IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S272/2016

BETWEEN

SZTAL

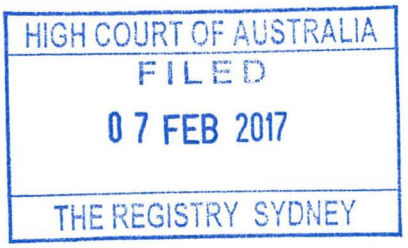
Appellant

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' REPLY SUBMISSIONS

Part I: Internet Publication

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

Part II: Argument

Introduction and overarching issues

2. These reply submissions address, in turn, the Minister's:

   a) reliance, in his submissions of 25 January 2017 (**RS**), on criminal law cases in determining the meaning of the Intent Requirements and his submissions about the ordinary meaning of "intent" (RS [14(a)], [17]-[22])

   b) reliance on the structure of the definitions of CITP and DTP (RS [23]-[24]);

   c) submission that the CP Regime constitutes a code, such that the scope of Australia's international obligations is irrelevant in this case (RS [14(c)(i)], [31]);

   d) submissions on the purpose of the CP Regime (RS [14(b)], [25]-[35]);

   e) submissions regarding international law (RS [14(c)(ii)-(iii)], [36]-[56]);

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f) floodgates argument and reliance on *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 (***WZAPN***) (RS [12]-[13]).

3. Before turning to each of these topics, some overarching submissions are made.

4. This case requires the Court to construe the Intent Requirements. No party contends that the Intent Requirement attaching to the *Migration Act* definition of DTP should be construed any differently to the Intent Requirement attaching to the *Migration Act* definition of CITP. To determine the scope of the Intent Requirement for CITP, the Court must construe the phrase "intentionally inflicted" in the definition of CITP.

5. That phrase also appears in the *Migration Act* definition of torture. The Minister accepts that the phrase has the same meaning in the definition of CITP as in the definition of torture: RS [39], [49]-[50]. The Minister accepts that the phrase was drawn from the CAT: RS [37], [39]. Despite this, the Minister submits that:

a) the CP Regime is a code, and that therefore it is neither necessary nor useful to ask how international law treaties would apply in the circumstances of this case: RS [14(c)(i)], [31]; and

b) when construing the words "intentionally inflicted", focussing on international jurisprudence concerning torture "is apt to obscure the critical issue": RS [37].

6. These submissions cannot stand in light of the Minister's acceptance that the phrase "intentionally inflicted" in the *Migration Act* was taken from the CAT. Contrary to RS [37], the meaning of the phrase "intentionally inflicted" in art 1 of the CAT is a critical issue in this appeal. Once this is accepted, many of the Minister's other arguments fall away. First, the Minister's submissions on statutory text and structure (RS [15]-[24]), including the "ordinary meaning" of intent, go nowhere, as the Minister fails to contradict the appellants' submission that "intentionally inflicted" in the *Migration Act* is *capable* of having the meaning that the appellants contend that it has in the CAT.

7. Secondly, the Minister's submissions regarding the jurisprudence on art 7 of the ICCPR and art 3 of the *European Convention on Human Rights* (**ECHR**) also miss the point. The Minister is at pains to emphasise that contraventions of those provisions may occur absent intent: RS [38]-[48]. The appellants do not contend otherwise. But the Minister's submissions do not bear upon what "intentionally inflicted" in art 1 of the CAT (and so in the relevant definitions in the *Migration Act*) means.

8. Finally, nothing that is said by the Minister in relation to the purpose of the CP Regime (RS [25]-[35]) bears upon the meaning of "intentionally inflicted" in the CAT. As noted in the appellants' submissions of 21 December 2016 (**AS**) at [44], once it is accepted that the words "intentionally inflicted" in the *Migration Act* were taken from the CAT, it is unnecessary to look to the purpose of the CP Regime in resolving these appeals (though doing so confirms that the appellants' approach should be accepted). Even if the Minister's view of the purpose of the CP Regime were accepted (for the reasons given below, it should not be), in light of the genesis of the phrase in issue and the meaning of that phrase in the CAT, this would not advance the Minister's case.

