IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S272/2016

BETWEEN

SZTAL

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR

Respondents

No S273/2016

SZTGM

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR

Respondents

APPELLANTS' SUBMISSIONS

Part I: Internet Publication

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

Part II: Issue

2. Each of these appeals raises the same issue: are the requirements as to intent (**the Intent Requirements**) contained in the definitions of:

   a) "cruel or inhuman treatment or punishment" (**CITP**) in s 5(1) of the *Migration Act 1958* (Cth) (***Migration Act***), that pain or suffering be "intentionally inflicted"; and

   b) "degrading treatment or punishment" (**DTP**) in s 5(1) of the *Migration Act*, that an act or omission be "intended to cause" extreme humiliation;

   satisfied if a person performs an act knowing that the act will, in the ordinary course of events, inflict pain or suffering, or cause extreme humiliation?

3. The answer to this question is "yes". In error, the Court below answered the question "no".

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Part III: No Constitutional Matter

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Judgment Below

5. The Court below addressed both proceedings in one judgment: *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69 (***SZTAL***).

6. At first instance, the judgments were *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 and *SZTGM v Minister for Immigration and Border Protection* [2015] FCCA 87.

Part V: Facts

7. The facts in each appeal are relevantly indistinguishable. In each case, the second respondent (**Tribunal**) affirmed a decision of a delegate of the first respondent (**Minister**) to refuse to grant the appellant a protection visa. In each case, the appellant claimed to fear significant harm because he left Sri Lanka illegally: *SZTAL* [6].

8. The court below noted that the Tribunal, constituted by the same member in each case, had "referred to the same material and made the same findings in rejecting" the relevant claim: *SZTAL* [1], [6]. It was therefore convenient to dispose of the appeals by referring "only to the material and findings in SZTAL's case": *SZTAL* [6], see also [91].

9. It will be convenient for this Court to take the same approach. Because of the absence of any factual difference between the cases, the outcome of SZTGM's appeal will follow the outcome of SZTAL's appeal.

10. SZTAL is a national of Sri Lanka: *SZTAL* [4]. He applied for a Protection (Class XA) visa on 28 June 2012. His application was refused, and he applied to the Tribunal for review of that refusal: decision of Tribunal dated 30 May 2013 (**Decision**) [1]-[3].

11. SZTAL claimed to fear harm because he left Sri Lanka illegally, and would be imprisoned in substandard conditions if returned: *SZTAL* [7]. The Tribunal accepted that illegal departure from Sri Lanka was an offence under the Sri Lankan *Immigrants and Emigrants Act 1945*, and that this Act was applied to "all persons who have departed Sri Lanka illegally": Decision [62]-[63], [73].

12. The Tribunal stated that "prison conditions in Sri Lanka may not meet international standards", and had been reported by the UK Home Office as "likely to breach Article 3 of the European Convention on Human Rights which prohibits 'inhuman or degrading treatment or punishment'": *SZTAL* [10] (Decision [70]). The Tribunal noted that the US Department of State had "reported that 'the combination of severe overcrowding and antiquated infrastructure of certain prison facilities… amounts to degrading treatment'": *SZTAL* [10] (Decision [70]). The Tribunal found that the Sri Lankan authorities had acknowledged the poor prison conditions: *SZTAL* [10] (Decision [72]).

13. The Tribunal stated that SZTAL would be remanded upon his return to Sri Lanka for "between one night to several nights or possibly up to 2 weeks": *SZTAL* [11] (Decision [74], [79]). However, the Tribunal rejected claims that, because SZTAL would be exposed to the prison conditions in question, he faced a real risk of CITP or DTP. In doing so, the Tribunal (Decision [80]):

    a) referred to the need to satisfy the Intent Requirements under Australian law;

b) stated that "[m]ere negligence or lack of resources" did not suffice to give rise to "cruel or inhuman or degrading treatment or punishment under Australian law";

c) found that, on the basis that the prison conditions were "due to a lack of resources", despite the Sri Lankan government being aware of the prison conditions, the Sri Lankan government did not have an intention to "inflict cruel or inhuman treatment or punishment or cause extreme humiliation" when placing persons in such prisons;

d) adopted the unqualified proposition of law that "[p]oor prison conditions involving inadequate resources and overcrowding do not appear to give rise to significant harm under Australian law".

14. The primary judge (Judge Driver) found no error in the Tribunal's construction of the Intent Requirements, including in the legal proposition referred to at paragraph 13(d) above. His Honour held that the Intent Requirements required an "actual, subjective, intention to cause harm": *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 [46], [49], [57].

