REFLEX
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From the Editor

Article 14(1) of the ICCPR provides that everyone is equal before the courts, and is entitled to a fair hearing before a "competent, independent and impartial tribunal".

In a paper published in 2012, two Australian professors stated that "research on the global incidence of disability suggests that 2.9 per cent of the world's population is severely disabled, while a further 12.4 per cent has moderate long-term disability"[1]. It is inevitable that these figures will be reflected in the people who come before us in our capacity as refugee law judges. The relevance of this is not simply that the disability may exacerbate the predicament of a person seeking protection. Equally important is that impairment or disability may inhibit an individual's ability to advance their claim.

What do we do about it?

Under the 2006 *Convention on the Rights of Persons with Disabilities*, States are required to provide *effective* access to justice for people with disabilities, "on an equal basis with others …" (Article 13(1)). That Convention seeks to shift the perception of disability away from something innate in the individual, and calls upon us to recognise that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their effective participation in society on an equal basis with others." (para (e) of the preamble).

What if the barrier arises from the level of competence of the Judge or the fairness of the process? According to one author, a "far higher proportion than previously realised of adult witnesses… have significant undiagnosed learning disorders which interfere with their ability to communicate in court". Witnesses with intellectual disability, autism, Asperger's, stroke victims, people with Down's Syndrome, the deaf, people with anxiety disorder or other mental health conditions; may all struggle to understand and to make themselves understood.

Is sufficient attention paid to what it means for a Judge to be competent in respect of the needs of the disabled, and to whether the processes we adopt are fair for such people?

"Competence" and "fairness" are not abstract concepts. They underpin the substantive core of the right to effective access to justice. As refugee law judges, we can only provide effective access to justice if we are

[1] M Crock, R McCallum (2012) "Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities" *International Journal of Refugee Law* (2012) 24 (4): 735.

alert to the existence of impairments, identify how they might impact upon the way a claim for protection is advanced, and take appropriate steps to ameliorate as far as possible any potential disadvantage.

If we fail to meet these obligations, then we elevate a person's impairment into a disability. We become the societal barrier that elevates their impairment into a disability. We fail to ensure effective access to justice, in breach of the obligation imposed upon us by Article 13(1) of the 2006 Convention.

Charged with identifying potential breaches of human rights, we may inadvertently promulgate them.

(Note that the Advocacy Training Council of the United Kingdom Bar has developed a website, with the assistance of senior academics, giving guidance about questioning witnesses with a range of vulnerabilities: see the Advocates Gateway at www.theadvocatesgateway.org).

Andrew Molloy, editor

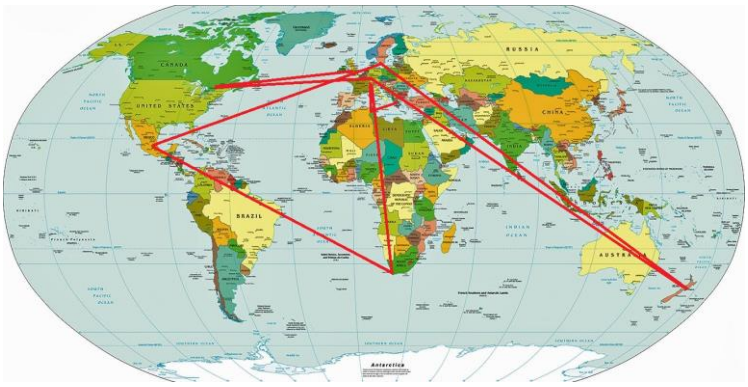
QUARTERLY UPDATE FROM THE CHAPTER COUNCIL

Dear friends and colleagues,

With the World Conference in late November looming closer, I do hope that you will be able to attend. As an organisation, we exist solely for the benefit of our members and it is, in the end, your participation that makes such events worth attending.

There are both Introductory and Advanced workshops before the conference proper and the conference itself is structured to allow the maximum participation, with most plenary sessions being followed by a 'breakout' session in which smaller groups can hear, and participate in, detailed discussion of more specialised sub-topics. It promises to be an invigorating format which will allow for greater sharing of views.

