degrading treatment or punishment would be denied complementary protection in circumstances in which Australia's protection obligation under Art 7 of the ICCPR would be engaged. That the introduction of the concept of intention narrows the scope of complementary protection provides no reason for treating the particular notion of intention that is incorporated into the definitions as a narrow one. To the contrary, it confirms the appropriateness of understanding the sense in which intention has been invoked to be a wide one.

54 The circumstances of the prisoner who was the victim in *Kalashnikov v Russia* can be treated as illustrative of the circumstances of a person who would come within the scope of Australia's protection obligation under Art 7 of the ICCPR. What the illustration shows is that to understand the underlying notion of intention in each of the three statutory definitions as met where a perpetrator acts with awareness that the consequence to the victim will occur in the ordinary course of events is to adopt a construction which allows the statutory criterion for the grant of a protection visa better to meet Australia's obligation under Art 7 of the ICCPR, and which for that reason best achieves the purpose for which the complementary protection regime was introduced.

55 The reasons for decision of the Refugee Review Tribunal in the present cases are capable of being read as containing findings to the effect that the conditions to which the applicants for protection visas would be subjected when held on remand on being returned to Sri Lanka would not be so extreme as to amount to cruel or inhuman treatment or punishment or to degrading treatment or punishment irrespective of any question of intention. That is how Buchanan J

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**59** (2003) 36 EHRR 34 at 589 [H11], 611 [101].

read them in the Full Court of the Federal Court. His Honour would have dismissed the applicants' appeals to that Court on that basis[60].

56 The Federal Circuit Court and the plurality in the Full Court of the Federal Court proceeded on a different view. They interpreted the decisions of the Tribunal as turning on findings to the effect that the conditions to which the applicants would be subjected when held on remand would be the result of a lack of resources "rather than an intention by the Sri Lankan government to inflict cruel or inhuman treatment or punishment or cause extreme humiliation". They therefore treated the decisions of the Tribunal as turning on the view that the notion of intention incorporated into the definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment within the complementary protection regime is limited to a subjective intention to bring about the relevant outcome. That view, they held, was correct in law[61].

57 The only question raised in the applicants' appeals to this Court is whether the plurality in the Full Court was itself correct in law in endorsing that limited view of intention. Recognising the question to be one of principle appropriate for resolution by this Court, the Minister has filed no notice of contention seeking to have the appeals dismissed on the basis identified by Buchanan J.

58 For the reasons given, I consider that the view of intention endorsed by the plurality in the Full Court and now endorsed by the majority in this Court is too narrow. On the construction of the definitions I think to be preferable, the requisite intention will exist in either of two scenarios: where the perpetrator means to engage in conduct meaning to bring about the result adverse to the victim; and where the perpetrator means to engage in conduct aware that the result adverse to the victim will occur in the ordinary course of events.

59 I would allow each appeal and make the consequential orders sought by the appellants.

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**60** *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 589-590 [94]-[95], [99].

**61** *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 at [46]; *SZTGM v Minister for Immigration and Border Protection* [2015] FCCA 87 at [29]; *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 578 [59].

EDELMAN J.

Introduction

60 The central question in these two appeals is the meaning of "intentionally" in s 5(1) of the *Migration Act* 1958 (Cth), as amended in 2012[62]. There is no dispute that, as the Full Court of the Federal Court held in each appeal, a person intends a result if the person "means" to achieve it in the sense of having it as the person's desire, aim, or purpose. But the appellants submitted that the concept of intent does not have to bear a narrow meaning which is limited to this sense of desire, aim, or purpose. They submitted that it had a broader meaning in s 5(1). The essential submission of the appellants was that the broader meaning of intention extends beyond desire, aim, or purpose and also "sees intent established once knowledge of the likelihood of the consequences [ie results] of an act reaches a sufficient degree of certainty". The appellants submitted that it was a sufficient degree of certainty if the actor knew that the result would occur in the ordinary course of events.

61 This broader meaning of intention is precisely the concept that philosophers since Bentham have described, and debated, as "oblique intention". Bentham described oblique intention as arising where a result "was in contemplation, and appeared likely to ensue in case of the act's being performed"[63]. In submissions of identical effect, the appellants argued that intention could arise in such a case because "you have knowledge that the act you want to do is likely to have a result". Although the appellants used the synonym "indirect intention" in place of "oblique intention", they relied upon a famous article by Professor Glanville Williams[64] in which Williams popularised, and supported, Bentham's label of oblique intention. For convenience, in these reasons I will describe the appellants' submissions by that well-known, and shorthand, label of "oblique intention", accepting that it is identical to the synonym used by the appellants of "indirect intention".

62 There have been a number of judgments in this Court, relied upon by the appellants, that have described intention in terms which include within it this notion of oblique intention. Different formulations of oblique intention have insisted upon different degrees of foresight. Sometimes it has been said that the result must be foreseen as "inevitable" or "virtually certain". Sometimes it has

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**62** *Migration Amendment (Complementary Protection) Act* 2011 (Cth). The amending provisions commenced by proclamation on 24 March 2012.

**63** Bentham, *An Introduction to the Principles of Morals and Legislation*, (1823), vol 1 at 141.

**64** Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417.

been said that the result need only be foreseen as "probable". And the *Criminal Code* (Cth) has defined intention with respect to a result as existing where that result is expected to "occur in the ordinary course of events"[65]. The fundamental point of oblique intention is that foresight of a result is not used as a means to *infer* intention in the sense of an aim or purpose. The point is that voluntary conduct with a foreseen result means that the foreseen result is *also* intended.

