FEDERAL COURT OF AUSTRALIA

SZTEQ v Minister for Immigration and Border Protection [2015] FCAFC 39

Citation:	SZTEQ v Minister for Immigration and Border Protection [2015] FCAFC 39
Appeal from:	SZTEQ v Minister for Immigration & Anor [2014] FCCA 2387
Parties:	**SZTEQ v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1044 of 2014
Judges:	**ROBERTSON, GRIFFITHS AND MORTIMER JJ**
Date of judgment:	24 March 2015
Corrigendum:	2 April 2015
Catchwords:	**MIGRATION** – whether Refugee Review Tribunal (the Tribunal) applied the wrong test pursuant to s 91R(2)(a) of the *Migration Act 1958* (Cth) – s 91R(2)(a) stated as an instance of serious harm, in relation to whether persecution involved serious harm to the person, a threat to the person's life or liberty – whether by undertaking a qualitative assessment of the nature and degree of the harm experienced by the appellant when in detention in Sri Lanka on remand for illegal departure, the Tribunal failed to apply the correct test pursuant to s 91R(2)(a) and thereby fell into jurisdictional error – whether *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 (*WZAPN*) correctly decided **Held**: appeal dismissed – *WZAPN* wrongly decided
Legislation:	*Australian Human Rights Commission Act 1986* (Cth) *Migration Act 1958* (Cth) ss 36, 91R *Migration Legislation Amendment Act (No 6) 2001* (Cth) *The Convention Relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967* Arts 1A, 31, 33 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the

qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/16

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71; (2003) 216 CLR 473
Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4; (1997) 190 CLR 225
Canada (Attorney General) v Ward [1993] 2 SCR 689
Chan v Canada (Minister of Employment and Immigration) [1995] 3 SCR 593
Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379
Chen Shi Hai v Minister for Immigration and Multicultural Affairs [2000] HCA 19; (2000) 201 CLR 293
Cheung v Canada (Minister of Employment and Immigration) [1993] 2 F.C. 314 (CA)
Commissioner for Railways (NSW) v Agalianos [1955] HCA 27; (1955) 92 CLR 390
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503
Goldie v Commonwealth (No 2) [2004] FCA 156; (2004) 81 ALD 422
Gomez-Zuluaga v Attorney General of the United States 527 F. 3d 350 (3rd Cir 2008)
Hariri v Secretary of State for the Home Department [2003] EWCA Civ 807
HJ (Iran) v Secretary for the Home Department [2009] Imm AR 600; [2009] EWCA Civ 172
HJ (Iran) v Secretary for the Home Department [2010] UKSC 31; [2011] 1 AC 596
H.L. v Canada (Minister of Citizenship and Immigration) 2009 F.C. 521
Horvath v Secretary of State for the Home Department [2001] 1 AC 489
Iqbal v Secretary of State for the Home Department [2002] UKIAT 2239
Islam v Secretary for the Home Department [1999] 2 AC 629
Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168
Mikhailevitch v Immigration and Naturalization Service 146 F. 3d 384 (6th Cir 1998)
Minister for Immigration and Citizenship v SZCWF [2007] FCAFC 155; (2007) 161 FCR 441
Minister for Immigration and Citizenship v SZJGV [2009]

HCA 40; (2009) 238 CLR 642
Minister for Immigration and Ethnic Affairs v Guo [1997] HCA 22; (1997) 191 CLR 559
Minister for Immigration and Multicultural Affairs v Haji Ibrahim [2000] HCA 55; (2000) 204 CLR 1
Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53; (2006) 231 CLR 1
Minister for Immigration and Multicultural and Indigenous Affairs v VBAO [2004] FCA 1495; (2004) 139 FCR 405
NBLB v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1051
NBLC v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 272; (2005) 149 FCR 151
Nelson v Immigration and Naturalization Service 232 F. 3d 258 (1st Cir 2000)
NGAV and NGAW of 2002 v Minister for Immigration and Multicultural Affairs [2005] HCA 6; (2005) 222 CLR 161
R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi [1989] Imm AR 595
R v Special Adjudicator; ex parte Ullah [2004] UKHL 26; [2004] 2 AC 323
Sadeghi-Pari v Canada (Minister for Citizenship and Immigration) 2004 F.C. 282
Sandralingham v Secretary of State for the Home Department [1996] Imm AR 97
SCAT v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 962
Sepet v Secretary of State for the Home Department [2003] UKHL 15; [2003] 1 WLR 856
Sugiarto v Canada (Minister of Citizenship and Immigration) 2010 F.C. 1326
SZBOV v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1407
SZWAU v Minister for Immigration and Border Protection [2015] HCA Trans 2
Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664
Topalli v Gonzales 417 F. 3d 128 (1st Cir 2005)
Van Alphen v The Netherlands (305/88), 29 March 1989 (UN Human Rights Committee)
Vasili v Holder 732 F. 3d 83 (1st Cir 2013)
VBAO v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 60; (2006) 233 CLR 1
VBAS v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 212; (2005) 141 FCR 435
WBM v Chief Commissioner of Police (Vic) [2012] VSCA 159; (2012) 230 A Crim R 322
X, Y and Z, Joined Cases C-199/12, C-200/12 and C-201/12, 7 November 2013 European Court of Justice

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

Edwards A, "Tampering with Refugee Protection: the Case of Australia" (2003) 15 Int'l J Refugee L 192-211
Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007)
Grahl-Madsen A, *The Status of Refugees in International Law* (AW Sijthoff, 1966)
Hathaway JC, *The Law of Refugee Status* (Butterworths, 1991)
Hathaway JC and Foster M, *The Law of Refugee Status*, (Cambridge University Press, 2nd ed, 2014)
Hathaway JC and Pobjoy J, "Queer Cases Make Bad Law" (2012) 44 NYU J Int'l L & Pol 315-389
Price ME, *Rethinking Asylum: History, Purpose and Limits*, (Cambridge University Press, 2009)
Storey H, "What Constitutes Persecution? Towards a Working Definition" (2014) 26 Int'l J Refugee L 272-285
Storey H, "Persecution: Towards a Working Definition", in Chetail V and Bauloz C (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014)
United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2011 (1979))
United Nations Human Rights Committee General Comment No. 6, Article 6, "The Right to Life" (30 April 1982)
Zimmermann A and Mahler C, "Article 1A, para. 2 (Definition of the Term 'Refugee'/Définition du Terme 'Réfugié')" in Zimmermann A, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011)

Date of hearing:	11 February 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	158
Counsel for the Appellant:	Mr S Prince with Mr P Bodisco
Solicitor for the Appellant:	Michaela Byers
Counsel for the Respondents:	Mr G Johnson SC with Ms R Francois

Solicitor for the Respondents:	Australian Government Solicitor

FEDERAL COURT OF AUSTRALIA

SZTEQ v Minister for Immigration and Border Protection [2015] FCAFC 39

CORRIGENDUM

1 In the last sentence of paragraph 73 of the Reasons for Judgment, the words "for the purposes of s 91R(2)(b)" should read "for the purposes of s 91R(2)(a)".

2 In the last sentence of paragraph 73 of the Reasons for Judgment, the words "such an approach under s 91R(2)(c)" should read "such an approach under s 91R(1)(c)".

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 Justices Robertson, Griffiths and Mortimer.

Associate:

Dated: 2 April 2015

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1044 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZTEQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**ROBERTSON, GRIFFITHS AND MORTIMER JJ**
DATE OF ORDER:	**24 MARCH 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs of the appeal, as agreed or assessed.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1044 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZTEQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**ROBERTSON, GRIFFITHS AND MORTIMER JJ**
DATE:	**24 MARCH 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This is an appeal from the judgment and orders of the Federal Circuit Court of Australia, given and made on 29 July 2014, dismissing with costs the applicant's application filed on 15 August 2013. That application was for judicial review of the decision of the Refugee Review Tribunal (the Tribunal) made on 19 July 2013 affirming the decision of the first respondent, the Minister for Immigration and Border Protection (the Minister), by his delegate, not to grant a Protection (Class XA) visa. We shall refer to the visa applicant as the appellant.

2 As found by the Tribunal, the appellant is a citizen of Sri Lanka and ethnically Tamil. He was born in Battuluoya, lived there up to 2012, apart from a period of three years in Saudi Arabia from 2001 to 2004, and worked as a fisherman in Udappu and as a labourer in Battuluoya. The appellant applied for a Protection (Class XA) visa on 20 November 2012 and the delegate refused to grant the visa on 27 March 2013. The appellant applied to the Tribunal for review of the delegate's decision on 10 April 2013.

THE PROCEEDINGS IN THE FEDERAL CIRCUIT COURT

3 The grounds of the application to the Federal Circuit Court were as follows:

> 1. The Tribunal fell into jurisdictional error in failing to apply the correct test for degrading punishment in relation to me breaching the Sri Lankan Immigration and Emmigration [sic] Act in that the [sic] I illegally departed Sri Lanka and would be questioned and arrested at the airport on my arrival, my detention for a few days in possibly cramped and unsanitary conditions while on remand awaiting a bail hearing or subsequently fines.
> 2. The issue of complimentary [sic] protection was not assessed as required by the Migration Act.
> 3. I have information to submit if court allows me that [sic] how Tamil failed asylum seekers were badly mistreated on their arrival at the airport and/or in Colombo/Negambo.

In his affidavit filed with the initiating application, the appellant also said:

> 4. The RRT fell into jurisdictional error in not putting to me fully for comment the DAFT [sic] reports about failed Tamil asylum seekers who are departed [sic] to Sri Lanka.

4 The Federal Circuit Court considered these grounds as follows. As to ground 1, the Court considered that although the Tribunal did not discuss in any detail the relevant tests for determining whether the appellant was entitled to a protection visa, the Tribunal had referred to the relevant statutory provisions and it should also be assumed that it was aware of those tests given the Tribunal's experience and references in its statement of reasons to some relevant materials which outlined those tests. It should also be noted at this point that because *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947 (***WZAPN***) had not yet been decided, it was not referred to by either the Tribunal or the Federal Circuit Court. The appellant's claims, as made in ground 1 and before the Tribunal did, however, inform the substance of the argument put on the appeal, and were further developed by reference to *WZAPN*.

5 Ground 2 raised the question of whether the Tribunal had assessed the appellant's claim for complementary protection. This ground was rejected on the basis that there were three paragraphs in the Tribunal's statement of reasons which indicated that the claim had in fact been assessed and rejected.

6 Ground 3, which stated that the appellant had information to provide on the mistreatment of Tamils on return to Sri Lanka, was rejected on the basis that the appellant was impermissibly inviting the Court to engage in a merits review.

7 Finally, ground 4, which alleged a breach of s 424A of the *Migration Act 1958* (Cth) (the ***Migration Act***), was rejected because the information in the Department of Foreign Affairs and Trade report which was the subject of this complaint was characterised as general information and not specifically about the appellant: therefore, it fell within the exceptions in s 424A(3) of the *Migration Act*.

THE PRESENT APPEAL

8 As pressed by the appellant, the part abandoned in the course of oral submissions being struck through, the ground of appeal to this Court is:

> His Honour fell into jurisdictional error by not finding that the Tribunal applied the wrong test pursuant to section~~s~~ 91R(2)(a) ~~and 36(2A)(c)~~ of the *Migration Act 1958* (Cth).
>
> Particulars
>
> By undergoing a qualitative assessment of the nature and degree of the harm experienced by the appellant when being questioned and investigations by the authorities at the airport and detention on remand for illegal departure, the reviewer failed to apply the correct tests pursuant to section~~s~~ 91R(2)(a) ~~and 36(2A)(c)~~ and thereby fell into jurisdictional error: *WZAPN v Minister for Immigration and Border Protection & Another* [2014] FCA 947.