Time is being given on Day 2 of the conference for regional chapters to hold a meeting and it would be an excellent opportunity for us to get together to talk about the next 12 months for the Asia Pacific chapter. The detailed planning for the next regional conference must be underway soon and I am hoping that the Council will have settled on a venue for it by the time we get to Athens.



Over the years, the biennial World Conference has been held in some extraordinary and captivating

locations – London, Ottawa, Bern, Wellington, Stockholm, Mexico city, Cape Town, Lake Bled and Tunis. As the map shows, it has been held twice in the Americas, twice in Africa and four times in Europe (five after Athens). But it has been held only once in the Asia Pacific region. Perhaps it is time to be looking at a World Conference in our part of the world? There are some wonderful venues in Asia/Pacific which would be within reach for most, and which would benefit enormously from exposure to such a conference. I hope to raise this as an issue for the next World Council to explore after the conference in Athens.

As Aristotle said, "Excellence is never an accident. It is always the result of high intention, sincere effort, and intelligent execution; it represents the wise choice of many alternatives - choice, not chance, determines your destiny". So, make your choice and come to Athens.

I leave you with Shakespeare's contribution to *The Book of Sir Thomas More*, inviting reflection on the savage mistreatment handed out by Londoners to foreigners seeking refuge in their city in the 1500s:

> Say now the king …
> Should so much come to short of your great trespass
> As but to banish you, whither would you go?
> What country, by the nature of your error,
> Should give you harbour? Go you to France or Flanders,
> To any German province, to Spain or Portugal,
> Nay, any where that not adheres to England,
> Why, you must needs be strangers. Would you be pleased
> To find a nation of such barbarous temper,
> That, breaking out in hideous violence,
> Would not afford you an abode on earth,
> Whet their detested knives against your throats,
> Spurn you like dogs, and like as if that God
> Owed not nor made not you, nor that the claimants
> Were not all appropriate to your comforts,
> But chartered unto them, what would you think
> To be thus used? This is the strangers' case;
> And this your mountainish inhumanity.

Refugees are entitled, at international law, to protection against mountainish inhumanity and we, in our daily work, are one of the critical bulwarks against it.

Martin Treadwell
President

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RECENT JUDICIAL DECISIONS AND DEVELOPMENTS IN PROTECTION LAW IN THE REGION

Australia **– The concept of intention in Australia's complementary protection regime**

SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection [2017] HCA 34

Justice Debbie Mortimer[2]

In 2012, the Australian Parliament amended the Migration Act 1958 (Cth) to introduce what is generally called a "complementary protection" regime. In the second reading speech to those amendments, the Minister explained that there was a "hole" in Australia's protection visa application processes, because there was no protection for an applicant from torture or cruel or inhuman treatment in her or his country of nationality, where the circumstances of that treatment fell outside the attributes identified in Art 1A of the Convention Relating to the Status of Refugees (1951).[3]

It was no coincidence that at this time, Australian decision-makers were dealing with very high numbers of applicants from countries to which it would be dangerous to return, even if not for Convention reasons. By these amendments, introduced through the Migration Amendment (Complementary Protection) Act 2011 (Cth), s 36(2)(aa) was introduced into the Migration Act. The provisions took effect on 24 March 2012. Section 36(2)(aa) provides a criterion for the grant of a protection visa which is sourced in Australia's protection obligations outside the Refugees Convention, in particular in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR): see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; 210 FCR 505 at [99] (Lander and Gordon JJ).

Since the introduction of the 2012 amendments, decision-makers have been required to consider the Art 1A criterion (contained in s 36(2)(a)), and if that is not satisfied, to then consider whether the applicant is owed protection obligations because of satisfaction of the criterion in s 36(2)(aa).

The criterion for complementary protection is expressed in that provision in the following way. The applicant must be a non-citizen in Australia in respect of whom:

> the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

The statutory term "significant harm" is defined in s 36(2A). It has three key aspects. There must be a real risk the non-citizen will be subjected to "torture", "cruel or inhuman treatment or punishment" or "degrading treatment or punishment".