63 The context in which the question is raised in these two appeals concerns whether a Sri Lankan official who intends to detain briefly in custody a returned asylum seeker, and knows of the shocking conditions in custody, therefore intends that the detainee be subjected to those shocking conditions. The two appellants applied for protection visas, alleging that they would suffer (i) torture, (ii) cruel or inhuman treatment or punishment, or (iii) degrading treatment or punishment upon return to Sri Lanka if their applications were denied. Since they had not departed Sri Lanka lawfully they would be exposed to a brief period of detention on remand. They alleged that the infliction of pain and suffering (within the definitions of these three matters in the *Migration Act*) would arise as a result of prison conditions if they were returned. They submitted that "severe pain or suffering, whether physical or mental" would be "intentionally inflicted" upon them, within the meaning of s 5(1) of the *Migration Act*.

64 As the appellants correctly submitted, the Full Court of the Federal Court effectively concluded that "actual, subjective, intention" cannot be proved in an oblique way merely by proving that the Sri Lankan official who would order the detention of the appellants would do so with knowledge of the consequences of his or her intended act. The appellants submitted that this was an error for two alternative reasons.

65 First, the appellants alleged that the *Migration Act* should be construed consistently with an alleged international meaning of intention which was said to include oblique intention. The appellants submitted that this international meaning was applied in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) ("the Convention against Torture"). The appellants' submission on an international meaning of intention which includes oblique intention placed particular emphasis upon the definition of intention in the *Criminal Code*, which incorporated oblique intention.

66 The appellants' first submission should not be accepted. No established, consistent definition of intention emerges from the international jurisprudence which the relevant provisions of the *Migration Act* could be thought to have adopted when they were inserted. The approach in the *Criminal Code*, which

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**65** *Criminal Code* (Cth), s 5.2(3).

includes oblique intention, is not a uniform international model. In any event, the *Criminal Code*'s adoption of oblique intention was made in circumstances of controversy where a choice was taken to depart from the ordinary meaning of intention, which does not include oblique intention. The *Migration Act* did not include the extended, and controversial, *Criminal Code* definition.

67 The second reason given by the appellants was that the ordinary meaning of intention includes the concept of oblique intention. The first respondent relied upon the joint judgment of Kiefel, Bell and Keane JJ in *Zaburoni v The Queen*[66], where their Honours rejected the concept of oblique intention. The decision in *Zaburoni* cannot resolve these appeals. There was no issue in that case as to whether "intent" in s 317(b) of the *Criminal Code* (Q) could include oblique intention. Indeed, it was conceded in argument that intention did not include oblique intention, so no reference was made to any of the earlier High Court judgments which had recognised or applied oblique intention[67]. Perhaps more fundamentally, even if the obiter dicta in *Zaburoni* could be treated as having impliedly rejected the earlier authorities, there would be a large question about the extent to which a later decision about the ordinary meaning of intention can be used to construe the meaning of that concept in an earlier statute. Nevertheless, the conclusions of the joint judgment about the ordinary meaning of intention should be endorsed. Despite earlier authority in this Court which suggested the contrary, the ordinary meaning applied in *Zaburoni* is not new. The earlier decisions of this Court which treated the ordinary meaning of intention as including oblique intention were never uncontroversial. Properly understood, oblique intention is not intention at all. Those cases must now be understood as using the word "intention" as a proxy for another concept, such as recklessness or a mental state other than intention.

68 The best construction of the *Migration Act* is that it uses "intention" in its natural and ordinary sense rather than the unnatural or fictitious sense in which it is used in some earlier authorities. The Full Court in each case was correct to so conclude. The appeals must be dismissed.

## The 2012 *Migration Act* amendments relevant to these appeals

### *Background to the 2012 amendments*

69 In the Second Reading Speech to the 2012 amendments, the Minister explained that prior to the amendments there existed "a significant administrative hole in [Australia's] protection visa application process". The "hole" gave rise to

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**66** (2016) 256 CLR 482 at 488-489 [8], [10]; [2016] HCA 12.

**67** *Zaburoni v The Queen* (2016) 256 CLR 482 at 483, 485.

a need to "align" Australia's protection visa process with Australia's international obligations of non-refoulement[68].

70 The administrative "hole" arose in the following way. Prior to the 2012 amendments, an applicant to whom Australia owed complementary protection obligations, such as protection from torture or cruel or inhuman treatment, fell outside the five categories outlined in the Convention Relating to the Status of Refugees (1951) and was therefore ineligible to receive a protection visa. The only way that an applicant could obtain a protection visa was to make an application to the Minister. Since the criteria for the application would not be satisfied, a delegate of the Minister would refuse the application (see s 65(1)(a)(ii) and (b) of the *Migration Act*). The applicant would then apply for review to the Refugee Review Tribunal, which application would necessarily be dismissed. However, the dismissal of the application for review would enliven the discretion of the Minister, under s 351 or s 417 of the *Migration Act*, to substitute a decision that was "more favourable" to the applicant if the Minister thought it was in the public interest to do so.

71 The effect of this scheme, in the words used by the Minister in the Second Reading Speech, was that applicants would have to go through a process of "applying, failing, seeking review and failing again, just so they are then able to apply to the minister for personal intervention"[69]. The Minister described this as a "lengthy process" which was "very time consuming and extremely stressful"[70]. The *Migration Act* was therefore amended "to establish an efficient, transparent and accountable system for considering complementary protection claims, which will both enhance the integrity of Australia's arrangements for meeting its *non-refoulement* obligations and better reflect Australia's longstanding commitment to protecting those at risk of the most serious forms of human rights abuses"[71].

