FEDERAL COURT OF AUSTRALIA

WZAPN v Minister for Immigration and Border Protection [2014] FCA 947

Citation:	WZAPN v Minister for Immigration and Border Protection [2014] FCA 947
Appeal from:	WZAPN v Minister for Immigration & Anor [2013] FMCA 6
Parties:	**WZAPN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and GRAHAM BARTER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number:	WAD 380 of 2013
Judge:	**NORTH J**
Date of judgment:	3 September 2014
Corrigendum:	5 November 2014
Catchwords:	**MIGRATION** – application for extension of time within which to file an appeal from a judgment of the Federal Magistrates Court affirming reviewer's recommendation not to grant the applicant a protection visa – applicant is an undocumented Faili Kurd from Iran – reviewer found that the applicant had a genuine fear of arbitrary detention and denial of basic rights by the Basij, and that there was a real chance this treatment would occur – reviewer found that treatment did not constitute serious harm and was not for a Convention reason – s 91R(1)(b) and (2)(a) – whether second respondent erred in asking whether the harm suffered by the applicant was 'sufficiently serious' to constitute serious harm pursuant to the Act – whether procedural unfairness in finding that detention was pursuant to a law or policy of general application, and that such law or policy was appropriate and adapted in the manner referred to in *Applicant S v MIMA* (2004) 217 CLR 387
Legislation:	*Australian Human Rights Commission Act 1986* (Cth) s 3 *Migration Act 1958* (Cth) s 91R *Convention Relating to the Status of Refugees 1951* *International Covenant on Civil and Political Rights 1966* *Protocol Relating to the Status of Refugees 1967*

Cases cited:	*Applicant A* (1997) 190 CLR 225 *Applicant S v MIMA* (2004) 217 CLR 387 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2006) 233 CLR 1 *Monis v Queen* (2013) 249 CLR 92 *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 *Chan v. Canada* [1995] 3 SCR 593 *Fornah v. Secretary of State for the Home Department* [2007] 1 AC 412 *HJ (Iran) v. Secretary of State for the Home Department* [2011] 1 AC 596 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 *Refugee Appeal No 74655/03* [2005] NZAR 60 *RT (Zimbabwe) v. Secretary of State for the Home Department* [2013] 1 AC 152 A Grahl-Madsen, *The Status of Refugees in International Law* (A W Sijthoff, 1966) vol 1 Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, 2007) J C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) J C Hathaway and M Foster, *The Law of Refugee Status* (2nd ed, Cambridge University Press, 2014) United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (January 1992, reissued December 2011)
Date of hearing:	9 May 2014
Date of last submissions:	27 June 2014
Place:	Melbourne

Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	80
Counsel for the Appellant:	Mr A Solomon-Bridge
Solicitor for the Appellant:	Maddocks
Counsel for the Respondents:	Mr L Brown
Solicitor for the Respondents:	Australian Government Solicitor

FEDERAL COURT OF AUSTRALIA

WZAPN v Minister for Immigration and Border Protection [2014] FCA 947

CORRIGENDUM

1. The reference in the 'Cases cited' on the cover page of this judgment to "*Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2006) 233 CLR 1", should be a reference to "*VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1".

2. The reference in [19] of this judgment to "*Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2006) 233 CLR 1", should be a reference to "*VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1".

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 5 November 2014

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 380 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**WZAPN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	GRAHAM BARTER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**

JUDGE:	**NORTH J**
DATE OF ORDER:	**3 SEPTEMBER 2014**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The time for the applicant to file a notice of appeal from the orders of the Federal Magistrates Court made on 31 January 2013 is extended until 9 May 2014.
2. Leave is granted to the applicant to amend the draft notice of appeal by adding paragraph 3 of the proposed amended draft notice of appeal filed on 30 May 2014, and the application to amend is otherwise dismissed.
3. Leave is granted to the applicant to adduce further evidence on appeal being the material contained in annexure SLW-4 to the affidavit of Sarah Louise Watson sworn 30 May 2014.

AND THE COURT DECLARES THAT:

4. In recommending to the first respondent that the applicant was not a person to whom Australia has protection obligations under the *Convention relating to the Status of Refugees 1951*, as amended by the *Protocol relating to the Status of Refugees 1967*, the second respondent made jurisdictional errors identified in the reasons for judgment delivered this day, namely, by failing to apply the correct test to determine

whether the applicant was at risk of serious harm within the meaning of s 91R(1)(b) and (2)(a) of the *Migration Act 1958* (Cth), and by failing to accord the applicant procedural fairness in the consideration whether s 91R(1)(a) of the said Act applied in this case.

AND THE COURT FURTHER ORDERS:

5. The appeal is allowed.

6. The orders of the Federal Magistrates Court made on 31 January 2013 are set aside.

7. The first respondent pay the applicant's costs of the appeal.

8. Leave is granted to the first respondent to apply in writing by 8 September 2014 to vary paragraph 7 of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 380 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**WZAPN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	GRAHAM BARTER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**

JUDGE:	**NORTH J**
DATE:	**3 SEPTEMBER 2014**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 Before the Court is an application for an extension of time within which to appeal from the judgment of the then Federal Magistrates Court delivered on 31 January 2013.

