IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 17 OF 2015**

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

AND:

WZAPN
First Respondent

GRAHAM BARTER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

APPELLANT'S REPLY

Part I PUBLICATION

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

Part II REPLY

Threat to liberty

2. It was common ground before North J that in applying s 91R the IMR was required to assess whether there was a threat – in the sense of a *risk* – that WZAPN would be "detained". The IMR found that there was such a threat (i.e. a risk of detention).[1] But WZAPN is wrong to equate that finding with a finding that there was a threat to WZAPN's "liberty". WZAPN says that such a finding should be "inferred".[2] However, the inference for which he contends would arise only if it was correct to equate the detention feared by WZAPN with loss of "liberty" as that word is used in s 91R(2)(a) of the Act.[3] It is North J's equation of those concepts that involved error.

3. It follows that WZAPN's submissions about the word "threat" are directed at a straw man.[4] The IMR did not find that there was a threat to WZAPN's liberty, and so it did not

---

1 The relevant finding being that WZAPN would "probably be detained for short periods when he fails to produce identification": IMR [81].

2 First Respondent's submissions at [18].

3 First Respondent's submissions at [18], [22].

4 First Respondent's submissions at [20].

Filed on behalf of the Appellant, Minister for Immigration and Border Protection
Prepared by: Ned Rogers
Australian Government Solicitor
Address for service:
Australian Government Solicitor
Level 21, 200 Queen Street
Melbourne, VIC 3000

Date of this document: 31 March 2015
Contact: Ned Rogers
File ref: 15037488
Telephone: 03 9242 1223
Facsimile: 03 9242 1265
E-mail: ned.rogers@ags.gov.au

then "calibrate the threat to liberty in assessing whether it constituted serious harm".[5] Instead, the IMR found that there was a real chance (a threat) that WZAPN would be detained, but concluded that nevertheless there was no threat to his "liberty" for the purposes of s 91R(2)(a).[6] That conclusion resulted from the IMR having engaged in a qualitative assessment of WZAPN's circumstances in order to determine whether he feared serious harm.

4. North J erred in finding that the IMR made a jurisdictional error by undertaking such a qualitative assessment. Indeed, a Full Court of the Federal Court has recently so found, as on 24 March 2015 the Court delivered judgment in *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ). Judgment was reserved in that case two days before special leave was granted in this matter.

5. In *SZTEQ*, the Full Court expressly rejected North J's analysis in *WZAPN*. It held that "s 91R(2)(a) should not be construed as meaning that any deprivation of liberty constitutes serious harm for the purposes of s 91R(1)(b) and Art 1A(2)".[7] Instead, the Court held that, as used in s 91R(2)(a), "'liberty' is a nuanced concept which takes its meaning from the context in which it appears, namely the requirement that the persecution involve serious harm, as is made clear in s 91R(1)."[8] The Court held that that conclusion was supported by each of:

   (1) the text of s 91R (the Court concluding that neither the absence of adjectival qualification in s 91R(2)(a), nor the structure of s 91R(2), supported North J's conclusion);[9]

   (2) the legislative purpose of s 91R;[10]

   (3) Australian decisions about the concept of persecution;[11]

   (4) foreign authorities on the meaning of persecution (including many of the same authorities that are relied upon in the Minister's submissions in this case);[12] and

   (5) academic writing.

---

5 First Respondent's submissions at [21].

6 Contrary to the First Respondent's submissions at [13]–[14], [19], [22].

7 [2015] FCAFC 39, [154].

8 [2015] FCAFC 39, [59].

9 [2015] FCAFC 39, [52]-[60].

10 [2015] FCAFC 39, [61]-[76].

11 [2015] FCAFC 39, [95]-[109].

12 [2015] FCAFC 39, [110]-[140].

6. The Full Federal Court's conclusion in *SZTEQ*, and its reasoning in support of that conclusion, is directly contrary to WZAPN's submissions in this Court.[13] By contrast, *SZTEQ* is entirely consistent with the Minister's submissions. For the reasons given by the Full Court, WZAPN's contentions in support of North J's analysis in *WZAPN* should be rejected.

