IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M17 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

FIRST RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. This appeal raises three issues:

   a. Whether a threat to liberty constitutes "serious harm" pursuant to s 91R(1)(b) of the *Migration Act 1958* (Cth), without the need to examine the gravity of the consequences should the threat to liberty materialise. (the **serious harm issue**)

   b. Whether the failure by the second respondent (the **IMR**) to accord procedural fairness in respect of his findings as to the reasons for the harm was capable of materially affecting the IMR's findings as to whether the harm feared was serious harm. (the **independent basis issue**)

   c. Whether the courts below were wrong to consider the IMR as having found that claimed questioning and detention were done pursuant to a law or policy of general application. (the **procedural fairness issue**)

Part III: Section 78B notices

3. The first respondent does not consider it necessary to give notices under s 78B of the *Judiciary Act* (Cth).

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Part IV: Factual background

A. The serious harm issue

4. The first respondent is a stateless Faili Kurd from Iran. Before the IMR, the first respondent's relevant claims and evidence centred around the first respondent's fear of harm, including of persistent detention and interrogation, at the hands of the Basij.[1] The Basij is an Iranian paramilitary force[2] and was described by the IMR as a group "charged with the protection of Islamic values ... and they may act in the furtherance of their task with virtual impunity from other Iranian authorities".[3]

5. Specifically, the first respondent claimed the following:

> The Basij were based in a mosque and had places for interrogation within the village, where he had been taken as much as 30 to 40 times for periods in excess of 2 hours; once for 48 hours and often for 12 hours; he was released after bribes were paid by Iranian citizen friends. He might be detained daily, weekly or monthly.[4] ...
>
> Whilst he has never been physically assaulted, he has been questioned interminably about his lack of identity and the fate of his parents; he has been shouted at, sworn at and called a 'bitch', which he finds particularly offensive. He was given no food or water. He was taken by car and made to walk back [the IMR accepting he had a chronic leg injury[5]]. This could be by either the police or the Basij.[6]

6. The IMR largely accepted the first respondent's life experiences at face value[7] and made the following critical findings:

> I accept that he has been stopped and questioned many times and that he has from time to time been detained, verbally abused and required to pay bribes.[8] ...
>
> I accept there is a real chance that the claimant will be questioned periodically, and probably detained for short periods when he fails to produce identification, in the reasonably foreseeable future should he return to Iran[9] ...
>
> There is a real chance that he will continue to face arbitrary questioning and detention for want of identification documents in the reasonably foreseeable future.[10]

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[1] IMR reasons at [12] (dot point 8, 11), [13] (dot point 4), [15] (dot points 6),[18] (dot point 8).
[2] FCA reasons at [71].
[3] IMR reasons at [30].
[4] IMR reasons at [18] (dot point 11).
[5] IMR reasons at [69]; see also at [12] (dot point 9), [13] (dot point 7), [18] (dot point 16), [85].
[6] IMR reasons at [18] (dot point 12).
[7] IMR reasons at [39], [42].
[8] IMR reasons at [80].
[9] IMR reasons at [81].
[10] IMR reasons at [99] (dot point 3).

7. In applying s 91R of the *Migration Act* to those primary facts as found, the critical passages are as follows:

> ... having regard to the guidance provided by s.91R(2)(a), (b) and/or (c), I do not accept that the frequency or length of detention, or the treatment he will receive whilst in detention will involve serious harm within the meaning of the Act.[11] ...
>
> Furthermore, even if I accepted the questioning, detention and abuse there is a real chance the claimant will be subjected to, is sufficiently significant to amount to serious harm[12] ... (emphasis added)
>
> The above harm [including "arbitrary questioning and detention"] does not amount to *serious harm* within the meaning of the Act[13] ...

8. The Federal Magistrates' Court (**FMC**) found that the IMR had applied a test of "sufficiently significant" to the test of serious harm in relation to a threat to liberty, but that the application of such a test involved no error.[14] The Federal Court also accepted that the IMR applied a test of "sufficiently significant" to the test of serious harm.[15] Ultimately, the Federal Court found that the IMR made a qualitative assessment of the nature of the harm when asking himself whether the threat to the first respondent's liberty was sufficiently significant,[16] and that that constituted jurisdictional error.[17]

B. The independent basis and procedural fairness issues

9. The IMR was not satisfied that the claimed questioning and detention of the first respondent would be for the essential and significant reason of a Convention ground. The critical findings and reasoning of the IMR in that respect are set out in the body of the argument below.

10. Both the FMC[18] and the Federal Court[19] below found that the IMR had found that the reason why it was not for the essential and significant reason of a Convention ground was that the questioning and detention would be done pursuant to a law of general application. The Federal Court found that that finding was in breach of the rules of procedural fairness (there had been no complaint about that finding before the FMC).[20]

Part V: Applicable provisions

11. The first respondent accepts the statement of applicable legislative provisions of the appellant (the **Minister**).

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[11] IMR reasons at [81].
[12] IMR reasons at [82].
[13] IMR reasons at [99] (dot point 4).
[14] FMC reasons at [84].
[15] FCA reasons at [18], [45].
[16] FCA reasons at [18].
[17] FCA reasons at [45].
[18] FMC reasons at [85], [109].
[19] FCA reasons at [63]-[65].
[20] FCA reasons at [75].

Part VI: Argument

A. Serious harm issue

Holding of Federal Court

12. The Federal Court held that a threat to liberty constitutes serious harm, and that the IMR was in error in assessing whether the features of the threat to liberty were sufficiently significant to constitute serious harm by placing a gloss on the words of the statute.[21] The Federal Court's conclusion was that the statutory language did not superimpose on the threat to liberty an additional qualification that regard must be had to the relative severity of the threat to liberty. That is, the Court rejected a contention that some, but not all, threats to liberty amount to serious harm.