9 This ground is poorly expressed. The issue is not whether the Federal Circuit Court judge fell into jurisdictional error but rather is whether his Honour erred in not finding that the Tribunal had fallen into jurisdictional error by not applying the test approved in *WZAPN*. Similarly, the reference in the particulars should be to the Tribunal rather than the reviewer. Both parties conducted the appeal on these bases.

10 By consent order made on 12 November 2014, the appellant was granted leave to appeal. It seems that this order was directed to the appellant's application for an extension of time filed on 13 October 2014. In any event, the notice of appeal was filed on 16 December 2014 and no procedural objection has been taken to it by the Minister. Neither did the Minister object to the amendment to the notice of appeal or raise any issue as to the ground in that notice not having been raised before the primary judge.

APPLICABLE PROVISIONS

11 Section 91R took the following form (having been inserted into the *Migration Act* by the *Migration Legislation Amendment Act (No 6) 2001* (Cth), which took effect from 27 September 2001):

91R Persecution

(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.

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

12 At the time of the Tribunal's decision, s 36(2)(a) of the *Migration Act* provided:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol;

…

13 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (the **Convention**) relevantly defined a "refugee" as 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.

THE TRIBUNAL'S REASONS

14 The relevant reasons of the Tribunal were as follows:

> 32. The information before the Tribunal, including the DFAT reporting cited above, indicates that under standardised procedures applying to all cases, regardless of their ethnicity or the circumstances in which they left the country, returnees are routinely interviewed at the airport on arrival by the Immigration and Emigration Department, the State Intelligence Service (SIS) and the airport Criminal Investigation Department (CID). These processes involve police and security clearances, including checks with the person's local police station and may take some hours. If they reveal outstanding arrest warrants for prior criminal offences, or if there are alerts against the person's name in immigration watch-lists, they may be subject to further questioning. Additional questioning would also be involved if the person were of security interest or if there were evidence of involvement in people smuggling.
>
> 33. On the basis of this information I accept that the Applicant would be subjected to such processes on return. I am not satisfied they would involve him being singled out or targeted in a discriminatory fashion because of his Tamil ethnicity. I am not satisfied that the fact of his being questioned at the airport, even for extended periods, could in itself reasonably be characterized as harm at any level, or that he would be subjected to any other form of mistreatment there. Nor am I satisfied that he would be subsequently targeted or subjected to serious harm because he sought asylum in Australia.
>
> 34. I note in this context a 2013 Sydney Morning Herald report by Ben Dougherty regarding returnees from Australia who had been harassed following their release from the airport and their return to their homes in Batticaloa. The six persons interviewed claimed they were campaign workers for the opposition Tamil National Alliance (TNA) and that they and other TNA activists were threatened by paramilitary groups allied to the government after the governing United People's Freedom Alliance lost control of the Eastern Provincial Council. I am not satisfied that these cases have any relevance to the situation of the Applicant, who has never involved himself in political activity of any kind, or that they indicate that he would be at risk of being harmed on return to his village after leaving the airport.
>
> 35. I have also considered whether the Applicant might be at risk of harm for leaving Sri Lanka in breach of the country's immigration laws. The information before the Tribunal indicates that under tightened procedures adopted in late 2012, returnees who are believed to have left the country in breach of the law on immigration and emigration (the Immigrants and Emigrants Act) are arrested at the airport and brought before a court to apply for bail. Bail is routinely given on the accused's own recognisance although a family member is also required to provide surety. If the arrival occurs over a weekend or on a public holiday the returnee is placed in the remand section of Negombo prison, possibly for some days, until a bail hearing is available. Conditions on remand have been described in media reports … as

> overcrowded and unsanitary, although there have not been reports that returnees held there awaiting bail hearings have been subjected to torture or other forms of deliberate mistreatment. The penalties eventually imposed on returnees by the courts for illegal departure take the form of fines ranging up to Rs 100,000.
>
> 36. I note that Sri Lanka's Immigrants and Emigrants Act provides for penalties of both imprisonment and fines on conviction for illegal departure. However, on the information before the Tribunal I am not satisfied that magistrates and judges do not have a discretion in imposing penalties under the Act. I do not accept that it is the practice of the courts in Sri Lanka is [sic] to impose custodial sentences in such cases, although those found guilty suffer anything other than a fine. I am not satisfied there is a real chance that the Applicant would suffer imprisonment or that he would be subjected to penalties other than a fine.
>
> 37. Taking together the country information and my findings about the Applicant's personal circumstances I am not satisfied that being questioned at the airport on arrival, detained for a few days in possibly cramped and unsanitary conditions while on remand awaiting a bail hearing or being subsequently fined could reasonably be seen as constituting serious harm. I am not satisfied there is a real chance that he would suffer serious harm on arrival in Sri Lanka or at any subsequent point, because of his membership of the particular social group consisting of 'failed asylum seekers returning to Sri Lanka.'
>
> (Citation omitted.)

THE PARTIES' SUBMISSIONS

15 With one exception, the submissions made in this appeal were the same as in the appeals in *SZTIB v Minister for Immigration and Border Protection* [2015] FCAFC 40 and *BZAFM v Minister for Immigration and Border Protection* [2015] FCAFC 41, which were argued at the same time and in which judgment is given at the same time. There is, therefore, a very substantial overlap in both the submissions and in our consideration of those submissions in each appeal. The exception to which we have referred is in relation to the submission noted at [44] of the present reasons for judgment and our noting of that submission at [157] below.

16 The appellant submitted that the critical issue in the appeal was whether North J correctly held in *WZAPN* that a "threat to the person's life or liberty" within the meaning of s 91R(2)(a) of the *Migration Act*, couched as it was in absolute terms, meant that such a threat necessarily constituted "serious harm".

17 If his Honour's approach was correct, then in the context of the present case, the appellant submitted, a qualitative assessment by the Tribunal as to the severity of the

consequences of arrest and detention was indicative of jurisdictional error. Reference was made to [37] of the Tribunal's reasons, set out above.

18 The appellant submitted that the interpretation of s 91R(2)(a) in *WZAPN* was consistent with the ordinary meaning of the statute. First, only s 91R(2)(a) was couched in absolute terms. Secondly, unlike physical harassment, physical ill-treatment and economic hardship, each of which must be "significant", there must only be a threat to liberty. Thirdly, this interpretation was consistent with common law principles, citing arrest and imprisonment as "grave interference with the rights of the individual". The appellant submitted there was also a strong line of authority in support of this interpretation cited in *WZAPN* at [33]-[34], including *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 (***Chan***) and *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1 (***Ibrahim***).

19 The balance of the appellant's written submissions were in reply to the Minister's written submissions and it is therefore convenient next to summarise the Minister's submissions.

20 The Minister submitted that the construction of s 91R in *WZAPN* was not correct as:

(a) the existence of a real chance that a person will be *detained* for a Convention reason did not necessarily mean that the person had a well-founded fear of being *persecuted* within the meaning of Art 1A(2) of the Convention;

(b) ss 91R(1) and 91R(2) were intended to reflect the meaning of persecution in the Convention which had always required a qualitative assessment of the nature of any harm claimed; and

(c) for the purpose of s 91R(2)(a), a decision-maker was required to undertake a qualitative analysis of the kind of detention feared (including considering its length, purpose and attendant conditions) to determine if the feared detention rises to the level of a "threat to liberty".

21 The Minister submitted that while persecution was not defined in the Convention, it was generally accepted that not all harm, even if perpetrated for a reason mentioned in the Convention, will amount to persecution. In order to do so, the harm must rise above a threshold of severity. In many jurisdictions and academic writings, that threshold was identified as the level of "serious harm". The Minister referred to *Chan* at 429-430; *Chen Shi*

Hai v Minister for Immigration and Multicultural Affairs [2000] HCA 19; (2000) 201 CLR 293 (***Chen***) at [24]-[25]; *Ibrahim* at [55]-[65]; *Islam v Secretary for the Home Department* [1999] 2 AC 629 at 653; *Mikhailevitch v Immigration and Naturalization Service* 146 F. 3d 384 (6th Cir 1998) (***Mikhailevitch***) at 389-390; Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009) (**Price**) at pages 104, 107-8, 116-7; and Hathaway, *The Law of Refugee Status* (Butterworths, 1991) at page 105.

22 The Minister submitted that the conclusion in *WZAPN*, that *any* period of detention, however isolated or short, necessarily constituted persecution involved an a priori assumption that a real chance of detention (irrespective of its character) was necessarily more serious than a real chance of being a victim of physical or other forms of harm which would constitute persecution only if they rose to the level of serious harm. The Minister submitted that this approach had no support in authority and there were numerous cases in the United States where it had been specifically held that detention of a short duration, unaccompanied by other forms of harm, did not rise to the level of persecution. The European approach appeared similar. The construction in *WZAPN* was not supported by the leading academic texts. The Minister cited as an example the view expressed by Grahl-Madsen in his book, *The Status of Refugees in International Law* (AW Sijthoff, 1966) (**Grahl-Madsen**), where it is stated at page 201 of volume 1 that:

> We may conclude that there is precedent for considering the following measures or sanctions 'persecution' in the sense of the Refugee Convention, provided that the circumstances warrant it: … (2) Imprisonment or other forms of detention or internment for a period of three months or more, it remaining an open question whether deprivation of physical freedom for shorter periods may constitute 'persecution'; however deprivation of liberty for 10 days or less has been deemed not to amount to 'persecution'.

23 The Minister submitted that the explanatory memorandum that accompanied the Bill that became the *Migration Legislation Amendment Act (No. 6) 2001* showed that s 91R was enacted to "set the parameters and raise the threshold of what can properly amount to "serious harm" within the spirit of the Refugees Convention", citing *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* [2004] FCA 1495; (2004) 139 FCR 405 at [36]. Section 91R(2) gave instances of serious harm. If the proper interpretation of s 91R(2)(a) deemed a threat of any period of detention to constitute serious harm, the consequence would be that there would be no need to conduct a qualitative assessment to determine whether such a threat would otherwise meet the requirement that there be a real

chance of "serious harm". That would mean that the Parliament, by enacting s 91R, in fact *lowered* the threshold for establishing persecution in a case where a person feared detention.

24 The Minister submitted that to construe s 91R(2)(a) as meaning that any threat of detention necessarily constituted serious harm would produce anomalous results. It would allow protection claims to be established based on a real chance of even a short period of detention, when more serious infringements of rights may nevertheless fail to constitute persecution because they fell short of the "serious harm" threshold. The Minister referred to the statement in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60; (2006) 233 CLR 1 (***VBAO***) at [19] per Gummow J that the six paragraphs (a)-(f) of s 91R(2) should be considered together and they all took their colour from the specification of "serious harm" in the opening words of the subsection. The Minister submitted that whether the particular harm that was feared was serious (and indeed so serious as to prevent the visa applicant from returning to their own country) required a qualitative analysis of the feared harm in each instance, citing *VBAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 212; (2005) 141 FCR 435 (***VBAS***) at [28]; *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 962 (***SCAT***) at [36]; and *SZBOV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1407 (***SZBOV***) at [19]-[20].

25 The Minister also submitted that, contrary to the apparent reasoning in *WZAPN*, a threat of detention was not synonymous with a threat to liberty for the purposes of s 91R(2)(a). The Minister submitted that it was an error to define the concept of "serious harm" or "persecution" by reference to international human rights treaties that post-dated the Convention and were directed to a different topic. The Minister submitted that it was an error to apply, as the Minister submitted the judge did in *WZAPN*, a "human rights framework" to the identification of serious harm under the Convention.

26 Insofar as the appellant submitted that some further analysis by the Tribunal was required to determine whether the relevant law was appropriate and adapted to its purpose, the Minister submitted that the High Court decisions considered in *WZAPN* preceded s 91R being inserted into the *Migration Act*; in any event, the High Court decisions proceeded on the basis that an analysis as to whether a law was appropriate and adapted to its purpose was only required when a law of apparently general application had a discriminatory impact or

effect, which was not this case; and the observations in *WZAPN* were obiter and, in any event, could not override any relevant statement by the High Court.