9. For these reasons, once it is accepted that the appellants' submissions on the meaning of "intentionally inflicted" in art 1 of the CAT are correct, the appeals must be allowed. That issue is addressed at AS [34]-[43] and below at [40]-[51].

Criminal law authorities and the ordinary meaning of "intent"

10. Turning to the first of the topics outlined at [2] above, at RS [17]-[21], the Minister refers to a number of criminal law cases in support of his construction of the Intent

Requirements. In doing so, the Minister makes the same error as the plurality below. Criminal law authorities operate in a different context to the CP Regime. They are not decisive of the meaning of intent in the present case: see AS [20]-[24]. That, as with the overarching submission at [4]-[9] above, is sufficient to dispose of the Minister's submissions on this issue. Nevertheless, the following additional points may be made.

11. At RS [17], the Minister states that "intentionally inflicted" contains an element akin to specific intent to cause a result, and then quotes from Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 569-70. The quote is selective. The Minister does not refer to the additional statements made by Brennan J at 570 (extracted at AS [31]), which clearly outline his Honour's view that specific intent is not necessarily to be proved only by a desire or wish to cause the result in question.

12. At RS [18]-[20], the Minister states that the criminal law cases show that the "ordinary meaning" of intent is "actual subjective intention" to bring about the result. This approach errs in treating the ordinary meaning of a phrase as something to be determined by considering the phrase in a vacuum rather than in context,[1] and by failing to consider whether the appellant's construction of the phrase: a) is open (which the Minister does not deny); and b) is, in the phrase's context, the preferred reading. Yet the phrase's context shows that "intentionally inflicted" should have the meaning that it has in art 1 of the CAT. The purpose of the CP Regime and of the definitions of CITP and DTP (which the Minister accepts forms part of the relevant context (RS [15])), addressed at AS [46]-[48] and below at [23]-[32], also show that the applicants' construction is preferable. As it is open, it is the correct construction.

13. At RS [21], the Minister submits that, based on the treatment of intent in the criminal law cases, Parliament should be taken to have understood the distinction between intent and foresight when enacting the CP Regime. That submission should be rejected. One assumes that Parliament understands the basic tenets of statutory interpretation, so as to appreciate the distinction in contexts between the CP Regime and law regarding the imposition of criminal liability. The meaning of intent in the latter context is of limited use in the former context. Further, since the phrase "intentionally inflicted" in the CP Regime was taken from the CAT, one assumes that Parliament intended the approach under the CAT to apply under the CP Regime.

14. Finally, at RS [22], the Minister submits that the Intent Requirements cannot be construed by applying the definition of intent from the *Criminal Code 1995* (Cth) (**Code**). The appellants do not submit that the Court should apply the Code definition. The appellants merely note that, if the Minister's approach were accepted, there would be an unacceptable disjunction between the scope of the conduct that Australia criminalises as torture on the one hand, and the scope of protection offered against torture under the CP Regime on the other: AS [59]-[60].[2]

The structure of the definitions of CITP and DTP

15. The Minister's reliance, at RS [23], on the exclusion in the *Migration Act* definitions of CITP and DTP of acts or omissions that are "not inconsistent with Article 7 of the

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1 Compare *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [82]; *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 69 at [37]; *R v Campbell* (2008) 73 NSWLR 272 at [48].

2 At RS fn 30, the Minister claims that the appellants are mistaken to submit that the definition of "intention" in the Code applies to the offence of torture, as the fault element is recklessness. The mistake is the Minister's. It is true that recklessness is the fault element for torture under the Code. But that has the consequence that proof of intention will also satisfy the fault element: Code s 5.4(4).

Covenant" is misplaced. As the Explanatory Memorandum states at [19], the purpose of "stating what [CITP] does not include is to confine the meaning of [CITP] to circumstances that engage a *non-refoulement* obligation" (underlining added). The same must be true in relation to the definition of DTP. This shows that the portion of the definition relied upon by the Minister was included to ensure that Parliament's definition of CITP, which was inserted in order to assist decision makers "to interpret and implement" Australia's international obligations (2011 2R Speech at 1357), did not result in decision makers granting protection if those obligations were not engaged. This part of the Explanatory Memorandum confirms the position that is otherwise made clear in the 2011 2R Speech: the definition of CITP was intended to correspond with Australia's *non-refoulement* obligations for the equivalent international law concept.