13. The case in the Federal Court proceeded on the common assumption that the findings of the IMR gave rise to, or included a finding of, a threat to the first respondent's liberty.[22] Accepting that assumption, however, the Minister argued below that "any threat to liberty requires more than occasional or temporary threats to liberty to qualify as serious harm".[23]

14. In this Court the Minister now appears to argue that the qualitative analysis of the conditions and length of detention undertaken by the IMR was directed to the anterior question whether that detention amounts to a threat to liberty at all and not whether the threat to liberty was of a sufficiently serious character so as to amount to serious harm.[24] That construction of the reasons of the IMR was not one advanced by the Minister below and does not reflect a fair reading of the reasons. But even if it were, it would simply bring the error found by the Federal Court to an earlier part of the analysis.

The reasoning of the IMR

15. The IMR concluded that the detention that the first respondent may suffer on return did not amount to serious harm because it was not "sufficiently significant".[25] He arrived at that conclusion, applying the "guidance" of s 91R(2).[26] According to the IMR, the threatened detention was not serious

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[21] "[S]erious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty": FCA reasons at [30] (emphasis added); "By making a qualitative assessment of the nature and degree of the harm experienced by the applicant when asking whether the threat to the applicant's liberty was sufficiently significant, the reviewer in the present case applied the wrong test in the application of s 91R(2)(a), and thereby fell into jurisdictional error": [45] (emphasis added).

[22] See e.g. FCA reasons at [19] where it is noted that it was common ground that the IMR "had to, and did, make an assessment of the risk of the threat to liberty materialising" (emphases added).

[23] FCA reasons at [24] (emphasis added).

[24] Minister's submissions, dated 10 March 2015, pars 14, 41, 43, 54.

[25] IMR reasons at [82].

[26] IMR reasons at [81].

harm by applying three criteria: frequency, length and treatment in detention.

16. It is clear that those criteria, read in the context of the reasons as a whole, were directed not to the threshold question as to whether the threatened harm would involve a threat to liberty, but whether the level of infringement of liberty was sufficiently significant as to come within the statutory "guidance". Each of the qualifications may make a period of detention more severe and burdensome but they were not relevant here to establishing whether there was a threat to liberty.

17. The IMR's reasons recognised a distinction between being stopped and questioned and being detained.[27] In using the words "detention" and "detained" the IMR was accepting a potential contrast between a loss of liberty and other restrictions on freedom of movement. For example, he observed that "detention will follow [questioning] if the person stopped is suspected of being involved in any illegal or immoral activity or otherwise presents some threat to state security".[28] He did not say that the detention the first respondent suffered, and which risked being repeated, was a restriction of movement that did not involve a loss of liberty.

18. In those circumstances, a finding that there was a deprivation of "liberty" is necessarily to be inferred, as it was by Dawson J in the circumstances of *Chan v Minister for Immigration and Ethnic Affairs*.[29] The matters set out in pars 4-6 above require no less, for the detention suffered by the first respondent necessarily involved a loss of liberty. The IMR used the word "detention" in answer to the claim that the first respondent was taken to a place of interrogation kept by the Basij often for 12 hours, interrogated and given no food or water.

19. It is also necessarily to be inferred by reason of the fact that the IMR in his reasons weighs the circumstances of the first respondent's detention against the ultimate criterion of *"serious harm"*,[30] and nowhere in the reasons does the IMR weigh those circumstances against the threshold criterion of "threat to … liberty" in s 91R(2)(a).

20. It follows the IMR did not ask itself whether there was a threat to liberty but whether the prospective deprivation of liberty was sufficiently significant so as to amount to serious harm. No issue presented concerning the meaning of "threat" in this context.[31]

21. The IMR having found a threat to the first respondent's liberty, the question is whether the IMR was wrong to calibrate the threat to liberty in assessing whether it constituted serious harm. The first respondent submits that the

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[27] IMR reasons at [80],[81], [82] and [99]
[28] IMR reasons at [83].
[29] (1989) 169 CLR 379 at 400.
[30] IMR reasons at [81]-[82].
[31] *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1, i.e. it was more than a possibility which was capable of instilling a fear of danger to life or liberty.

Federal Court was right to answer that question "yes", holding a threat to liberty is an instance of serious harm *per se*. That approach is supported by a number of compelling considerations:

a. the text and context of s 91R(2)(a);

b. orthodox rules of construction which apply to inclusive definitions;

c. the proposition that serious harm does not equal persecution;

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d. the legislative history of the provision;

e. the special status of liberty under the Convention; and

f. the special status of liberty under the general law and international law more broadly.

Text and context

20 22. The phrase "threat to liberty" is not defined. While there may be debate at the margins about what restrictions on movement will amount to a deprivation of liberty, the definition necessarily includes four-walls detention where the person is detained against his or her will. For the reasons given above, the IMR necessarily found a threat to liberty in this case. The Federal Court did not equate detention with a loss of liberty for the purposes of s 91R(2). Nor did it need to: a threat to liberty was accepted.