15. In the Court below, the plurality (Kenny and Nicholas JJ) found no error in the primary judge's (or the Tribunal's) approach: *SZTAL* [68]. Their Honours rejected the submission (see [39]) that the Intent Requirements are satisfied if an actor performs an act knowing that the act will, in the ordinary course of events, inflict pain or suffering, or cause extreme humiliation. Justice Buchanan found that the Tribunal had disposed of SZTAL's claim on the basis that the harm faced by SZTAL "did not amount to a level of harm which met the physical or mental elements" of the definitions of CITP or DTP, and "so could not be regarded as intentional conduct which satisfied the definitions": [99]. The plurality did not suggest that Buchanan J's approach reflected an alternative basis of disposing of the appeals.

Part VI: Argument

Introduction

16. The definitions of CITP and DTP are key aspects of the complementary protection regime established by the *Migration Act* (**CP Regime**). They are two of the five types of "significant harm" that could provide the basis for granting a protection visa to a non-citizen who is not a refugee: *Migration Act*, ss 36(2) and (2A).

17. The CP Regime was inserted into the *Migration Act* for the stated purpose[1] of aligning Australia's protection visa process with Australia's international obligations of non-refoulement under the ICCPR,[2] the CAT[3] and the CROC.[4] In this case, SZTAL and the Minister advance differing constructions of the Intent Requirements, which form part of the CP Regime. SZTAL's construction is open, and it better achieves the CP Regime's stated purpose. As such, it is to be preferred.[5] SZTAL's approach also accords with the meaning of the corresponding intent requirement in the CAT, which

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1 Second Reading Speech to the *Migration Amendment (Complementary Protection) Bill 2011* (Cth) (**2011 Bill**), Hansard, 24 February 2011 (**2011 2R Speech**) p 1356.

2 *International Covenant on Civil and Political Rights* (made 16 December 1966) [1980] ATS 23.

3 *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (made 10 December 1984) [1989] ATS 21.

4 *Convention on the Rights of the Child* (made 20 November 1989) [1991] ATS 4.

5 *Acts Interpretation Act 1901* (Cth) s 15AA.

both parties accept is the international instrument that is the genesis of the words "intentionally inflicted" in the definition of CITP in s 5(1) of the *Migration Act*. Construing the Intent Requirements as proposed by SZTAL ensures that the CP Regime, which is protective in nature, is construed beneficially so as to give the fullest relief that a fair meaning of its language allows.[6]

18. Despite these matters, the plurality in the Federal Court construed the Intent Requirements in the narrowest possible way. In doing so, their Honours adopted an approach that is contrary to accepted principles of statutory interpretation. The plurality's approach results in the largest possible disjunction between the scope of the CP Regime and its stated purpose of aligning Australia's protection visa process with Australia's international obligations. It conflicts with the international law genesis of the Intent Requirements and the principle that protective legislation is to be construed beneficially.

19. Rather than construing the Intent Requirements as narrowly as possible, the plurality should have accepted that those requirements are satisfied if an actor performs an act knowing that the act will, in the ordinary course of events, inflict pain or suffering, or cause extreme humiliation. This is so for the following three reasons, each of which is expanded upon in turn:

a) the concept of "intent" is capable of bearing a broader construction than the plurality assigned to the Intent Requirements. It is at least capable of bearing the meaning contended for by SZTAL;

b) the phrase "intentionally inflicted" in the definition of CITP in s 5(1) of the *Migration Act* is the same phrase as is used in the definition of "torture" in s 5(1). In the Court below, the Minister's position was that the phrase was drawn from the CAT.[7] SZTAL agrees. That being so, the relevant international jurisprudence supports SZTAL's position, and shows that the plurality's construction is wrong;

c) the purpose of the CP Regime, including as demonstrated in the relevant extrinsic material, shows that the Intent Requirements should be construed broadly, and, so far as possible, to align the meanings of CITP and DTP (and torture) under the *Migration Act* with their meanings under international law. SZTAL's approach is consistent with this approach, and best achieves that alignment. The Minister's approach, and that of the plurality below, is not, and does not.

Meanings of "intent"

20. At *SZTAL* [44]-[59], the plurality referred to authorities that discuss intent in the context of Australian criminal law. The plurality concluded that, at common law, the "preponderance of authorities" showed that "intention with respect to result means to have it in mind to achieve the result", and that knowledge of a likely result is only evidence from which an inference of intent may be drawn: [53]. Relying on *R v Crabbe* (1985) 156 CLR 464 (***Crabbe***) at 469, their Honours stated that for "murder at common law, knowledge that it is probable that death will result is **comparable** to intention **and** is an **alternative** mental element of the crime" (bolding in original):

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6 See, eg, *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44.

7 Art 1 of the CAT states that "... the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person..." (underlining added).

[53]. At *SZTAL* [53], the plurality cited *Zaburoni v The Queen* (2016) 256 CLR 482 (***Zaburoni***) at [15] and [66]-[68] in support of their Honours' view. The plurality's view led their Honours to conclude that criminal law authorities were of no assistance to SZTAL: [53].