27 The Minister submitted the Tribunal did consider whether the period on remand would involve serious harm and answered that question in the negative at [37]. The Minister accepted that this was a qualitative assessment by the Tribunal in that respect, but submitted that such an assessment was permissible for the reasons set out above.

28 The appellant's responses to these submissions were as follows.

29 The appellant submitted that the reasoning in *WZAPN* was not plainly wrong. The appellant relied on the reasoning in *WZAPN* at [30] and [45] of the judgment. That is, the express statutory formulation in s 91R(2)(a) was not contingent on a qualitative or adjectival expression of the harm, the reasonable inference of which was that the threat to life or liberty was without reference to the severity of the consequence to life or liberty. This construction – of a threat to liberty as absolute and devoid of qualitative assessment – accorded with Australia's international obligations under the Convention. The absolute nature of the protections afforded to the right to liberty was consistent with other Australian statute and tort law, including those exceptions cited under the *Australian Human Rights Commission Act 1986* (Cth).

30 As to the Minister's submission that the reasoning in *WZAPN* should be rejected because that reading of the plain words of s 91R(2)(a) was inconsistent with the intended effect of s 91R, the appellant submitted that that in turn depended on an assertion that s 91R(2)(a) was inconsistent with the meaning of "persecution" for the purposes of the Convention, which was incorrect.

31 As to the Minister's submission that the reasoning in *WZAPN* should be rejected because detention did not necessarily equal persecution within the meaning of Art 1A(2) of the Convention, the appellant submitted that proposition should be rejected.

32 As to the Minister's submission that the reasoning in *WZAPN* should be rejected because the purpose of s 91R(2)(a) was to require a decision-maker to undertake a qualitative analysis of the kind of detention feared to determine if the feared detention rose to a threat to liberty, the appellant submitted no authority existed for such a proposition and it was contrary to the ordinary meaning of liberty.

33 As to the Minister's submission or suggestion that the reasoning in *Chan* and *Ibrahim* established that harm must rise above a threshold of severity, the appellant submitted that what McHugh J said in *Chan* simply noted that not every threat of harm for a Convention reason constituted "being persecuted", but this clearly left open the question of whether particular types of harm would constitute persecution. Secondly, the Minister's submission ignored the significant reference made by McHugh J in both cases to the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (**UNHCR Handbook**), particularly to [51] of that Handbook. The appellant also referred to Goodwin-Gill and McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) at page 90.

34 The appellant submitted that:

(a) none of the authorities or commentaries referred to in the Minister's submissions established that a threat to liberty did not constitute a threat of serious harm for the purposes of that component of the equation to determine whether there was a risk of persecution. Section 91R(2)(a), by its plain words, included within "serious harm" a "threat to liberty";

(b) North J in *WZAPN* did not conclude that any period of detention, however short, necessarily constituted persecution but, rather, his Honour's conclusion was that any period of detention, however short, constituted a threat to liberty and therefore "serious harm" within s 91R(1)(b);

(c) the Minister impermissibly conflated the concept of persecution with its subset of "serious harm";

(d) the Minister's reference to Grahl-Madsen's comments was misplaced; and

(e) the Minister's contention that the construction of s 91R(2)(a) in *WZAPN* was inconsistent with Art 1A(2) of the Convention should be rejected.

35 In the present case, the appellant submitted, the real reason that the Tribunal found that there would be no persecution in respect of the claim to fear imprisonment on return as a failed asylum seeker was simply a finding that such imprisonment would not amount to "serious harm". Unsurprisingly, the appellant submitted, in light of that finding, there was no separate consideration of the other integers of "persecution" which would have independently supported a finding, for the purposes of the Convention, that there was no "relevant persecution" – for example, because the action would not occur for a Convention reason.

36 The appellant submitted that the Minister's submissions as to the construction of s 91R proceeded from the erroneous assumption that a "threat to liberty" would not necessarily involve "serious harm" for the purposes of the Convention.

37 The appellant submitted that the Minister's reliance on the observations in *VBAO* was misplaced.

38 The appellant submitted that the Minister's assumption that convenience dictated that people must be returned to a place where they will be deprived of their liberty for a few hours where such deprivation of liberty was because of their ethnicity and not pursuant to a law of general application countenanced "a little abuse of liberty", which immediately begged the question of how much liberty was important to an individual and what level of abuse of a person's liberty would convenience require. That proposition, the appellant submitted, was entirely inconsistent with the value which the common law had always placed on the absolute nature of liberty of the individual. The appellant referred to *Goldie v Commonwealth (No 2)* [2004] FCA 156; (2004) 81 ALD 422 (***Goldie***) at [17] per French J (as his Honour then was). The appellant submitted the plain meaning of liberty did not admit or countenance captivity for a particular period of time. The assumption that some deprivation of liberty did not involve serious harm should be rejected. No authority was cited for the proposition that a confinement for a short period was not a deprivation of liberty.

39 Shortly before the hearing of the appeal, the Minister filed further submissions in which he drew the Court's attention to a recent ex tempore judgment of Hayne J in *SZWAU v Minister for Immigration and Border Protection* [2015] HCA Trans 2 (29 January 2015) (***SZWAU***). In dismissing an application for an interlocutory injunction to prevent the imminent return to Sri Lanka of an unsuccessful asylum seeker, and having had the decision of North J in *WZAPN* drawn to his attention, Hayne J made two points of relevance to the present appeal. First, noting there was an application for special leave to appeal in *WZAPN*, his Honour said (at page 16 of the transcript):

> For the purposes of determining this application I will proceed on the footing that the Tribunal was bound to act in accordance with the law as it may be understood to have been stated by North J in the decision in *WZAPN*. That assumption should not be understood as expressing any concluded view at all about the correctness of his Honour's exposition of the law. Those are matters which await consideration in the application for special leave brought by the Minister.

40 Second, his Honour gave emphasis to the following matter relating to the meaning and effect of s 91R of the Act (at page 18 of the transcript):

> It will be observed that the **premise for the engagement** of section 91R(1) is that Article 1A(2) of the Refugees Convention as amended by the Protocol **is otherwise satisfied**, there being persecution – I interpolate a real risk of persecution – for one or more of the reasons mentioned in that Article.
>
> The question of whether the persecution involves serious harm to the applicant arises if, and only if, it is first demonstrated that the applicant fears a real risk of harm for a Convention reason. (Emphasis added.)

41 The Minister submitted that s 91R(2)(a) had work to do only in relation to what was serious harm for the purposes of s 91R(1)(b), as was made clear in the opening words of s 91R(2). And the opening words of s 91R(1) made clear that each of paragraphs (a)-(c) of that sub-section must be fulfilled before Art 1A(2) will apply in relation to persecution for a Convention ground.

42 The Minister then submitted that s 91R(1) "provides added conditions" for the purposes of the application of the Act and the regulations to a person. Furthermore, it was submitted that these conditions "reflected Parliament's view of the true effect of Art 1A(2)", and, in that sense, ss 91R(1) and (2) were "limiting provisions". The Minister then contended that if the provisions were not viewed as limiting but instead as loosening the requirements of Article 1A(2), they would have no work to do because, as Hayne J explained in *SZWAU*, these provisions operate only once Art 1A(2) is otherwise satisfied. This, submitted the Minister, was a further reason why the construction in *WZAPN* was incorrect.

43 The Minister further submitted that, once it was accepted that "persecution" for the purposes of Article 1A(2) involved evaluation by the Tribunal of whether the relevant harm was "serious harm", the appeal must fail. The Minister emphasised that the Tribunal made a clear finding at [37] of its reasons that it was not satisfied that being questioned on arrival at the airport, and detained for a few days in possibly cramped and unsanitary conditions while on remand awaiting a bail hearing, could reasonably be seen as constituting "serious harm".

44 The Minister also clarified that he was not contending that the Sri Lankan law pursuant to which the appellant might face a period in remand was not one of general application. The Minister acknowledged that there was no clear finding by the Tribunal that the law was in fact one of general application.

CONSIDERATION

45 As this appeal was argued, the appellant's submission was that any threat to his liberty involves serious harm to him within s 91R(1)(b). Thus, the appellant submitted, the Tribunal's finding at [35] and [37] that the possibility of the appellant being held briefly on remand in poor conditions before being brought before a magistrate sufficed to establish that serious harm for the purposes of s 91R(1)(b). As we have said above, the appellant expressly accepted he then needed to satisfy the remainder of s 91R(1), especially s 91R(1)(c). In the appellant's submission, any detention or imprisonment for any period of time constituted serious harm and, if done for a Convention reason, would give rise to persecution unless the detention or imprisonment was authorised by a law of general application which was not applied discriminatorily. As particularised, the jurisdictional error was said to be "undergoing a qualitative assessment of the nature and degree of the harm experienced by the appellant when being questioned and investigations by the authorities at the airport and detention on remand for illegal departure".

46 Those submissions should be rejected. In our opinion, on its proper construction, s 91R does not forbid a qualitative assessment of claimed detention or imprisonment with a view to establishing whether or not it rises to the level of "serious harm" so as to constitute persecution, if the detention or imprisonment is for a Convention reason and the other aspects of s 91R are satisfied.

Approach to construction of s 91R

47 In accordance with the contemporary approach to statutory construction, legislative provisions such as s 91R of the *Migration Act* should be construed having regard to the text, considered in their context. As Hayne, Heydon, Crennan and Kiefel JJ stated in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Citations omitted.)

48 To similar effect, see *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39] per French CJ, Hayne, Crennan,

Bell and Gageler JJ and *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

49 At the relevant time, a criterion for a protection visa in s 36(2) of the *Migration Act* was the requirement that the Minister be satisfied that Australia has protection obligations to a person under the Convention. In *NGAV and NGAW of 2002 v Minister for Immigration and Multicultural Affairs* [2005] HCA 6; (2005) 222 CLR 161, in joint reasons (and having noted at [27] that the provision is awkwardly drawn in its use of the concept "obligations" under the Convention), the High Court described the effect of s 36(2) in the following terms (at [32]-[33]):

> Section 36(2) does not use the term "refugee". But the "protection obligations under [the Convention]" of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer "surrogate protection" in the place of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself. That directs attention to Art 1 and to the definition of the term "refugee".
>
> Such a construction of s 36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of "refugee" spelled out in Art 1 of the Convention.
> (Citations omitted.)

50 It is also now well-established that a domestic statute which gives effect to an international treaty, should be construed in accordance with the meaning in the treaty of the corresponding text in the absence of a contrary intention, and the rules of construction which apply to the treaty govern the interpretation of the domestic statute, noting that primacy is to be given to the ordinary meaning of the terms used in the treaty, albeit in their context and in the light of the object and purpose of the treaty, which may also involve recourse in an appropriate case to the *travaux préparatoires*: see *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 265 per Brennan CJ; *Chan* at 412-413 per Gaudron J; and *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 (***Applicant A***) at 231 per Brennan CJ; at 239 per Dawson J; at 251-256 per McHugh J; and at 277 per Gummow J.

51 In our view, an important aspect of the text is that s 91R makes explicitly clear that the provision concerns persecution involving serious harm to the person. The correct approach to s 91R of the *Migration Act*, and, as a subset of that issue, the construction of one of the express "instances" of "serious harm", requires attention to be given to a number of

matters. Those matters are: the text of s 91R, the legislative purpose of the provision, and the concept in Art 1A of the Convention of "being persecuted" in Australian cases, and in other jurisdictions and international instruments. These matters are all to be approached on the basis that, at the time of the decision under review in the present appeal, s 36(2)(a) of the *Migration Act* incorporated the terms of Art 1A(2) as one of the criteria for the grant of a protection visa.