23. Three matters are immediately notable about the text of s 91R(2)(a):

30 a. First, through its collocation with "life" in s 91R(2)(a), the liberty of the person is treated, textually, as importantly as the life of the person. That is, life and liberty are not concepts separately divided, as is the case for the other deemed instances of serious harm in sub-ss 91R(2)(b)-(f). The Minister concedes[32] that a "threat to life" is serious harm *per se*; the interpretation of a "threat to liberty" should be informed by that concession, a differential reading is not supported by the text.

b. Secondly, aside from s 91R(2)(a), all the other deemed instances of "serious harm" in s 91R(2) are attended by some qualitative element (e.g.
40 that there be significant physical harassment; or that there be denial of access to basic services such that the denial threatens the person's capacity to subsist). In contrast, s 91R(2)(a) deems a threat to life or liberty to be an instance of "serious harm", without reference to any qualitative qualifier.

c. Thirdly, the other prescribed instances in s 91R(2) are focused upon inherently harmful events or conditions occurring or coming about (e.g. significant physical harassment of the person). By contrast, s 91R(2)(a)

[32] Minister's written submissions, dated 10 March 2015, par 26.

focuses not upon any inherently harmful event or condition occurring or coming about, but upon "a threat" to two inherently positive human conditions: life and liberty. The Parliament has thus indicated that serious harm will be deemed to occur before the inherently harmful events of "death" and "loss of liberty" eventuate; rather, it has provided that a "threat", i.e. a likelihood of harm,[33] to the positive conditions of life and liberty is enough to constitute serious harm.

24. These textual and contextual matters all confirm the conclusion arrived at by the Federal Court, namely that a threat to life or liberty is "serious harm" *per se* under the *Migration Act*, without reference to the severity of the consequences should the threat materialise. That approach is consistent with the peculiar treatment of the rights to life and liberty under s 91R.

Section 91R(2) provides for an inclusive definition of "serious harm"

25. It should also be noted that s 91R(2) provides for an inclusive definition of "serious harm" as it appears in s 91R(1)(b). This is how it was characterised in the second reading speech in support of the bill which introduced s 91R.[34] Indeed the bill was subsequently amended, precisely to ensure that it was taken to be non-exhaustive.[35]

26. According to orthodox principles of statutory construction, such inclusive definitions are used, in order to enlarge the ordinary meaning of words.[36] Therefore, a "threat to the person's life or liberty" should not be informed by the natural and ordinary meaning of "serious harm", which it seeks to define in a non-exhaustive way.[37] To do so would be to abandon orthodox principles of statutory construction. It would also be contrary to unanimous authority of this Court to the effect that the words of a definition must not be construed by reference to the term defined.[38]

27. To require a "serious" or "significant" threat to liberty, as the IMR did,[39] is to contravene both of the above principles.

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[33] *VBAO v Minister for Immigration and Multicultural Affairs* (2006) 233 CLR 1.
[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2001 at 30421 (Phillip Ruddock).
[35] The chapeau to proposed s 91R(2) in the original bill provided "The reference in paragraph (1)(b) to ***serious harm*** to the person includes a reference to any of the following". The chapeau was amended in the House of Representatives to its current form in order "to clarify that it provides a non-exhaustive list of what is 'serious harm'" and that proposed sub-ss (2)(a)-(f) "do not prevent other things from amounting to 'serious harm'": Revised Explanatory Memorandum, par 23 (see also par 24); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 2001 at 31169 (Phillip Ruddock).
[36] *Dilworth v Stamps Commissioner* [1899] AC at 105-106 (PC).
[37] Compare *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1 at 9 [19] per Gummow J.
[38] *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419; see also *Esso Australia Resources Pty Ltd v Commissioner of Taxation* (2011) 199 FCR 226 at 256-258 [101]-[107].
[39] IMR reasons at [82].

Serious harm does not equal persecution

28. Before coming to some broader aspects of context, it is important to emphasise that a finding of serious harm is not a finding of persecution. In one sense, the Act differs from art 1A(2) of the Convention by treating the elements in an isolated way. That is not to say that one is to read sub-ss 91R(1)(a)-(c) as if they were disconnected from each other and blind to the background of the Convention. However, it does not follow that because a person may suffer serious harm in the form of loss of liberty (including of a relatively short duration) they will have established persecution.

29. As stated by Crennan J in *VBAS v Minister for Immgiration and Multicultural and Indigenous Affairs*:[40]

> The submission for the [Minister] is correct: whilst it remains necessary to establish a well-founded fear of "persecution" within the meaning of Art 1A(2) of the Convention, it is now also necessary to establish that such persecution involves "serious harm" to the relevant person. Subsections 91R(1)(b) and (2) do not replace the test of "persecution" with a test of "serious harm"; rather those provisions require an applicant to have a well-founded fear of *persecution involving serious harm*. (emphasis in original)

30. Thus, "serious harm" is a necessary but not sufficient criterion for the grant of a protection visa under s 36(2)(a) of the *Migration Act*. Whether the harm feared by an applicant amounts to "serious harm" does not dispose of the questions whether that which an applicant fears amounts to "persecution", whether the persecution is essentially and significantly for a Convention reason (s 91R(1)(a)), and whether the persecution involves systematic and discriminatory conduct (s 91R(1)(c)). Rather, "serious harm" is, as Crennan J identified, a separate and distinct hurdle under the *Migration Act* and is not a replacement for "persecution".

31. Furthermore, as McHugh J's analysis in *Haji Ibrahim* exemplifies, "persecution" is a compound concept that takes account of the nature of the harm, the identity of the persecutor, whether it is systematic and discriminatory and whether it is for a Convention reason.[41] This is reflected in s 91R(1) where, under the heading "Persecution", it enumerates several criteria required to be present for art 1A(2) of the Convention to apply.