2 The federal magistrate dismissed an application for review of the recommendation made on 10 August 2011 by the second respondent, the reviewer. The recommendation was that the applicant not be recognised as a person to whom Australia has protection obligations under the *Convention Relating to the Status of Refugees 1951*, as amended by the *Protocol Relating to the Status of Refugees 1967*, together referred to as the Convention.

3 Although in form the application was for an extension of time within which to file a notice of appeal, it was accepted by the first respondent, the Minister for Immigration and Border Protection, that the principal area of controversy was whether the appeal has merit. In the circumstances of this proceeding, a determination of that issue would resolve the application for an extension of time. Consequently, the hearing was in substance a hearing of the appeal. Notwithstanding these matters, WZAPN will be referred to as the applicant.

THE APPLICANT'S CLAIMS

4 The applicant arrived in Australia on 21 July 2010. He was then between 22 and 26 years old. The applicant applied to the Department of Immigration and Citizenship for a refugee status assessment. On 27 September 2010, a refugee status assessment officer concluded that the applicant was not a refugee within the meaning of the Convention.

5 The applicant was born in Tehran. He is a stateless Faili Kurd. He claimed to fear persecution if he returned to Iran for reason of his Kurdish ethnicity and membership of a particular social group, namely, stateless persons, undocumented Faili Kurds living in Iran, stateless Faili Kurds, or undocumented refugees living in Iran.

6 By the time the proceeding reached this Court, the focus was on one aspect of the applicant's claims. It is thus unnecessary to set out the considerable attention given by the reviewer and the federal magistrate to other aspects of the claim.

7 The claim to which the grounds of appeal were directed was 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.

RELEVANT LEGISLATION

8 Central to the reasoning of the reviewer and to the issues raised by this proceeding are Art 1A(2) of the Convention and the provisions of s 91R(1) and (2) of the *Migration Act 1958* (Cth) (the Act). Article 1(A)(2) of the Convention provides that a refugee is a person who:

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

9 Subsections 91R(1) and (2) of the Act provide:

> (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
>
> **(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and**

> **(b) the persecution involves serious harm to the person**; and
>
> (c) the persecution involves systematic and discriminatory conduct.
>
> (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:
>
> **(a) a threat to the person's life or liberty**;
>
> (b) significant physical harassment of the person;
>
> (c) significant physical ill-treatment of the person;
>
> (d) significant economic hardship that threatens the person's capacity to subsist;
>
> (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
>
> (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
> [Emphasis added.]

10 The reviewer recorded the information given by the applicant at the initial arrival interview on Christmas Island on 24 August 2010, in a subsequent written statement dated 5 September 2010, and also in written submissions made by his lawyer on 2 November 2010.

11 The reviewer also recorded the evidence given by the applicant on 13 April 2011 in an interview conducted with the assistance of an interpreter and by video-link with the reviewer in Sydney. The reviewer recorded the applicant's evidence at the interview on the issue presently before the Court at [18] as follows:

> He was afraid of leaving the house in Cham Rota. He said he would not walk about during the day but preferred to move at night to go to work for fear of the Basij. He was identified by his neighbours and the target of corruption. His money was taken, his ring and his tools of trade. There was always a risk of identification by informers.
>
> He has always been afraid of walking about the streets of Cham Rota and he has never been outside of the village. He has been afraid that he would be stopped by the Basij, taken for prosecution and investigation. He was afraid of being bullied.
>
> …
>
> The Basij were based in a mosque and had places for interrogation within the village, where he had been taken as much as 30 or 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.

> 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. This could be by either the police or the Basiji.

12 The reviewer referred to country information concerning the role of the Basij and said:

> 30. The above information indicates that the religious/political group known as the Basij has a large and extensive membership which pervades Iran and is supported by a network of informers and a command of technology, including the ability to tap phones. That group is charged with the protection of Islamic values, which are fundamental to the Iranian political system and they may act in the furtherance of their task with virtual impunity from other Iranian authorities.

13 Under the heading "Findings and Reasons", the reviewer first made an assessment of the applicant's credibility generally and concluded at [42]:

> Having regard to all of the above I generally accept [the applicant's] evidence as reasonably truthful, accurate and reliable, but prone to hyperbole.

14 Then, the reviewer defined the claim relevant to the present application as follows:

> 64
> …
> b. He has been detained by the Basiji and police from time to time, once for 48 hours but on other occasions for no more than twelve hours. He is usually detained for relatively brief periods of time and he has never been physically assaulted, although he has suffered extreme verbal abuse.

15 The reviewer then determined that claim as follows:

> 79. In relation to the second claim, the claimant's evidence is that he feared detention by the Basiji as a result of his race and lack of identification papers, although 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.
>
> 80. I accept 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. He does not suggest he had ever been physically abused but he has been questioned at length and called a 'bitch'. He has not had his life threatened or been kept in detention for more than 48 hours.
>
> 81. Having regard to the extent of enquiries by the police, the Basij and other de-facto law enforcement agencies revealed by Country Information,

particularly since the 2009 elections, **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**.

