P10/2015

IN THE HIGH COURT OF AUSTRALIA **No. ~~P36~~ of ~~2014~~**

SYDNEY REGISTRY

BETWEEN: **WZARV**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

10 First respondent

IMOGEN SELLEY IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER

Second respondent

APPELLANT'S SUBMISSIONS

Part I Certification

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

20 ### Part II Issues

2. The critical issue in the appeal is whether the reasoning of his Honour Justice North in *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 ["*WZAPN*"] applies to the present case such that the Independent Merits

---

Filed on behalf of the appellants on :

Rasan T Selliah and Associates
38-40 George Street
PARRAMATTA NSW 2150

Ref:
Contact:
Phone: (02) 9635 5650
Fax: (02) 9635 5650

Reviewer failed to properly construe section 91R(2)(a) of the *Migration Act 1958* (Cth) ["the Act"] by imposing a threshold of severity upon the deprivation of the Appellant's liberty, which the First Respondent admits will occur at the airport on arrival in Sri Lanka, for the purposes of the meaning of 'serious harm'.

3. A subsidiary issue arises on the First Respondent's case, namely whether *WZAPN* was correctly decided. These submissions do not respond to that subsidiary issue which will be the subject of submissions in reply, once the basis of the Minister's criticisms of the reasoning in *WZAPN* is known.

Part III *Judiciary Act 1903*

4. The Appellant will give notice to the Attorneys-General of the Commonwealth and of the States in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV Citations

5. The parties agree that the issue which was the subject of the grant of special leave arose from the decision in *WZAPN*, which was decided after argument in the courts below; and was not the subject of any determination by those courts in these proceedings.

6. The reasons for decision of the Federal Court are not reported and the internet citation is: *WZARV v Minister for Immigration and Border Protection* [2014] FCA 894.

7. The reasons for decision of the Federal Circuit Court are not reported and the internet citation is: *WZARV v Minister for Immigration & Anor* [2013] FCCA 1556.

8. These submissions have been produced pursuant to a compressed timetable and prior to the preparation of appeal books, cross-references to the appeal books will be provided at a later date.

Part V Facts

Background facts to the Appellant's Claims

9. The Appellant is a Sri Lankan citizen who entered Australia by boat and was taken to Christmas Island on 7 November 2010 where he applied for a Refugee Status Assessment (**RSA**) on 21 December 2010 following an entry interview on 12 December 2010.[1]

10. In the course of that interview, he explained that he was a Sri Lankan citizen of Tamil ethnicity, born in the Northern Province in 1985. He claimed that he was forced to do one day's training with the Liberation Tigers of Tamil Eelam (**LTTE**) in 2008. He claimed to have been injured in a bomb blast later that year. In the following year, he worked as a security guard for the United Nations High Commissioner for Refugees (**UNHCR**).[2]

11. In 2010, he was employed by a non-governmental organisation (**NGO**), the Swiss Foundation for Mine Action, to remove land mines.[3] The Appellant asserted that he was detained by the Sri Lankan Army (**SLA**) in 2009 at the Vavuniya camp, but his father managed to pay a bribe in order to secure his release. He also claimed he was detained and beaten on 10 June 2010 after his arrest while waiting at a bus shelter. After this detention he claimed that SLA officers came to his house on a number of occasions asking for him.

12. A Refugee Status Assessment (**RSA**) officer interviewed the Appellant in relation to his claims on 26 January 2011. The Appellant provided the officer with copies of various documents intended to support his claim, including a UNHCR Asylum seeker certificate dated 11 August 2010, a photograph of him with another person, documents from the Swiss Foundation for Mine Action, various birth, marriage and death certificates, documents from Roxy Agencies Security Services, various medical reports, various letters of support and recommendation and documents relating to a complaint made to the Human Rights Commission of Sri Lanka by his father-in-law.[4]

13. On 21 April 2011, the Appellant was informed of the negative assessment by the Departmental Officer.

14. On 10 May 2011, the Appellant applied for an Independent Merits Review of the decision of the RSA officer. By a letter dated 18 October 2011, the Appellant's representative made written submissions which reiterated the claims by the Appellant for refugee protection.