21. The plurality then referred ([54]-[59]) to *R v Ping* [2006] 2 Qd R 69 (***Ping***), in which the phrase "intentional infliction" (of severe pain or suffering) in the definition of torture in s 320A of the *Criminal Code 1899* (Qld) (**Qld Code**) was construed. The construction in *Ping* required proof that an accused had "an actual, subjective, intention… to bring about the suffering… the acts in question must have as their object the infliction of severe suffering": *Ping* [27]. The plurality acknowledged that *Ping* dealt with the concept of "intentional infliction" of pain or suffering in a different context to the *Migration Act*, being "the prosecution of an accused under a State criminal statute": *SZTAL* [59]. Nevertheless, the plurality held that *Ping* was a persuasive authority in construing the Intent Requirements, and applied the *Ping* approach to the Intent Requirements: *SZTAL* [59], [68].

22. There are three flaws in this part of the plurality's reasoning.

23. First, the significance of common law criminal law authorities in the present case is only to show that the concept of intent does not *have to* bear a narrow meaning. The plurality's reasoning missed this point. Instead, their Honours treated the scope of the *mens rea* of intent at common law, and the meaning of "intent" in the Qld Code (discussed in *Zaburoni*), as somehow being of particular significance in construing the Intent Requirements. That was an error. There was no reason to think that the Intent Requirements, appearing as they do in a protective statutory regime, should be limited in their meaning by the criminal law position. This is especially (but not only) so when it is recognised that intent under criminal law is used to determine moral culpability: see, eg, *Miller v R* (2016) 334 ALR 1 at [111], [117].

24. Secondly, their Honours made a similar error in treating *Ping* as a persuasive authority insofar as the construction of the CP Regime is concerned. The Intent Requirements must be construed in context and with reference to the purpose of the CP Regime.[8] The purpose of the CP Regime is addressed in more detail at paragraphs 46 to 52 below. In short, it is a protective regime, designed to create a mechanism for Australia to discharge its complementary protection obligations under various international agreements. Given the difference in context and purpose, the meaning of "intentional infliction" in a statute imposing serious criminal liability provides very little guidance to the meaning of the Intent Requirements in the CP Regime.

25. Thirdly, the plurality's statements regarding *Crabbe* overstated what was said in *Crabbe*. In *Crabbe* at 469, the Court acknowledged that "on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur". The Court referred to authorities, including Dixon CJ's judgment in *Vallance v The Queen* (1961) 108 CLR 56 (***Vallance***, discussed further below), in support of that view. The Court then held that it was "unnecessary to enter upon that controversy", and only at that point stated that knowledge of the likely consequences of an act is "comparable with an intention" to bring about that consequence: at 469. Contrary to the plurality's reading of *Crabbe* (*SZTAL* at [52]), nothing in *Crabbe* undermined the view expressed by Dixon CJ in *Vallance*.

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8 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11].

26. Turning to the approach that the plurality should have taken, case law, including that discussed by their Honours, shows that "intent" is a concept that is *capable* of bearing more than one meaning. The criminal law authorities are relevant only because they demonstrate that to be so. One meaning that "intent" is capable of bearing is the narrower meaning, adopted by the plurality. A broader meaning sees intent established once knowledge of the likelihood of the consequences of an act reaches a sufficient degree of certainty.

27. Support for that proposition is found in a number of cases.

28. First, as discussed below at paragraphs 36 to 41, international case law on the meaning of "intentionally inflicted" under art 1 of the CAT shows that the relevant intent is made out if a person intends to act in a way that, in the ordinary course of events, would cause severe pain or suffering. As noted above, it is common ground (unless the Minister seeks to change the position he took in the Court below) that the words "intentionally inflicted" in the definition of CITP have their origin in the CAT.

29. Secondly, in *Peters v The Queen* (1998) 192 CLR 493 (***Peters***) at [68], McHugh J stated that, 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". Contrary to the apparent holding of the plurality (*SZTAL* at [52]), nothing his Honour said in *Peters* at [69] detracted from this statement. His Honour's view finds support in academic writing focussed on the concept of intent.[9]

30. Thirdly, in *Vallance*, Dixon CJ construed the word "intentional" in s 13(1) of the *Criminal Code 1924* (Tas) as including a case in which an actor foresees a consequence "as likely to result from" his act: at 59.4-6, 61.2-3. The plurality noted that Windeyer J had stated (at 82) that "intentional" bore its common law meaning, and stated that Dixon CJ's comments had to be understood in light of *Crabbe*: *SZTAL* at [52]. However, as noted above, *Crabbe* does not detract from Dixon CJ's statements. His Honour's statements are relevant in the present case simply because they show that "intent" does not have to be construed in only one, narrow, way.