16. The last sentence of RS [24] makes the same error as RS [23]. In that respect, reference may be made to the preceding paragraph of these submissions. As to the balance of RS [24], this goes nowhere, as the Minister does not submit that poor prison conditions resulting from inadequate resources cannot breach art 7 of the ICCPR. He is correct to so refrain, as the authorities at AS [53] show.

The Minister's claim that the CP Regime is a code and that the scope of international obligations is irrelevant

17. At RS [14(c)(i)] and [31], the Minister submits that the CP Regime is a code that contains its own definitions, such that it is irrelevant to consider how any international law treaties would apply in the present case. This submission relies upon *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 (***MZYYL***).

18. *MZYYL* is distinguishable from the present case. In *MZYYL*, the Federal Court was concerned with s 36(2)(aa) and (2B) of the *Migration Act*: *MZYYL* at [20]. The relevant words of those provisions were not drawn from an international instrument. As discussed above, in the present case, the phrase "intentionally inflicted" in the *Migration Act* definition of CITP was taken directly from art 1 of the CAT. *MZYYL* does not stand for the proposition that Australian courts should disregard the meaning of a phrase in an international instrument when that phrase is reproduced in an Australian statute: cf, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 264-5. As discussed at [5]-[6] above, the Minister's "code" submission cannot stand in light of his concession regarding the genesis of the relevant words of the *Migration Act*.

19. The above submission reflects the primary position taken below by the appellants in relation to *MZYYL*. It reflects that in *MZYYL* at [20], their Honours stated that it was neither necessary nor useful to ask how the international treaties would apply "to the circumstances of this case" (underlining added). If, however, *MZYYL* is regarded as authority that it is not useful to have regard to international law in any case involving the CP Regime (and in particular, the present case), then this Court should find that *MZYYL* is incorrect in that respect.

20. In *MZYYL* at [18], the Federal Court stated that unlike s 36(2)(a), the criteria and obligations in the CP Regime "are not defined by reference to a relevant international law" and that the CP Regime "uses definitions and tests different from those referred to" in the relevant international treaties. That statement is, to an extent, correct, but it does not make international law irrelevant. The present case provides a clear example as to why that is so. Though the definitions in the CP Regime may not wholly correspond with international law, there are aspects of those definitions (such as the concept of intentional infliction of pain or suffering) that do. At least in that respect, reference to international law is both necessary and useful.

21. Moreover, s 36(2B) (under consideration in *MZYYL*) has the purpose of ensuring "that Australia's *non-refoulement* obligations are applied and implemented consistently with international law": Explanatory Memorandum at [85]. As outlined at AS [46]-[52] and below at [23]-[33], other aspects of the CP Regime, such as the definitions of CITP and DTP, were also designed to ensure compliance with Australia's international obligations. That does not, of course, mean that the CP Regime should simply be interpreted as though it incorporated the relevant international treaties into Australian law. But if in construing a phrase in the CP Regime, more than one construction is available, the operation of the relevant international treaties is a factor that may bear upon which construction should be accepted. This is merely the outcome reached by the usual method of statutory interpretation; that is, considering the text in context, including the policy or purpose of the provision in question.[3]

22. For these reasons, though the outcome in *MZYYL* is not questioned, the statement in *MZYYL* at [20] is not, contrary to RS [31], an accurate reflection of the relevance of international law to the construction of every part of the CP Regime. The statement cannot apply to the words of the CP Regime under consideration in the present case.

The purpose of the CP Regime

23. At RS [25], the Minister accepts that a construction of a statute that best achieves the statute's purpose is generally to be preferred. Of course, that does not mean that a statute may be given a meaning that its words cannot bear. But as noted above at [6] and [12], the Minister fails to contradict the appellants' submission that the Intent Requirements are *capable* of having the meaning for which the appellants contend.

24. RS [27]-[33] claims that the purpose of the CP Regime was not to align Australia's protection visa process with Australia's *non-refoulement* obligations. This part of the Minister's submissions contains a number of flaws.