72 The *Migration Act* was amended by the *Migration Amendment (Complementary Protection) Act* 2011 (Cth), the relevant provisions of which took effect on 24 March 2012.

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**68** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 February 2011 at 1356-1357.

**69** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 February 2011 at 1357.

**70** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 February 2011 at 1357.

**71** Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 1.

*The operation of the 2012 amendments*

73 The 2012 amendments introduced s 36(2)(aa) of the *Migration Act*, which provided an additional basis for a grant of a protection visa. That additional basis is complementary protection in circumstances where the applicant does not fall within s 36(2)(a) because he or she is not a person about whom the Minister is satisfied that Australia has protection obligations because the person is a refugee. As Lander and Gordon JJ said in *Minister for Immigration and Citizenship v SZQRB*[72], s 36(2)(aa) recognises that a non-citizen may be entitled to a protection visa because of Australia's *other* protection obligations under the Convention against Torture or the International Covenant on Civil and Political Rights (1966) ("the ICCPR"). In broad terms, the criterion is that the Minister must be satisfied that Australia has protection obligations in relation to the visa applicant. Those protection obligations arise if the Minister has substantial grounds for believing that, "as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm"[73]. Paragraphs (c), (d), and (e) of s 36(2A) then respectively provide that a non-citizen will suffer significant harm if, among other things, the non-citizen will be "subjected to torture" or "subjected to cruel or inhuman treatment or punishment" or "subjected to degrading treatment or punishment".

*Torture*

74 Article 3(1) of the Convention against Torture, to which Australia is a party, provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". The definition of "torture" in Art 1(1) of the Convention against Torture was substantially reproduced in s 5(1) of the *Migration Act*. Torture is defined in s 5(1) of the *Migration Act* as follows:

> "***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:
>
> (a) for the purpose of obtaining from the person or from a third person information or a confession; or
>
> (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or

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**72** (2013) 210 FCR 505 at 526 [99].

**73** *Migration Act* 1958 (Cth), s 36(2)(aa).

(c) for the purpose of intimidating or coercing the person or a third person; or

(d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or

(e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant."

75 Under s 5(1), "Covenant" is defined to mean the ICCPR.

76 One departure in s 5(1) of the *Migration Act* from the definition of torture in the Convention against Torture is that s 5(1) does not restrict the torture, as Art 1(1) does, to pain or suffering "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". The Explanatory Memorandum accompanying the 2012 amendments, including the definition of torture, explained that in extending the definition in this respect, "Australia is mindful that Article 1(2) of the [Convention against Torture] enables States Parties to adopt national legislation that contains provisions of wider application than the [Convention against Torture] definition"[74].

*Cruel or inhuman treatment or punishment*

77 Australia's non-refoulement obligation in relation to cruel or inhuman treatment or punishment arises under Arts 2 and 7 of the ICCPR. Article 7 of that Covenant provides:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

78 Unlike the definition of torture in s 5(1) of the *Migration Act*, which was derived closely from the Convention against Torture, the definition of "cruel or inhuman treatment or punishment" in s 5(1) departed significantly from the ICCPR. The ICCPR did not define "cruel, inhuman or degrading treatment or punishment". But s 5(1) of the *Migration Act* did define "cruel or inhuman

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**74** Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 9 [52].

treatment or punishment". It included a requirement of intention which was not present in the ICCPR. The s 5(1) definition of "cruel or inhuman treatment or punishment" is essentially an extension of the definition of torture where the pain or suffering was not inflicted for one of the purposes or reasons stipulated under the definition of torture[75]. The s 5(1) definition is as follows:

> "***cruel or inhuman treatment or punishment*** means an act or omission by which:
>
> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
>
> but does not include an act or omission:
>
> (c) that is not inconsistent with Article 7 of the Covenant; or
>
> (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant."

79 The consequence of this approach to "cruel or inhuman treatment or punishment" in the *Migration Act* is that the concept operates as an extension of the provisions in relation to torture rather than to implement any particular international obligation. At least in the requirement for intention in the definition of "cruel or inhuman treatment or punishment" in s 5(1), it was, therefore, common ground that the definition still left a "hole" in the *Migration Act* scheme. In circumstances in which an applicant for a protection visa would be returned to a country where the person would be subject to *unintended* cruel or inhuman treatment or punishment, the applicant would need to make a necessarily unsuccessful application for a protection visa, with a necessarily unsuccessful review by the Tribunal, before the application could be considered by the Minister.

Did the *Migration Act* incorporate an international law meaning of "intention" from the Convention against Torture?

80 The appellants' submission concerning an alleged international meaning of "intention", which included oblique intention, essentially involved three steps.

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**75** Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 5 [16].

First, the definition of cruel or inhuman treatment or punishment is essentially an extended application of the definition of torture. Therefore, "intention" in relation to cruel or inhuman treatment or punishment should have the same meaning as its use in relation to torture. Secondly, "intention" is a word that is capable of bearing more than one meaning. Thirdly, the 2012 amendments to the *Migration Act* adopted the international law meaning of intention, as that meaning is applied in the definition of torture in the Convention against Torture. The appellants submitted that according to the international law meaning, intention is "established once knowledge of the likelihood of the consequences of an act reaches a sufficient degree of certainty". As I have explained, this extension of intention to include foresight is oblique intention.

