IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. P10 of 2015

BETWEEN: WZARV
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMOGEN SELLEY IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER
First Respondent

APPELLANT'S REPLY

Part I:

1. The redacted version of the reply is in a form suitable for publication on the internet.

Part II:

2. The appellant notes that the Respondent has concluded that no notices under s78B of the Judiciary Act are necessary and agrees with that submission.

3. Since the Appellant's submissions were filed, decisions of the Full Court of the Federal Court of Australia were delivered in *BZAFM v Minister for Immigration and Border Protection* [2015] FCAFC 41 ["BZAFM"], *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39 ["SZTEQ"] and *SZTIB v Minister for Immigration and Border Protection* [2015] FCAFC 40 ["SZTIB"]. The Minister relies on the reasoning of the Full Court in those decisions by which the Court held that it did not consider that the decision of the Full Court (although constituted by a single judge) in *WZAPN* "correctly decided the construction of s91R(2)(a)"[1].

4. As the Minister correctly submits, the approach taken by the Full Court in *SZTEQ*, *BZAFM* and *SZTIB*, are consistent with the submissions made by the Minister to this Court in *WZAPN*. The reasons of the Full Court and the submissions of the Minister in WZAPN (which have been adopted in this case) involve the same error in approach to the construction of s91R of the Act for the reasons which follow; and for the reasons explained in the reply submissions of WZAPN filed on 24 March 2015 which WZARV adopts.

[1] *BZAFM v Minister for Immigration* [2015] FCAFC 41 at [149]. The Full Court did not appear to apply the 'plainly wrong' standard to its consideration of Justice North's decision in *WZAPN* notwithstanding his Honour's decision involving an exercise of the appellate jurisdiction of the Court. Obviously nothing turn on that point in this Court.

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5. First, the words of the Act simply do not involve any quantification or qualification on what period of deprivation of liberty may be necessary before there a 'deprivation of liberty' will meet the description in 91R(2)(a).

6. Second, the approach to the meaning of 'persecuted' in Article 1A(2) of the Convention, together with the international cases in construing 'persecution', are not relevant to the issues to be decided by this Court, namely whether there was an error in construction of 91R(1)(b) together with 91R(2)(a) (that being only one component of the definition of 'persecution').

7. Many of the foreign cases referred to by both the Minister in *WZAPN* and by the Full Court in *SZTEQ* et al, do not address the issue of what constitutes 'serious harm' and occur in a context where 'persecution' is to be considered at large, in stark contrast to the unique Australian statutory framework in s91R (1) where persecution has been broken into three separate (albeit cumulative) statutory components (only one of which is the risk of serious harm).

8. Further, there are some specific difficulties with some of the propositions advanced by reference to the foreign cases in the Minister's submissions in WZAPN. For example, the proposition at [31] of the Minister's submissions in WZAPN overstate the *ratio* in *Vasili v Holder*[2]. In the US, 'persecution' requires that the harm has occurred with 'some regularity and frequency'[3].

9. The Minister also overstates the proposition derived from *Velluppillai v Canada*[4] in his submissions in WZAPN at [32]. At paragraph [15] of the reasons for decision in *Velluppillai* Gibson J repeated a finding of the assessor about short periods of detention *for the purpose of preventing disruption or dealing with terrorism.*

10. There is nothing inconsistent between a finding that a person would be subject to 'serious harm' for the purposes of s91R(2)(a) and a finding in the foreign cases that there may yet not be 'persecution'. That is because the finding that any deprivation of liberty under s91R(2)(a) does not preclude a finding that the 'serious harm' does not amount to a finding that there is 'persecution for the purposes of s91R (1) of the Act. The basis for the writs in the present case is that it is accepted the assessor simply did not look at the other components of 'persecution' under s91R other than 'serious harm' and so any error in construction of 'serious harm' will necessitate a reconsideration of the claims against the whole of s91R of the Act.

11. Under s91R, there must be 'serious harm' for there to be 'persecution' but the reverse does not hold. The existence of a 'threat of serious harm' is not conclusive of 'persecution'. It may be that a threat of 'serious harm' does not amount to 'persecution' because it is not for a Convention reason or it is

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[2] *Vasili v Holder*, 732 F. 3d. 83
[3] *Vasili v Holder*, 732 F. 3d. 83, at 89 (second column point 6) (1st Cir. 2013)
[4] *Velluppillai v Canada (Minister of Citizenship and Immigration)* [2000] F.C.J No. 301 (QL)

not systematic or discriminatory. Clearly remand on custody according to law in relation to a crime against a law of general application which was proportionate and adapted to a legitimate domestic purpose would not involve persecution (even though it may involve 'serious harm').

12. The Minister's submissions assume equivalency between approaches to 'persecution' and the meaning of 'serious harm'. In turn, the Minister's false equivalency leads directly to the 'absurd' results it posits in relation to a strict definition of 'deprivation of liberty'.

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13. There is no 'absurdity' in a strict approach to 'deprivation of liberty' because it is only one element of the 'persecution' equation. Absurd results will be avoided at the point where consideration is given by a decision maker to whether the detention is pursuant to a law of general application proportionate and adapted to a legitimate domestic purpose (the decision maker did not consider that issue in this case).