25. First, it does not engage with what is actually said in the extrinsic material regarding the purpose of the CP Regime and the definitions of significant harm within that regime. RS [28] claims that little was said in the extrinsic material about the definitions of CITP and DTP, but in fact 2011 2R Speech states that the "definitions will enable Australia to meet its non-refoulement obligations".[4] Notably, the Minister has no response at all to what is said regarding the Committee's report and his Department's statements regarding the Intent Requirements at AS [48]. This is so even though the 2011 Act was drafted with regard to that report: 2011 2R Speech at 1356.

26. Secondly, at RS [29], the Minister relies upon s 36(2C) of the *Migration Act* to support his submissions that, despite what is said in the extrinsic material, it was not intended that the CP Regime be fully congruent with Australia's non-refoulement obligations. It is true that s 36(2C) prevents certain persons from obtaining the benefit of the CP Regime even though Australia may have *non-refoulement* obligations in respect of them. But unlike other parts of the CP Regime, the extrinsic material identifies s 36(2C) as a part of the CP Regime that does not conform to Australia's *non-refoulement* obligations: 2011 2R Speech at 1358; Explanatory Memorandum [89]-[90].

27. The contrast between what is said in the extrinsic material regarding s 36(2C) and, for example, the definitions of significant harm, supports the view that the balance of the

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3 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

4 See AS [46]; 2011 2R Speech at 1357. This statement appears immediately before the selective quote given by the Minister at RS fn 42. That footnote is incorrect to say that 2011 2R Speech states only that the definitions would not expand the relevant concepts beyond the relevant international interpretations.

CP Regime, and in particular those definitions, were essentially intended to reflect international law. Moreover, in the 2011 2R Speech at 1358, the Minister stated that, for persons caught by s 36(2C) but in respect of whom Australia owed *non-refoulement* obligations, "determinations as to post-decision case management will remain with the minister personally". The identification of that role for Ministerial intervention, along with what is said at AS [47], confirms that, contrary to RS [33], the CP Regime was not otherwise intended to leave persons in respect of whom Australia owes *non-refoulement* obligations at the mercy of Ministerial intervention.

28. Thirdly, RS [30] makes a similar mistake to RS [29] by mischaracterising the appellants' criticism of the plurality's judgment below. The appellants do not claim that the plurality "erred because its approach created a disjunction between the [CP Regime] and Australia's *non-refoulement* obligations". Rather, the plurality erred because, faced with two available constructions of the Intent Requirements, the plurality chose the construction that resulted in "the largest possible disjunction": AS [18]. The appellants do not contend that the CP Regime must be read in a manner that removes *any* disjunction between the CP Regime and international law. Rather, the CP Regime should be read to minimise any disjunction if its words may bear such a reading. Thus, AS speaks of aligning the meanings of CITP and DTP with international law "as far as possible" (AS [19(c)]), of reading the definitions consistently with international law to the extent that they can be so read (AS [52]) and of achieving greater (rather than complete) conformity with Australia's international obligations (AS [55], [63]).

29. Fourthly, RS [31] makes the error addressed at [17] to [22] above. Fifthly, RS [32] emphasises disjunctions between the *Migration Act* and other areas of international law, or other ways in which the *Migration Act* subjects certain asylum seekers to the exercise of Ministerial discretion. None of that has any bearing on the construction of the Intent Requirements.

30. Finally, RS [33] emphasises the availability of Ministerial intervention. The Minister states that such intervention remains available where the CP Regime does not apply, and states that this was "expressly recognised in the Second Reading speech" at 1358. Yet that reference to Ministerial intervention in the 2011 2R Speech is the same reference as that referred to above at [27]. The reference shows that Ministerial intervention was envisaged in some cases where s 36(2C) applied, but that is all. The specific identification of the types of cases where Ministerial intervention might be required tells against the Minister's attempt to place broader reliance on Ministerial intervention as a method of discharging Australia's *non-refoulment* obligations.