81 The first step of the appellants' submission should be accepted. The same reference to intention, in definitions of closely related concepts, should have the same meaning. Ultimately, the first respondent did not contend that the word "intention" should have a different meaning in relation to the definition of "torture" from its meaning in relation to "cruel or inhuman treatment or punishment".

82 As to the second step in the appellants' submission, it can be accepted immediately that "intention" is capable of being used by statutes with different meanings. Statutory words must always be read in their context. Indeed, it was common ground between the parties that the definition of intention in the *Criminal Code* (Cth) departed from some common law definitions of intention. But that does not mean that the word has more than one ordinary or natural meaning.

83 The appellants' submission falters at the third step. However, several of the appellants' propositions in the third step should be accepted. The appellants correctly submitted that when Parliament implements a treaty into domestic law by using the same words as the treaty, "it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty"[76]. In other words, where particular words are consciously imported from an international instrument into municipal law then it will generally be the case that the words in municipal law are used in the same way as an established international law meaning of those words. This approach is applicable to the definition of "torture" in s 5(1) of the *Migration Act*. Contrary to the submissions of the first respondent, the definitions in s 5(1) should not automatically be treated as a "code" to be interpreted without reference to any international materials. The Explanatory Memorandum to the

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**76** *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265; [1982] HCA 27. See also *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388 at 397 [36].

Bill which introduced the 2012 amendments containing the definition of torture said that the purpose of stating expressly what torture does not include was "to confine the meaning of torture to the meaning expressed in international expert commentary (for example, commentary by relevant international human rights treaty bodies) on the meaning of that term as defined"[77].

84 The reason why the appellants' submission fails at the third step is that there is no established international law meaning of intention against which the use of that word in the *Migration Act* should be construed. The international law sources relied upon by the appellants are limited, are conflicting, and do not demonstrate any established or consistent meaning of intention. They can be divided into three categories. The first category involves decisions of the International Criminal Tribunal for the former Yugoslavia. The second concerns the Rome Statute of the International Criminal Court (1998) ("the Rome Statute") and the *Criminal Code*. The third category concerns a publication by the Immigration and Refugee Board of Canada[78]. The third category can be put to one side because the publication contained different meanings of intention in the text and the footnotes and, in any event, it was only a domestic publication provided by the Executive of one country for the use of a Tribunal in that country. Each of the first two categories can be examined in turn.

85 As to the decisions of the International Criminal Tribunal for the former Yugoslavia, the appellants relied upon the decision of the Appeals Chamber in *Prosecutor v Kunarac*[79] and subsequent Trial Chamber decisions which followed the Appeals Chamber[80]. The accused persons in *Prosecutor v Kunarac* argued that rapes that they had committed did not fall within the definition of torture because their intention was "of a sexual nature". The Appeals Chamber rejected this submission.

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**77** Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 9 [52].

**78** Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection – Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*, (2002).

**79** *(Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002).

**80** *Prosecutor v Limaj (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-66-T, 30 November 2005) at [238]; *Prosecutor v Martić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) at [77].

86 The Appeals Chamber said that the Trial Chamber had adopted a definition of torture with reference to the Convention against Torture and the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The definition was described as having the following three elements: (i) the infliction, by an act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; and (iii) the act or omission must be aimed at one of the matters provided in the Convention against Torture[81].

87 The text of Art 1 of the Convention against Torture, which the Appeals Chamber was explicating in the threefold definition, refers to "any act by which severe pain or suffering ... is intentionally inflicted". The threefold definition does not involve any element of oblique intention. It requires, as the third element, that the act be "aimed at" causing severe pain or suffering. This is a natural sense of intention. In a later passage in the Appeals Chamber's judgment it was said that, irrespective of the motive of the accused, their acts involved torture, since[82]:

> "In view of the definition, 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, whether physical or mental, to his victims."

This reference to the "normal course of events" does not appear to refer to the issue of intention in the third element of the definition. Instead, it appears directed to the first requirement, that the act inflicts pain or suffering. As Kiefel CJ pointed out during oral argument, this is a requirement of causation, not intention.

88 The second category of international sources relied upon by the appellants includes the Rome Statute and the *Criminal Code*, which were said to be evidence of opinio iuris for an international definition of intention for the purposes of torture. The text of the Rome Statute was drafted and circulated in 1998. It entered into force on 1 July 2002. Article 7(1)(f) of the Rome Statute provides that torture may constitute a crime against humanity. Article 7(2)(e) defines torture consistently with the Convention against Torture. However, Art 30(2)(b) defines intention for the purpose of the whole of the Rome Statute. That definition of intention includes oblique intention. It applies in relation to a

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**81** *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) at [142].

**82** *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) at [153].

consequence where the "person means to cause that consequence or is aware that it will occur in the ordinary course of events". The same definition of oblique intention is given in the definition of intention with respect to a result in s 5.2 of the *Criminal Code*. That section of the *Criminal Code* defines intention "with respect to a result" as arising "if he or she means to bring it about or is aware that it will occur in the ordinary course of events".

89 The definitions of intention in the Rome Statute and the *Criminal Code* do not establish an international law meaning of intention for the purposes of the Convention against Torture, which could then be transplanted to s 5(1) of the *Migration Act*. There is no evidence that the definitions in the Rome Statute and the *Criminal Code* were enacted to pick up the definition in the Convention against Torture. The definition in each is different from the approach taken by the Appeals Chamber in *Prosecutor v Kunarac*. In both cases, the definition applies to a wide range of offences. As for the *Criminal Code*, there is also the obvious difficulty in establishing international opinio iuris by reference to the practice of a single State actor.