31. Fourthly, in *He Kaw Teh v The Queen* (1985) 157 CLR 523 (***He Kaw Teh***), Brennan J discussed the relationship between knowledge and intent at some length. His Honour stated that intent "in one form, connotes a decision to bring about a situation so far as it is possible to do so" and that intent "in another form, connotes knowledge": at 569.2-3 (underlining added). His Honour drew a distinction between general intent and specific intent, with the latter being an intent to cause a result: at 569.8-570.1. His Honour then said that both forms of intent may be established by knowledge, with specific intent established "by knowledge of the probability of the occurrence of the result to which the intent is expressed to relate": at 570.1. His Honour noted that "intent to cause a prescribed result can be, but is not ordinarily, established by knowledge that such a result will probably (or is likely to) occur: *Reg v Crabbe*": at 570.4 (underlining added).

32. The plurality in *SZTAL* noted that some of Brennan J's remarks "might be thought to favour" SZTAL, but then stated that it was significant that Brennan J referred to *Crabbe*: *SZTAL* at [49]. The plurality then discussed *Crabbe*, which, as noted above, their Honours mistakenly read as showing that "intent" could only have the meaning ascribed to it by the plurality. The plurality never returned to *He Kaw Teh* to explain

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9 Glanville Williams, *Oblique Intention*, (1987) 46 Cambridge Law Journal 417 at 418, 420-1.

why Brennan J's judgment did not demonstrate precisely the point made by SZTAL: that the concept of intent need not be limited to a situation in which an actor decides, in Brennan J's words, "to bring about a situation so far as it is possible to do so".

33. Finally, reference may be made to cases involving the tort of deceit, which state that the law "justly imputes to every man" the intention "to produce those consequences which are the natural result of his acts".[10] The context of those cases is obviously different to the *Migration Act*, but the reference serves merely to confirm what the above discussion shows: that the concept of intent can be broader than the construction adopted by the plurality.

Context: the Intent Requirements and international law

34. As noted at paragraph 19(b) above, it appears to be common ground that the phrase "intentionally inflicted" in the definition of CITP in s 5(1) of the *Migration Act* was drawn from the CAT. The meaning of "intentionally inflicted" in the CAT is therefore an important consideration in determining the meaning of that phrase in the *Migration Act*.

35. In this respect, three points should be noted.

36. First, the definition of torture in art 1 of the CAT is generally regarded as reflecting customary international law (**CIL**). Statements to this effect may be found in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (**ICTY**),[11] the Extraordinary Chambers in the Courts of Cambodia (the Khmer Rouge Tribunal),[12] and leading texts.[13] Similarly, the International Criminal Tribunal for Rwanda, when determining the meaning of "torture" under its statute, applied the definition from art 1 of the CAT.[14] As Jagot J (with whom Black CJ agreed (at [1])) said in *Habib v Commonwealth of Australia* (2010) 183 FCR 62 at [117]: "[t]he prohibition on torture is an absolute requirement of customary international law. The prohibition is codified in the Torture Convention".

37. To the extent that there are some cases that suggest that art 1 of the CAT is not wholly reflective of CIL, these cases refer to matters such as:[15]

    a) the list of purposes the pursuit of which could be regarded as coming within the definition of torture;

    b) whether it is necessary for the act to be committed in connection with an armed conflict;

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10 *Smith v Chadwick* (1884) 9 App Cas 187 at 190; *Magill v Magill* (2006) 226 CLR 551 at [112].

11 *Prosecutor v Brđanin*, Appeals Chamber, IT-99-36 (3 April 2007) (Judgment) at [246]; *Prosecutor v Kunarac*, Appeals Chamber, Case No It-96-23 and IT-96-23/1-A (12 June 2002) (Judgment) (***Kunarac***) at [146]; *Prosecutor v Furundžija*, Appeals Chamber, IT-95-17/1 (21 July 2000) (Judgment) at [111]; *Prosecutor v Delalić*, Trial Chamber, IT-96-21-T (16 November 1998) (Judgment) at [459].

12 *Co-Prosecutors v Kaing*, Trial Chamber, No 001/18-07-2007/ECCC/TC (26 July 2010) (Judgment) at [353].

13 Cassese, *International Criminal Law* (2nd ed, 2008) p 151; see also Kittichaisaree, *International Criminal Law* (2001) p 110-1, where the author states "[u]nder customary international law, torture is the intentional infliction of severe physical or mental pain or suffering upon the victim…", and Michael Bothe, *War Crimes*, in Cassese et al (eds), *The Rome Statute of the International Criminal Court: a Commentary* (2002) p 392 ("The internationally accepted definition of torture is contained in Article 1 of the UN Convention on Torture").

14 *Prosecutor v Akayesu*, Chamber 1, ICTR-96-4-T (2 September 1998) (Judgment) at [593], [681].

15 *Prosecutor v Kunarac*, Trial Chamber, IT-96-23-T and IT-96-23/1-T (22 February 2001) (Judgment) at [484].

c) the requirement, if any, for the involvement of a public official or person acting in an official capacity.