32. In the context of an holistic analysis, the harm which an applicant for a protection visa fears may be relevant on a number of levels in relation to his or her claims to a well-founded fear of persecution. Most obviously, it will be relevant to whether that harm amounts to "serious harm" within s 91R(1)(b).

33. However, it may also be relevant to whether treatment is discriminatory for a Convention reason. If, for example, the harm complained of is done pursuant to a law or policy of general application, the harm may properly be

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[40] (2005) 141 FCR 435 at 442 [18].
[41] *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 18-19 [55].

seen as not discriminatory for a Convention reason. Indeed, the very shortness of the detention may lead to a valid inference that it is done pursuant to a law or policy of general application.[42] On the other hand, if a law of general application employs means which cause disproportionate harm in achieving the law's legitimate national objectives, then the harm may properly be seen as discriminatory for a Convention reason.[43] Furthermore, whether the harm feared is liable to occur only once or periodically may be relevant to whether it is "systematic", pursuant to s 91R(1)(c).[44]

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34. In other words, the fact that harm amounts to "serious harm" does not dispose of the question whether the person has a well-founded fear of persecution. While a threat to a person's liberty necessarily constitutes "serious harm" (pursuant to s 91R(2)(a)), that may not amount to persecution and the "anomalous consequences" which the Minister fears[45] go unrealised.

35. If anything, the Minister's approach in this appeal impermissibly compartmentalises the concepts which form part of a claim for a well-
20 founded fear of persecution on Convention grounds. On that basis alone it should be rejected.

Legislative history

36. Section 91R was inserted into the *Migration Act* by the *Migration Legislation Amendment Act (No 6) 2001* (Cth).[46] Yet the concept of persecution involving some serious or significant harm had already been developed in this Court by Mason CJ and Dawson J in *Chan v Minister for Immigration and Ethnic Affairs*,[47] their separate reasons evidencing an assumption that
30 threats to liberty were *per se* sufficiently serious to amount to persecution. Section 91R draws directly from those judicial statements.

37. That proposition is supported in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs*. In that case, Gummow J observed[48] that s 91R could be traced to certain dicta of Mason CJ and Dawson J in *Chan*[49] in respect of the seriousness of the harm required. The Minister had put arguments to the Court to that effect.[50]

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[42] Compare J C Hathaway and M Foster, *The Law of Refugee Status* (2nd ed, 2014) at 242.
[43] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 402-403 [44] per Gleeson CJ, Gummow and Kirby JJ.
[44] Cf. *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 30-32 [96]-[100]; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430.
[45] Minister's written submissions, dated 10 March 2015, pars 56-58.
[46] Sch 1, cl 5.
[47] (1989) 169 CLR 379 at 388, 390 per Mason CJ, 399 per Dawson J; see also *Minster for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 388.
[48] (2006) 233 CLR 1 at 8-9 [16]-[17].
[49] (1989) 169 CLR 379.
[50] (2006) 233 CLR 1 at 4 *arguendo*.

38. Those dicta quoted by Gummow J in *VBAO* include the following passage in the judgment of Dawson J:[51]

> [T]here is a general acceptance that a threat to life or freedom for a Convention reason amounts to persecution ... Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity. (emphasis added)

39. They also include the following passages in the judgment of Mason CJ:[52]

> [Persecution requires] some serious punishment or penalty or some significant detriment or disadvantage. ...
>
> Discrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character. (emphases added)

40. Gummow J noted the Explanatory Memorandum for the bill which introduced s 91R complained that claims of persecution were being determined to fall within the scope of the Convention though the feared harm fell short of the level of harm accepted by the parties to the Convention to constitute persecution. However, Gummow J observed, correctly it is submitted, that that complaint was not in respect of the judicial dicta extracted above "which include terms now found in s 91R, so much as perceived inconsistencies in their subsequent application from case to case".[53]

41. Thus, it is clear that s 91R drew from a judicial interpretation of persecutory harm which interpretation identified and privileged threats to liberty as persecutory harms *per se*.[54]

42. The express qualifications that are found in sub-ss 91R(2)(b)-(f) but which are absent in 91R(2)(a), recognise that where feared harm extends beyond threats to life or liberty, questions of degree are involved. Within the potential spectrum of harm, it is only significant harm, reflecting that which a person cannot reasonably be expected to tolerate, that might give rise to persecution. The consequences of a threat to life and to liberty are recognised in the Act as being of sufficient severity to warrant the protection of the Convention.

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[51] (1989) 169 CLR 379 at 399-400 per Dawson J.
[52] (1989) 169 CLR 379 at 388, 390 per Mason CJ.
[53] VBAO at 8 [16]. It may well have been introduced in response to *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 855 at [48] in which a Full Court of the Federal Court interpreted the statements of Mason CJ in *Chan* to mean that the harm feared need only be more than trivial or insignificant.
[54] Cf. *Ex parte Campbell* (1870) LR 5 Ch App 703 at 706 per James LJ, approved in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 412, 435, 438, 442, 446.

43. The Act does not ignore the severity and consequences that a threat to life or liberty entails but expressly recognises them as being instances of serious harm for the purpose of applying the Convention.