82. 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 (which I do not); I am not satisfied it will be for the essential and significant reason of a convention ground.

83. 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.

84. 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**. [Emphasis added.]

16 Finally, the reviewer summarised his conclusion thus:

99. For the reasons set out above, I find that:

- The claimant is outside his country of former habitual residence.
- He has a genuine subjective fear of ongoing harm in the form of arbitrary detention and denial of basic rights.
- 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. He will also be deprived of the advantages associated with identification documentation set out above.
- The above harm does not amount to *serious harm* within the meaning of the Act and is not for reason of a convention ground.
- The claimant does not have a well founded fear of being persecuted, for reason of any of the grounds referred to in the Convention; in the foreseeable future should he return to the country of his former habitual residence.

THE PROPOSED GROUNDS OF APPEAL

A. The test to be applied to determine serious harm

Introduction

17 The first proposed ground of appeal is that the reviewer applied the wrong test when concluding that the applicant did not suffer serious harm within the meaning of s 91R(1)(b) and (2)(a), and that the federal magistrate erred by failing to find that the reviewer had made that error.

18 The reviewer accepted that there was a real chance that the applicant would be questioned periodically and probably detained for short periods when he failed to provide identification, but held that the frequency and length of the detention, and the nature of the treatment he would receive in detention, did not amount to serious harm within s 91R(2)(a), (b) or (c). The reviewer concluded that on this analysis, the nature of the detention was not sufficiently significant and thus did not constitute serious harm ([81] – [82]). In approaching the matter in this way, the reviewer made a qualitative assessment of the nature of the harm caused by the detention.

19 It was common ground that the reviewer first had to, and did, make an assessment of the risk of the threat to liberty materialising; see *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2006) 233 CLR 1; [2006] HCA 60 (*VBAO*).

The Arguments of the parties

20 The applicant contended in his original written submissions, and in oral submissions, that the reviewer wrongly applied a qualitative assessment to the nature of the harm. The applicant argued that s 91R(2)(a) is concerned with the threat, in the sense of a risk, of harm to life and liberty, whatever the nature of the harm. Whether there is a threat depends on an assessment of the likelihood of harm happening. But once that threat is established, s 91R(2)(a) operates so that the threat to life or liberty amounts to serious harm irrespective of the nature or extent of the potential harm to life or liberty. Thus, there is no place for an assessment of the frequency or degree of the harm, or the circumstances which attend such harm, save only for a *de minimus* exclusion. Consequently, once the reviewer found that the applicant was at risk of detention, serious harm was established within the meaning of s 91R(2)(a) irrespective of the significance of the circumstances attending the detention.

21 In support of this construction, the applicant drew attention to the co-location in s 91R(2)(a) of threats to liberty with threats to life as demonstrating the reason why threats to liberty are established without reference to the severity of the circumstances of the detention. There is inherent serious harm in such risks. The inherent harm is underscored, so the applicant contended, by the focus not on the occurrence of the harm, as in the instances covered by s 91R(2)(b) – (f), but on the threat of the harm occurring. This approach, the applicant argued, is consistent with pre s 91R authorities, which accepted that a threat to life or freedom for a Convention reason amounted to persecution.

22 The first respondent argued that once the reviewer found that the threat existed, the reviewer properly assessed whether the nature of the threatened harm in the circumstances of the detention amounted to serious harm for the purposes of s 91R(1)(b).

23 The first respondent relied on the purpose of the section as explained in the Revised Explanatory Memorandum for the Migration Legislation Amendment Bill (No 6) 2001 (Cth), which introduced s 91R as follows:

> 19. Claims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell short of the level of harm **accepted by the parties to the Convention to constitute persecution…**
>
> …
>
> 25. The above definition of persecution reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality.
> [Emphasis added.]

24 The first respondent argued that the instances of harm provided in s 91R(2) all "take their colour from the specification of "serious harm" in the opening words of the sub-section": *VBAO* per Gummow J at [19]. All the instances of harm in s 91R(2)(b) – (f) are serious harm. The threat to liberty referred to in s 91R(2)(a) must be seen in this context. So, any threat to liberty requires more than occasional or temporary threats to liberty to qualify as serious harm. Whether harm is so serious as to prevent a person from returning to his/her own country requires a qualitative assessment of the threatened harm in each instance. According to the first respondent, the reviewer was correct to assess the nature of the circumstances of detention to ascertain whether they were so serious as to amount to serious harm.

25 Following oral argument, and in view of the indication in [19] of the Revised Explanatory Memorandum that s 91R(1)(b) and (2)(a) were intended to reflect the meaning of serious harm in the concept of persecution provided for in the Convention, the parties were asked to provide further written submissions concerning the jurisprudence on the meaning of serious harm in the concept of persecution provided for in the Convention.

