SZTAL v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ANOR (S272/2016)

SZTGM v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ANOR (S273/2016)

Court appealed from: Full Court of the Federal Court of Australia [2016] FCAFC 69

Date of judgment: 20 May 2016

Special leave granted: 16 November 2016

The facts in both of these matters are relevantly identical. Both Appellants are Sri Lankan citizens who left Sri Lanka illegally. Both claimed that they would be imprisoned in substandard conditions if they were returned to their homeland.

In each matter the then Refugee Review Tribunal, now known as the Administrative Appeals Tribunal, ("the Tribunal") accepted that illegal departure from Sri Lanka was an offence under the Sri Lankan *Immigrants and Emigrants Act* 1945. It further found that this Act was applied to "all persons who have departed Sri Lanka illegally". In doing so the Tribunal acknowledged that prison conditions in Sri Lanka were poor, a fact that was accepted even by the Sri Lankan authorities. It went on to conclude however that a returnee who was remanded in custody temporarily would not face a real risk of "cruel or inhuman treatment or punishment" ("CITP") or "degrading treatment or punishment" ("DTP") amounting to significant harm. It also found that, despite the Sri Lankan Government being aware that its prison conditions were poor, it did not have an intention to "inflict cruel or inhuman punishment or cause extreme humiliation". The Appellants' applications for protection visas were therefore refused.

In dismissing each subsequent application for judicial review, Judge Driver found no error in the way the Tribunal approached the construction of the "intent" requirement (to inflict cruel or inhuman punishment or cause extreme humiliation) amounting to significant harm. His Honour found that an actual, subjective intention to cause such harm was required.

In a combined judgment of the Full Federal Court, neither Justices Kenny nor Nicholas found fault with either Judge Driver's or the Tribunal's approach to the Appellants' claims. Their Honours rejected the submission that the "intent" requirement was satisfied if someone performs an act knowing that it will, in the ordinary course of events, inflict pain, suffering or humiliation. Justice Buchanan however found that the Tribunal had disposed of the claims on the basis that the harm faced by the Appellants "did not amount to a level of harm which met the physical or mental elements" of the definitions of CITP or DTP and "so could not be regarded as intentional conduct which satisfied the definitions".

The grounds of appeal in both matters are:

- The Federal Court erred in law in holding that:
  a) the expression *"intentionally inflicted"* in the definitions of *"torture"* and *"cruel or inhumane punishment"* in s 5(1) of the *Migration Act* 1958 (Cth) ("the Act"); and

  b) the expression "intended to cause" in the definition of *"degrading treatment or punishment"* in s 5(1) of the Act;

  require an actor to have "an actual, subjective, intention" to inflict pain or suffering, or to cause extreme humiliation, by the actor's acts or omissions, being an intention that cannot be proved by the actor's knowledge of the consequences of the actor's acts or omissions, no matter how certain that knowledge may be.