Minister's reliance on Explanatory Memorandum misconceived

44. The Minister's submission that s 91R was intended to "raise the threshold" of harm required for refugee status does not engage with the issues that presently arise.[55] For the following reasons, the Explanatory Memorandum does not assist the Minister:

a. First, at best the mischief identified in the Explanatory Memorandum is as follows:

> These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.[56]

Thus, any notion of s 91R "raising the threshold" must be seen in light of the extremely low bar which the explanatory materials had identified.

b. Secondly, and as Gummow J observed, the Explanatory Memorandum does not challenge the judicial statements which had specifically identified threats to liberty as persecutory harm *per se*.

c. Lastly, statutory interpretation is concerned with ascertaining the legislative intention which is manifested by the legislation.[57] That is, it is concerned with "not what the Parliament intended to do, but what it actually did".[58] As stated by French CJ, Gummow, Hayne, Crennan and Kiefel JJ in *Saeed v Minister for Immigration and Citizenship*:

> [s]tatements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.[59]

And as Mason CJ, Wilson and Dawson JJ observed in *Re Bolton; Ex parte Beane*,[60] these principles apply *a fortiori* where deprivation of the liberty of

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[55] Minister's written submissions, dated 10 March 2015, pars 45-47.
[56] Revised Explanatory Memorandum, par 25. This is perhaps reminiscent of the language in the 1938 *Convention Concerning the Status of Refugees*, which excluded from protection those who had left Germany "for reasons of purely personal convenience": see A Grahl-Madsen, *The Status of Refugees in International Law* (1966) vol 1 at 188.
[57] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel, quoting with approval *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169 per Gummow J.
[58] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 278 [74] per Heydon J.
[59] (2010) 241 CLR 252 at 264-265 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also at CLR 277 [74] per Heydon J: "In short, as is very common, reading the Explanatory Memorandum and the Second Reading Speech is much less helpful than reading the legislation itself."

an individual is concerned. Furthermore, as the plurality in *Saeed* noted, "it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction".[61]

Special protection of life and liberty consistent with Convention

45. The Federal Court's approach to threats to liberty as constituting serious harm *per se* is furthermore consistent with the special importance which the rights to life and liberty enjoy under the Convention. In 1966, Grahl-Madsen identified the contemporary scholarly consensus as follows:[62] "It is generally agreed that 'a threat to life or freedom on one of the grounds stated in the Statute and the Convention will always be persecution'."[63]

46. That is the scholarly consensus that was identified by Dawson J in *Chan*, extracted at par 38 above.[64] In *Chan*, Dawson J immediately went on to say:[65]

> The [UNCHR] Handbook [on Procedures and Criteria for Determining Refugee Status] in par. 51 expresses the view that it may be inferred from the Convention that a threat to life or freedom for a Convention reason is always persecution, although other serious violations of human rights for the same reasons would also constitute persecution. It is unnecessary for present purposes to enter the controversy whether any and, if so, what actions other than a threat to life or freedom would amount to persecution.

47. The Handbook, which has been described as "highly influential"[66] and a permissible aid to interpretation,[67] maintains that view in its latest edition.[68]

48. Dawson J's analysis in *Chan* reflected contemporary disagreement in international law as to the scope and meaning of persecution under the Convention.[69] The so-called "restrictive school" considered that only deprivation of life or physical freedom could constitute persecution, whereas

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[60] (1987) 162 CLR 514 at 518, quoted with approval in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [32] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[61] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ, citing with approval *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ.
[62] *The Status of Refugees in International Law* (1966) vol 1 at 193 (emphasis added).
[63] Grahl-Madsen's view quoted by the Minister in his written submissions, dated 10 March 2015, par 34, has been understood to relate to his view of when emergency detention is of sufficient duration to amount to persecution: J C Hathaway, *The Law of Refugee Status* (1991) at 113 n 118; it does not bear upon when discriminatory, non-emergency detention constitutes persecution.
[64] (1989) 169 CLR 379 at 399 (emphases added).
[65] (1989) 169 CLR 379 at 399-400 (emphases added).
[66] S Rempell, "Defining Persecution" [2013, No 1] *Utah Law Review* 283 at 332.
[67] *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168 at 192-193 [111], 196 [130].
[68] (2nd ed, 1992) (reissue 2011), pars 51-52.
[69] See A Grahl-Madsen, *The Status of Refugees in International Law* (1966) vol 1 at 193ff.

the so-called "liberal school" considered it might extend to other infringements of rights, depending on the circumstances.[70]

49. While persecution is now acknowledged to encompass rights breaches beyond those contemplated by the "restrictive school",[71] the difference between that which was contentious and that which was consensus remains fundamental today. As Goodwin-Gill and McAdam state in the most recent edition of *The Refugee in International Law*, referring to the conflict between the "restrictive" and "liberal" schools:[72]

> The core meaning of persecution readily includes the threat of deprivation of life or physical freedom. In its broader sense, however, it remains very much a question of degree or proportion.

50. The notion that matters of degree and proportion only enter into the analysis where there is an infringement of rights other than one constituting deprivation of life or physical freedom is consistent with McHugh J's observations in *Haji Ibrahim*, cited by the IMR[73] in this case:

> Persecution involves discrimination that results in harm to an individual. But not all discrimination amounts to persecution. ... Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend upon the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution.[74]

51. Hathaway notes in this regard:[75]

> Critics argue that the relative ease of establishing a risk of persecution on the basis of a threat to life or freedom privileges these aspects of human dignity in relation to social, economic, and cultural rights. This observation, while correct, accurately reflects the current hierarchical state of the international law of human rights.

52. The privileged position of life and liberty rights under the Convention is also justified by Zimmermann and Mahler[76] on the basis that the right to physical freedom is amongst the "core values of any individual in any situation" and that "[t]he acceptance of a violation of these rights as persecution is based on the position that any violation of these rights infringes the human dignity of the person".[77]

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[70] A Grahl-Madsen, *The Status of Refugees in International Law* (1966) vol 1 at 193.
[71] See e.g. A Zimmermann and C Mahler, in "Article 1A, para. 2" in A Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) at 346.
[72] (3rd ed, 2007) at 92 (emphasis added).
[73] IMR reasons at [51].
[74] *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 18-19 [55].
[75] *The Law of Refugee Status* (1991) at 115.
[76] In their discussion of "life, personal integrity, and freedom" rights.
[77] A Zimmermann and C Mahler, in "Article 1A, para. 2" in A Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) at 355 (emphasis added).