In turn, the phrase "cruel or inhuman treatment or punishment" is defined in s 5(1) of the Act. It is defined as an act or omission by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

Similarly, the definition of "degrading treatment or punishment" in s 5(1) of the Act also defines that phrase by incorporating an element of intention. Degrading treatment or punishment is defined to mean an act or omission "that causes, and is intended to cause, extreme humiliation which is unreasonable".

[2] Federal Court of Australia. I am indebted to my Associate, Chadwick Wong, for his assistance with this note.
[3] See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 February 2011 at 1356-1359.

The definition of "cruel or inhuman treatment or punishment", and in particular the phrase "is intentionally inflicted on a person", was the subject of recent consideration by the High Court of Australia in *SZTAL v Minister for Immigration and Border Protection*; *SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34, a decision handed down on 6 September 2017.

Before turning to a brief outline of the facts of *SZTAL*, the lead case, it is important to note that what the Australian Parliament has done through the 2012 amendments is to introduce a statutory definition of the ICCPR and CAT concept of "cruel or inhuman treatment or punishment". In neither of those conventions is that term defined. However, as the majority in the High Court pointed out at [4] of its reasons in *SZTAL*, the statutory definition in s 5(1) is a "partial adaptation" of the definition of torture which appears in Art 1 of the CAT. Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

Thus, the 2012 amendments, while having as their avowed purpose the implementation of Australia's obligations under the ICCPR and the CAT, expressed a legislative choice to require the conduct feared by an applicant to have an intentional quality. What kind of intentional quality is required is the subject of the High Court's decision.

SZTAL was one of the thousands of asylum cases which have been presented to Australian decision-makers by Tamil applicants, who have fled Sri Lanka. One common theme in these claims is that people have left Sri Lanka illegally, either on a false passport or without a passport, and make a claim to fear harm because of that illegal departure, if they are returned to Sri Lanka.

Under the Immigrants and Emigrants Act 1945, it is an offence in Sri Lanka to depart Sri Lanka other than via an approved port of departure. Penalties for leaving illegally include imprisonment for up to five years, and a fine of 200,000 Sri Lankan rupees. Australian decision-makers commonly rely upon and accept information provided by the Australian Department of Foreign Affairs and Trade (DFAT) for the purpose of assessing protection visa applications. DFAT information provided to decision-makers on this issue is generally to the effect that, where Sri Lankan police suspect an illegal departure, the returnee is arrested and charged under the Immigrants and Emigrants Act. DFAT's information states that this generally occurs at the airport, and detainees are then transported to the closest magistrates' court at the first available opportunity after investigations have been completed. The court will then make a determination whether the individual should remain in police custody or be granted bail. If a magistrate is not available, it may be the case that a detainee will be held in a nearby prison. If bail is not granted, it will also be the case the detainee will be held in prison pending any trial.

The Tribunal's decision in SZTAL was summarised by Edelman J at [106]-[108] of his Honour's reasons:

> The Tribunal found that SZTAL would be remanded for a short period of time of between one night and several nights, and possibly up to two weeks. As to the treatment during remand, the Tribunal referred to country information which indicated that prison conditions in Sri Lanka did not meet international standards, with concerns of "overcrowding, poor sanitary facilities, limited access to food, the absence of basic assistance mechanisms, a lack of reform initiatives and instances of torture, maltreatment and violence". The Tribunal quoted from a former United Nations Special Rapporteur on Torture, cited by the United States Department of State, who reported that "the combination of severe overcrowding and antiquated infrastructure of certain prison facilities places unbearable strains on services and resources". The Tribunal also referred to a press report which quoted returnees who said that they "slept on the floor in line" with their "bodies pressed up against each other", that they "could not roll over", and that some nights they had to take turns sleeping due to lack of space.
>
> The Tribunal described how Sri Lankan authorities have acknowledged the poor prison conditions but said that a lack of space and resources has inhibited reform. The Tribunal cited a call by the President of Sri Lanka for "an overhaul of the