90 Independently of the lack of any particular international law definition of intention, there is a further, insurmountable problem with transplanting the definition of intention in the *Criminal Code* to the *Migration Act*. This problem is the conscious choice about a definition of intention that was made in the *Criminal Code* but not made in the *Migration Act*. The insertion of the offence of torture in the *Criminal Code* occurred by amendments to the *Criminal Code* which entered into force on 14 April 2010[83]. Prior to that time, the *Crimes (Torture) Act* 1988 (Cth) defined torture in s 3(1) as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person". Section 3(2) provided that, except so far as a contrary intention appeared, expressions used in the Act had the same meaning as in the Convention against Torture. Whatever the meaning of intention in the Convention against Torture, it is arguable that the meaning was altered by the operation of the particular *Criminal Code* definition of intention to offences generally[84] from 15 December 2001. Certainly, when the offence of torture was substantially amended and relocated in the *Criminal Code* in 2010, the plain consequence was to provide for the inclusion of oblique intention as contained in the *Criminal Code* definition. In contrast, the enactment of the 2012 amendments to the *Migration Act* did not purport to apply the *Criminal Code* definition.

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**83** *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* 2010 (Cth).

**84** *Criminal Code* (Cth), ss 2.2(2) and 5.2.

91 The different choice made concerning the definition of intention in the *Migration Act* cannot be said to have been due to a consensus, less than two years after application of the *Criminal Code* definition to torture, that the definition was so well established that it need not be set out in full. Indeed, when the definition of intention was inserted into the *Criminal Code* in 1995, it was recognised in the Explanatory Memorandum that the inclusion of awareness that an event will occur in the ordinary course of events was controversial[85]. Two reasons given in the Explanatory Memorandum illustrate this controversy. One reason was that it was contrary to the approach taken by the House of Lords in three cases[86]. In one of those cases[87], Lord Bridge of Harwich, with whom the other Law Lords agreed, said that the maxim that a person "is presumed to intend the natural and probable consequences" of his or her acts did not belong as part of the meaning of intention but was merely evidence from which an inference of intention *might* be drawn[88]. The other reason for controversy was that the distinction between circumstances and consequences (ie results) is problematic at the margins. The words chosen in s 5.2 of the *Criminal Code* were adopted with reference to this controversy.

The ordinary meaning of intention in language and in law

92 It was common ground that, in the absence of any established meaning of intention in relation to torture in international law jurisprudence, the meaning of intention in s 5(1) of the *Migration Act*, read in context, must be its natural and ordinary meaning.

93 Some judgments of this Court have recognised or supported a concept of oblique intention. For instance, the appellants relied upon a passage in *Vallance v The Queen*[89] where Dixon CJ approved the remarks of Professor Kenny that "in law it is clear that the word 'intention' ... covers all consequences whatever which the doer of an act foresees as likely to result from it". A similar observation was made by Menzies J[90]. Later, in a joint judgment in *R v Crabbe*[91], which was also

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**85** Australia, Senate, Criminal Code Bill 1994, Explanatory Memorandum at 13-14.

**86** *R v Moloney* [1985] AC 905; *R v Hancock* [1986] AC 455; *R v Nedrick* [1986] 1 WLR 1025; [1986] 3 All ER 1.

**87** *R v Moloney* [1985] AC 905.

**88** *R v Moloney* [1985] AC 905 at 928-929.

**89** (1961) 108 CLR 56 at 59; [1961] HCA 42.

**90** *Vallance v The Queen* (1961) 108 CLR 56 at 73.

**91** (1985) 156 CLR 464 at 469; [1985] HCA 22.

referred to by the appellants, this Court cited English academic writing[92] and English judicial authority[93] for the proposition that "on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur", although it was ultimately "unnecessary to enter upon that controversy".

94 Perhaps the most famous English academic support for this view was given by Glanville Williams. In an article relied upon by the appellants, advocating for the adoption of oblique intention, Williams suggested an example[94] of a villain who blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. The villain's aim was not to kill the people on board although he knew that their deaths would be an inevitable side-effect[95]. Williams postulated that while it was not the villain's aim or purpose to kill the people on board, it was possible for the law to say that he intended their deaths. However, even Williams recognised that oblique intention, as reflected in this example, is not the ordinary meaning of intention. Williams' argument was that the recognition of oblique intention was "a small departure" from the ordinary meaning of intention and "permissible on grounds of policy"[96]. Neither point should be accepted. First, as I explain below, the departure from ordinary language is not small. Indeed, Williams acknowledged that the extended meaning "does not always work satisfactorily" in some cases including, pertinently for these appeals, in relation to instances of mental stress[97]. Secondly, even if there were some warrant to extend intention to a different concept by reference to some preferred policy, a transparent approach should be taken which recognises that the concept being employed is not intention at all.

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**92** Mitchell (ed), *Archbold: Pleading, Evidence and Practice in Criminal Cases*, 41st ed (1982) at 995-1001; Kenny, *Outlines of Criminal Law*, (1902) at 148.