Consistent with human rights approach

53. The human rights approach favoured by Hathaway and Foster and adopted elsewhere[78] also supports the holding that threats to liberty are persecutory harms *per se*, although the learned authors would exclude from this category of *per se* persecutory harms deprivations of liberty which were lawful, not arbitrary, and respectful of the inherent dignity of the person (those criteria being cumulative).[79] That latter refinement reflects the interrelationship between harm and the reason for the harm in this context.

54. The Minister is wrong to submit that the Federal Court erred in its understanding of the human rights approach propounded by Hathaway and Foster.[80] In particular, he is wrong to submit that their analysis rather assumes that the threat to liberty in question is of sufficient severity to amount to serious harm. That is not so. So much is clear from their concluding remarks on the topic of arrest and detention:[81]

> The risk of an arrest or detention that fails to meet these standards [i.e. lawful, not arbitrary, and respectful of the inherent dignity of the person] is presumptively serious harm for refugee law purposes. ... Only where there is compliance with these internationally defined norms will arrest and detention even in the context of a national emergency fail to be evidence of persecutory harm.

55. The Minister's submission is also in tension with the authors' exclusion of *de minimis* rights violations as not amounting to persecution:[82]

> [T]here will occasionally be cases in which – despite the fact that the risk alleged implicates a broadly subscribed international human rights norm and considerations neither of internal limitation nor of emergency derogation apply – it may nonetheless be clear upon thoughtful and conscientious reflection that the threat is so far at the margins of a rights violation as to amount to a *de minimis* harm. In such exceptional cases, the risk need not be treated as serious harm for refugee law purposes. ... There must be a clear and convincing basis to find that the sustained or systemic risk of denial of a broadly subscribed international human right is truly *de minimis* in the circumstances of a particular case ...

56. A test of *de minimis* was proposed by the first respondent in the Federal Court below to exclude from the definition of serious harm trifling threats to liberty.[83] An exclusion of threats to liberty which are truly *de minimis* is an appropriate qualifier to s 91R(2)(a), particularly in circumstances where, as described at pars 28-35 above, to succeed in obtaining a protection visa, the application will have had additionally to demonstrate that the harm is discriminatory and systematic, and for a Convention ground. Needless to

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[78] See FCA reasons at [36]ff.
[79] *The Law of Refugee Status* (2nd ed, 2014) at 239.
[80] Minister's written submissions, dated 10 March 2015, n 17.
[81] *The Law of Refugee Status* (2nd ed, 2014) at 242-243.
[82] *The Law of Refugee Status* (2nd ed, 2014) at 206.
[83] FCA reasons at [20].

say, the IMR did not address himself to whether the detention was *de minimis*; thus, if that be the true qualifier, the Minister's appeal must fail.

Comparative treatment of threats to liberty

57. The Minister embraces[84] the United States cases in relation to the harm required to amount to persecution. However, there are four fundamental problems with his reliance on them:

a. First, the Minister misidentifies the relevant standard in the United States cases as being whether the treatment "rises to the level" of persecution – in fact, the standard applied is whether the conduct complained of amounts to more than "mere harassment",[85] and the courts have quashed the decisions of decision-makers who have failed to address themselves to that question.[86] More than "mere harassment", as a standard of harm, does not sit well with authority of this Court[87] which has identified "harassment" as a touchstone of persecution.[88] And, in any event, the IMR did not address himself to any such standard in this case.

b. Secondly, the United States cases, including in cases involving short periods of detention,[89] often involve deference to reasonable interpretations of the statute by the Board of Immigration Appeals, pursuant to the *Chevron* doctrine.[90] That doctrine has, of course, been rejected by this Court.[91]

c. Thirdly, United States legislation recognises as refugees a broader class of person than the Convention, extending the definition of "refugee" to those who have suffered past persecution but do not fear future persecution.[92] In this context, the United States courts have sometimes required past persecution to meet a higher standard of harm than that required under the Convention.[93]

d. Fourthly, the Minister's assertion that "it has been specifically held that detention of short duration, which is not accompanied by other forms of

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[84] Minister's written submissions, dated 10 March 2015, par 31.
[85] *Borca v INS*, 77 F 3d 210 at 214 [8]; *Asani v INS*, 154 F 3d 719 (7th Cir. 1998) at [15]; *Balazosku v INS*, 932 F 2d 638 (7th Cir. 1991) at 642; *Attia v Gonzalez*, 477 F 3d 21 (1st Cir. 2007) at [3]; *Nelson v INS*, 232 F 3d 258 (1st Cir. 2000) at 263; *Vladimirova v Ashcroft*, 377 F 3d 690 (7th Cir 2004) at [24]; S Rempell, "Defining Persecution" [2013, No 1] *Utah Law Review* 283 at 312-314.
[86] See e.g. *Asani v Immigration and Naturalization Service*, 154 F 3d 719 (7th Cir. 1998) at [15].
[87] Nor the Canadian approach: J C Hathaway, *The Law of Refugee Status* (1991) at 101.
[88] See e.g. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 per Mason CJ, 429 per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; cf *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 18-19 [55] per McHugh J.
[89] See e.g. *Zalega v INS*, 916 F 2d 1257 at 1259 (7th Cir. 1990); *Borca v INS*, 77 F 3d 210 (7th Cir. 1996) at 214.
[90] *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984).
[91] *Corporation of City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
[92] S Legomsky, "Refugees, Asylum and the Rule of Law in the USA" in *Refugees, Asylum Seekers and the Rule of Law* (2009) (S Kneedbone (ed)) at 131-132.
[93] See e.g. *Skalak v INS*, 944 F 2d 364 (7th Cir. 1991), referred to in FCA reasons at [26].