38. Those matters do not relate to the requirement in art 1 of the CAT that severe pain or suffering be "intentionally inflicted". For present purposes, the key point is that the intent requirement under art 1 of the CAT reflects CIL. Indeed, under CIL, it is uncontroversial that torture requires an intent to inflict pain or suffering.[16]

39. Secondly, at CIL, the intent requirement for torture is satisfied where a person intends to perform an act (or intends to make an omission), knowing that doing so will cause the requisite pain or suffering in the ordinary course.

40. In *Kunarac*, the ICTY Appeals Chamber considered appeals from convictions of torture for engaging in rape. The appellants argued that their intention "was of a sexual nature, which... is inconsistent with an intent to commit the crime of torture": [153]. The Appeals Chamber disagreed, stating that "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture... since such pain or suffering is a likely and logical consequence of his conduct": [153]. The important question to ask was "whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering": [153].

41. The approach in *Kunarac* was followed in *Prosecutor v Limaj*,[17] where the ICTY stated that for the *mens rea* for torture, "direct intent is required: the perpetrator must have intended to act in a way which, in the normal course of events, would cause severe pain or suffering": [238].[18] The contrast between this approach and, for example, the approach applicable for crimes of intent under the Qld Code (*Zaburoni* [14] and *Ping* [27], [29]; relied upon by the plurality at *SZTAL* [53]-[59]) is plain.

42. The approach taken in *Kunarac* and *Limaj* is reflected in the *Rome Statute*,[19] which defines crimes to reflect CIL (and so the intent requirement set out in art 1 of the CAT).[20] Article 30 of the *Rome Statute* states that a person has intent in relation to a consequence where "that person means to cause that consequence or is aware that it will occur in the ordinary course of events". That further confirms that the meaning of "intentionally inflicted" in art 1 of the CAT, and so the definition of CITP in s 5(1) of the *Migration Act*, is as SZTAL contends.

43. Thirdly, counsel's research has not revealed even one piece of international jurisprudence on the intent requirement for torture under the CAT and CIL that is to the contrary of *Kunarac* and *Limaj*. As such, there is no good reason to read the Intent

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16 See, eg, Cassese et al, *International Criminal Law: Cases and Commentary* (2011) p 259, 269-271.

17 Trial Chamber II, IT-03-66-T (30 November 2005) (Judgment) (***Limaj***); see also *Prosecutor v Martić*, Trial Chamber, IT-95-11-T, (12 June 2007) (judgment) at [77] ("it needs to be established that the perpetrator acted or omitted to act with direct or indirect intent").

18 See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (3rd ed, 2013) at 218 [9.06], stating that the relevant intention under art 1 of the CAT is "to cause, or at least be recklessly indifferent to the possibility of causing" the relevant pain or suffering and that "acts that would not cause extreme pain and suffering to an ordinary person are normally outside the definition" as the "requisite intent would be missing, unless the torturer was aware of the victim's special susceptibilities" (underlining added).

19 *Rome Statute of the International Criminal Court* (made 17 July 1998) [2002] ATS 15.

20 Kirsch, *Customary Humanitarian Law, its Enforcement, and the Role of the International Criminal Court*, in Maybee and Chakka (eds), *Custom as a Source of International Humanitarian Law* (2006) p 80, 83.

Requirements,[21] appearing as they do in a protective statute with wording drawn from an international instrument, as importing an approach akin to the Qld Code approach: cf *SZTAL* at [59], where the plurality relied on *Ping*. The above shows that there are ample reasons to reject such a reading, and that SZTAL's construction is to be preferred.

Purpose: the extrinsic material and alignment of CP Regime with international obligations

44. The above submissions are sufficient to show that the plurality erred in construing the Intent Requirements. Once it is accepted that a phrase in a statute is drawn from an international instrument, and that, in the statute, the phrase is capable of bearing the meaning that it has in that instrument, there would need to be good reason to give the phrase some other meaning. There is no such reason in the present case.

45. Nevertheless, there are further points that may be made in favour of SZTAL's approach, and against the approach of the Minister and the plurality below. In short, the purpose of the CP Regime was to ensure that Australia met its international non-refoulement obligations under the ICCPR, CAT and CROC, and that it did so through a visa application process with merits review available, not through the exercise of a non-compellable Ministerial discretion. The plurality's approach creates significant disjunctions between the scope of the CP Regime and the scope of Australia's international obligations. SZTAL's approach would avoid, or at least minimise, those disjunctions.