> penal code and for the lower courts to reduce prison congestion and expedite the hearing of cases", as well as plans to construct and expand several prisons in partnership with the International Committee of the Red Cross.
>
> The Tribunal determined that a "relatively short period of remand" did not amount to an act or omission by which severe physical or mental pain or suffering is intentionally inflicted, nor did it amount to an act which could reasonably be regarded as cruel or inhuman. The Tribunal reiterated the requirement for intentional infliction of cruel or inhuman treatment or punishment or degrading treatment or punishment and said that "[m]ere negligence or lack of resources does not suffice". The Tribunal continued:
>
> > "The country information above indicates that the poor prison conditions in Sri Lanka are due to a lack of resources which the government appears to have acknowledged and is taking steps to improve, rather than an intention by the Sri Lankan government to inflict cruel or inhuman treatment or punishment or cause extreme humiliation."

The question was whether in those circumstances the harm could be said to have been "intentionally inflicted". It can be seen the Tribunal concluded this was not the case.

On judicial review, the Federal Circuit Court (Judge Driver) found no error of law in the Tribunal's approach, finding that the term "intentionally inflicted" asks the decision-maker to determine whether there is an actual, subjective intention on the part of the person to bring about suffering by her or his conduct. His Honour reached the same conclusion in relation to the words "intended to cause" in the definition of degrading treatment or punishment: see *SZTAL v Minister for Immigration & Anor* [2015] FCCA 64 at [49]. A majority of the Full Court of the Federal Court (Kenny and Nicholas JJ) upheld his Honour's approach: see *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69; 243 FCR 556 at [68].

In the High Court, the majority judgment (Kiefel CJ, Nettle and Gordon JJ) upheld the approach taken by the Federal Circuit Court and the Full Court of the Federal Court at [8]. Edelman J reached the same conclusion as the majority, finding (at [103]) that:

> … the ordinary meaning of intention to these appeals, therefore, would ask whether a person (the relevant Sri Lankan official) will *mean* to produce a particular result such as the severe pain or suffering which is an element of the definition of cruel or inhuman treatment or punishment.
>
> (Emphasis in original.)

His Honour also endorsed the phrase "actual, subjective, intention" as an appropriate description of what is meant by "intentionally inflicted" in s 5(1) of the Act: see [114] of his Honour's reasons. Gageler J dissented.

In *SZTAL*, the appellants' contention was that if a person did an act knowing the act would, in the ordinary course of events, inflict pain or suffering or cause extreme humiliation, this was sufficient for intention. Relevantly to the circumstances facing persons likely to be detained in Sri Lankan prisons, it was said that prison officials could be found to "intend" the infliction of pain or suffering because they should be assumed to be aware of the prison conditions likely to give rise to such harm.

In rejecting this approach, the majority applied (as the majority in the Full Federal Court had) the approach taken in Australian criminal law to intention, restated in the decision of the High Court in *Zaburoni v The Queen* [2016] HCA 12; 256 CLR 482. There, a majority of the Court found that the ordinary and natural meaning of the word "intends", which is the one that should be applied, is to "have in mind". At [15] of *SZTAL*, the majority said:

> In *Zaburoni*, the plurality held that a person is ordinarily understood to intend a result by his or her action if the person means to produce that result. What is involved is the directing of the mind, having a purpose or design. So understood, intention refers to a person's actual, subjective, intention, as the Tribunal and Kenny and Nicholas JJ in the Full Court concluded.

(Footnote omitted.)

In taking this approach, the majority in *SZTAL* rejected a second and alternative meaning of "intention" which can be found in s 5.2(3) of the Criminal Code (Cth). This provides:

> 5.2 Intention
>
> …
>
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.
>
> (Emphasis added.)