**93** *R v Hyam* [1975] AC 55 at 82, 86, 96. Cf at 74-75 and, now, *R v Jogee* [2017] AC 387 at 413-414 [73].

**94** Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417 at 423, acknowledging the immediate source of the example as Lord Hailsham of St Marylebone in *R v Hyam* [1975] AC 55 at 74, who, in turn, borrowed from The Law Commission, *Imputed Criminal Intent (Director of Public Prosecutions v Smith)*, Report No 10, (1967) at 14-15 [18], which, in turn, may have borrowed it from Williams, *The Mental Element in Crime*, (1965) at 34-35.

**95** Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417 at 423.

**96** Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417 at 426.

**97** Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417 at 435.

However, where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense.

95 Other instances of support for oblique intention in this Court can arguably be seen in *Bahri Kural v The Queen*[98], and can be seen in *Peters v The Queen*[99]. In *Bahri Kural*, Mason CJ, Deane and Dawson JJ said that intention to import a drug "is established" if (i) an accused intended to bring an article into Australia, and (ii) the accused knew that the article contained narcotic drugs. It is possible to treat (ii) as just a circumstance from which intention is inferred rather than recognition of oblique intention[100]. However, the decision of McHugh J (with whom Gummow J agreed) in *Peters* is an unequivocal recognition of oblique intention. The appellants relied upon a passage where his Honour said that[101]:

> "If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur."

96 Despite the support for oblique intention that was identified by the appellants in academic writing and various judgments in this Court the concept should not be accepted as the ordinary meaning of "intention". For three reasons, the better approach is to recognise that where intention is used in its ordinary sense it bears its ordinary meaning. If another concept is relevant then the word "intention" would be better avoided. It will often only engender confusion for the same word to be used to embrace that which Bentham described by the misnomer "oblique intention", and which the appellants described as "indirect intention".

97 The first reason why oblique intention should be regarded as invoking a concept different from intention is that the recognition of oblique intention as a form of intention has often proceeded from the false assumption that a person can intend an undesired consequence. For instance, in *Peters*, McHugh J reached the conclusion that intention includes oblique intention because he considered that "a person may intend to do something even though it is the last thing that he or she wishes to bring about"[102]. In oral submissions, the appellants therefore asserted

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**98** (1987) 162 CLR 502 at 504; [1987] HCA 16. Cf at 507.

**99** (1998) 192 CLR 493 at 521-522 [68]-[69] per McHugh J, 533 [93] per Gummow J; [1998] HCA 7.

**100** *Smith v The Queen* (2017) 91 ALJR 621 at 642 [78]; 343 ALR 561 at 586; [2017] HCA 19.

**101** *Peters v The Queen* (1998) 192 CLR 493 at 522 [68].

**102** *Peters v The Queen* (1998) 192 CLR 493 at 522 [68].

that intention could arise at two levels, either in respect of a result that is desired or in respect of one that is undesired, but is likely to occur. The argument that oblique intention is just an example of an intention about something undesired initially appears attractive. But it suffers from the flaw of conflating two different, although overlapping, senses of desire[103]. A person can desire a consequence in the sense of volitionally choosing it. Or a person can desire a consequence in the sense of emotionally wanting it. Hence, a person who boards a plane from London to Manchester can still have a desire, in the sense of volitional choice, to travel to Manchester even if "Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit"[104]. Another example is an accused who "sets fire to his enemy's house so as to spite the enemy even though he regrets the destruction of the house because it is a masterpiece of period architecture"[105]. The accused desired to destroy the house in the sense of volitionally choosing that outcome, even though he did not desire it in the sense of emotionally wanting it.

98 The second reason why "oblique intention" should not be treated as intention is that it can lead to an absurd and unnatural use of the word "intention". For instance, a person who buys a lottery ticket will be aware that success is highly unlikely, or that in the ordinary course of events the person's ticket will not be successful. But no-one would speak of the person intending to be unsuccessful. Professor Finnis gives an example of a woman who decides to give testimony at her brother's trial although "acutely conscious of her uncontrollable stutter"[106]. She intends to give evidence but no-one would say that she intends to stutter. She does not choose, or desire, to do so.

99 The third reason for eschewing oblique intention as a type of intention is that despite the authority in this Court which has recognised it, there is also substantial authority which has cast doubt upon whether oblique intention is really intention at all. For instance, in *Vallance v The Queen*[107], Taylor J contrasted a "result foreseen as a not unlikely consequence" with "actual intent". In *Giorgianni v The Queen*[108], Wilson, Deane and Dawson JJ suggested that

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**103** Finnis, *Intention and Identity*, (2011) at 177.

**104** *R v Moloney* [1985] AC 905 at 926, also conflating the two senses of desire.

**105** *Zaburoni v The Queen* (2016) 256 CLR 482 at 491 [18], citing Gillies, *Criminal Law*, 4th ed (1997) at 50.

**106** Finnis, *Intention and Identity*, (2011) at 237.

**107** (1961) 108 CLR 56 at 68.

**108** (1985) 156 CLR 473 at 506; [1985] HCA 29.

where it is sufficient that an act is done with foresight of its probable consequences, then it may be that such "intent may more properly be described as a form of recklessness". And in perhaps the most illuminating passage, Windeyer J said in *Vallance v The Queen*[109]:

> "The probability that harm will result from a man's acts may be so great, and so apparent, that it compels an inference that he actually intended to do that harm. Nevertheless, intention is a state of mind. The circumstances and probable consequences of a man's act are no more than evidence of his intention. For this reason this Court has often said that it is misleading to speak of a man being presumed always to intend the natural and probable consequences of his acts. And this, I do not doubt, is so. Because intent is a state of mind, it becomes necessary to ask what is that state of mind; what for the purposes of the criminal law is comprehended in the idea of an intentional act. Under the law apart from the Code, an accused would be guilty of unlawfully wounding if his actual purpose was to inflict a wound: he would also be guilty if, without any actual purpose to wound anyone, but foreseeing that what he was about to do was likely to cause a wound to someone, he yet went on to do it. The common law treats what was done recklessly, in that way, as if it had been done with actual intent. It says that a man, who actually realizes what must be, or very probably will be, the consequence of what he does, does it intending that consequence. The word 'intentional' in the Code carries, I think, these concepts of the common law. I therefore do not read s 13 as altering these principles. It is, I may add, in my view undesirable to insist upon desire of consequence as an element in intention. There is a risk of introducing an emotional ingredient into an intellectual concept. A man may seek to produce a result while regretting the need to do so."

100 In this passage Windeyer J made several points which should be reiterated and affirmed as a summary of the discussion so far. First, the foresight of consequences which is the basis for "oblique intention" is not intention at all. It is only evidence from which an inference can be drawn of intention, in the sense of meaning for some result to occur or having that result as an aim or purpose. Secondly, there are instances where the common law treats recklessness as if it were intention. The law does itself no credit by deeming one concept to be another. Thirdly, there is a danger which can be caused by a focus on desire. This danger is that desire is a concept which can be understood in either an emotional sense or a volitional sense. When desire is used as a synonym for intention then it ought to be used in the sense of volitional desire or, in other words, the person's aim or purpose.

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**109** (1961) 108 CLR 56 at 82-83.

101 The ordinary meaning of intention was considered in *Zaburoni*. In that case, Kiefel, Bell and Keane JJ quoted, with approval[110], the approach of Connolly J in *R v Willmot (No 2)*[111] that the ordinary and natural meaning of the word "intends" is "to mean, to have in mind", and that dictionary definitions show that "what is involved is the directing of the mind, having a purpose or design". As their Honours explained, this meaning of intention is different from the knowledge that conduct "will probably produce a particular harm"[112]. They explained that when asking whether a person had unlawfully transmitted a serious disease with intent to do so, the meaning of intention made irrelevant concepts of foreseeability, likelihood and probability[113]. To prove an intention to produce a particular result, by the ordinary meaning of intention, it is necessary to establish that the accused meant to produce that result by his or her conduct[114].

102 Although considerable weight was placed on *Zaburoni* by the first respondent in argument that decision is only relevant to these appeals as an illustration of what the ordinary and natural meaning of intention has always been. The decision, which concerned the meaning of intent in s 317(b) of the *Criminal Code* (Q), cannot be an authority which affects the construction of different legislation enacted years earlier. Further, the legitimacy of "oblique intention" as part of the concept of intention was not in issue in *Zaburoni*. The Crown did not argue on that appeal that Mr Zaburoni had an intention to transmit the human immunodeficiency virus ("HIV") because Mr Zaburoni had oblique intention arising from a choice to have unprotected sexual intercourse with the foresight that the act of unprotected sexual intercourse would cause HIV. Apart from the lack of any evidence about Mr Zaburoni's foresight of the possibility of HIV, the statistical evidence was that there was a 14 per cent risk of transmission, not that it was a certain result which had been foreseen.

103 The appellants' submission that the ordinary or natural sense of intention includes "oblique intention" should not be accepted. In ordinary or natural language, oblique intention is not intention at all. Nor should it attract that label in law. The same ordinary meaning applies in s 5(1) of the *Migration Act*. The application of the ordinary meaning of intention to these appeals, therefore, would ask whether a person (the relevant Sri Lankan official) will *mean* to

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**110** (2016) 256 CLR 482 at 488 [8].

**111** [1985] 2 Qd R 413 at 418.

**112** *Zaburoni v The Queen* (2016) 256 CLR 482 at 489 [10]. See also at 504 [66] per Nettle J.

**113** *Zaburoni v The Queen* (2016) 256 CLR 482 at 489 [13].

**114** *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [14].

produce a particular result such as the severe pain or suffering which is an element of the definition of cruel or inhuman treatment or punishment.

The decisions below

104 Both appeals concerned decisions by the Tribunal to affirm the decisions of delegates of the Minister to refuse protection visas to each appellant under s 65 of the *Migration Act*. In each case, the appellant submitted to the Tribunal that a protection visa should be granted because there was a real risk that he would suffer significant harm if removed to Sri Lanka. The risk of significant harm was said to arise because of the treatment in Sri Lanka of citizens who departed contrary to Sri Lankan laws. The appellants submitted that this treatment would amount to torture or to "cruel or inhuman treatment or punishment" as those terms are defined in s 5(1) of the *Migration Act*.

105 In SZTAL's case, the Tribunal accepted that since November 2012 all returnees who left Sri Lanka illegally had been arrested after their return. They were held on remand and then charged with an offence under the *Immigrants and Emigrants Act* 1945 prior to being bailed.

106 The Tribunal found that SZTAL would be remanded for a short period of time of between one night and several nights, and possibly up to two weeks. As to the treatment during remand, the Tribunal referred to country information which indicated that prison conditions in Sri Lanka did not meet international standards, with concerns of "overcrowding, poor sanitary facilities, limited access to food, the absence of basic assistance mechanisms, a lack of reform initiatives and instances of torture, maltreatment and violence". The Tribunal quoted from a former United Nations Special Rapporteur on Torture, cited by the United States Department of State, who reported that "the combination of severe overcrowding and antiquated infrastructure of certain prison facilities places unbearable strains on services and resources". The Tribunal also referred to a press report which quoted returnees who said that they "slept on the floor in line" with their "bodies pressed up against each other", that they "could not roll over", and that some nights they had to take turns sleeping due to lack of space.