Extrinsic material and the purpose of the CP Regime

46. The CP Regime was inserted into the *Migration Act* by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (**2011 Act**), as the 2011 Bill became once it was passed. In the 2011 2R Speech, the Minister referred to the complementary protection obligations under the ICCPR, CAT and CROC, and stated that "what this bill does is align our protection visa process with our existing international obligations and practices": p 1356. The Minister stated that the 2011 Bill defined concepts such as CITP and DTP "to assist assessing officers to interpret and implement these international obligations": 2011 2R Speech p 1357. He further stated that these "definitions will enable Australia to meet its non-refoulement obligations, without expanding the relevant concepts in a way that goes beyond current international interpretations": 2011 2R Speech p 1357.

47. The reform was designed to ensure that assessment of whether non-refoulement obligations under the relevant Conventions were engaged no longer had to be undertaken by the Minister personally. Instead, they would be done as part of the usual visa processing arrangements including a right of merits review: 2011 2R Speech p 1356; Explanatory Memorandum p 1-3.[22] Prior to the reform, the capacity to invoke these non-refoulement obligations could be engaged only by applying for a visa for

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21 SZTAL does not contend that there is any relevant difference between the standard to be applied in respect of the phrase "intentionally inflicted" in the definition of CITP in s 5(1) of the *Migration Act* and "intended to cause" in the definition of DTP in s 5(1) of the same.

22 See also the Senate Legal and Constitutional References Committee report, *Administration and Operation of the Migration Act 1958* (March 2006) (**2006 Report**), which was referred to in the Explanatory Memorandum at p 3 as having identified the need for reform. The 2006 Report recommended that consideration "of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time": [4.126].

which the applicant was ineligible, then "failing, seeking review and failing again, just so they are then able to apply to the minister for personal intervention": 2011 2R Speech p 1356. The Minister noted that, in such cases, the Minister's power was non-compellable and not subject to merits review: 2011 2R Speech p 1356. That had led to criticism of the reliance on the Minister's power for the purposes of providing complementary protection.[23] The purpose of the reform was not to limit Australia's response to its treaty obligations, but to mainstream the processing of complementary protection claims.

48. Further, prior to the introduction of the 2011 Bill, in 2009, an earlier version of the 2011 Bill, the *Migration Amendment (Complementary Protection) Bill 2009* (Cth) (**2009 Bill**), was considered by the Senate Legal and Constitutional Affairs Committee (**Committee**). The 2009 Bill included wording regarding intent in its definitions of CITP and DTP that was relevantly the same as the Intent Requirements: 2009 Bill, Sch 1 items 2 and 3. The Committee's report on the 2009 Bill noted that the Minister's Department had stated that the definitions were "consistent with current international law", and "reflect the extent of Australia's non-refoulement obligations without expanding the concepts beyond interpretations currently accepted in international law and commentary".[24]

49. In light of the statements by the Minister in the 2011 2R Speech, and by his Department to the Committee, it is surprising that the Minister submitted in the Federal Court that, in defining CITP and DTP in the CP Regime, "Parliament deliberately chose to implement or incorporate only a subset of Australia's obligations under the CAT and ICCPR". One would not expect the Minister to assert an operation of the CP Regime so much at odds with the Minister's explanation to Parliament and his Department's explanation to the Committee.

50. The plurality accepted the Minister's submission: *SZTAL* [62]. Their Honours erred in doing so. In reaching their conclusion, their Honours reasoned as follows:

a) the relevant definitions in s 5(1), and the text of s 36, of the *Migration Act* shows that Parliament did not intend the CP Regime to implement the relevant international obligations in their entirety: [61];

b) insofar as the definitions of torture, CITP and DTP in s 5(1) of the *Migration Act* are concerned, the statements in the Explanatory Memorandum that the definitions are "exhaustively defined" in s 5(1) confirms this understanding: [62];

c) a reason that the definitions of CITP and DTP in s 5(1) were not intended to implement the relevant international obligations in their entirety was that the ICCPR does not define CITP and DTP "by reference to intention": [62];

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23 The report of the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004), referred to in the Explanatory Memorandum at p 3 as having identified the need for reform, discussed Australia's non-refoulement obligations and identified "concerns about the adequacy of discretionary powers to implement international legal obligations that are not discretionary": [9.70].

24 *Legal and Constitutional Affairs Legislation Committee report into Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009 at [3.35]-[3.36]. The *Dissenting report by Liberal Senators* indicated a preference for Ministerial discretion to remain the only method by which Australia complied with its non-refoulement obligations: at [1.4], [1.8]. The approach now taken by the Minister to construing the Intent Requirements seeks to narrow the scope of the CP Regime, and thereby shift the power to grant protection in many cases back to the Minister's discretion.

d) as such, the "addition of the element of intention in the relevant definitions in s 5(1) narrows the scope of the equivalent concepts in the Migration Act": [62]; and

e) it "may be inferred from the relevantly narrower definitions in s 5(1) that the complementary protection provisions in s 36 of the *Migration Act* were intended to give effect to only a subset of Australia's obligations under the CAT and the ICCPR": [62].