26 The additional written submissions filed by the first respondent provided examples of cases in the United States of America and Canada in which the decision-maker made a qualitative assessment of harm to determine whether it amounted to serious harm. The applicant responded by providing a different explanation for the individual decisions relied on by the first respondent. For example, the first respondent relied on the case of *Skalak v. INS* 944 F2d 364 (7th Cir 1991), at 365, in support of the contention that in the US, periodic detention on its own is insufficient to reach the level of severity required to establish persecution. The applicant highlighted that in that case the Court in fact held that the past detention experienced by the petitioner did constitute persecution. However, owing to idiosyncrasies in the US system by which asylum-seekers who have suffered past persecution but do not fear future persecution can be recognised as refugees, and in light of new circumstances in that case which made it unlikely that the harm would recur, the past persecution was required to be so severe that the petitioner should not be returned to her country of origin even where the danger of recurrence were negligible. On the facts, the past harm suffered by the petitioner did not meet that high threshold. This instance demonstrates that the individual examples relied on by the first respondent are of limited assistance to the task of construing s 91R(2)(a), because they are often concerned with developments in local jurisprudence relating to matters beyond the purview of the Convention.

27 Greater assistance is obtained from reference to academic texts which synthesise the international jurisprudence, and generally support the view that threats to life and freedom on Convention grounds will always be persecution: A Grahl-Madsen, *The Status of Refugees in International Law* (A W Sijthoff, 1966) vol 1 p 193; J C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) p 113 n 118; J C Hathaway and M Foster, *The Law of Refugee Status* (2nd ed, Cambridge University Press, 2014) p 239; Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, 2007) p 92.

Consideration

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.

31 The conclusion to be drawn from the language of the section is confirmed by other considerations. In construing s 91R, the construction which accords with Australia's obligations under the Convention should be favoured: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; [1995] HCA 20 at [26], per Mason CJ and Deane J. This principle is reflected in the statement in the Revised Explanatory Memorandum that s 91R(1)(b) and (2)(a) are intended to reflect the meaning of serious harm as an element of persecution referred to in the Convention.

32 What then is the meaning of serious harm accepted by the parties to the Convention? The meaning of persecution in the Convention is not defined. However, it is accepted that persecution requires serious harm, or 'serious violations of human rights': see United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (January 1992, reissued December 2011) (the Handbook), at [51]. The Handbook further states at [51] that:

> From Article 33 of the 1951 Convention [the obligation of non-refoulement], it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.

33 The pre s 91R authorities relied on by the applicant also support the view that threats to liberty for a Convention reason amount to persecution, and implicitly, that such threats rise to the level of serious harm attending to the Convention concept of persecution. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; [1989] HCA 62 Dawson J said at 399:

> "Persecution" is not defined in the Convention, although Arts 31 and 33 refer to those whose life or freedom may be threatened. Indeed, **there 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. The Handbook [*On Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, (1979)] 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.
> [Emphasis added.]

34 Mason CJ at 390 said that "[d]iscrimination which involves interrogation, detention or exile…amounts prima facie to persecution unless the actions are so explained that they bear another character". In *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; [2000] HCA 55, McHugh J said at [55]:

> Persecution involves discrimination that results in harm to an individual. But not all discrimination amounts to persecution…The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on 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.
> [Emphasis added.]

35 These decisions were not directed to the more recent s 91R, nor were they principally concerned with serious harm in the form of threats to liberty. However, they are relevant in that they distinguish threats to life or liberty from other forms of discrimination which may or may not amount to serious harm for the concept of persecution in the Convention.

36 Courts in Canada, the United Kingdom, and New Zealand have approached the meaning of persecution in the Convention by considering conduct against the international

human rights framework. See for example, *Fornah v. Secretary of State for the Home Department* [2007] 1 AC 412, at [10] per Lord Bingham of Cornhill; *HJ (Iran) v. Secretary of State for the Home Department* [2011] 1 AC 596, at [15] per Lord Hope of Craighead, at [101] per Lord Walker of Gestingthorpe, and at [113] per Lord Dyson; *RT (Zimbabwe) v. Secretary of State for the Home Department* [2013] 1 AC 152, at [28] – [32] per Lord Dyson; *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, at [71] per the Court; *Chan v. Canada* [1995] 3 SCR 593, at [57] and [69] – [71] per La Forest, L'Heureux-Dubé and Gonthier JJ; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at [56] – [57] per L'Heureux-Dubé, Gonthier, McLachlin and Bastarache JJ; *Refugee Appeal No 74655/03* [2005] NZAR 60, per RPG Haines QC at [41], [56] – [61], and particularly at [58] where it was said that "core norms of international human rights law are relied on to define forms of serious harm within the scope of "being persecuted"", and at [124], "[t]he New Zealand approach…places [international human rights standards] at the centre of the 'being persecuted' analysis in the belief that this provides a principled and disciplined framework for analysis."