The second limb of this definition was, in effect, the meaning for which the appellants in *SZTAL* contended, unsuccessfully. The majority held that, although it was possible to find decisions in international law supporting the appellants' contention, there was no settled meaning of "intentionally" to be derived from any international law sources: at [18], see also Edelman J at [84]. Further, in rejecting the use of the second and alternative definition from s 5.2(3) of the Criminal Code, the majority described this alternative definition as reflecting a "policy choice concerning criminal responsibility". Their Honours held that there was nothing in the circumstances of the introduction of the complementary protection regime into the Migration Act in 2012 which suggested Parliament intended to include such an alternative meaning of intention in that context. The majority saw such a meaning as "wider than the ordinary meaning of that word would allow": see [23]. The majority saw no appropriate parallels between legislative choices as to the scope of criminal responsibility for conduct and the provisions of the complementary protection regime. In applying these principles the majority concluded (at [27]-[29]):

> An intention of a person as to a result concerns that person's actual, subjective, state of mind. For that reason, as the plurality in *Zaburoni* were at pains to point out, knowledge or foresight of a result is not to be equated with intent. Evidence that a person is aware that his or her conduct will certainly produce a particular result may permit an inference of intent to be drawn, but foresight of a result is of evidential significance only. It is not a substitute for the test of whether a person intended the result, which requires that the person meant to produce that particular result and that that was the person's purpose in doing the act.
>
> <u>Intention applied</u>
>
> In the present cases the question for the Tribunal was whether a Sri Lankan official, to whom knowledge of prison conditions can be imputed, could be said to intend to inflict severe pain or suffering on the appellants or to intend to cause them extreme humiliation by sending them to prison. That question was to be answered by the application of the ordinary meaning of "intends", as the Tribunal concluded.
>
> As has been explained, evidence of foresight of the risk of pain or suffering or humiliation may support an inference of intention. In some cases, the degree of foresight may render the inference compelling. But in the present matters, having regard to the evidence before the Tribunal (including evidence about what the Sri Lankan authorities might know), the Tribunal was entitled to conclude that it was not to be inferred that the Sri Lankan officials intended to inflict the requisite degree of pain or suffering or humiliation.
>
> (Footnotes omitted.)

Edelman J, agreeing with the majority in the result, took a different approach. His Honour contrasted the "ordinary and natural meaning" of intention as set out by the majority, with what his Honour called "oblique intention". His Honour drew this concept from legal philosophers such as Jeremy Bentham who, his Honour said, had identified an oblique intention as arising where a result "was in contemplation, and appeared likely to ensue in the case of the act's being performed": see [61] of his Honour's reasons. After quite a lengthy analysis, his Honour rejected the application of this approach to "intentionally inflicted" in

s 5(1), concluding that the Migration Act used "intention" in its natural and ordinary sense, and describing the competing meaning as an "unnatural or fictitious sense": see [68].

The dissenting reasons of Justice Gageler should be given some attention. His Honour commences his reasons in the following way (at [31]):

> A policeman arrests a person at an airport on suspicion of the person having committed a crime. The policeman does so because that is his job. That is where his job ends. The policeman knows that the person will be remanded in custody in a gaol and he knows that the conditions in the gaol will be appalling. There is nothing the policeman can do about that.
>
> Does the policeman "intend" to subject the person to the appalling gaol conditions? Not obviously; not obviously not; and no amount of contemplating the abstract meaning of "intend" will supply the answer. The answer depends on why the question is asked.

His Honour notes that the reason why the question is asked in *SZTAL* relates to the implementation of the complementary protection regime. His Honour emphasised that the answer to the question posed in the appeals turned on a constructional choice to be made in that context. In rejecting the proposition that there was a clearly discernible "ordinary and natural meaning" to be attached to the concept of intention, his Honour noted that the question whether a person "intends" a result, and what is meant by "intends" will always depend on the purpose and scope of the rule or law to be applied. His Honour said (at [41]-[42]):