107 The Tribunal described how Sri Lankan authorities have acknowledged the poor prison conditions but said that a lack of space and resources has inhibited reform. The Tribunal cited a call by the President of Sri Lanka for "an overhaul of the penal code and for the lower courts to reduce prison congestion and expedite the hearing of cases", as well as plans to construct and expand several prisons in partnership with the International Committee of the Red Cross.

108 The Tribunal determined that a "relatively short period of remand" did not amount to an act or omission by which severe physical or mental pain or suffering is intentionally inflicted, nor did it amount to an act which could reasonably be regarded as cruel or inhuman. The Tribunal reiterated the

requirement for intentional infliction of cruel or inhuman treatment or punishment or degrading treatment or punishment and said that "[m]ere negligence or lack of resources does not suffice". The Tribunal continued:

> "The country information above indicates that the poor prison conditions in Sri Lanka are due to a lack of resources which the government appears to have acknowledged and is taking steps to improve, rather than an intention by the Sri Lankan government to inflict cruel or inhuman treatment or punishment or cause extreme humiliation."

109 The reasons, and decision, of the Tribunal in SZTGM's case, including the information referred to by the Tribunal and the reasoning of the Tribunal, were relevantly identical.

110 Both SZTAL and SZTGM sought review of the Tribunal's decisions in the Federal Circuit Court. One submission for the appellants was that the Tribunal had misconstrued the meaning of "intention" in s 5(1) of the *Migration Act*. Both applications were dismissed. The primary judge in the Federal Circuit Court in *SZTAL v Minister for Immigration and Border Protection*[115] held that the phrase "intentionally inflicted" required the existence of an actual, subjective intention on the part of a person to bring about the suffering by his or her conduct. Therefore, the Tribunal did not err by failing "to consider whether the Sri Lankan authorities had the necessary intent because they foresaw the consequences of their actions"[116]. This reasoning was incorporated by the same primary judge in his reasons in *SZTGM v Minister for Immigration and Border Protection*[117].

111 Both appellants appealed to the Federal Court. The appeals were heard together, with a third appeal, by the Full Court (Kenny, Buchanan and Nicholas JJ). The Full Court dismissed the appeals. In a joint judgment, Kenny and Nicholas JJ held that "intention" in s 5(1) of the *Migration Act* bore its natural and ordinary meaning of "actual subjective intention by the actor to bring about the victims' pain and suffering by the actor's conduct"[118]. Their Honours observed that the primary judge was correct to dismiss the applications for review because the Tribunal had treated "intentionally inflicted" as requiring an "actual subjective intention to cause the relevant harm" irrespective of whether

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**115** [2015] FCCA 64 at [49].

**116** *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 at [45].

**117** [2015] FCCA 87 at [29].

**118** *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 578 [59].

the authorities foresaw the consequences of their actions[119]. The third member of the Full Court, Buchanan J, dismissed the appeals on the basis that the Tribunal had found that the level of harm did not meet the physical or mental elements of the definitions[120]. The first respondent did not bring any notice of contention seeking to dismiss each appeal from the decision of the Full Court of the Federal Court on the basis that the Tribunal had found that the physical element of the definition was not satisfied.

The approach to intention applied by the Tribunal

112 The primary submission of the appellants in the Full Court of the Federal Court had been that the approach the Tribunal should have taken was to ask whether the actor knows or is aware that pain or suffering will be inflicted by the act or omission "in the ordinary course of events". For the reasons explained above, the Full Court correctly rejected that submission.

113 Although the appellants maintained that submission in this Court, their submission in this Court was more nuanced. The appellants' ground of appeal in this Court was that the Full Court erred by requiring the "actual, subjective, intention" to be one which cannot be proved merely by the actor's knowledge of the consequences of his or her intended acts or omissions, no matter how certain that knowledge may be. The appellants' submission was effectively that intention could include circumstances where knowledge of (ie belief in) the future consequences of a voluntary act reaches a sufficient degree of certainty. Hence, they submitted that the Full Court and primary judge both erred by failing to apply the correct test. This submission of the appellants requires the recognition of "oblique intention" as a legitimate and ordinary use of intention. For the reasons I have explained, that submission cannot be accepted.

114 The appeals must therefore be dismissed. The Full Court was correct that the Tribunal was required only to consider intention as meaning an "actual, subjective, intention". It was not sufficient for that intention to be proved by oblique intention. Foresight of consequences, especially with a high degree of perceived likelihood, is a matter from which intention can be inferred. But it is not part of the definition of intention. The appellants could only have established "intention" within par (a) of the definition of "cruel or inhuman treatment or punishment" in s 5(1) of the *Migration Act* if the Tribunal accepted that a relevant Sri Lankan official acted in a way meaning, in the sense of having as an

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**119** *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 563 [14], 571 [40].

**120** *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at 589-590 [99].

aim or purpose, that "severe pain or suffering, whether physical or mental" would be inflicted. This conclusion was rejected by the Tribunal.

Orders

115 The appeals should be dismissed. In each matter the appellant should pay the costs of the first respondent.