37 In *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, the Canadian Supreme Court found that the proper approach to persecution is to consider whether the claimant's basic human rights are in jeopardy. At [71] it held as follows:

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:
>
> > CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.
>
> This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway… explains the impact of this general tone of the treaty on refugee law:
>
> > The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard.
>
> This theme sets the boundaries for many of the elements of the definition of "Convention refugee". "Persecution", for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; see Hathaway. So too Goodwin-Gill observes that "comprehensive analysis requires the general notion [of persecution] to

> be related to developments within the broad field of human rights". This has recently been recognised by the Federal Court of Appeal in the *Cheung* case.
> [References omitted.]

38 J C Hathaway and M Foster in *The Law of Refugee Status*, (2nd ed, Cambridge University Press, 2014) argue that the international human rights framework is the proper touchstone for the interpretation of persecution and thus serious harm in the Convention: see pp 193-208. They state at p 185 that, "[t]he modern understanding of "being persecuted" [i]s the sustained or systemic denial of basic human rights demonstrative of a failure of state protection." And at p 194:

> International human rights standards are rather uniquely suited to the task of defining which risks involve unacceptable forms of serious harm in a manner that offers not only consistency, but also normative legitimacy…

39 There is particular force in this approach in Australia because the right to liberty is an international human right which is, and was when s 91R was introduced, well known to Australian statutory law. The *Australian Human Rights Commission Act 1986* (Cth) (the Human Rights Act) provides for a process of enforcement of defined human rights in Australia. The Human Rights Act in s 3 defines human rights to include the rights recognised in the *International Covenant on Civil and Political Rights 1966* (the Covenant), which Australia signed in December 1972, and ratified in August 1980. Article 9(1) of the Covenant provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> [Emphasis added.]

40 And Art 10(1) of the Covenant provides:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

41 Hathaway and Foster explain the circumstances in which detention amounts to serious harm constituting persecution under the Convention by reference to the international human rights framework, and in particular to Arts 9 and 10 of the Covenant, at p 239:

> Persecution often takes the form of "detention, arrest, interrogation, prosecution, [and] imprisonment" – whether by way of police or other officially mandated custody, house arrest, "involuntary hospitalization," or even "being involuntarily transported." Importantly, though, not every constraint on free movement amounts to

> a violation of an international guaranteed human right: **international human rights law requires only that any deprivation of liberty be "on such grounds and in accordance with such procedures as are established by law," and – assuming this first requirement is met – expressly disallows only "arbitrary" arrests or detention**. It follows, for example, that ordinary policing efforts do not normally infringe this standard, assuming that they are conducted in accordance with valid criminal law and are not arbitrarily conceived or enforced. **Beyond the basic requirements of lawfulness and avoidance of arbitrary action, international human rights law requires further that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."** Taken together, these three requirements provide a sound and workable basis for the assessment of persecutory harm under refugee law.
> [Footnotes omitted.]
> [Emphasis added.]

42 Thus, a decision-maker faced with a claim based on persecution arising from a threat to a person's liberty should ask whether the deprivation was on grounds and in accordance with procedures established by law, whether the detention was arbitrary, and whether the applicant was treated with humanity and respect for the inherent dignity of the person. This approach applies the international human rights standards.

43 International human rights standards inform the interpretation of s 91R by reason of the statutory environment in Australia. The right to liberty is incorporated in a particular form in the Human Rights Act. The reference to that right in s 91R should be interpreted consistently with other Australian statute law. At the same time, such an approach conforms with the principle that Australian legislation should be interpreted consistently with international law, because Parliament intends to give effect to Australia's obligations under international law.

44 In taking the human rights approach, there is no place for a qualitative assessment of detention affecting the right to liberty for it to constitute an infringement of that right.

45 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.

46 Later in the reasons, the reviewer seems to have approached the question whether the applicant suffered persecution by a different analysis. At [84] he concluded that the applicant did not suffer persecution because the detention was pursuant to a law of general application which was 'not inappropriate' in the sense discussed by the High Court in *Applicant S v*

MIMA (2004) 217 CLR 387; [2004] HCA 25 (*Applicant S*). For the reasons advanced in Part B of these reasons, the reviewer fell into jurisdictional error in this conclusion because he denied the applicant procedural fairness in the consideration of that issue.

47 Although unnecessary for the resolution of this case, it is useful to address the proper approach to persecution in the circumstance where an applicant is detained pursuant to a law of general application.

48 Earlier judgments of the High Court have held that conduct undertaken pursuant to a law of general application does not amount to persecution if the law is, "appropriate and adapted to achieving some legitimate object of the country concerned": see *Applicant S* at [43], adopting the test articulated by McHugh J in *Applicant A* (1997) 190 CLR 225; 1997 HCA 4, at 258. At [45], the High Court further explained the concept by reference to the comments of the plurality in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293; 2000 [HCA] 19 (*Chen*), at [29] that:

> [w]hether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity.

49 In more recent times, some members of the High Court have criticised the test of whether a law is "reasonably appropriate and adapted to serve a legitimate end" in the context of assessing whether such a law infringes the Constitutional freedom of political expression. In *Monis v Queen* 249 CLR 92; [2013] HCA 4 at [283] and [344] – [345], Crennan, Kiefel and Bell JJ preferred the test of proportionality and said, at [345], in relation to the test which asks whether a law is reasonably appropriate and adapted to serve a legitimate end:

> [i]t is cumbersome and lacks clarity of meaning and application as a test… The phrase provides no guidance as to its intended application and tends to obscure the process undertaken by the court [and] ... may encourage statements of conclusion absent reasoning.