> The concept of intention is similarly insufficiently precise to allow its content in a particular statutory context always to be determined by reference merely to ordinary or grammatical meaning. That is particularly so where the question is whether a person "intends" a result which the person is aware will occur but which the person does not want to occur, either as an end in itself or as a means of achieving some other end. Does the dentist "intend" to cause pain to the patient? Does the judge who finds for the plaintiff knowing that the damages will bankrupt the defendant "intend" to bankrupt the defendant? Does the "strategic bomber" who drops the bomb on the enemy munitions factory "intend" to kill the children in the adjacent school? The answer will not be found in a dictionary, and neither common sense nor conceptual analysis can be expected to yield a single answer satisfying across a range of circumstances irrespective of why the question is asked.
>
> Whether the concept of intention invoked in a particular statutory context is objective or subjective and, if subjective, whose and what state of mind will suffice to constitute the requisite intention will vary from statute to statute. Where the question is one of subjective intention as to the result of conduct, "introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous". But whether a man or woman is to be taken subjectively to intend the known or expected consequences of his or her act is less susceptible of generalisation. Intention as to a result will sometimes require the purpose or design of bringing about the result. At other times, intention as to result will sufficiently be found in willingness to act with awareness of the likelihood of the result. Absent express legislative indication as to which of those, or perhaps other, alternatives is applicable in a given context, the choice between them becomes a matter of construction. Neither alternative can be dismissed simply on the basis that it lies beyond the ordinary meaning of intention.
>
> (Footnotes omitted.)

Noting that the 2012 amendments were intended to ensure that all claims by visa applicants that may engage any of Australia's non-refoulement obligations in human rights instruments should be determined through one process, Gageler J emphasised that to achieve that purpose an interpretation which closely aligns the statutory criteria with Australia's obligations under Art 7 of the ICCPR and Art 3 of the CAT is to be preferred: see [43].

The critical difference in approach between the majority and Gageler J is that his Honour does not start with any kind of presumption or assumption that the concept of intention has an "ordinary", "natural", or "grammatical" meaning. Rather, his Honour identifies a constructional choice, and sees the concept of intention as a fluid one depending on context.

Gageler J also spends some time considering the creation of the offence of torture in the Criminal Code, but from a different perspective. His Honour notes that the creation of this offence gave effect to Australia's obligation under Art 4 of the CAT to criminalise acts of torture. In doing so, the Criminal Code chose to adopt two alternative definitions. His Honour describes them in the following terms at [47]:

> The requisite intention will exist in either of two scenarios. One is where the perpetrator means to engage in the conduct and means to bring about infliction of severe physical or mental pain or suffering on the victim. The other is where the perpetrator means to engage in the conduct and is aware that infliction of severe physical or mental pain or suffering on the victim "will occur in the ordinary course of events".
>
> (Footnote omitted.)

His Honour went on to observe that for the Commonwealth Parliament to take one approach to the definition of torture in Art 1 of the CAT when legislating to implement its obligations under Art 3 of the CAT, and a different approach to the same definition in legislating to implement its obligations under Art 4 of the CAT, is something that would seem "strangely inconsistent". His Honour saw no basis to attribute different legislative intentions to Parliament in those circumstances: see [49].

His Honour also saw a wider notion of intention as consistent with the scope of Art 7 of the ICCPR. In doing so, his Honour endorsed the appellants' reliance on the decision of the European Court of Human Rights in *Kalashnikov v Russia* [2002] ECHR 596; (2003) 36 EHRR 34, where the European Court concluded that there had been a violation of Art 3 of the European Convention on Human Rights (ECHR) (which mirrors Art 7 of the ICCPR) by the gaoling of a prisoner in admittedly unsanitary and overcrowded prison conditions for a long period of time, with a serious effect on his physical health. In this decision, the European Court made it clear that there was no positive intention to humiliate or debase the prisoner, but nevertheless concluded there was a contravention of Art 3 of the ECHR. Gageler J said at [54]:

> The circumstances of the prisoner who was the victim in *Kalashnikov v Russia* can be treated as illustrative of the circumstances of a person who would come within the scope of Australia's protection obligation under Art 7 of the ICCPR. What the illustration shows is that to understand the underlying notion of intention in each of the three statutory definitions as met where a perpetrator acts with awareness that the consequence to the victim will occur in the ordinary course of events is to adopt a construction which allows the statutory criterion for the grant of a protection visa better to meet Australia's obligation under Art 7 of the ICCPR, and which for that reason best achieves the purpose for which the complementary protection regime was introduced.