7. The meaning of persecution for the purpose of the Convention and its application in Australia is not altered by s 91R. That is confirmed by the Explanatory Memorandum to the Bill that introduced s 91R, which demonstrates that the purpose of s 91R was to ensure that the Convention was applied in Australia as Parliament understood it to be intended to operate. In other words:

> By express incorporation of the concepts of serious harm, and systematic and discriminatory conduct, the Parliament intended to give more particular content to the term in the way the text of the Convention does not, so as to avoid what the Parliament saw as the expansion of the concept by the courts, beyond the Convention.[14]

8. Under the Convention, a decision-maker is required to assess the circumstances of a threat of harm before determining if it amounts to persecution. WZAPN's submission that such assessment is not required where the harm feared is a threat to liberty (save for an exception for *de minimis* threats to liberty)[15] finds no support in the authorities.[16] In particular, the Australian authorities do not support the contention that threats to liberty are serious harm *per se.*[17] There is no special place reserved for alleged threats to liberty.[18]

9. That is not to deny that liberty is an important right under general law and international law. But acceptance of that proposition does not advance WZAPN's argument, because once it is accepted that an applicant for protection must establish that the harm that they fear crosses a threshold of severity, it necessarily follows that not all infringements of human rights amount to persecution. The Convention is directed towards those

---

13 Cf First Respondent's submissions at [21]-[61].

14 *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39, [66].

15 First Respondent's submissions at [42]–[52].

16 See *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39, [100], [102], [105], [111], [122], [128]–[130], [132], [139]–[140], [141]; this is contrary to the First Respondent's submissions at [45]–[59].

17 First Respondent's submissions at [36]–[39].

18 See *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39, [96], [100], [105].

circumstances where the rights infringement is sufficiently serious so that the person "cannot reasonably be expected to tolerate it."[19]

10. WZAPN argues, in effect, that the issue of serious harm under s 91R(1)(b) is divorced from the issue of persecution more broadly.[20] That submission should be rejected, because s 91R(1)(b) expressly deals with persecution that *involves* serious harm. To attempt to separate the questions is artificial and does not take account of the entire statutory context.[21]

Procedural Fairness

11. WZAPN appears to challenge the IMR's finding as a matter of fact that the detention that he feared would not be the result of discriminatory conduct by the Basij.[22] He does this on the footing that his detention was discriminatory because it was related to his inability to provide identification papers, that being an inability that the IMR found "will attract further inquiries". Contrary to WZAPN's submission, it is not the case that inability to provide identification is "a discriminatory criterion".[23] It is a criterion that potentially applies to persons with a range of different characteristics, and those characteristics may attract very different consequences. Further, while WZAPN *claimed* that he was a member of a particular social group of persons not holding identification documents,[24] the IMR rejected that claim in the very passage of its reasons on which WZAPN now relies (at [84]). Plainly, the IMR's reasons cannot fairly be read as involving a finding of discrimination as a member of a social group the existence of which the IMR rejected.

12. In finding that a breach of procedural fairness had occurred, North J expressly recognised (at [53]) that the IMR had advanced two independent bases for its recommendation, being (1) that the harm feared did not constitute "serious harm"; and (2) that the "essential and significant reason" for WZAPN's detention was not a Convention reason. His Honour's finding of a breach of procedural fairness was expressly directed only to the second of those bases. The proposition now advanced by WZAPN, that this finding can also be relied upon to establish error in connection with the IMR's "serious harm" finding, has no foundation in the reasons of the Court below.[25]

---

19 See, e.g., *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2013) 216 CLR 473, 489 [40] (McHugh and Kirby JJ), and the other cases cited in support of this proposition in the Appellant's primary submissions.

20 See First Respondent's submissions at [28]–[35].

21 See *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39, [51], [76].

22 First Respondent's submissions at [66]–[69].

23 First Respondent's submissions at [68].

24 As matter relied upon in the First Respondent's submissions at [68].

25 Contrary to the First Respondent's submissions at [73]–[74].

The submission is also contrary to the structure of the IMR's reasons.[26] On a fair reading of those reasons, the procedural fairness holding cannot provide an independent basis for sustaining the judgment.[27]

Part II NOTICE OF CONTENTION

13. The Minister notes that the notice of contention is no longer pressed.

DATED: 31 March 2015

Stephen Donaghue
Telephone: (03) 9225 7919
Email: s.donaghue@vicbar.com.au

Liam Brown
Telephone (03) 9225 7503
Email: liam.brown@vicbar.com.au

10

26 The IMR first considered whether the detention that was feared constituted "serious harm" and then, as an alternative, examined whether a Convention reason was the essential and significant reason for that detention.

27 See *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609, 618–619 [29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).