31. Turning to RS [34]-[35], the Minister suggests that, in relying upon the protective nature of the CP Regime, the appellants are attempting to extend "the ambit of the regime": RS [35]. That argument is circular, as it assumes that the ambit of the regime accords with the Minister's construction of the Intent Requirements.

32. At RS [34], the Minister submits that the extrinsic materials are not called in aid of the appellants' argument about the protective nature of the CP Regime. Yet the purpose of the CP Regime demonstrated by those materials, as outlined at AS [46]-[48] and at [25]-[27] above, supports the appellants' submissions on this point. The CP Regime was intended, subject to specific exceptions such as s 36(2C), to reflect the obligations that Australia has to not *refoule* certain persons. The definitions of CITP and DTP were intended to reflect the corresponding international concepts, with the result that persons facing a real risk of harm of that nature would be protected. To construe the

definitions with regard to that protective purpose identified in the extrinsic material is not only appropriate, but is the conventional approach to statutory interpretation.[5]

33. Lastly on the topic of purpose, in addition to the points made above, the submission made at [8] above should be recalled. None of the Minister's submissions on the purpose of the CP Regime affect the meaning of "intentionally inflicted" in the CAT, yet that is a critical issue in construing the same phrase in the definition of CITP.

International law concerning torture and CITP

CITP and the Minister's attempt to distract from international law concerning torture

34. At RS [37], the Minister complains that the appellants focus "on the international jurisprudence concerning torture", whereas the relevant issue before the Tribunal was whether the appellants faced a real risk of CITP. The Minister ignores that the phrase "intentionally inflicted" in the *Migration Act* definition of CITP was taken from the CAT, a point that the Minister elsewhere concedes: RS [39], [49]-[50]. In light of the genesis of the phrase, the appellants' focus on torture jurisprudence is unsurprising.

35. The Minister instead would have the Court focus on the international jurisprudence concerning cruel, inhuman or degrading treatment or punishment. As stated above at [7], the key point that the Minister draws from these cases is that, leaving aside torture, contravention of art 7 of the ICCPR or art 3 of the ECHR does not require intent: RS [39]-[43]. As outlined above, that point is correct, but it does not impact on the meaning of the phrase "intentionally inflicted" in the definition of CITP, which must correspond with its meaning under the CAT.

36. RS [44] is a red herring. The appellants do not (and need not) argue that Australia's *non-refoulement* obligations with respect to CITP (or DTP) are limited to cases where intent is present. At RS [45], the Minister relies on the presence of the Intent Requirements to claim that Parliament intended the CP Regime definitions of CITP and DTP to be narrower in scope that the equivalent international law concepts. That submission is reminiscent of the error made by the plurality at *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69 (***SZTAL***) at [61]-[62] (see AS [50]-[52]). The Intent Requirements were not added to a pre-existing definition. The ICCPR does not define cruel, inhuman or degrading treatment or punishment.

37. As outlined above at [23]-[32], the extrinsic material leaves no doubt that the definitions of CITP and DTP were intended to correspond with Australia's *non-refoulement* obligations. Parliament attempted to define concepts that are not defined in international law, so as to assist decision makers "to interpret and implement" the relevant international obligations: 2011 2R Speech at 1357. It may be accepted that in doing so, Parliament failed to develop definitions that capture *every* case in which Australia's relevant *non-refoulement* obligations are engaged. But that does not, in light of the purpose of the definitions, warrant refusing to construe those definitions so as to correspond with the relevant international law concepts to the extent that they will bear such a definition. The first sentence of RS [45] mischaracterises the appellants' position on this matter, as the submissions at [28] above make clear.

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5 See, eg, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11]; *NH v Director of Public Prosecutions* (2016) 334 ALR 191 at [49]; *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 334 ALR 223 at [30] *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [35]-[36]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Commonwealth v Genex Corporation Pty Ltd* (1992) 176 CLR 277 at 293.

38. RS [46] suffers from the same problem at RS [45]. As just outlined, contrary to the first sentence of RS [46], the appellants do not submit that the CP Regime definition of CITP should be construed so that it is entirely co-extensive with international law. They submit only that it should be construed consistently with international law to the extent that it can bear such a construction. This criticism applies equally to the last sentence of RS [48]. It should also be noted that nothing that is said in *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 (RS [46]-[47]) undermines the appellants' approach to construing the Intent Requirements. Rather, the quote at RS [47] supports the view that, the phrase "intentionally inflicted" having been adopted from the CAT, it should have the same meaning as it has in the CAT.