The text of ss 91R(1) and (2)

52 Without seeking artificially to divorce the text of s 91R from consideration of its purpose and context (which we deal with below), there are some features of the text and structure of the provision which deserve emphasis.

53 The provision is concerned with two different aspects of the operation of Art 1A of the Convention. Sections 91R(1) and (2) deal with the kind of treatment or conduct a person must fear before a decision-maker can be satisfied the person has a fear of "being persecuted" for the purposes of Art 1A(2) of the Convention as a criterion of a protection visa under s 36(2)(a) of the *Migration Act*. In its terms it is not a statutory definition, but rather a prescription of attributes which the treatment or conduct a person claims to fear must have. Section 91R(3) deals with a different aspect of the Art 1A(2) criterion: namely, conduct outside a person's country of nationality which may give rise to a sur place claim: see generally *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642.

54 As Gummow J pointed out in *VBAO* at [12] and [13], the statutory articulation of persecution is to be found in s 91R(1), where three cumulative aspects are incorporated. The presently relevant aspect is the concept of "serious harm". What then appears in s 91R(2) are, expressly, no more than examples or, as the statute describes them, "instances". Whatever is comprehended by each instance is classified by the Parliament as "serious harm". To say that much may not advance the textual argument about s 91R(2)(a) on this appeal one way or the other. That is because of what must be seen as a deliberate choice by the Parliament not to insert any adjectival qualification in s 91R(2)(a), nor to insert any circumstantial qualification of the kind found in ss 91R(2)(d), (e) and (f). The constructional choice to be made about the absence of any adjectival qualification is whether the Parliament intended to reflect absolute concepts, or rather to reflect broader understandings of the concepts of life and liberty (or freedom) within the framework of Art 1A of the Convention.

55 The Minister relied on Gummow J's observations in *VBAO* at [19]-[20] where his Honour said:

> It is trite to observe that the six paras (a)-(f) of s 91R(2) should be considered together; they all take their colour from the specification of "serious harm" in the opening words of the sub-section. That phrase in turn may be traced to judicial statements such as that of Mason CJ in *Chan* to which reference has been made. His Honour also used the adjective "significant" to describe a detriment or disadvantage which answers the description of persecution. The phrase "a threat" to life or freedom was used in *Chan* by Dawson J. The term "significant" qualifies the physical harassment, physical ill-treatment and economic hardship spoken of in paras (b), (c) and (d) of s 91R(2). The consequence of an action or state of affairs spoken of in paras (d), (e) and (f) must be one which "threatens the person's capacity to subsist".
>
> This reading of the whole of the text of s 91R(2) suggests that no less an element of comparable gravity is involved in the stipulation of a threat to the life or liberty of the person in question. More is required than a possibility which is capable of instilling a fear of danger to life or liberty. (Citations omitted.)

56 Again, it does not seem to us that these passages necessarily advance one argument or another on the present appeal. Gummow J noted expressly the adjectival qualifications in paras (b), (c) and (d), and the way in which paras (d), (e) and (f) are also expressly qualified. There is no doubt these qualifications are present because the kind of conduct described in those paragraphs has been given a qualitative "colour" to accord with the Parliament's conception of "serious harm". Yet, having accepted at [18] that the Minister was correct to submit that the word "threat" in para (a) of subs (2) means "risk", Gummow J then identified para (a) of s 91R(2) with what was said by Dawson J in *Chan*, where Dawson J did not use any qualifying adjectives when describing threats to life or freedom as persecution. In *Chan*, Dawson J said (at 399-400):

> "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 general acceptance that a threat to life or freedom for a Convention reason amounts to persecution**: see Grahl-Madsen, op. cit., p. 193; Goodwin-Gill, *The Refugee in International Law* (1983), p. 38. 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 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. It is unnecessary for present purposes to enter the controversy whether any and, if so, what actions other than a threat to life or freedom would amount to persecution. (Emphasis added.)

57 For those reasons, we consider North J was, with respect, correct in *WZAPN* at [29] not to see these passages from Gummow J's reasons in *VBAO* as of assistance to the Minister's arguments about s 91R(2)(a), although we differ somewhat from his Honour about

why that is so. It seems to us that the point now in issue on this appeal was not the subject of any consideration in *VBAO*.

58 Another aspect of the structure of s 91R(1), which we have touched on above, concerns the fact that it contains three separate and cumulative conditions for persecution to be established for the purposes of the *Migration Act* and the regulations, of which the requirement of serious harm is only one. We acknowledge that matters such as the length of detention, its frequency, purpose and character may also arise in determining whether the reason for the detention, which must be a Convention reason, is the essential and significant reason for the persecution (as required by s 91R(1)(a)) or involves systematic and discriminatory conduct (as required by s 91R(1)(c)). However, this does not mean that such matters may not also arise for consideration and evaluation in relation to the requirement of serious harm within s 91R(1)(b).

59 Unlike North J in *WZAPN*, we do not consider the absence of adjectival qualification in s 91R(2)(a) to be of significance, given the context of the provision as a whole. Rather, the absence of an adjective indicates that a threat to "liberty" is not synonymous with the possibility of a person being held briefly on remand or detained for a short time for questioning. In this context, "liberty" is a nuanced concept which takes its meaning from the context in which it appears, namely the requirement that the persecution involve serious harm, as is made clear in s 91R(1).

60 With great respect to the different view expressed in *WZAPN* at [30], we do not consider that the structure of s 91R(2) supports a construction of that provision to the effect that *any* threat to liberty constitutes serious harm without reference to the severity of the threat to liberty. As Dixon CJ observed in a frequently cited passage in *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 at 397:

> ... the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.

The legislative purpose of s 91R

61 Before developing this topic, it is desirable to address the significance of the explanatory memorandum with a particular focus on what light it sheds on the question whether the Parliament intended s 91R to qualify or limit the meaning of persecution under the Convention or simply confirm that meaning. The relevant paragraphs of the explanatory memorandum are 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. Persecution has also been interpreted to be for reason of the above Convention grounds where there have been a number of motivations for the harm feared and the Convention-based elements have not been the dominant reasons for that harm. Taken together these trends in Australian domestic law have widened the application of the Refugees Convention beyond the bounds intended.
>
> …
>
> 22. Under new paragraphs 91R(1)(b) and 91R(1)(c), the persecution must involve serious harm to the person and systematic and discriminatory conduct. New subsection 91R(2) sets out a non-exhaustive list of the type and level of harm that will meet the serious harm test and fall within the meaning of persecution for the purposes of the Refugees Convention. New subsection 91R(2) makes it clear that serious harm includes a reference to any of the following:
>
> - a threat to the person's life or liberty; or
> - significant physical harassment of the person; or
> - significant physical ill-treatment of the person; or
> - significant economic hardship that threatens the person's capacity to subsist; or
> - denial of access to basic services, where the denial threatens the person's capacity to subsist; or
> - denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
>
> …
>
> 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, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. Persecution must constitute serious harm. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.

62 Although there was some ambiguity in the Minister's submissions before us (to which we refer below), we understood counsel to submit that these passages in the explanatory memorandum demonstrated that the Parliament's intention in inserting s 91R was simply to confirm the Parliament's understanding of what the Convention required in any event, rather than to qualify or limit it. That submission has some support from Gummow J's reading of

the explanatory memorandum in *VBAO* at [16]. The appellant did not contest this aspect of the Minister's submissions. Indeed, the same submission was made by his counsel. For the reasons we set out below, we are prepared to proceed on the basis of this agreed position while noting, however, that counsel then appearing for the Minister seems to have put a different submission in *VBAS*, namely that s 91R "qualified" the Convention (see *VBAS* at [16]), a submission which Crennan J accepted at [18] and [25].

63 The legislative choice to give statutory content to the concept of persecution in the *Migration Act*, rather than leave its interpretation and application entirely to refugee decision-makers and the courts, has been the subject of criticism: see for example Edwards "Tampering with Refugee Protection: the Case of Australia" (2003) 15 Int'l J Refugee L 192-211; Storey "What Constitutes Persecution? Towards a Working Definition" (2014) 26 Int'l J Refugee L 272-285 at pages 274-275. Despite that criticism, in our opinion, each of the extracted paragraphs of the explanatory memorandum makes it clear the Parliament had as its touchstone the Convention concept of persecution, as the Parliament understood that to be.

64 In the summary of the Minister's written submissions on the present appeal, the Minister submitted that "section 91R(1) and 91R(2) were intended to reflect the meaning of persecution in the Convention which … has always required a qualitative assessment of the nature of any harm claimed". Later in the same written submissions, however, reliance was placed on the judgment of Marshall J, sitting as the Full Court of this Court, in *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* [2004] FCA 1495; (2004) 139 FCR 405 at [36] where his Honour said that s 91R was enacted to "set the parameters and raise the threshold of what can properly amount to 'serious harm' within the spirit of the Refugees Convention". As in the written submissions, in oral argument there was some difficulty in clarifying the Minister's position. Senior counsel ultimately confirmed that the Minister was not submitting that ss 91R(1) and (2) narrowed or restricted the Convention. Rather, the Minister submitted, it was intended to reflect the Parliament's understanding of Convention requirements, while making clear that some previous judicial interpretations of the concept of persecution were, in the Parliament's view, unwarranted extensions of the Convention.

65 We agree with the parties that this submission accords with the observations of Gummow J in *VBAO*. At [16] Gummow J referred to the explanatory memorandum introducing s 91R. His Honour described paragraph 19 of the explanatory memorandum as

manifesting "a concern that the degree of the apprehended 'harm' not rise above the level regarded by the Parliament as that accepted by the parties to the Convention as constituting 'persecution'. Hence paras (b) and (c) of s 91R(1)."

66 We consider it is clear that ss 91R(1) and (2) were intended to express the concept of persecution as the Parliament understood the Convention used the term. By express incorporation of the concepts of serious harm, and systematic and discriminatory conduct, the Parliament intended to give more particular content to the term in the way the text of the Convention does not, so as to avoid what the Parliament saw as the expansion of the concept by the courts, beyond the Convention. To the extent that there are observations in *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 272; (2005) 149 FCR 151 at [5] and *NBLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1051 at [39] to the effect that ss 91R(1) and (2) have raised the threshold or narrowed the concept of persecution to move it away from the concept as conceived by the Convention, we respectfully disagree.

67 As we have noted above, at the most general level there is some departure from the Convention in that the Parliament has taken Australian law away from the Convention's conscious decision to leave the term without express content. However, the approach taken by the courts of other state parties to the Convention, by regional instruments and regional courts interpreting those instruments, and in secondary sources reviewing the decisions of those courts and the Convention concept of persecution, indicates that in no substantive sense do ss 91R(1) and (2) "raise" the threshold set by the Convention or "narrow" the meaning of persecution in the Convention.

68 Indeed, what has been done by ss 91R(1) and (2) has some parallels with Art 9 of the "Qualification Directive" issued by the Parliament of the European Union (Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/16) (**Qualification Directive**), which we discuss further below. The express purpose of the Qualification Directive was to give content to concepts within the Convention as a practical means of providing guidance for refugee decision-makers.

69 In our opinion, and in the absence of any clear statutory indication to the contrary, to construe ss 91R(1) and (2) as intended to reflect the Convention concept of persecution is also consistent with the presence in the *Migration Act* of s 36(2)(a) and the importation into the criteria for a protection visa of Art 1A(2) of the Convention. While s 36(2)(a) remained a criterion for a protection visa, it would take clear statutory language to signal an intention by the Parliament to depart from the accepted approach under the Convention to such a central concept as persecution.

70 The legislative purpose of ss 91R(1) and (2) is important because it affects the available constructional choices for the provision. Therefore, in determining whether North J's construction of para (a) of s 91R(2) in *WZAPN* is correct, it is appropriate to construe the term "serious harm" in a way which conforms with the Convention, and which conforms with any generally accepted construction in other countries subscribing to the Convention, in the same way it would conform with any provision of an international instrument that has been received into its domestic law: see *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1 (***QAAH***) at 15 ([34]) per Gummow A-CJ, Callinan, Heydon and Crennan JJ. Of course, as their Honours also point out at [34] of *QAAH*, it is always the words of the statute which must govern.