See also *Attorney-General (SA) v Corporation of the City of Adelaide* 249 CLR 1; [2013] HCA 3 at [202] and [209] per Crennan and Kiefel JJ.

50 Hathaway and Foster at pp 239 – 241 also criticise the test which asks whether the law of general application is appropriate and adapted to achieve a legitimate object of the country as being overly subjective and amorphous. They argue that these weaknesses are

reduced by testing the law of general application against accepted international human rights standards, that is to say, by application of the approach as set out at [41] of these reasons.

51 When assessing a law of general application, the essence of the international human rights approach and of the appropriate and adapted test is similar. Both ask whether the detention was lawful, in the sense of being pursuant to a domestic law, but also by reference to the object of that law and whether the detention was proportionate to that object. The human rights approach asks whether the detention, whilst perhaps lawful, was arbitrary, whilst the question of whether the law was applied arbitrarily is implicit in the appropriate and adapted test. If applied arbitrarily, the law may not be appropriate and adapted in the sense of proportionate in the means used to achieve its object: *Applicant S*, at [48]. Finally, the human rights approach asks whether the detainee was treated with humanity and inherent dignity for the person, whereas conduct pursuant to a law of general application will not be considered appropriate and adapted if it offends the standards of civil societies which seek to meet the calls of common humanity: *Chen*, at [29].

52 Although the two approaches align with each other in the essential elements, the human rights approach to persecution takes account of the recent criticism of the appropriate and adapted test voiced by some members of the High Court and is a more predictable basis on which to assess whether a person is at risk of being persecuted.

53 In the case before the Court, the reviewer provided an alternative basis to the serious harm ground for the rejection of the detention claim. He concluded that even if there was serious harm, it was not for a Convention reason. Unless the applicant can also successfully challenge the alternative reasoning, his success on the serious harm issue just discussed would not result in the Court granting relief in respect of the recommendation.

B. Denial of procedural fairness

54 The effect of s 91R(1)(a) in this case is that the applicant will not be considered to be a refugee unless the essential and significant reason for his detention was that he is an undocumented Faili Kurd or a member of one of the other social groups identified by the applicant. The reviewer found that the applicant's detention was for the reason that he lacked identification papers, and not for the other reasons which the applicant claimed.

55 Following the hearing, the applicant applied to amend the draft notice of appeal by adding a number of grounds, including a ground alleging that the reviewer denied the

applicant procedural fairness. The denial of procedural fairness ground was articulated in three ways as follows:

> (a) The Second Respondent failed to draw to the Applicant's attention, and invite his comment upon, information which the Second Respondent used to find that the questioning and detention which the Applicant claimed to have been subjected to was done pursuant to a law of general application.
>
> (b) Alternatively, the Second Respondent arrived at an adverse conclusion, namely that the claimed questioning and detention was done pursuant to a law of general application, which conclusion was not obviously open on the known material.
>
> (c) Further or alternatively, the Second Respondent failed to identify to the Applicant an issue critical to the decision which was not apparent from its nature, being the issue whether the Basij were authorised by laws or policies of general application to subject the applicant to the claimed questioning and detention.

56 These arguments were not raised in the Federal Magistrates Court. The applicant sought leave to rely on further evidence in support of the proposed grounds (a) and (b). That evidence was the country information referred to by the refugee status assessment officer who made the original adverse decision.

57 The parties filed written submissions in relation to the proposed new grounds of appeal. The first respondent objected to the amendment of the notice of appeal, but only on the basis that the new grounds were without merit and could not succeed. He did not object on the ground that the arguments were not raised before the federal magistrate and he did not allege any prejudice. Similarly, he did not object to the reception of the new evidence.

58 The parties did not require a further oral hearing on the issues raised by the proposed new grounds of appeal.

59 There was no dispute between the parties as to the requirements of procedural fairness applicable in the circumstances. Each of the three ways in which the denial of procedural fairness was put relied on the well-known passage in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; [1994] FCA 576 at [30]:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision

> which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

60 It is useful to set out [82] – [84] of the reviewer's reasons again as these paragraphs are the focus of the present arguments:

> 82. 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 (which I do not); I am not satisfied it will be for the essential and significant reason of a convention ground.
>
> 83. 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.
>
> 84. 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.