39. Finally on this topic, the Minister relies on *Kalishnikov v Russia* (2002) 36 EHRR 34, a case about art 3 of the ECHR, to suggest that imprisonment in poor conditions will not satisfy the Intent Requirements: RS [40]-[41]. As noted in that case, intent is not necessary to establish a breach of art 3 of the ECHR: at [101]. The comments about intent in that case must therefore be understood in the context that, first, not only are they obiter, but, secondly, Kalishnikov did not even assert that Russia had intentionally inflicted any pain, suffering or humiliation on him. Unsurprisingly given that context, the Court gave no consideration to the meanings that "intent" might have. As such, the case is of no use in determining the meaning of "intentionally inflicted" in the CAT and the *Migration Act*. Rather, the cases and other matters discussed at AS [39]-[42] and below are more on point.

Torture and international law

40. RS [50]-[52] seeks to reduce the significance for this appeal of the ICTY jurisprudence on the meaning of intent in relation to torture. Those submissions should be rejected. In *Kunarac*,[6] the defendants put in issue the holding by the Trial Chamber that they had the intent required to commit torture: at [153]. In response, the Appeals Chamber held that, in determining whether the requisite intent was present, the question was whether the alleged perpetrator "intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims": at [153]. The holding is part of the *ratio* of the Appeals Chamber's decision. The Minister's statement in RS fn 81, that the Trial Chamber in *Limaj*[7] was bound by this part of the decision in *Kunarac* confirms this point, and highlights the status of the Appeals Chamber as an important source of jurisprudence on the topic.

41. The Minister's attempt to undermine *Kunarac* on the basis of the discussion of the intent requirement being "intermingled" with consideration of the purpose for which pain or suffering was inflicted (RS [50]) should be rejected. The consideration of the intent requirement in *Kunarac* at [153] suffers from no such flaw. Moreover, at [153], the Appeals Chamber was alive to "the important distinction between 'intent; and 'motivation'": cf RS [50]. Insofar as the Minister suggests at RS fn 80 that the Appeals Chamber proceeded on the basis that intent attached only to the act or omission causing the pain or suffering, rather than the pain or suffering itself, he is plainly incorrect. His submission is inconsistent with the holding in *Kunarac* at [153].

42. The Minister focusses on the conduct in question in *Kunarac*, being rape, in an attempt to confine the Appeals Chamber's approach to cases involving rape: RS [51]-[52]. That attempt is flawed, and the Minister's submissions on the point make an implicit

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6 ICTY Appeals Chamber, Case No It-96-23 and IT-96-23/1-A (12 June 2002) (Judgment) (***Kunarac***).

7 Trial Chamber II, IT-03-66-T (30 November 2005) (Judgment) (***Limaj***).

concession that undermines the balance of the Minister's submissions in this appeal (and the construction of the Intent Requirements adopted by the plurality below).

43. The Minister relies upon the Appeals Chamber's statement (at [150]) that some acts, including rape, necessarily involve suffering for those upon whom the act is inflicted: RS [51]. The Minister states that, this being so, *Kunarac* "did not involve any question of knowledge" of the probably result of the defendants' acts: RS [52]. But that simply means that, given the nature of the conduct in question, the Appeals Chamber did not need to give any real consideration to whether the defendants had the requisite knowledge. The defendants plainly did. That does not detract from the holding in *Kunarac* as to how intent to torture may be established, or suggest that the ICTY's approach is relevant only in the context of rape or sexual violence: cf RS [52].

44. The Minister submits that, as severe pain and suffering is inherent in rape, there is "no distinction between intention to rape and intention to cause severe pain and suffering": RS [52]. This submission is significant. It involves a concession that an intent to torture is established where an actor intends to act in a way that will necessarily cause severe pain and suffering. That is inconsistent with the approach taken in the balance of the Minister's submissions, and by the plurality below, that the actor must "have an 'actual, subjective' intention to inflict pain or suffering": see, eg, RS [3], [14], [57]; *SZTAL* at [59], [68]. In that respect, two points should be made.