Thus, Gageler J preferred a construction of intention in the definition of significant harm which allowed for either of the two scenarios to which his Honour refers at [58] of his Honour's reasons:

> [W]here the perpetrator means to engage in conduct meaning to bring about the result adverse to the victim; and where the perpetrator means to engage in conduct aware that the result adverse to the victim will occur in the ordinary course of events.

The outcome of this appeal has consequences for a very large number of cases currently before Australian administrative decision-makers, and before the Federal Circuit Court and the Federal Court of Australia. Many cases on judicial review have been held in abeyance awaiting the outcome of this decision. The outcome will affect all those cases where there is a claim to fear harm from prison conditions in Sri Lanka because of being imprisoned on remand or after sentence in relation to illegal departure. There will be little or no prospects of such a claim succeeding unless the applicant is able to persuade the decision-maker (or a court on review) there is evidence that Sri Lankan officials "mean" to inflict harm on the applicant, were he or she to be returned to those conditions.

Once again, it might be said that (save for the reasoning of Gageler J) the Australian High Court has taken a stance, when presented with a constructional choice, that turns further away from the approach of international law, rather than towards it.

New Zealand **– Credibility and the nature of specialist decision-makers**

AR v Immigration and Protection Officer [2017] NZHC 2039

In this recent decision from the New Zealand High Court, Downes J was called upon to consider the role and responsibilities of decision-makers hearing refugee claims, when assessing issues of credibility.

The issue arose because leave to appeal/judicially review a decision of the Immigration and Protection Tribunal had been granted in unusual circumstances. Downes J noted:

> "Duffy J did 'not think the Tribunal's assessment can be faulted'. However, the Judge considered 'how credibility assessments should be made in claims for refugee status' raised a question of law of general and public importance. The Judge granted leave for an appeal and judicial review on this issue."

Downes J did not, however, go on to find that there was any existing vacuum in the law as to how credibility ought to be assessed. He noted the well-known decisions in *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA), and *BV v Immigration and Protection Tribunal* [2014] NZCA 594 and, after reviewing the principles of law arising in those cases, commented:

> "[W]hile leave was granted on the basis credibility assessment in this context gave rise to a question of law of general and public importance, it is not clear the jurisprudence was really brought home to the Judge."

After recording that there are "dangers to prescription in this context", Downes J noted in support both the fact that the general principles are well-settled and that the New Zealand Parliament "may be thought to have signalled a margin of appreciation to the Tribunal's approach in this area" by the broad powers it had given to it. He went on, perhaps most importantly, to hold that:

> "[C]redibility assessment is acutely fact-sensitive. An approach that may work in one case may not work in another. Doubt therefore attaches to whether there is any utility in attempting to go beyond the general, particularly when, as observed, Parliament has refrained from doing so and instead empowered the Tribunal to determine its own approach."

Finally, the Court acknowledged:

> "[T]here are also dangers of over-refinement in this area, or what the Court of Appeal in *BV* described as "labels". Courts and Tribunals make credibility assessments on a daily basis. They do so with little explicit conceptual guidance, for the function is both intensely practical and intrinsic to their role."

Practitioners and decision-makers looking for guidance as to the approach to credibility assessment really need look not much further than the three cases cited by Downes J and his helpful assessment of them at [10]-[23] of the decision.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

- **IARLJ World Conference**

Athens, 25/26 November 2017 (workshops) and 27 November- 1 December (conference) www.iarlj.org

- **Kaldor conference - *The Global Compacts on Refugees and Migration***

Law Theatre, UNSW Sydney, 24 November 2017 www.kaldorcentre.unsw.edu.au

Keynote Speaker: Professor Elizabeth Ferris - a leading expert on forced migration. She has been closely involved in a range of international negotiations relating to displacement, including the 2016 UN Summit on Refugees and Migrants in New York.