71 If, in contrast, ss 91R(1) and (2) were intended to alter the meaning of persecution so that it had a meaning different from its Convention meaning, then the approach to the construction of ss 91R(1) and (2) , especially s 91R(2)(a), would also have to be different.

72 Although not directly in issue in this appeal, it is important to say something about the requirement in s 91R(1)(c) that conduct be discriminatory and systematic. As the third limb of the content given by s 91R(1) to the concept of persecution, the work which it does also informs the construction of the second limb in s 91R(1)(b). To say of conduct that it is "systematic" is not to say that it is "systemic. The word "systemic" was used by Hathaway in his 1991 text, *The Law of Refugee Status* (at pages 104-105), as part of a longer phrase giving content to the concept of persecution, namely "the sustained or systemic violation of basic human rights". A violation of rights which is sustained or systemic, as Hathaway himself points out in this passage, is demonstrative of a failure of state protection. Nor does the word "systematic" mean there is a requirement that conduct be repeated, in respect of the same or different individuals, a certain number of times: see *Ibrahim* at 30 per McHugh J; *Minister for Immigration and Citizenship v SZCWF* [2007] FCAFC 155; (2007) 161 FCR 441

at [31] to [32]. It is clear then, that "systematic" is used in s 91R(1)(c) in the same way that "discriminatory" is used, to direct the decision-maker's attention to the motivation of the alleged persecutor. It conveys deliberate behaviour on the part of the alleged persecutor, rather than behaviour that is random or accidental. It also reinforces the causative aspect of Art 1A(2), that persecution must be "for reasons of" one of the prescribed attributes in Art 1A(2).

73 Thus, in accordance with s 91R(1)(c), before it will constitute persecution for the purposes of s 36(2) and Art 1A(2), any risk to life or liberty must have the attributes of being discriminatory and systematic. Neither of those latter characterisations can be arrived at without an evaluative exercise, in the context of the facts and other material before the decision-maker. To preclude an evaluative approach to the nature and seriousness of any deprivation of life or liberty for the purposes of s 91R(2)(b), but then to require such an approach under s 91R(2)(c) would be to give a somewhat incoherent structure to s 91R(1) as a whole.

74 The appellant further submitted that, while it may be accepted that a "threat" to a person's life or liberty as referred to in s 91R(2)(a) requires the threat to be one which gives rise to a risk or a danger (and not a mere threatening utterance or statement), both "life" and "liberty" involve values of such fundamental importance that they apply in a binary form. Hence, just as life and death are polar opposites, so are liberty and non-liberty. Accordingly, while an evaluative exercise is required to determine whether there is a "threat", the appellant contended that there was no further evaluative exercise to be carried out in respect of the concept of "liberty" with a view to establishing whether or not "serious harm" was involved.

75 These submissions should also be rejected. Although s 91R(2)(a) juxtaposes a threat to life and a threat to liberty as instances of serious harm, that does not mean that the sharpness of the distinction between life and death dictates a similarly sharp distinction between the existence and absence of liberty. Life and death are absolute concepts, but that is not the case with the state of a person's liberty or its absence. Neither party suggested that any significance should attach to the fact that s 91R(2)(a) uses the term "liberty" as opposed to the term "freedom" which appears in Arts 31 and 33 of the Convention. Both those concepts encompass a range of values and are not simply limited to liberty (or freedom) in the sense of movement. They also encompass such other values as freedom (or liberty) of thought and expression, freedom (or liberty) of association or assembly, and freedom (or

liberty) of religion. None of those freedoms or liberties is absolute and untrammelled. This serves to underline the observation made above that "liberty" as it appears in s 91R(2)(a) is a nuanced, rather than an absolute, concept.

76 In our view, it is impermissibly artificial to focus on the word "liberty" apart from the balance of the text. Equally, in our view, it is impermissibly artificial to focus on the word "life" so as to reason that because life is either threatened or it is not, parity of reasoning shows that liberty is either threatened or not.

A relatively uniform approach to the Convention concept of persecution

77 It is inevitable that the fact-dependent nature of the inquiry, and the legitimate scope for reasonable minds to differ about the evaluative assessment involved, mean any examination of decisions across jurisdictions will reveal a spectrum of outcomes for individual asylum seekers. However, consideration of cases from other jurisdictions, international jurisprudence and, importantly, although it post-dates the insertion of s 91R into the *Migration Act* in Australia, the only agreed international definition of persecution in the European Union's Qualification Directive suggests a relatively uniform approach to the concept of "being persecuted" in Art 1A(2). More particularly, where an applicant for refugee status relies on a fear of persecution because of detention or imprisonment for a Convention reason, these sources demonstrate that serious harm is not necessarily established simply by the fact that detention or imprisonment is likely to occur.

78 Further, in our opinion, although there is much debate amongst academic commentators about how to articulate the concept of persecution, and the most effective ways in which refugee decision-makers should go about using and applying the concept while staying true to the purposes of the Convention, there is no debate that where a person claims she or he fears "being persecuted" for a Convention reason, the Convention requires a close and careful evaluation of the factual circumstances surrounding the particular claim without any assumptions that certain kinds of claimed conduct are inevitably to be characterised as persecution. When a person claims to fear torture if returned to her or his country of nationality, a refugee decision-maker must evaluate the factual basis for that claim, and characterise the conduct the person claims to fear, to determine whether it is "torture" as that concept is understood in international and human rights law. In the same way, when a person claims to fear threats to her or his life or freedom (or liberty), a refugee decision-maker must also evaluate the factual basis for that claim, and characterise the conduct the person claims

to fear to determine whether it is the kind of threat to life or freedom (or liberty), as that concept is understood in international and human rights law, that falls within the concept of persecution.

79 A similarly evaluative approach is found in the Australian cases, both before and after the enactment of s 91R.

80 Finally, secondary sources and commentary on the Convention generally describe the approach to whether conduct constitutes persecution in evaluative, rather than absolute, terms.

81 Before turning to the Australian cases, the international cases and instruments, and the secondary sources and commentary, several initial matters should be addressed. They are, in turn: the actual expression used in Art 1A(2), the role of Arts 31 and 33 of the Convention and the UNHCR Handbook, and the place of general statements about the importance of liberty.

Art 1A(2): "Being persecuted"

82 It is as well to recall that the noun "persecution" is not found in Art 1A(2). Rather, Art 1A(2) speaks of a well-founded fear of "being persecuted". That language focusses on what is done to an individual, by way of conduct. In the French text the term is "d'être persécutée", and the tense signifies present rather than historic fear and a focus on the interaction between the persecutor and the persecuted: see Storey, "What Constitutes Persecution? Towards a Working Definition" (2014) 26 Int'l J Refugee L 272-285 at page 272.

83 The phrase "being persecuted" appears in Art 1A(2) as part of a larger phrase – "well-founded fear of being persecuted". In interpreting the phrase "being persecuted" and the meaning given to persecution in s 91R(1), it is important to recall that the present fear claimed by any applicant will need to be well-founded, according to the well-established test: see *Chan* at 389 per Mason CJ, 407 per Toohey J and 429 per McHugh J. The need for the identified fear of being persecuted for a Convention reason to be well-founded may be the point at which a claim under Art 1A(2) fails. It is not necessary to load up the concept of "being persecuted", or persecution, to do all the work of determining whether a person is in need of the surrogate protection for which the Convention provides.

The role of Arts 31 and 33 of the Convention, and the UNHCR Handbook

84 Taking the holistic approach required by the 1969 Vienna Convention on the Law of Treaties to Art 1A and the place of Art 1A in the Convention as a whole (see *QAAH* at [34] per Gummow A-CJ, Callinan, Heydon and Crennan JJ; *Applicant A* at 230-231 per Brennan CJ, at 240 per Dawson J, at 254-255 per McHugh J, at 277 per Gummow J and at 294 per Kirby J), in discussions about the meaning of "being persecuted", reference is often made to the text of Arts 31 and 33 of the Convention. Article 31 relevantly prohibits the imposition of penalties on account of illegal entry on persons coming from a territory where "their life or freedom was threatened in the sense of article 1". Article 33 relevantly prohibits the expulsion of a person to the frontier of a territory where her or his "life or freedom would be threatened" for a Convention reason.

85 Perhaps to emphasise that "being persecuted" involves conduct wider than threats to "life or freedom", the UNHCR Handbook at paragraph 51 states:

> There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, 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. Other serious violations of human rights – for the same reasons – would also constitute persecution.

86 Despite the use of the word "always", there is no sense in judicial decisions of various jurisdictions, nor in the academic commentary, that this paragraph is to be construed as meaning the UNHCR's position is that decision-makers faced with a well-founded claim of *any* deprivation of life or liberty must find the person fears "being persecuted" for the purposes of Art 1A. No such absolute approach is evident.

87 Nor, in our opinion can it be said that the words "life" and "freedom" in Arts 31 and 33, and in paragraph 51 of the UNHCR Handbook, are intended to protect an individual from *any* interference with her or his life or freedom, no matter what the circumstances of the interference.

88 Notwithstanding that the right to life is described in some human rights contexts as a "supreme right", and seen as non-derogable (see, for example the United Nations Human Rights Committee General Comment No. 6, Article 6, "The Right to Life" (30 April 1982), as Hathaway and Foster observe in *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) at page 208, international law does not protect life in an absolute and

unqualified way. As the authors point out, the 1966 International Covenant on Civil and Political Rights (**ICCPR**) prohibits "arbitrary" deprivation of life, a prohibition of most obvious relevance to countries where the death penalty remains available as a form of criminal punishment. What will constitute an "arbitrary" deprivation of life will be informed, in any given case, by the nature and use of any law of general application which imposes the death penalty: see, for example, the discussion by Hathaway and Pobjoy in "Queer Cases Make Bad Law" (2012) 44 NYU J Int'l L & Pol 315-389 of punishment imposed in some countries for homosexual conduct.

89 In relation to liberty or freedom (assuming those terms may be used interchangeably in this context), the protection afforded by international human rights law is also conditioned in at least two general ways. First, the protection extends only to deprivations of liberty that are not "on such grounds and in accordance with such procedures as established by law". Secondly, the protection will extend to deprivations of liberty which, although in accordance with domestic law, are "arbitrary": see, for example, the ICCPR Art 9(1) and the findings of the UN Human Rights Committee in *Van Alphen v The Netherlands* (305/88), 29 March 1989. In *Van Alphen*, the Committee said (at [5.8]) that:

> The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.

90 In the similar human rights context of an "arbitrary" interference with privacy, the Victorian Court of Appeal has described arbitrariness as "concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought": *WBM v Chief Commissioner of Police (Vic)* [2012] VSCA 159; (2012) 230 A Crim R 322 at [114] per Warren CJ.

91 These references to the approaches taken in international human rights law are not intended to depart from or undermine the current approach to laws of general application and the concept of "being persecuted" under Australian law, which is one based more in constitutional concepts of laws being "reasonably appropriate and adapted to achieving some legitimate object of the country of the refugee" (see *Applicant A* at 258 per McHugh J; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473 (***Appellant S395***) at [49] per McHugh and Kirby JJ).

92 Rather, the purpose of these references is to demonstrate that, even in what might be perceived to be the most general analytical framework for the concept of "being persecuted" – namely, international human rights law – a risk of deprivation of life or liberty, or life or freedom, even if well-founded, will not necessarily bring a person within that concept. A fact finding exercise evaluating the particular circumstances in which such deprivations will occur must be undertaken.