51. A fundamental flaw in this reasoning process is that the ICCPR does not define CITP or DTP at all. In art 7, the ICCPR simply states that no "one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...". Unlike torture, which is defined in art 1 of the CAT, there are no definitions of CITP or DTP in the ICCPR. This explains the Minister's statement in the 2011 2R Speech that the definitions in the CP Regime were inserted "to assist assessing officers to interpret and implement" Australia's international obligations: p 1357.

52. When this point is understood, it is plain that there was no "addition of the element of intention" to the *Migration Act* definition of each of CITP and DTP as compared with some pre-existing international law definition: cf *SZTAL* [62]. The plurality erred (at [62]) in referring to s 5(1) as containing "relevantly narrower definitions" of CITP and DTP as compared to the ICCPR. The better understanding of the *Migration Act* definitions of CITP and DTP, consistent with the extrinsic material referred to above, is that these definitions were Parliament's best effort to define these concepts, which are not defined in international law. That being so, to the extent that the definitions can be read consistently with international law, they should be. Yet as the following part of these submissions shows, the approach of the plurality results in the definitions of CITP, DTP and torture in the CP Regime failing to accord with Australia's international obligations in a number of respects.

The CP Regime definitions and examples from international law

53. It is trite that poor prison conditions, including those resulting from inadequate resources, may constitute a breach of art 7 of the ICCPR.[25] Yet on the plurality's approach, the Tribunal did not err in stating that, under Australian law, poor prison conditions involving inadequate resources and overcrowding do not give rise to significant harm: Decision [80]. On the plurality's approach, the Tribunal's statement accords with the meaning of the Intent Requirements. Under the plurality's approach, the placing of a person in generally poor prison conditions (even for a lengthy or even unlimited period of time) cannot, without more, satisfy the Intent Requirements because it is, in essence, necessary that the actor desire to inflict harm. There is thus a disjunction caused between the CP Regime and Australia's non-refoulement obligations.

54. On SZTAL's approach, the Tribunal's statement is incorrect, and the disjunction between the CP Regime and international law is eliminated or minimised. SZTAL's approach is that the Intent Requirements are satisfied where a person performs an act knowing that the act will, in the ordinary course of events, inflict pain or suffering or

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25 See, eg, UN Human Rights Committee (**HRC**), *Portorreal v Dominican Republic*, Comm No 188/1984, UN Doc CCPR/C/OP/2 (5 November 1987) at [9.2], [11]; HRC, *Mukong v Cameroon*, Comm No 458/1991, UN Doc CCPR/C/51/D/458/1991 (21 July 1994) at [9.3]; HRC, *Tshisekedi v Zaire*, Comm No 242/1987, UN Doc CCPR/C/37/D/242/1987 (2 November 1989) at [13].

cause extreme humiliation.[26] On SZTAL's approach, at least in cases where a government or individual responsible for imprisoning a person knows,[27] for example, that the prison conditions are such as to cause pain, suffering or extreme humiliation in the ordinary course, the Intent Requirements will be satisfied. It is therefore incorrect to say that poor prison conditions cannot give rise to "significant harm", as defined in the *Migration Act*, simply because they stem from "inadequate resources" and "overcrowding": cf Decision [80].

55. The greater conformity with Australia's international obligations achieved by SZTAL's construction is not limited to cases of poor prison conditions. For example, a person may face a risk, upon return to their home country, of a form of medical experimentation known to cause excruciating pain. But the experimentation would not have as its "object the infliction of severe suffering": *Ping* [27]. It would be cruel, inhuman or degrading treatment under international law,[28] but on the plurality's approach, the CP Regime would not respond. The disjunction illustrated by this example is significant, as the words "[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation" were inserted at the end of art 7 of the ICCPR because "the matter was so important as to require a specific provision, even at the risk of repetition".[29]

56. Similarly, noting that the words "intentionally inflicted" appear in the definition of "torture" in s 5(1) of the *Migration Act* as well as the definition of CITP, as the ICTY authorities discussed at paragraphs 40 to 41 above show, SZTAL's construction aligns the definition of torture in the CP Regime with Australia's obligations under the CAT. Moreover, the issue discussed in those cases, whether rape involves the intentional infliction of pain or suffering necessary to constitute torture, applies equally when considering whether a person who faces a risk of rape if returned home is at a real risk of CITP or DTP. Assuming that the potential rapist would be motivated only by sexual desire, then on the Minister's approach, the CP Regime would not respond. This would be so even though such treatment would plainly be cruel, inhuman or degrading in contravention of art 7 of the ICCPR.

57. Each of these examples shows that SZTAL's construction of the Intent Requirements avoids a disjunction between the scope of the CP Regime and Australia's international obligations that would be created by the plurality's construction. As such, and since SZTAL's construction is open, it should be adopted as it better achieves the CP Regime's purpose.