The Arguments of the Parties

61 First, it is necessary to clarify how these paragraphs should be understood.

62 The first respondent contended that the reviewer made two independent findings. First, the first respondent said, [83] and the first sentence of [84] were directed to s 91R(1)(a), namely whether the applicant was detained for a Convention reason, in this case his being an undocumented Faili Kurd. The reviewer found that the applicant was not detained for a Convention reason. Rather, the reviewer found that the State and the Basij stop people indiscriminately and detain them if they are suspected of being involved in any illegal or immoral activity, or otherwise present some threat to State security. Then, in the final sentence of [84], the reviewer made a finding that, even if people without identification papers constituted a social group for the purposes of the Convention, he did "not consider such questioning and detention to be inappropriate in the sense discussed by the High Court in *Applicant S*." According to the first respondent, this was an independent finding. Even if the applicant was able to challenge this finding successfully, there remained the first finding in [83] and the first sentence of [84] which was fatal to his application because it meant that

the persecution was not for the essential and significant reason of a Convention ground as required by s 91R(1)(a).

63 The applicant contended that there was no alternative finding as proposed by the first respondent. He contended that the reviewer found in these paragraphs that the applicant was not detained for a Convention reason, but rather that he was detained by the Basij in accordance with a law or policy of general application. The applicant said that this was the proper inference in the absence of any other reason given in [84] as to why questioning and detention by the Basij was not discriminatory for a Convention ground.

64 Paragraph 83 and the first sentence of [84] do not clearly reflect the construction advanced by the first respondent. Paragraph 83 seems to be an introduction to the circumstances of the applicant's case. It describes the way people come to be detained and questioned indiscriminately by the Basij. Then, on a proper reading of [84], the second sentence is not an alternative to the proposition advanced in the first. Having found that the Basij detain and question people indiscriminately (in [83]), the reviewer therefore found in the first sentence of [84] that the applicant's detention was not for a Convention reason. The second sentence of [84] is an extension of that finding. That is, the reviewer found that any detention would not be for a Convention reason because the indiscriminate questioning and detention by the Basij, brought about by a lack of identification papers, would not be inappropriate in the sense described in *Applicant S*. There is no other reason advanced as to why the questioning and detention would not be for a Convention reason. Nothing arises from the phrase "[e]ven if people without identification papers could be regarded as a social group", and it cannot be held to give meaning to the finding that the detention was not for a Convention reason. It follows that if there was jurisdictional error in the conclusion that the questioning and detention would not be inappropriate in the *Applicant S* sense, then there is no separate finding to sustain the reasoning under s 91R(1)(a).

65 The construction proposed by the applicant should be accepted. It is the clearer of the suggested meanings. In view of the potentially serious consequences to the applicant of the refusal of his application, there is no place for reliance on imprecise or confused expression.

66 It is convenient to deal with the three procedural fairness arguments together because the first respondent gave a single answer to all of them.

67 The reference by the reviewer to *Applicant S* is perfunctory and without elaboration. It was probably intended as a reference to a passage such as in the judgment in that case of Gleeson CJ, Gummow and Kirby JJ at [43] – [45] as follows:

> 43. The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in *Applicant A*. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Chen*. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in *Israelian*. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.
>
> 44 In *Applicant A*, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.
>
> 45 The joint judgment in *Chen* expanded on these criteria:
>
> > "Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object *depends* on the different treatment involved and, *ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity*. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective."
> > [Emphasis in original]
> > [Footnotes omitted]

68 The applicant first argued that it could be assumed that the reviewer came to the view that the applicant's detention was the result of a law of general application. In accordance with the discussion in *Applicant S*, this required that the law be appropriate and adapted to

achieving some legitimate object of the country concerned. The finding that the conduct of the Basij was pursuant to such a law or policy was adverse to the applicant. Consequently, the reviewer was bound to advise the applicant of the information which supported this view and to give the applicant an opportunity to comment on it. The reviewer did not do so in the hearing, and the material relied on, which was the subject of the application to adduce further evidence, did not contain any such information.

69 The second and alternative formulation of the procedural fairness ground was that the reviewer was obliged to advise the applicant of any adverse conclusion not obviously open on the known material. The applicant argued that the information about which he had notice did not obviously allow him to draw the conclusion that his detention was pursuant to a law of general application which was appropriate and adapted to achieving a legitimate object of Iran.

70 The third articulation of the procedural fairness ground was that the reviewer was bound to identify to the applicant any issue critical to the decision which was not apparent from its nature or the terms of the statute under which it was made. Whether the Basij was authorised by a law or policy of general application which was appropriate and adapted to achieving a legitimate object of the State was critical to the decision of the reviewer. The issue was not identified to the applicant.

71 The first respondent submitted that there was no denial of procedural fairness because this issue was clear on the information that was known to the applicant and his advisers. The relevant information was to be found not in the country information referred to by the reviewer but rather in the record of the refugee status assessment officer which included the following:

> Iranian Authorities (including the 'Basiji/Basij')
>
> The US State Department Country Report on Human Rights Practices; 2009 Human Rights Report (Iran) provided the following information on the Iranian authorities, including the 'basij', and the abuse of their authority:
>
> "Several agencies share responsibility for law enforcement and maintaining order, including the MOIS, the Law Enfocement Forces under the Interior Ministry, and the IRGC. The Basij and informal groups known as the Ansar-e Hizballah (Helpers of the Party of God) were aligned with extreme conservative members of the leadership and acted as vigilantes. On October 4, the government announced the merger of the Basij into the IRGC ground forces. While some Basij units received formal training, many units were disorganized and undisciplined. During government led crackdowns on demonstrations, the Basij were primarily responsible for the violence

against the protesters. The decentralized organization of the Basij forces contributed to individual Basijis being less accountable for their actions, further contributing to their excesses …

The UK Home Office Report (Iran) of August 2010 provides the following information on the volunteer group, the "Basiji':

"… The Basij derives its legitimization from Article 151 of the Iranian Constitution, which calls upon the government to fulfil its duty according to the Quran to provide all citizens with the means to defend themselves. Numbering over 1,000,000 members, the Basij is a paramilitary force, mostly manned by elderly men, youth and volunteers who have completed their military service.