General statements about liberty

93 The appellant relied on statements in Australian cases about the importance of liberty. At a level of generality, the importance of liberty cannot be disputed, but the weakness in the argument is to leave the statements at that level of generality, devoid of context. For example, the appellant relied on statements by French J in *Goldie* at [17], where his Honour said:

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

94 *Goldie* was a case dealing with false imprisonment, occasioned by wrongful detention under the *Migration Act*. As is plain from the opening words of this paragraph, French J was dealing with deprivation of liberty which was not, to use the language of the human rights instruments, "on such grounds and in accordance with such procedures as are established by law". That is not to say, of course, that had the deprivation of liberty suffered by Mr Goldie been suffered by an asylum seeker in her or his country of nationality it would necessarily meet the definition of "serious harm" in s 91R(1). Rather, it is to make the point that Australian law, alike with the domestic laws of other state parties to the Convention, recognises that there are circumstances in which deprivation of liberty is justifiable. In our view, the appellant's reliance on the comments of French J in *Goldie* is misplaced. His Honour's comments that arrest and imprisonment "involve a grave interference with the rights of the individual coupled with humiliation which is both private and public" are uncontroversial, but it is important to note that those comments were directed to an arrest and imprisonment which were wrongful and unlawful.

Australian decisions about the concept of persecution

95 *Chan* was relied on by the appellant. Mr Chan was a citizen of the People's Republic of China and a member of a faction of the Red Guards which lost the struggle for control of that organization in his local area. Members of the faction, including Mr Chan, were questioned by police. Mr Chan was detained by police for two weeks. His name was later publically released on a list in his local area as someone who was opposed to the policies and ideas of the Chinese state. He was assessed as "anti-revolutionary" and exiled by a Local People's Committee to another area. He attempted to escape on three occasions and was recaptured, receiving increasingly long periods of detention on each occasion. He was warned that any further escape attempts would result in two years' detention. He then successfully escaped, stowed away on a ship bound for Australia and sought refugee status here. His application was refused, a refusal upheld by the Full Federal Court but not by the High Court. The case raised the question of the meaning of the concept of "being persecuted" in the Convention.

96 In *Chan*, at 388 Mason CJ spoke of persecution as requiring "some serious punishment or penalty or some significant detriment or disadvantage". However, at 390 his Honour spoke of "[d]iscrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence" as prima facie constituting persecution, the first two kinds of conduct (interrogation and detention) appearing in an unqualified way in his Honour's description. These statements may indicate Mason CJ drew a distinction between treatment which his Honour saw as obviously constituting "harm" (such as detention) and treatment which might involve a "denial of fundamental rights or freedoms otherwise enjoyed by nationals", but which does not obviously constitute "harm", by which we take his Honour to be referring to denial of, for example, other civil and political rights such as freedom of assembly or freedom of expression. Treatment which infringed the latter kinds of rights, his Honour said, "may constitute such harm", but he expressly stated that he "would not wish to express an opinion on the question whether *any* deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason" (at 388, emphasis in original). When the facts of *Chan* are recalled, it is apparent there was no need for any adjectival qualification to his Honour's references to "detention": the detention which Mr Chan feared was, on any view, of a serious and significant nature.

97 This point is made by Gaudron J in *Chan* (at 416):

> It is not reasonable by the standards of civilized nations to categorize exile and detention for reasons of political opinion as discrimination 'to a limited degree' not constituting persecution. Whatever else may lie within the meaning of 'persecution', significant deprivation of liberty certainly falls to be so characterized.

98 In the same case, Dawson J said that "there is 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" (at 399). In *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 the observations of both Mason CJ and Dawson J were referred to by the majority with approval (at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ), and they were cited with apparent agreement by Gummow J in *VBAO* at [15].

99 Thus, if the descriptions employed by Mason CJ and Dawson J in *Chan* were to be applied literally, they might support the proposition put by the appellant in the present case: namely, that any deprivation of liberty is within the concept of "being persecuted" in Art 1A(2).

100 That would be, in our opinion, a misreading of these statements, and of the judgments and context in *Chan* as a whole. Reading the judgments as a whole, it is clear their Honours understood the Convention term "persecution" to require conduct of a certain level of seriousness or intensity, taking into account that threats to life or freedom are more readily characterised as having the necessary quality of seriousness or intensity of harm. That was the view taken by other members of the Court: see Gaudron J at 416 (extracted above); also McHugh J at 429. Toohey J's finding about the legal unreasonableness of the delegate's conclusions makes a similar point (at 408):

> Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China.

101 In *Appellant S395* at [66] Gummow and Hayne JJ said:

> The term "persecution" is not defined in the Convention, and in the decisions of this Court there has been no precise tracing of the metes and bounds of its meaning in the Convention definition of "refugee" applied in the Act. It is not of great assistance and is apt to mislead to approach the matter by saying, as did an English court, that

> "persecution" is a "strong word". However, it is clear from the decision of this Court in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* that a systematic course of conduct is not required. Further, in the joint judgment of six members of this Court in *Minister for Immigration and Ethnic Affairs v Guo*, an approving reference was made to the proposition stated by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* that measures in disregard of human dignity may, in appropriate cases, constitute persecution. In the present appeals, there was no challenge to those propositions.

The reference to "an English court" is to the decision of *R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi* [1989] Imm AR 595 at 599 per Kennedy J.

102 *Appellant S395* was decided after the enactment of s 91R. The analysis of Gummow and Hayne JJ provides, in our opinion, further support for the proposition that ss 91R(1) and (2) were not intended to move away from the Convention's approach to "being persecuted", but rather were intended to illustrate that the concept of persecution involved, as Mason CJ said in *Chan*, conduct with sufficiently serious effects that surrogate protection for an individual was necessary.

103 In *Appellant S395* at [40], McHugh and Kirby JJ described persecution in the following terms:

> The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. **Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it**. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality. (Emphasis added.)

104 This passage has been cited many times, both in Australia and in other jurisdictions, notably in the United Kingdom. The reference to what a person can "reasonably be expected to tolerate" was misunderstood by the Court of Appeal in *HJ (Iran) v Secretary for the Home Department* [2009] Imm AR 600; [2009] EWCA Civ 172, where the Court of Appeal saw

this reference as authorising refugee decision-makers to ask what a person can be "expected" to do on return to her or his country of nationality. That misunderstanding is noted by members of the UK Supreme Court in *HJ (Iran) v Secretary for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 (***HJ (Iran)***) at [28]-[29] per Lord Hope, at [102] per Lord Collins, and at [125]-[126] per Dyson JSC. The introduction of glosses such as what a person might be "expected" to endure, as well as the notion of individuals needing to "tolerate" certain kinds of behaviour by their alleged persecutors, in our opinion, is not consistent with the otherwise relatively uniform tenor of formulations of "being persecuted". Those other formulations focus on the nature and quality of the harm inflicted, not the individual's ability to cope with it. They focus, correctly in our respectful opinion, on normative standards governing the behaviour of those whose conduct is under scrutiny rather than asking a decision-maker to impose expectations on the person said to be the target of the persecutory conduct.

105 However, even if aspects of the passage at [40] in *Appellant S395* may tend to put a gloss on what is meant by "being persecuted", for the purposes of the issues in this appeal, this passage again makes plain that the decision whether conduct does or does not constitute persecution involves an evaluative exercise, no matter what the conduct is.

106 It is true that there are obiter statements in other Australian authorities to the effect that ss 91R(1) and (2) "limit" the range of circumstances in which apprehended harm may be characterised as persecution for the purposes of Art 1A(2) (see for example *SZJGV* at [6] and [7]). As we have noted above, given the provision is dealing with a concept left deliberately undefined by the Convention, that description may be appropriate. In substance, however, the jurisprudence of other state parties and the secondary sources demonstrate, in our opinion, that the content given to the concept of persecution by ss 91R(1) and (2) is not inconsistent with the approach required by the Convention, provided the terms of ss 91R(1) and (2) are not themselves restrictively interpreted or applied.

107 Finally, we do not see anything said by Crennan J in *VBAS* as inconsistent with this approach. Her Honour noted at [18] that, by the terms of s 91R(1), Art 1A of the Convention "does not apply" in relation to one or more Convention reasons unless, cumulatively, the three aspects of subs (1) are satisfied. Where her Honour states that an applicant must, under s 91R(1), have a well-founded fear of "persecution involving serious harm" her Honour was,

in our respectful opinion, simply paraphrasing the effect of s 91R(1) rather than finding that the Convention concept of persecution had been altered.

108 The final sentence in [18] of her Honour's reasons was one upon which the Minister placed some reliance. Her Honour stated:

> The first instance of 'serious harm' set out in s 91R(2)(a) – 'a threat to the person's life or liberty' – does not mean that every death threat or threat of imprisonment made against an applicant will fall within that paragraph and necessarily constitute 'serious harm'.

109 *VBAS*, like *VBAO*, was concerned with the proper construction of the word "threat" in ss 91R(1) and (2). Crennan J found (at [22]) that the word should be construed as meaning "risk", rather than a declaration of an intention to cause harm, or a determination to cause harm. This was the construction subsequently adopted by the High Court in *VBAO*. In the passage above, her Honour was referring to conduct which could be covered by either of the constructions proposed in the case before her, and simply making the incontrovertible point that whether the word means "risk" or refers to an "utterance", not every instance will constitute "serious harm". There was no occasion for her Honour to consider whether *any* imprisonment would suffice, and her Honour clearly did not do so.

Other jurisdictions

110 The following analysis of selected judicial decisions in other Convention jurisdictions indicates that the Convention has generally been interpreted as requiring a qualitative assessment to be carried out of any detention or imprisonment which is claimed to amount to persecution where it has occurred for a Convention reason. That qualitative assessment is required to establish whether or not the detention or imprisonment involves serious harm.

The United States

111 In the United States, a subjective approach is taken to the assessment of what is, and is not, "being persecuted" and this approach is undoubtedly evaluative.

112 In *Mikhailevitch*, after noting that the US Immigration and Nationality Act did not contain a definition of "persecution", the US Court of Appeals for the Sixth Circuit referred at [7] to other relevant US authorities, and noted that it had been held that the concept of "persecution" "embodies punishment or the infliction of suffering or harm". Furthermore, the Court stated:

> We agree with our sister circuits that "persecution" within the meaning of 8 U.S.C. §

> 1101(a) of 42(A) requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, **or significant deprivation of liberty**. (Emphasis added.)

113 In *Mikhailevitch*, the asylum seeker sought protection on the basis that he feared persecution if he was returned to Belarus because, while there, he had been questioned by the KGB and subject to searches of his home and place of business on account of his activities as a Roman Catholic. He also claimed that the KGB arrived at his home at 1.00 am. and knocked on his door for 40 minutes before leaving. There was no evidence that he had been physically abused, imprisoned or arrested by the KGB as a consequence of practising his religion. It was held that while the evidence indicated that the asylum seeker had been "harassed" by the KGB because of his religious activities, this did not rise to the level of "persecution" under US legislation.