---

[1] *WZARV v Minister for Immigration and Border Protection* [2014] FCA 894 (22 August 2014) at [3].
[2] Ibid at [3].
[3] Ibid, at [3].
[4] Ibid, at [6]

15. An interview was conducted on 7 May 2012 in Perth by the independent merits reviewer, the second respondent (**IMR**).

16. After this interview and by letter dated 22 May 2012, the IMR informed the Appellant of various suggested inconsistencies in his account and extended an invitation to the Appellant to comment on those inconsistencies.

17. By a letter from his representative dated 22 June 2012, the Appellant's representative responded. Further country information in support of his claims for protection was provided. Two additional copies of documents from the Swiss Foundation for Mine Action relating to his employment at that organisation were also provided.

18. On 21 September 2012, the IMR recommended that the Appellant did not meet either of the criteria for a Protection (Class XA) visa set out in s36(2)(a) and s36(2)(aa) of the Act and accordingly that he not be recognised as a person to whom Australia owes protection obligations.

19. The IMR recommended that the Appellant was a Tamil from the Northern Province of Sri Lanka who had departed the country on a valid passport. The IMR accepted the claims that he was forced to undergo a day's training with the LTTE, was interned in a SLA camp in 2009 and had been employed by the UNHCR and the Swiss Foundation for Mine Action.[5]

20. The IMR accepted that it was likely that the Appellant would be questioned by Sri Lankan authorities at the airport upon his return, but that country information indicated that such questioning would usually be completed in a matter of hours and that the Appellant would not have a profile which indicated he would be suspected of being a LTTE supporter.[6]

Key Facts relevant to the Issues in the Appeal

21. The Appellant relies on concessions made by the First Respondent in his Summary of Argument filed on 23 February 2015.

22. The First Respondent accepts that the IMR "found that the likely restriction of the Applicant's liberty whilst undergoing police checks at the airport [upon involuntary return to Sri Lanka as a failed asylum seeker] did not amount to serious harm"[7].

---

[5] Ibid, at [14]
[6] Ibid, at [17]
[7] First Respondent's Summary of Argument at [11]

23. The First Respondent relies on the finding by the IMR that the period of questioning at the airport (during which the restriction of liberty will occur) will be for a matter of hours only. It is accepted that the IMR's finding as to the restriction of the applicant's liberty would be for a duration of only a matter of hours.

24. The First Respondent accepts that the only basis for the IMR's rejection of the Appellant's claims in relation to the being detained on arrival as a failed asylum seeker was the finding that the short time period of deprivation of liberty would not amount to 'serious harm' for the purposes of s91R(1)(a) of the Act.

25. The First Respondent accepts that, although the claim relating to detention at the airport could have been dismissed by the IMR on the basis that the deprivation of liberty was not discriminatory (that is was not for a Convention reason or was pursuant to a law of general application); the IMR did not address those issues[8]. There is no dispute that the IMR only dealt with the claim on the basis that there was no 'serious harm' in a deprivation of liberty for only a few hours[9].

26. In relation to the second ground separate ground of the appeal (concerning questioning by authorities following release from the airport because of his work with senior UNHCR official[10]), the First Respondent has not made any of the concessions identified above[11]. The First Respondent has made a conscious decision to concede that there will be a deprivation of liberty in relation to the first ground (namely detention for questioning at the airport on arrival).

27. The Appellant accepts that the only finding made by the IMR in relation to the second type of questioning (that is once he has left the airport) is that he will be questioned[12]. There is no finding that he will be deprived of his liberty during that questioning or for the purposes of that questioning. In those circumstances, and in the absence of the same concession made by the First Respondent in respect of the airport questioning, these submissions only address the deprivation of liberty which is accepted will occur on arrival at the airport and the second issue of questioning is not pressed as it does not engage the reasoning in *WZAPN*.