"This force is organized in a regional and decentralized command structure. It has up to 740 regional 'battalions,' each organized into three to four, subunits. Each battalion has 300-350 men. According to one source, about 20,000 Basij forces were organized in four brigades during an exercise in November 2006.

'It maintains a relatively small active-duty staff of 90,000 and relies on mobilization in the case of any contingency. According to an IRGC general, a military exercise (Great Prophet II) conducted in the first two weeks of November 2006 employed 172 battalions of the Basij Resistance Force. According to the same source, the main mission of these troops was to guard 'public alleyways and other urban areas.'

"The Basij has a history of martyr-style suicide attacks dating back to the Iran-Iraq War, 1980-1988. Today, its main tasks are thought to assist locally against conventional military defense as well as quell uprisings. In addition, one of the Force's key roles has been to maintain internal security, including monitoring internal threats from Iranian citizens and acting as 'a static militia force.' The state of training and equipment readiness for the Basij is believed to be low. No major weapon systems have been reported for the inventory of the Basij. The IRGC maintains tight control over the leadership of the Basij and imposes strict Islamic rules on its members. Recent comments by Iranian leaders indicate that the mission of the Basij is shifting away from traditional territorial defense to 'defending against Iranian security threats.' Furthermore, there are reports of an increased interest in improving the Basij under the leadership of President Mahmoud Ahmadi-Nejad …"

The primary mission of the Basij has so far been internal security, monitoring the activities of Iranian citizens, acting as replacements for the military, services and serving as a static militia force tied to local defence missions …"

72 The material contained in the US State Department Report of 2009 was referred to in a submission sent by the applicant's lawyer to the reviewer.

73 The first respondent argued that from this information the applicant was on notice of the following factual issues arising from the country information:

1. The Basij were either a State authority or de facto authority with legitimacy, at least, under the Iranian Constitution;
2. The Basij were integrated or supervised by regular Iranian military forces;
3. The Basij had responsibility for internal security, monitoring internal threats, quelling uprisings, and maintaining order; and

> 4. The Basij were able to act with impunity in the satisfaction of their responsibilities.

74 The first respondent's written submissions then contended:

> 15. The issue of the status of the Basij and their role and practices in Iran was not raised directly with the applicant during the IMR interview but these matters were obvious on the known material, including the RSA [Refugee Status Assessment] and the applicant's lawyer's submissions. It follows that the IMR was not obliged to raise them directly with the applicant during the interview and the IMR did not fail to accord procedural fairness by not having done so.

Consideration

75 The applicant's argument that he was denied procedural fairness should be accepted. The information before the refugee status assessment officer provided some background to the way in which the Basij operated. However, it did not address whether, and if so, how this conduct was appropriate and adapted to achieving a legitimate national objective of Iran. Yet, the reviewer determined that the reason for the detention was a result of the application of such a law or policy. It was on that basis that the reviewer concluded that the essential and significant reason for the detention was not as the applicant claimed. The reviewer was bound in fairness to alert the applicant to information, if there was any, which demonstrated that the conduct of the Basij was in pursuance of a legitimate national objective, and that the detention was appropriate and adapted to achieving that objective. Alternatively, in the absence of such information, the reviewer was bound in fairness to identify to the applicant the issue that the conduct of the Basij may be regarded as conduct appropriate and adapted to achieving a legitimate national objective. By failing to provide reference to any such information, or alternatively, to alert the applicant to the critical issue, the reviewer denied the applicant procedural fairness.

CONCLUSION

76 For these reasons the reviewer made jurisdictional errors in the application of both s 91R(1)(a) and (b).

77 The applicant sought to rely on some further arguments which would have, if successful, yielded the same result. In view of the conclusions reached it is unnecessary to traverse those additional arguments.

78 There will be orders reflecting these reasons for judgment and a declaration that the reviewer fell into jurisdictional error when making the recommendation.

79 The applicant sought an injunction restraining the first respondent from acting on the recommendation. In accordance with the usual expectation of the Court that the first respondent will abide the judgment of the Court, there is no need for an injunction against the first respondent.

80 As the question of costs was not addressed in argument, there will be an order that the first respondent pay the applicant's costs of the appeal, but liberty will be reserved to the first respondent to apply within a limited time to vary the order for costs if he wishes to argue that the usual order for costs should not be made.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 3 September 2014