114 A similar approach has been adopted in subsequent decisions of the US Court of Appeals. For example, in *Topalli v Gonzales* 417 F. 3d 128 (1st Cir 2005), a twenty-four year old Albanian man claimed to be a refugee on the basis that he had been arrested and beaten multiple times for his participation in anti-government rallies. The Board of Immigration Appeals accepted his evidence that he had been arrested and detained by the police seven times between 1999 and 2001 and that four of those arrests were for his participation in anti-government rallies and the three other occasions were simply because the police recognised him. None of the periods of detention lasted more than 24 hours. He also claimed that each time that he was arrested, he was beaten by the police, but not to the extent that he required medical attention. The Board of Immigration Appeals rejected his application on the basis that his past maltreatment did not amount to persecution, nor did he demonstrate a reasonable likelihood of future persecution. It emphasised that the detentions were short, never lasting more than 24 hours, and his injuries did not require medical attention. The Court of Appeals rejected his appeal applying the well-known deferential substantial evidence standard. While acknowledging that the question whether the appellant had suffered past persecution on account of his political beliefs was "a close one", the Board's decision was upheld. The Court observed (at 132):

> The record reveals that the detentions never exceeded 24 hours (and sometimes lasted for much less time). The police only once threatened Topalli with imprisonment if he continued with his (sometimes illegal) political activities, and Topalli himself was confident that the police did not have the power to incarcerate him for more than 24 hours without formal charges. Topalli did not give a great deal of detail concerning the duration or severity of the beatings, but it is relevant that Topalli did not claim to

> need medical attention from the beatings. Topalli conceded that at least some of the arrests may have been due to his fighting with the police at the illegal rallies, rather than the result of police signalling him out in a pattern of targeted political harassment. Besides the three when he was arrested walking down the street, there were no other incidents of police surveillance, targeted harassment, or threats against him. Moreover, Topalli was able to live in relative peace in Albania, free from police harassment, for almost three years after his last arrest. We cannot say that we are compelled to conclude that Topalli was subjected to systematic maltreatment rising to the level of persecution, as opposed to a series of isolated incidents…

115 In *Gomez-Zuluaga v Attorney General of the United States* 527 F. 3d 350 (3rd Cir 2008), the US Court of Appeals reaffirmed that for the purposes of US immigration law (which, like Australia, draws down the Convention definition of a refugee) not every detention of a person for a Convention reason constitutes persecution. At 341, the Court described the relevant legal position in the United States as follows:

> We have held that persecution, while not inclusive of every act that our society might regard as unfair, unjust, unlawful, or unconstitutional, generally includes treatment like death threats, involuntary confinement, torture and other severe affronts to the life or freedom of the applicant. (Citing *Lin v INS, 238 T.D 239* at 244, 3d Cir 2001.)

116 The asylum seeker in that case, a Colombian national, had been detained in Colombia by the terrorist group commonly known as FARC, on three separate occasions. Her detention on each of those occasions related to the fact that she was dating members of Colombia's armed or police forces. The first detention was for two hours after she was taken from her home to an outdoor playing field where she observed armed men and other women who had been brought there under similar duress. She was not physically harmed but said that she feared for both her own and her family's safety as a result of the experience and being told by the terrorists that she should remember what she had been told about FARC's opposition to local women fraternising with soldiers because it was an "insult" to the FARC and if the conduct did not end something would happen to them or their families.

117 The second detention incident occurred two years later when the petitioner, who had then formed a relationship with a police officer, was taken from her father's home by an armed man to an area outside the town where they met up with two other men, who were armed with ammunition and grenades and who wore FARC colours. They referred to her failure to abide by the previous FARC warning and the petitioner said that she became very scared. She was released after about one hour.

118 The third incident occurred early the following year, when the petitioner was taken by an armed man from her local church. She was blindfolded and forced to walk for two hours to a small empty house, at which there were other armed men. She was chained to a bed for eight days and only allowed to be unchained to go to the toilet, on which occasions one of the terrorists accompanied her. Various threats were also made to her. She was ultimately released on the basis, she believed, that the terrorists learned that she was studying to be a dental hygienist and they released her on condition that she had to return and work for them when she completed her studies.

119 In conducting a de novo review of a decision of the Board of Immigration Appeals, which rejected the petitioner's claim to be recognised as a refugee, the US Court of Appeals distinguished the first two detentions from the third. As to the first two detentions, while they were described as being "close to the line" they were held not to rise to the level of persecution because the detentions were brief and little or no physical harm had occurred. That is to be contrasted with the Court's findings in respect of the third detention, which are reflected in the following passages (at 342-343):

> These earlier incidents do not rise to the level of persecution, but Petitioner's eight-day abduction and confinement does. Petitioner testified that an armed man forced her to walk for two hours, eyes covered and hands bound, before chaining her to a bed in an unfamiliar house in the hills. There, she remained blindfolded, while a number of armed men repeatedly threatened her, menacingly informed her that "they had intentions" with her, and told her that they wanted her to "stay with them". The men even remained with her when she periodically went outside to the bathroom. The FARC guerrillas confined her under these conditions for eight days.
>
> **While we have explained that detentions alone do not necessarily constitute persecution, this unlawful abduction rises to the level of persecution because of the duration of confinement, the deprivation of Petitioner's freedom of movement and sight, the invasion of Petitioner's privacy, the implicit and overt threats made against her person, the ominous warnings upon her release that the FARC would be "very attentive" to her, and that she was obliged to return to serve their cause upon completion of her studies**. (Emphasis added.)

120 The following summary of the relevant principles by a different US Court of Appeals in *Vasili v Holder* 732 F. 3d 83 (1st Cir 2013) confirms that the US approach has not relevantly changed post 2001:

> An individual seeking asylum faces a "daunting task" in establishing subjection to past persecution… To meet this standard, "the discriminatory experiences must have reached a fairly high threshold of seriousness as well as [occurred with] some regularity and frequency"… Infrequent beatings, threats or periodic detention, we have said, do not rise to the level of persecution, and the nature and extent of an applicant's injuries are relevant to the ultimate determination… Thus, "persecution"

> requires "more than mere discomfiture, unpleasantness, harassment, or unfair treatment" and "implies some connection to government action or inaction". (Citations omitted.)

121 One of the cases cited in this extract was the US Court of Appeals' decision in *Nelson v Immigration and Naturalization Service* 232 F. 3d 258 (1st Cir 2000), in which it was held that the petitioner failed to establish persecution even though he had been subjected to physical abuse and placed in solitary confinement for less than 72 hours on three different occasions.

122 We refer to these cases not to rely on the correctness of the decisions but to draw attention to the qualitative nature of the approach adopted by the courts.

The United Kingdom

123 In 1996, in *Sandralingham v Secretary of State for the Home Department* [1996] Imm AR 97 at 107, the Court of Appeal adopted the now widely recognised formulation of persecution proposed by Hathaway, in the 1991 edition of his text, *The Law of Refugee Status* (Butterworths) (at page 112):

> In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or a failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources.

124 The "first category" referred to in this passage consisted of those rights in the 1948 Universal Declaration of Human Rights (**UDHR**), translated into immediately binding form in the ICCPR and from which no derogation can be permitted, such as freedom from the arbitrary deprivation of life, and protection against torture or cruel, inhuman or degrading punishment or treatment. The "second category" is described by Hathaway as those rights in the UDHR given binding and enforceable form in the ICCPR, including "freedom from arbitrary arrest or detention" and from which states may derogate in limited circumstances. The "third category" is described by Hathaway as those rights in the UDHR which were carried forward into the International Covenant on Economic Social and Cultural Rights, where no absolute and immediately binding standards of attainment were imposed, such the rights to food, housing and medical care.

125 Hathaway's formulation as described in *Sandralingham* has been endorsed by the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 495 per Lord Hope, for the majority; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15 (***Sepet***) at [7] per Lord Bingham; and *R v Special Adjudicator; ex parte Ullah* [2004] UKHL 26; [2004] 2 AC 323 at [33] per Lord Steyn.

126 In *HJ (Iran)*, the UK Supreme Court dealt with the circumstances of a homosexual applicant, and the relevance to satisfaction of Art 1A(2) of the proposition that such a person might modify her or his behaviour in her or his country of nationality so as not to attract attention and risk persecution for what was clearly the Convention reason of membership of a social group. In the course of deciding, as the High Court did in *Appellant S395*, that a person could not be compelled to modify her or his behaviour so as to avoid the otherwise well-founded fear of persecution becoming a reality, Lord Hope considered the concept of persecution.

127 Noting (at [12]) that, as Lord Bingham had said in *Sepet* (at [7]), it was a "strong word" and indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to repression or extirpation of it, Lord Hope then also considered the description given by McHugh and Kirby JJ in *Appellant S395* at [40] (to which we refer above) and to the Qualification Directive (to which we refer below). Lord Hope then made three points which we consider of significance to the issue on this appeal.

128 First, Lord Hope adopted Hathaway's formulation of persecution. Secondly, and connected to this, he emphasised that the purpose of the Convention was to provide surrogate protection where state protection of its nationals has failed. That emphasis can also be found in the reasons of Lord Rodger at [52]. The question, Lord Hope said (at [13]), was "whether the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals". Thirdly, although the guarantees in the UDHR were fundamental to the Convention, as the reference to the UDHR in the Preamble to the Convention made clear, the contracting states did not undertake to protect claimants against discrimination judged according to the standards in the state of asylum. Lord Hope said (at [15]):

> Persecution apart, the Convention was not directed to reforming the level of rights prevailing in the country of origin. Its purpose is to provide the protection that is not available in the country of nationality where there is a well-founded fear of persecution, not to guarantee to asylum seekers when they are returned all the

> freedoms that are available in the country where they seek refuge. It does not guarantee universal human rights.

129 Although not the main focus of his reasons, at [53] Lord Rodger in *HJ (Iran)* also recognised the concept of persecution as involving harm of a certain kind. He said:

> The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may **suffer harm of the requisite intensity or duration** because they are, say, black, or the descendants of some former dictator, or gay. (Emphasis added.)

130 A further significant example of the approach taken in the United Kingdom comes from the Immigration Appeal Tribunal decision of *Iqbal v Secretary of State for the Home Department* [2002] UKIAT 2239 (***Iqbal***) (to which the Court of Appeal in *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807 refers). *Iqbal* concerned a "prosecution versus persecution" situation, where the appellant claimed that in his foreshadowed prosecution for breach of the criminal law, he would face pre-trial detention involving significant hardship. The Tribunal found the kind of detention he would face did not amount to persecution for the purposes of Art 1A(2). Noting (at [74.5]) that the right to a fair trial is not an absolute, non-derogable right and failures in a trial process must "go beyond shortcomings and pose a threat to the very existence of the right to a fair trial" before they might amount to persecution, the Tribunal said (at [74.6]):

> When considering whether the generality of citizens face a real risk of persecution under the criminal justice system of their country of origin, it is important to establish the scale of any violations of relevant human rights such as the right not to be exposed to ill treatment during detention or the right to a fair trial. A useful benchmark is set out in Article 3 of the Convention Against Torture, namely whether the level of abuse of human rights rises to the level of a 'consistent pattern of gross, flagrant or mass violations of human rights'.

Canada

131 Judicial decisions in Canada reveal a similarly evaluative approach. The Canadian *Immigration and Refugee Protection Act* (S.C. 2001, c 27) relevantly incorporates at s 96 the Art 1A(2) criteria into Canadian domestic law.

132 In *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 733-734 (***Ward***) and in the context of considering the meaning and application of the Convention reason of "particular social group", the Supreme Court of Canada adopted, admittedly in reasonably general terms, an approach to the concept of persecution which was inherently evaluative:

> 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, *supra*, at p. 108, thus 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 systemic 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, *supra*, at pp. 104-105. So too Goodwin-Gill, *supra*, at p. 38, 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 recognized by the Federal Court of Appeal in the *Cheung* case.

133 In *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 the Supreme Court considered, amongst other issues, whether forced sterilization of a man pursuant to China's one child policy constituted "being persecuted" for the purposes of the equivalent s 2 of the predecessor *Immigration Act 1985*. The Court divided four to three on the ultimate outcome of the appeal, but there was no relevant distinction between the majority and minority on the question whether forced sterilization – if a claimant (whether male or female) established a real risk of such treatment – was capable of constituting persecution.

134 In relation to laws of general application and the nature of punishment meted out under such laws, the minority judgment given by La Forest J (L'Heureux-Dubé and Gonthier JJ concurring) made it clear (at [68]) that such punishment could nevertheless constitute persecution in certain circumstances. The minority approved a passage from a Federal Court decision in *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314 (C.A.), at 323 where Linden JA said:

> Even if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status. Under certain circumstances, the operation of a law of general application can constitute persecution. In *Padilla v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.), the Court held that even where there is a law of general application, that law may be applied in such a way as to be persecutory .... if the

> punishment or treatment under a law of general application **is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory**. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality. (Emphasis added.)