---

[8] First Respondent's Summary of Argument at [15] and [16]
[9] The IMR's reasons at [205] considered that it was 'delays are unlikely' in the checks on the Appellant in circumstances where checks that involved 'delays' could take 'months'.
[10] First Respondent's Summary of Argument at [18]; see also IMR Decision at [210]
[11] First Respondent's Summary of Argument at [17] to [18]
[12] First Respondent's Summary of Argument at [18]

Part VI Argument

28. The First Respondent, in its Summary of Argument, concedes that the IMR decision is affected by legal error in relation to the finding that the Appellant would face no 'serious harm' if the reasons of Justice North in *WZAPN* are applied to the IMR's findings[13].

29. The First Respondent accepts that:

> "Accordingly, following the reasons of North J in *WZAPN*, the IMR erred in her consideration of whether the [Appellant] would face serious harm."

30. Further, the First Respondent accepts that the claim could have been, but was not, dismissed because the deprivation of liberty would not have been discriminatory for the purposes of s91R(2)(c)[14].

31. Accordingly, the First Respondent accepts that there is no separate and independent basis, unaffected by error, upon which to uphold the IMR decision[15].

32. In those circumstances, and unless the First Respondent is successful in its appeal from the decision of Justice North in *WZAPN*, the relief sought by the Appellant would be granted.

33. In *WZAPN*, the grounds of appeal were directed to a claim that the applicant would, as a Faili Kurd, be detained and questioned by the Basij, a religious/political group charged with the protection of Islamic values in Iran: *WZAPN* at [7]. The Tribunal in that case accepted:

> "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, but having regard to the guidance provided by s.91R(2)(a), (b) and/or (c), I do not accept that the frequency or length of detention, or the treatment he will receive whilst in detention, will involve serious harm within the meaning of the Act."[16]

---

[13] First Respondent's Summary of Argument at [15]
[14] First Respondent's Summary of Argument at [16]
[15] First Respondent's Summary of Argument at [21 (2)]
[16] see WZAPN at [15]

34. The key findings by North J in *WZAPN* are at paragraphs [28] to [30] of his Honour's reasons:

> 28. The starting point for the consideration of the proper approach to the construction of s 91R(2) is the text of the subsection. It is immediately obvious that s 91R(2)(a) is structured differently from the other paragraphs in s 91R(2). In each of the other paragraphs the harm is described by reference to a qualitative factor. Thus, physical harassment, physical ill-treatment and economic hardship each must be significant. Economic hardship, denial of access to basic services and the denial of a capacity to earn a livelihood of any kind must each threaten the person's capacity to subsist. These paragraphs are in contrast to s 91R(2)(a), in which no qualitative element of the harm is stipulated.
>
> 29. The first respondent's reliance on the statement by Gummow J in *VBAO* that each of the paragraphs in s 91R(2) take their colour from the phrase 'serious harm' articulated in subs (1)(b) is misplaced. That statement relates to the observation that paras (a) – (f) should be considered together, and to his Honour's observations that, like the instances in paras (b) – (f), the threat to life or liberty in (a) ought to be of comparable gravity, in the sense of being more than a possibility.
>
> 30. The conclusion from the language and structure of s 91R(2) is that serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty.

35. There is nothing exceptional about his Honour's construction of s91R(2)(a) in this regard. The interpretation is consistent with the ordinary meaning of the statute.

36. There is also a strong line of authority in support of that construction cited by his Honour in *WZAPN* at [33]-[34], including remarks by Dawson J in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, Mason CJ at [390] and McHugh J in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1.

37. The construction is also consistent with the approach to the meaning of persecution under the Convention. As is clear from the reasoning of McHugh J in *Chan v Minister for immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430-431, the nature of harm which will be required to establish persecution extends *beyond* deprivation of liberty or threats to life, which appear to be in the core of the meaning of 'serious harm'. There is a good structural reason why s91R(2) of the Act treats threats to life and liberty as not requiring any additional

qualitative assessment, unlike the balance of the extended categories of serious harm.

38. It must also be understood that the 'threat of serious harm' is only one integer of the equation that makes up 'persecution'. Clearly, it may be that a decision maker can find that notwithstanding a person faces 'serious harm', they do not face 'persecution'.