45. First, given the implicit concession that intent is established where an actor knows that pain or suffering is a necessary result of the actor's act, the Court should reject the Minister's submission that intent is not also established where the actor knows that pain or suffering will occur in the ordinary course. Much of the Minister's submissions in favour of his "actual, subjective intention" approach cannot stand consistently with his concession, but the appellants' submissions remain.

46. Secondly, even if the Court refused to adopt the appellants' construction of the Intent Requirements, and adopted only the construction implicitly conceded by the Minister, the appeals would have to be allowed. The plurality below misconstrued the Intent Requirements. The Tribunal's holding[8] that poor prison conditions involving inadequate resources and overcrowding do not give rise to significant harm under the CP Regime is incorrect. If correct, that holding would apply no matter how poor the prison conditions, and no matter how much time the individual in question might face in those conditions. Yet it is not difficult to imagine a combination of conditions and duration of detention that would warrant the conclusion that pain and suffering was a necessary result of that detention. Whether that is so in any given case is for the Tribunal to determine. The Tribunal did not determine this issue in the present case.

47. Turning to other sources of law, it is significant that the appellants' construction is supported by the position taken in Canada. Under s 97(1)(a) of the *Immigration and Refugee Protection Act* SC 2001 c 27, reference is made to persons who may be subject to a danger "of torture within the meaning of Article 1 of the Convention Against Torture". In interpreting this section, and so the CAT, the Immigration and Refugee Board of Canada states that severe "pain or suffering is considered to be intentionally inflicted" if it is a desired consequence, "or it is known to be a likely consequence".[9]

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8 AB 18 [80]. In accordance with AS [8]-[9], all AB references are to the Appeal Book in STZAL's appeal.

9 Legal Services, Immigration and Refugee Board, *Consolidated grounds in the* Immigration and Refugee Protection Act – *Persons in Need of Protection: Danger of Torture* (15 May 2002) at [5.1.4]; LaViolette, *The* Immigration and Refugee Protection Act *and the International Definition of Torture* (2004) 35 Immigration Law Reports (Articles) (3d) 59.

48. As to the *Rome Statute*, the Minister's response to AS [42] (RS [53]-[54]) is flawed. The fact that "intent" is defined in the *Rome Statute* does not undermine the appellants' argument. The appellants' point is that, since the statute defined crimes to reflect customary international law (**CIL**), the presence of a definition of intent that corresponds with the appellants' construction of the Intent Requirement confirms that the appellants' construction accurately reflects the meaning of the phrase "intentionally inflicted" in art 1 of the CAT (which reflects CIL). Further, the last sentence of RS [53] supports the appellants, not the Minister. In light of the differing contexts of the CAT and the *Rome Statute*, if intent was to bear a different meaning in each instrument, one would expect intent under the CAT to have a broader, not narrower, meaning than under the *Rome Statute*. RS [54] adds nothing. The appellants' reference to the *Rome Statute* does not mean that they are applying the *Rome Statute*.

49. At RS [55]-[56], the Minister refers to academic writing in support of his position. The quote at RS [55] reveals a matter regarding the CAT's drafting history that supports the appellants, not the Minister. The United States tried to introduce a malice requirement into the definition of torture, but failed. Moreover, the last sentence of the quote still does not discuss what "intent" actually means. The quote at RS [56] suggests that recklessness does not suffice, but says nothing about what intent means. It leaves open that the meaning of intent contended for by the appellants is correct.

50. There is, however, support available in the academic literature for the appellants' position. As noted at AS fn 18, Joseph and Castan consider that "acts that would not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture, as the "requisite intent would be missing, unless the torturer was aware of the victim's special susceptibilities".[10] They, along with Professor McAdam, are of the view that reckless indifference to the possibility of causing pain and suffering is sufficient.[11] The appellants do not need to ask the Court to go so far, but these statements weigh against the Minister's claim that there is "ample support" (RS [55]) for his view. It is significant that, not only does the literature relied upon by the Minister fail to provide him with any real support, but he has failed to find a single instance of international jurisprudence that suggests the appellants' approach is wrong.