harm, does not 'rise to the level' of persecution" is contrary to his ultimate submission that whether short-term periodic detention amounts to serious harm is a matter of fact and impression for the decision-maker.[94] In any event, each of the United States authorities relied upon by the Minister discusses that proposition under its analysis of "past persecution" (which, as discussed above, can have a peculiar standard of harm in the United States, higher than the apprehended conduct necessary to establish a well-founded fear of future persecution).

58. As for the single justice decision of *Vellupillai v Canada*, relied upon by the Minister, the Court there did not, as the Minister submits,[95] hold that short periods of detention did not generally amount to persecution. Rather, it accepted that it "may be generally true" that "short detentions for the purpose of preventing disruption or dealing with terrorism do not constitute persecution".[96] The decision has nothing to say about short periods of detention which are for Convention grounds and not for reasons of the execution of laws of general application.

59. For the above reasons, it is difficult to draw anything of moment from the miscellany of United States and Canadian cases relied upon by the Minister. The authoritative scholarly consensus view, that a threat to life or liberty amounts to persecution *per se* under the Convention, should not be taken to be disturbed.

Special protection of liberty consistent with general law and with international law

60. Construing s 91R(2)(a) such that a threat to liberty is serious harm *per se* is consistent with the attitude of the general law to liberty. Blackstone held personal liberty to be an absolute right vested in the individual by the immutable laws of nature.[97] Fullagar J observed the right of personal liberty to be "the most elementary and important of all common law rights".[98]

61. It is furthermore consistent with broader international human rights law. In particular, the right to "life, liberty and security of person" is the first substantive right protected by the 1948 Universal Declaration of Human Rights.[99] The United Nations Human Rights Committee makes the important observation in respect of the right to liberty and security of person under art 9 of the International Covenant on Civil and Political Rights that, while liberty and security of person are precious for their own sake, they are also precious "because the deprivation of liberty and security of person

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[94] Minister's written submissions, dated 10 March 2015, par 58.
[95] Minister's written submissions, dated 10 March 2015, par 32.
[96] *Velluppillai v Canada* [2000] FCJ No 301 (QL) at [15] (emphasis added).
[97] *Commentaries on the Laws of England* (Oxford 1765), Bk 1 at 120-121, 130-131; *Williams v The Queen* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ.
[98] *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (emphasis added). See also *Cleland v The Queen* (1982) 151 CLR 1 at 26, where Deane J stated "a police power or practice of arbitrary detention is, like a police power or practice of arbitrary arrest, a negation of any true right to person liberty and a hallmark of tyranny"
[99] Art 3; UNHRC, General comment No. 35, dated 16 December 2014 at [2].

have historically been principal means for impairing the enjoyment of other rights".[100]

B. Procedural fairness issue

62. The Federal Court held that the IMR denied the first respondent procedural fairness in making his finding that the essential and significant reason for the detention of the first respondent was not for a Convention ground.[101] That holding depended upon a finding by the Federal Court that the IMR had found that the detention of the first respondent was done pursuant to a law of general application.[102]

63. The Minister's challenge in this Court to the Federal Court's holding of procedural unfairness depends upon an allegation that the Federal Court misconstrued the IMR's reasons as to why the first respondent's detention was not for a Convention reason.[103] At this point, it is convenient to set out the relevant passage from the IMR's reasons:[104]

> Country information indicates that State and de-facto authorities such as the Basij will stop and question people indiscriminately. Detention will follow if the person stopped is suspected of being involved in any illegal or immoral activity or otherwise presents some threat to State security.
>
> The inability to provide identification papers will attract further enquiries, but I do not consider such questioning and detention as described by the claimant to be persecutory, as I do not consider it to be discriminatory for a Convention reason. Even if people without identification papers could be regarded as a particular social group (which I do not accept), I do not consider such questioning and detention to be inappropriate in the sense discussed by the High Court in *Applicant S v MIMA* (2004) 217 CLR 387.

64. The Minister submits that, in the above passages, the IMR made two independent findings: one finding that the detention was simply not discriminatory, and another (ultimately not relied upon) that any harm was consistent with the principles in *Applicant S*,[105] which case relates to the appropriateness and adaptedness of laws of general application.[106] In this respect, the Minister is wrong to submit[107] that the appropriateness of a law is only relevant if it is being implemented in a discriminatory fashion; it is enough that the law results in discriminatory treatment.[108]

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[100] UNHRC, General comment No. 35, dated 16 December 2014 at [2].
[101] FCA reasons at [75].
[102] FCA reasons at [61]-[65].
[103] Minister's submissions, dated 10 March 2015, pars 59-65; see also par 75 below.
[104] IMR reasons at [83]-[84].
[105] Minister's submissions, dated 10 March 2015, pars 63-64.
[106] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 402 [42]-[43] per Gleeson CJ, Gummow and Kirby JJ, approving *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 per McHugh J.
[107] Minister's written submissions, dated 10 March 2015, par 64.
[108] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 402 [43].