39. For example, it may be that a person faces serious harm (deprivation of liberty) because of the commission of an normal type of criminal offence in the home country. In such circumstances, it would be well open to a decision maker to find that although there was a 'threat of serious harm (deprivation of liberty), nonetheless it would not be discriminatory in the sense required in s91R(2)(c); and so, would not amount to persecution. Such an inquiry would involve a consideration of whether the serious harm would arise by reason of the application of a law of general application.

40. Further, it would be open to the decision maker to find that the 'serious harm' (even if persecutory and discriminatory) would not be for a Convention reason.

41. In the present case, the First Respondent accepts that although the IMR could have found no persecution on the basis that the deprivation of liberty did not involve discrimination and was pursuant to a law of general application, however accepts that the IMR simply did not engage in that process of analysis or consideration.

42. The only basis upon which the First Respondent bases its resistance to the relief sought by the Appellant, is an attempt to impose some quantification or threshold upon deprivation of liberty at the 'serious harm' stage of the inquiry into persecution. That is so because it is conceded that the only basis of the IMR's decision was that qualitative approach to a threat to liberty.

43. There is no need for the imposition of a qualitative assessment into the clear statutory test in s91R(2)(a). Any concerns by the First Respondent about the extent of the reach of a jealous construction of 'liberty' in 91R(2)(a), for the purposes of 'serious harm', can be answered (although in this case were not) in other parts of the test for persecution.

44. The common law has always jealously protected the concept of a person's 'liberty'. There is no case law, that the Appellant has been able to locate, which countenance the notion that liberty is not interfered with if a person's will is overborne for only a short period of time. Such a rule would seriously threaten

the common law's protection of the liberty of the subject. It immediately leads to indeterminate questions such as, how much interference with liberty will be necessary before liberty is infringed.

45. Further, such an approach would be inconsistent with jurisprudence in tort law, where the rule for an action lies for false imprisonment in circumstances where the imprisonment amounts to a total restraint of the liberty of the person, for however short a time: *Goldie v Commonwealth* [2004] FCA 156 at [17], where his Honour French J (as his Honour then was) stated:

> "Wrongful arrest and imprisonment even for a short time is a serious matter whose seriousness is measured not solely by the length of the period of incarceration. **Arrest and imprisonment involve a grave interference with the rights of the individual coupled with humiliation which is both private and public.** The arrest in this case occurred in a public setting and added to the indignity suffered by Mr Goldie. The physical constraint applied to him was undignified, albeit not unreasonable from the point of view of the ACM officers who were apprehending him. The pat searches and interrogations and the removal of his tie and belt and shoelaces, which followed at the Detention Centre, were all factors to be taken into account in measuring the extent of the interference with his rights associated with the imprisonment and the humiliation and indignity thereby inflicted on him." [our emphasis]

46. These submissions cannot canvass the First Respondent's arguments against the reasoning of North J in *WZAPN* which submissions have not yet been filed or served. Those arguments will have to be addressed in detail in submissions in reply.

47. The reasons of Justice North were sound. His Honour's construction of s91R(2)(a) was unexceptional and consistent with the terms of the Act; and provides coherence in the law concerning the absolute nature of liberty.

48. In those circumstances, and upon the First Respondent's concession that the IMR recommendation involved error if Justice North's reasoning is accepted in *WZAPN*, the Appellant is entitled to succeed in the appeal.

Part VII Legislation

49. The applicable constitutional, statutory and regulatory provisions as they existed at all material times are to be provided in a bundle to be agreed with the defendants.

Part VIII Orders sought

50. The appeal be allowed.

51. In lieu thereof:

    a. It be declared that the recommendation of the Second Respondent was not made in accordance with law;

    b. An injunction restraining the First Respondent, by himself or by his Department, officers, delegates or agents, from relying upon the recommendation of the Second Respondent;

    c. That the First Respondent pay the costs of the Appellant in these proceedings and the proceedings in the courts below.

Counsel for the Appellant

S.E.J. PRINCE
State Chambers
T (02) 9223 1522
F (02) 9223 7646
prince@statechambers.net

P W BODISCO
Sir Owen Dixon Chambers
T: (02) 8076 6600
F: (02) 8076 6622
pbodisco@sirowendixon.com.au