Conclusion and other matters

58. The above submissions show that the Federal Court should have held that the Tribunal erred, including by asserting that, under Australian law, poor prison

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26 Submissions have been made above at paragraphs 20 to 43 as to why that construction is open and is preferable having regard to the genesis in art 1 of the CAT of the phrase "intentionally inflicted" in s 5(1) of the *Migration Act*.

27 As a factual matter, one would expect that in most cases it would be open to find, and indeed hard to reject, that a government has knowledge of the conditions in its prisons and that the persons who physically place prisoners in prison similarly have knowledge of the conditions.

28 *X v Denmark* [1983] 32 DR 282 at 283, 284, in which the European Commission on Human Rights held that non-consensual medical experimentation, and potentially even non-consensual medical *treatment* of an experimental nature, can contravene art 3 of the European Convention of Human Rights ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

29 *Annotations on the Text of the Draft International Covenants on Human Rights* (UN Doc A/2929) at [14].

conditions involving inadequate resources and overcrowding do not give rise to significant harm.

59. There is, however, a further point against the plurality's approach. The CAT requires States to establish universal jurisdiction over the crime of torture in accordance with the principle of *aut dedere aut punire*.[30] As such, Australia criminalises torture wherever it occurs: *Criminal Code 1995* (Cth) (**Code**) ss 15.4, 274.2(1), (2), (5). The Code defines torture as conduct that inflicts a result, namely severe pain or suffering, in certain cases: s 274.2(1)(a), (2)(a). Under the Code, a person has an intention with respect to a result including if he "is aware that it will occur in the ordinary course of events": Code s 5.2(3). That approach to the *mens rea* of intent for torture under the Code is separate to the *mens rea* for recklessness, which is dealt with in s 5.3 of the Code.

60. The plurality's approach to construing "intentionally inflicted" in the *Migration Act* definition of CITP must apply equally to the meaning of the same phrase in the *Migration Act* definition of torture. Yet that would mean a narrower standard of intent applies under the CP Regime than is required for a foreign official to commit the offence of torture under Australian law. There would be some conduct that Australia criminalises on the basis that it is torture, but Australia would not, under the CP Regime, offer protection from that conduct. That outcome should not be accepted.

61. The last issue to note in relation to the plurality's judgment is to address the statement at [41] that the "appellants accepted that the Tribunal's findings were inadequate to support the case they made". SZTAL certainly made no concession in the court below that the Tribunal's findings were inadequate to support his case of jurisdictional error. It is correct that the Tribunal's findings are insufficient to show that the applicant *would necessarily* face a real risk of CITP or DTP if returned to Sri Lanka. A court would not, based on the Tribunal's findings, determine that the applicant faced a real risk of significant harm. But this is because, as the Tribunal disposed of the claim by misconstruing the Intent Requirements, the Tribunal did not go on and make findings as to whether the claim would have succeeded if the Intent Requirements were satisfied. That is why, if the Tribunal erred in law as SZTAL contends, the matter must be remitted to the Tribunal. At [80], the plurality stated that "the appellants were plainly correct to acknowledge that, if they failed to show jurisdictional error in the Tribunal's decision, there was no sufficient basis for their claim under s 36(2)(aa) of the Migration Act". That statement accurately reflects the position advanced before the Federal Court, and explains what is meant by the plurality's statement at [41].

62. For the sake of completeness, it should be noted that Buchanan J also erred. A fair reading of [77]-[80] of the Decision shows that the Tribunal resolved the claim based on the Tribunal's view of the Intent Requirements. The whole of [80] of the Decision would be redundant if Buchanan J were correct. Plainly enough, the plurality did not share Buchanan J's view.

63. In summary, SZTAL's construction is open, reflects the meaning of the Intent Requirements' origin in art 1 of the CAT, better achieves the CP Regime's stated purpose of alignment with Australia's international obligations, and is a beneficial construction of a protective regime. For these reasons it is the correct construction. The plurality erred in holding otherwise.

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30 CAT art 5(2); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 200-1.

Part VII: Applicable Provisions

64. See annexure.

Part VIII: Orders Sought

65. In each appeal, as set out in the notice of appeal, the orders sought are that:

a) the appeal be allowed with costs;

b) the orders of the Federal Court of Australia be set aside, and in their place there be orders that:

i. the appeal be allowed;

ii. the orders of the Federal Circuit Court of Australia be set aside, and in their place there be orders that:

A. a writ of certiorari issue, quashing the Decision;

B. a writ of mandamus issue, remitting the matter to the Tribunal to be determined according to law;

C. a writ of prohibition issue, prohibiting the Minister from acting upon or giving effect to the Decision;

D. the Minister pay the applicant's costs;

iii. the Minister pay the appellant's costs.

Part IX: Estimate of Time

66. The appellants estimate that around two hours will be required for their oral argument.

Dated: 21 December 2016

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