65. Here the relevant claim by the first respondent was that his membership of a particular social group (constituted by either Stateless persons, undocumented Failli Kurds living in Iran, stateless Failli Kurds, or undocumented refugees living in Iran[109]) "exposes the claimant to abuse ... and detention at the hands of State authorities such as the police and de-facto State authorities such as the Basij".[110]

66. The Minister's assertion that the detention was found to be indiscriminate is fundamentally wrong. While the "stop[ping] and question[ing][111]"[112] may have been found by the IMR to be indiscriminate, the IMR found that detention would follow only according to a discriminatory criterion, namely "if the person stopped is suspected of being involved in any illegal or immoral activity or otherwise presents some threat to State security".[113] In the first respondent's particular case, the IMR also found that the first respondent's "inability to provide identification papers will attract further enquiries", again, a discriminatory criterion.

67. To put matters beyond doubt, the IMR stated at the beginning of his consideration of this aspect of the first respondent's claim that "it is clear from his evidence that the essential and significant reason for his detention has been his inability to provide identification when called upon to do so".[114] And at the end of his reasons that "[t]here is a real chance that he will continue to face arbitrary questioning and detention for want of identification documents in the reasonably foreseeable future.[115]

68. An inability to provide identification when called upon to do so is, of course, a discriminatory criterion from which, in this case, detention flowed. It is a discriminatory criterion which is on all fours with his particular social group claim, as described above (with members of the particular social group not holding identification documents).

69. Therefore, the assertion that the IMR found that the detention was indiscriminate cannot stand and the Minister's appeal on this ground must fail. There is no finding anywhere in the IMR's reasons that the detention was indiscriminate, and to draw any such implied finding would be contrary to all the relevant express findings of the IMR.

C. Independent basis issue

70. The above submissions have shown that the Minister's challenge to the Federal Court's holding that there had been procedural fairness must fail. That is, there remains (or should remain) an undisturbed holding that the

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[109] IMR reasons at [56].
[110] IMR reasons at [58].
[111] i.e. questioning on the street, and not the sort of interrogation at the Basij base complained of by the first respondent.
[112] IMR reasons at [83] (emphasis added).
[113] IMR reasons at [83].
[114] IMR reasons at [79] (emphasis added).
[115] IMR reasons at [99] (dot point 3) (emphasis added).

IMR failed to accord the first respondent procedural fairness in finding that his detention and other treatment at the hands of the Basij was done pursuant to a law or policy of general application.

71. A party will not be denied relief where there has been procedural unfairness except only in rare cases. One such case is where the Court concludes that the denial of procedural fairness could have made no difference to the outcome.[116] The Court cannot exclude the possibility here that the denial of procedural fairness made a difference to the outcome.

72. The infirm finding that the first respondent's detention and other treatment at the hands of the Basij was done pursuant to a law or policy of general application establishes two further matters:

a. first, in arriving at that conclusion, the IMR considered that the law or policy of general application which authorised the questioning, detention and abuse was appropriate and adapted to achieving a legitimate object of the country concerned (this is encapsulated in short form by his finding that "I do not consider such questioning and detention to be inappropriate in the sense discussed by the High Court in *Applicant S*"[117]); and

b. secondly, the IMR necessarily also took the view that the questioning and detention did not offend "the standards of civil societies which seek to meet the calls of common humanity"[118] (that being the ultimate test by which conduct pursuant to a law of general application must be judged[119]).

73. Simply put, the possibility cannot be excluded that the IMR's finding on the reason for the harm materially affected his assessment whether the first respondent's treatment amounted to "serious harm". As was recognised in recognised in *SZBYR*, procedural unfairness in relation to one basis for decision may well infect an alternative basis for decision.[120] It could not be said that "irrespective of any question of procedural fairness ... the

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[116] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [58]-[60] per Gaudron and Gummow JJ; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1198 [29] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ. There may be no difference to the outcome in the relevant sense where there is an incontrovertible fact or point of law which provides a discrete basis for the decision which cannot be affected by the procedural unfairness, or where the party inviting the court to refuse relief in the exercise of its discretion satisfies the court that the result would inevitably be the same: *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492 at 519.

[117] IMR reasons at [84].

[118] *Chen v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303 [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 403 [45] per Gleeson CJ, Gummow and Kirby JJ.

[119] *Chen v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303 [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 403 [45] per Gleeson CJ, Gummow and Kirby JJ.

[120] *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1198 [29].

decision-maker was bound by the governing statute to refuse" to recommend that the first respondent be recognised as a refugee.[121]

74. The first respondent was therefore entitled to declaratory relief in the Federal Court regardless of his success on the serious harm issue. Therefore, even if the Minister's appeal to this Court is otherwise successful on the serious harm issue, his appeal must nonetheless be dismissed.

Part VII: Notice of contention

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75. The first respondent apprehended that, under cover of ground 2(2), the Minister would submit in the alternative that the IMR's finding that the detention was authorised by a law of general application was not made in breach of the rules of procedural fairness. In response, the first respondent filed a notice of contention which sought to identify further jurisdictional errors in relation to that finding which had been argued but not ruled upon by the Federal Court.[122] The Minister has made no written submissions as to why Ground 2(2) should succeed and the first respondent treats that alternative ground as abandoned. In those circumstances, the first
20 respondent does not press the issues raised on the notice of contention.

Part VIII: Estimate

76. The first respondent estimates that he will require approximately two hours for the presentation of his oral argument.

Dated 24 March 2015

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[121] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [58], citing *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228 and Wade and Forsyth, *Administrative Law* (7th ed, 1994) at 528; quoted with approval in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1198 [29].
[122] FCA reasons at [77].