51. Finally, the Minister fails to grapple with the examples given at AS [55]-[56] (except to make the implicit concession outlined above at [44]-[46]). As those examples show, the appellants' construction of the Intent Requirements ensures that the CP Regime responds to significant examples of conduct that enliven Australia's *non-refoulement* obligations, but which, on the Minister's approach, would fall outside the CP Regime. As a further example, female genital mutilation may be regarded as torture,[12] though its object (however warped) is not the infliction of pain or suffering. The Minister's approach would see the CP Regime fail to respond to conduct of that nature.

The Minister's floodgates argument and reliance upon WZAPN

52. At RS [12], the Minister attempts to conjure up a spectre of "many people" from Sri Lanka obtaining protection visas if these appeals succeed. This floodgates argument should be rejected. First, as was made clear at AS [61], if these appeals are allowed, the result is *not* that the appellants (or "many people" from Sri Lanka) necessarily face

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10 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (3rd ed, 2013) at 218 [9.06] (**Joseph and Castan**) (underlining added).

11 Jane McAdam, *Australian Complementary Protection: A Step-by-Step Approach* (2011) 22 Sydney Law Review 687 at 700; Joseph and Castan at 218 [9.06].

12 *Ten Case Abstracts*, (1994) 6 International Journal of Refugee Law 662 at 664.

a real risk of CITP or DTP if returned to Sri Lanka. It is unclear from the Tribunal's factual findings whether the relevant claims for protection would have succeeded if the Tribunal had accepted that the Intent Requirements were satisfied. If the Intent Requirements are satisfied, the Tribunal will need to consider the prison conditions in question, the time that may be spent in those conditions, and any other relevant factor, in determining whether the other parts of the definitions of CITP or DTP are met.

53. Secondly, if prison conditions in another country are so poor that detaining a person in those conditions for, for example, two weeks (AB 18 [79]) would breach the ICCPR, then it is not surprising that the CP Regime would respond. As outlined above and in AS [23]-[32], that is the CP Regime's purpose. Moreover, contrary to the last sentence of RS [12], poor prison conditions that are not specifically targeted at an individual can breach art 7 of the ICCPR (see AS [53]). The Minister declined to submit otherwise in the Court below, and he still does not make such a submission: RS [24] and see above at [16].

54. The Minister's attempt at RS [13] to draw parallels between the present case and *WZAPN* is baseless. The cases have nothing to do with one another. In contrast to *WZAPN* (see at [45]), the appellants here complain that the Tribunal did not engage in a qualitative assessment of the detention that they feared, but instead dismissed their claims by misconstruing the Intent Requirements. The attempt to link this case to *WZAPN* is, like the Minister's floodgates argument, merely an attempt to distract from the flaws in his (and the plurality's) construction of the Intent Requirements.

Final point and conclusion

55. Before concluding, it is necessary to respond to the Minister's claim that the summary of material facts at AS [7]-[15] is incomplete: RS [5]. Having made that assertion, the Minister sets out certain additional facts at RS [6]-[9]. But the Minister gives no explanation of how those further facts are said to bear upon the outcome of these appeals. No submission is made by the Minister as to why any of those further facts are material. No argument is made (and there is no notice of contention to the effect) that the appeals should be dismissed even if the issue of construction raised by the appeals is decided in the appellants' favour. As such, there is no basis for the Minister's statement that the appellants' summary of material facts is incomplete.

56. In conclusion, the Minister seeks to uphold a construction of the Intent Requirements that conflicts with the genesis of the relevant wording in the CP Regime, and is inconsistent with the purpose of the CP Regime and of the definitions of CITP and DTP within that regime. He does so despite there being an available interpretation of the Intent Requirements that better addresses both of these issues. That approach is contrary to the conventional approach to statutory interpretation. It should be rejected. At the heart of this case is the Tribunal's view that poor prison conditions caused by a lack of resources are incapable of constituting significant harm under the CP Regime (AB 18 [80]). That view is incorrect. The appeals should be allowed.

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