135 To take an example at Canadian Federal Court level, in *Sadeghi-Pari v Canada (Minister for Citizenship and Immigration)* 2004 F.C. 282 at [29] Mosley J said:

> The meaning of persecution as set out in the seminal decisions of *Canada (Attorney General) v. Ward* and *Chan v. Canada (Minister of Employment and Immigration)* is generally defined **as the serious interference** with a basic human right. (Emphasis added. Citations omitted.)

136 There are many cases of the Canadian Federal Court dealing with the manner in which a fact-finding tribunal should approach the distinction between discrimination and persecution as concepts. Many of those decisions emphasise the need to assess whether the discrimination is cumulative, and therefore of a sufficiently intense and serious nature to constitute persecution: see for example *Sugiarto v Canada (Minister of Citizenship and Immigration)* 2010 F.C. 1326 at [12] per Tremblay-Lamer J and the series of cases there referred to; also *H.L. v Canada (Minister of Citizenship and Immigration)* 2009 F.C. 521 at [26] (***H.L.***).

137 In *H.L.* Martineau J, referring to Hathaway's formulation (in the 1991 edition of his text, *The Law of Refugee Status* (Butterworths)) as endorsed by the Supreme Court in *Ward*, said (at [21]):

> Discrimination in itself does not amount in every case to persecution. It may, however, if it manifests as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection".

138 This summary of approaches taken in other jurisdictions, by no means comprehensive, is entirely supportive of the proposition that the concept of "being persecuted" in Art 1A(2) is understood by courts in other jurisdictions as requiring decision-makers to evaluate the nature of the harm claimed to be feared and to be satisfied it reaches a level of intensity or seriousness which is both commensurate with the understanding of the word "persecution" and which justifies surrogate protection by a state party.

The European Union's Qualification Directive

139 Despite the reticence demonstrated, outside Australia, in articulating the content of the concept of persecution, in Art 9(1) to (3) of its Qualification Directive, the European

Union took a step which in our opinion is not so dissimilar to ss 91R(1) and (2). Like ss 91R(1) and (2) it does not purport to be an exhaustive definition. Art 9(1) to (3) of the Qualification Directive provides:

> 1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
>
> (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
>
> 2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> (c) prosecution or punishment which is disproportionate or discriminatory;
>
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
>
> (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
>
> (f) acts of a gender-specific or child-specific nature.
>
> 3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

140 The European Court of Justice has made it clear that the terms of Art 9 mean, much like s 91R, that not all violations of human rights constitute persecution. Rather, the violation must be "sufficiently serious": *X, Y and Z*, Joined Cases C-199/12, C-200/12 and C-201/12, 7 November 2013. In those cases, which dealt with homosexual asylum seekers, the Court expressed the view that the "mere existence" of legislation criminalising homosexual acts could not be regarded as an act affecting the applicants "in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of article 9(1) of the Directive" (at [55]).

Academic writing

141 Turning now to consider the views of some academic writing on the issue whether *any* detention, confinement or imprisonment for a Convention reason necessarily amounts to persecution, the following materials indicate that commentators accept that a qualitative assessment is involved, although they may differ on the measures or reference points by which that assessment should be undertaken.

142 In Grahl-Madsen, it is noted, at page 193 of volume 1, that there are at least two schools regarding the question whether persecution includes any threat to freedom. Reference is made to the view expressed by one commentator (Vernant), who quoted "persecution" with "severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights", as opposed to a less liberal view, represented by another commentator (Zink), who interpreted "persecution" so as to mean only deprivation of life or of physical freedom, whilst also excluding deprivation of physical freedom for a very short period of time. After discussing various cases in France and Germany, Grahl-Madsen gave the following summary at page 201, which suggests that a qualitative assessment is involved:

> We may conclude that there is precedent for considering the following measures or sanctions "persecution" in the sense of the Refugees Convention, provided that the circumstances warrant it:
>
> (1) threats to a person's life;
>
> (2) imprisonment or other forms of detention or internment for a period of three months or more, it remaining an open question whether deprivation of physical freedom for shorter periods may constitute "persecution"; however, deprivation of liberty for 10 days or less has been deemed not to amount to "persecution";
>
> (3) numerous arrests or summonses for interrogation;
>
> (4) removal to a remote or designated place within the home country;
>
> (5) infliction of bodily harm and serious threats to a person's health;
>
> (6) extradition to a country where the person may be subjected to measures mentioned under (1) or (2).

143 To similar effect is the description given by Zimmermann and Mahler, "Article 1A, para. 2 (Definition of the Term 'Refugee'/Définition du Terme 'Réfugié')" in Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) at page 348 ([227] and [228]):

> To determine whether a severe violation of human rights amounting to persecution

> has been taking place, a complex bundle of factors such as "the nature of a freedom threatened, the nature and severity of the restriction and the likelihood of the restriction eventuating in the individual case" has to be taken into consideration. Possible factors are the intensity of the acts and their duration; the danger of or the actual recurrence of such acts; whether the acts occur are individual cases or as part of a larger campaign of systematic human rights violations; and finally the effect of such acts on the health, family life, or participation in political life of the person concerned. The most difficult part, however, is how to weigh the different aspects…
>
> With regard to a required duration, and it has been argued that a short duration shall, in general, not suffice or that an isolated act is not sufficient, but that there has to be a sustained, persistent, or systematic risk of human rights violations in order to amount to persecution. However, the example of torture proves the contrary. In this case the violation of human dignity is so severe that even a single incident and a short period of time trigger persecution. At least with regard to very basic rights a single incident should accordingly be regarded as sufficient to be tantamount to persecution and that the "persistency as a usual but not a universal criterion of persecution."
> (Citations omitted.)

144 A third example is to be found in Hathaway and Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014). At page 198, in responding to a criticism that a human rights framework might diminish attention being given to "individuated vulnerabilities", the authors write:

> While an understandable concern, the truth is that international human rights law not only allows, but actually requires, careful scrutiny of particularized circumstances… courts relying on human rights norms to identify serious harm for refugee law purposes have appropriately insisted, for example, that personal attributes such as "age and frailty" may have an impact on seriousness of harm… (Citations omitted.)

145 In considering the relationship between persecution and human rights such as those the subject of Art 9 of the ICCPR, Hathaway and Foster state (at page 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 hospitalisation" or even "being involuntarily transported". Importantly, though, not every constraint on free movement amounts to a violation of an internationally 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" arrest 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. (Citations omitted.)

146 The authors elaborated upon each of these requirements as follows. First, an arrest or detention must be truly on grounds and in accordance with procedures as are established by law. Accordingly, persons facing arrest or detention at the hands of non-state actors will almost always face the risk of persecutory harm.

147 Secondly, even where an arrest and/or detention takes place within a genuine legal framework, it must not be "arbitrary". This includes conduct which is not only against the law but also conduct which is authorised by law but is discriminatory or shows elements of inappropriateness, injustice, lack of predictability, and due process of law.

148 Thirdly, even if an arrest and/or detention is both lawful and not arbitrary, it must be effected in a manner that comports with the duty of states to ensure that all persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person. Hence, if the arrested or detained person is subjected to "truly undignified conditions", even if falling short of inhuman or degrading treatment, this bespeaks a risk of breach of international human rights norms and constitutes serious harm. In our view, these remarks confirm the appropriateness of an evaluative or qualitative exercise of the relevant facts surrounding a loss of liberty.

149 The authors then state, at page 204, that under a human rights framework "a finding of serious harm requires careful consideration of whether a generally accepted right *as codified in international law* is, on the facts of the case, at risk of being violated" (emphasis in original). They discuss at length the checks and balances they perceive to inhere in this approach, ranging from the need for the feared treatment to fall within a human rights norm as defined by a "widely ratified" international human rights treaty, to the incorporation of notions of derogable and non-derogable rights, internal limitations on rights and a proportionality approach.

150 Other commentators propose a different approach: see, for example, Price at pages 103-136, arguing against what he describes as a "humanitarian approach" to the concept of persecution in the Convention, and in favour of what he calls a "legitimacy approach".

151 Storey, in "Persecution: Towards a Working Definition", in Chetail and Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) at page 476, makes the following observations, with which we respectfully agree:

> Thus both refugee law and human rights law make clear that it is only if violations of

> human rights attain a sufficient severity or disproportionality that they amount to persecution or ill treatment.
>
> Furthermore, under a human rights approach it remains the case that persecution has to be shown to be person-specific. Not every violation of human rights will have equally serious consequences for different individuals. There is broad acceptance of the need for the human rights approach to be applied contextually. In Goodwin-Gill's formulation, whether a human rights violation will amount to persecution will "again turn on an assessment of a complex of factors, including (1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case". As stated by Symes and Jorro, "[b]y this sensible linkage between formal breach of a human right and its conversion into persecution by means of the gravity of its invasion, the principal criticism of the Hathaway approach, that it might extend the forms of harm capable of constituting persecution too far, is overcome." (Citations omitted.)

152 Indeed, perhaps with the exception of some of the United States decisions, almost all of the decisions to which we have referred (from Australia and other jurisdictions) have considered the question of what conduct should be characterised as persecution from the perspective of interferences with basic human rights. The matter was clearly put, with respect, by Brennan CJ in *Applicant A* (at 232):

> When a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied.

153 In our view, it is unnecessary for the purposes of this appeal to choose between the competing academic approaches to the analysis of what kind of conduct may constitute "being persecuted" for the purposes of Art 1A. Whether or not the preferable analysis is to measure it against human rights norms, the point of referring to this approach in some detail here is to put beyond doubt that, on any view, the evaluation of whether what a person claims to fear is "serious harm" will be a question of fact and degree, often complicated and quite specific to the individual concerned, and involving consideration of domestic and international justifications for interference with, and limits placed on, the enjoyment of human rights in a particular country of nationality.

CONCLUSION

154 For the above reasons, and with great respect to North J, we do not consider that *WZAPN* correctly decided the construction of s 91R(2)(a). In our opinion, s 91R(2)(a) should not be construed as meaning that any deprivation of liberty constitutes serious harm for the purposes of s 91R(1)(b) and Art 1A(2).

155 As the above analysis has sought to show, even if there was no error in his Honour's examination of ss 91R(1) and (2) and the Convention concept of persecution by reference to "international human rights standards" (see his Honour's reasons at [43]), an issue which need not be determined in this appeal, contrary to his Honour's reasoning, neither those standards, nor the jurisprudence and commentary about those standards in refugee decision-making supports the proposition that any deprivation of liberty must constitute serious harm for the purpose of the Convention.

156 In our opinion, the Tribunal did not misconstrue s 91R(2)(a) or ask itself the wrong question.

157 As to the Minister's reliance on what was said by Hayne J in *SZWAU*, we do not consider that that case assists in determining this appeal. The passages relied on reflect the particular facts in *SZWAU*, which were different from those here. In the present appeal, the identification of the social group relied on by the appellant and accepted by the Tribunal of "failed asylum seekers from a Western country" was not contested by the Minister. In this appeal, there is not an alternative argument by the Minister that the appellant cannot overcome the findings of fact which would mean that neither s 91R(1)(a) or (c) was satisfied: see the submission at [44] above. Whether or not the Sri Lankan Emigration and Immigration Act is a law of general application, and whether or not in any given case it may be applied to an applicant for protection arbitrarily or in a discriminatory way, is not necessary to consider in this appeal, given the conclusions we have reached on the construction of ss 91R(1) and (2).

158 The appeal should be dismissed, with costs.

I certify that the preceding one hundred and fifty-eight (158) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Robertson, Griffiths and Mortimer.

Associate:

Dated: 24 March 2015