14. The reasons of the Full Court in *SZTEQ*, *BZAFM* and *SZTIB* suffer from the same foundational error based on the false equivalency between 'serious
20 harm' and 'persecution'. The Full Court found the 'purpose' of s91R to be determinative[5]. Their Honours found the 'purpose' to be an expression of the meaning of 'persecution' under the Convention[6]. Accordingly, their Honours found that under the Convention a finding of 'persecution' requires a close and careful evaluative process, it therefore followed that there must be an evaluative process in assessing 'deprivation of liberty' as 'serious harm'[7].

15. Further, the Full Court in *SZTEQ*, *BZAFM* and *SZTIB* engaged in the same erroneous approach to the utility of the US cases as urged by the Minister
30 on this Court in WZAPN and this case.[8]

16. The lack of utility in cases considering Article 1A(2) of the Convention in other jurisdictions stems from the unique statutory regime in the Migration Act whereby the definition of 'persecution' is disaggregated in to specific statutorily prescribed cumulative requirements.

17. The Minister has conceded that the components of persecution *other than* 'serious harm' (as defined in s91R) have not been addressed by the Reviewer and the Minister accepts that the appeal turns entirely on the
40 construction of the 'serious harm' component of 'persecution'. This approach is confirmed at [12], [15] and [16] of the Minister's submissions on the appeal filed 31 March 2015.

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[5] BZAFM [2015] FCAFC 41 at [55]
[6] BZAFM [2015] FCAFC 41 at [58]
[7] BZAFM [2015] FCAFC 41 at [73]
[8] BZAFM [2015] FCAFC 41 at [106] to [117], Namely, a conflation of different elements of 'persecution' including the requirement in the US cases for the 'level of persecution' to require 'regularity and frequency'.

18. This appeal does provide a stark example of whether deprivation of liberty is to be viewed as not serious where it is for a short duration and a person is not otherwise mistreated during the period in which his liberty is detained. There is no issue in this case that the applicant will be detained for a short period if he is returned to Sri Lanka.

19. The stark example referred to by the Minister does not produce absurd or anomalous results as he contends.

20. First, there is nothing anomalous about characterizing a person's right to liberty as absolute, subject to the operation of the rule of law and proper laws of general application which are necessary and proportionate to a legitimate public purpose.

21. To the contrary, the Minister's construction would open a serious lacuna in the Parliament's approach to the use of terms such as deprivation of liberty. On the Minister's construction, some undefined exception to the requirement for valid laws to justify the interference with a person's liberty would exist where the deprivation of liberty was for a 'short duration' (whatever that means). Such a construction of Parliament's use of the expression 'deprivation of liberty' in 91R (2)(a) has serious and anomalous consequences.

22. The importance to Parliament of any 'deprivation of liberty' was explained in *Al-Khateb v Godwin* [2004] HCA 37; 219 CLR 562 Gleeson CJ (although in dissent, there appeared to be no controversy about these statements of principle). His Honour said (at [19]):

> In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases[10]. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness"[11].

23. Likewise, in *Al-Khateb*, Gummow J (also in dissent, although there appeared to be no controversy about these statements of principle) said at [137]:

> Accordingly, the focusing of attention on whether detention is "penal or punitive in character" is apt to mislead. As Blackstone noted, in a passage quoted by Brennan, Deane and Dawson JJ in *Lim*[140],

"[t]he confinement of the person, in any wise, is an imprisonment" and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process. It is primarily with the deprivation of liberty that the law is concerned, not with whether that deprivation is for a punitive purpose. The point is encapsulated in the statement in *Hamdi v Rumsfeld* by Scalia J (with the concurrence of Stevens J), made with reference to Blackstone and Alexander Hamilton[141], that[142]:

> "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

24. Liberty is such a basic right or freedom, that any attempt to parse its meaning so as to erode its reach or importance by reference to threshold of duration should be resoundingly rejected as an anathema to the rule of law. There is no problem with defining 'deprivation of liberty' strictly because to do so simply invites attention to the question of whether the deprivation is justified by a valid law. In the context of s91R, this directs attention to whether the deprivation of liberty would be by a law of general application which is proportionate and adapted to its purpose. It is accepted in the present case that such an analysis was simply not undertaken by the Tribunal. This is consistent with Article 9 of the ICCPR.[9]

25. Contrary to the view of the Full Court of the Federal Court in *BZAFM* at [54], "liberty" in the context of s91R(2)(a) is not a "nuanced concept". The "deprivation of liberty" is an easily understood concept of the most fundamental importance. It is clearly met by circumstances where a person's will is overborne so that he is confined by another against his will. It is accepted that this will happen to the appellant on his return to Sri Lanka. It matters not to the question of 'serious harm' that the deprivation of liberty will be of short duration and will not involve any other types of serious harm.

26. Whether the 'serious harm' otherwise amounts to 'persecution' is a matter for the Reviewer to determine properly instructed on the meaning of 'serious harm' within the meaning of s91R(1)(b) and (2)(a) of the Act.

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[9] It may be noted at this point that the reliance on Grahl-Madsen's relative approach to whether there had been a 'deprivation of liberty' (Minister's Submissions in WZAPN at [34]) is misplaced. That text was produced in 1966 prior to the entry into force of Article 9 of the ICCPR in 1976 which suggests that in international law, the notion of arbitrary arrest and detention depends on the legitimacy of the act, not its duration.