- **8th International Conference on Human Rights Education**

Montreal, 30 November - 3 December 2017 https://equitas.org/news-and-events/conference-2017

An international forum to explore human rights education solutions to global challenges. It will include practical workshops and insightful sessions featuring the latest tools, knowledge and good practices in human rights education. The Conference will be bilingual, in French and English.

IN THE LIBRARY

The following new reports are noted:

ASEAN Parliamentarians for Human Rights (APHR), 14 September 2017, ***Examining Human Rights in the Context of ASEAN Regional Migration***
Brief summary report of findings from a fact-finding mission to examine issues related to migrant workers, refugees, and human trafficking in Malaysia and in the broader ASEAN region.

Center for Strategic and International Studies (CSIS), 28 August 2017, ***Global Trends in Terrorism Through 2016***
This working draft provides a graphic overview of terror data and trends, mostly for 2011-2016, by country and by region.

International Crisis Group, 5 September 2017, ***Buddhism and State Power in Myanmar***
This report provides a detailed background on the activities of Myanmar's most prominent nationalist organization, the Association for the Protection of Race and Religion (commonly called MaBaTha) and other nationalist groups, as well as of the motivations and views of its members and supporters.

UN Human Rights Council, 13 September 2017, ***Situation of human rights in Yemen, including violations and abuses since September 2014***
Records violations and abuses of human rights and international humanitarian law since September 2014. Coalition airstrikes continued to be the leading cause of civilian casualties.

COUNTRY INFORMATION UPDATE

IN THE MEDIA

A selection of news articles and media reports that you may have missed over the past month.

Australia offers to pay Rohingya refugees to return to Myanmar **,** 19 September 2017, **Guardian**
Asylum seekers in the Australian-run detention centre on Papua New Guinea's Manus Island have been pressured by officials to return to their home countries, even if they face violence. The Guardian understands up to seven Rohingya may be facing return from Manus Island.

Cameroon's controversial anti-terror law used to muzzle critical press, 20 September 2017, **Mail and Guardian** (South Africa)
The Cameroonian government has used the ambiguous provisions of an anti-terrorism law to arrest and harass journalists, according to a new report by the Committee to Protect Journalists (CPJ).

China to push for greater cooperation on graft, terrorism at Interpol meeting, 24 September 2017, **Reuters**
Beijing has been hosting Interpol's general assembly amid concerns from some quarters that it is using the Interpol "red notice" system for its own goals.

Half a century of India's Maoist insurgency, 21 September 2017, **The Diplomat**
A political analysis of the long-running conflict. Includes graphics showing affected areas in India, and casualty figures.

Six major humanitarian challenges confronting the UN General Assembly, 18 September 2017, **Integrated Regional Information Networks (IRIN)**
Issues mentioned include climate change, famine, and the decreased peacekeeping budget. Article contains links to information on specific countries/regions.

RECENT ELECTIONS

GERMANY (PARLIAMENT - BUNDESTAG)
Final results: Angela Merkel must put together a coalition of conservatives, Greens and the business-friendly Free Democrats (FDP). Merkel will serve a fourth term as Chancellor, but her party lost significant voter support and her leadership is not assured. The far-right Alternative für Deutschland (AfD) party, which became the Bundestag's third largest party, has been shaken by the announced departure of its co-chair, Frauke Petry.
German elections 2017: full results**,** 25 September 2017, **Guardian**
German election, [ongoing updates], **DW [Deutsche Welle]**

IRAQ (KURDISTAN) (REFERENDUM ON INDEPENDENCE)
Final results: More than 92% of voters in Iraqi Kurdistan voted for an independent state. Baghdad has threatened to send troops, seize oil fields and shut international airports in the Kurdish region. Iraq has called the vote illegal.
Iraq escalates dispute with Kurds, threatening military action, 27 September 2017, **New York Times**
More than 92% of voters in Iraqi Kurdistan back independence, 28 September 2017, **Guardian**

RECENT AND FORTHCOMING ELECTIONS

Country	Election Type	Date
Liberia	House of Representatives & President	10 October 2017
Kyrgyzstan	President	15 October 2017
Kenya	President (Re-run)	26 October 2017

THE CLOSING WORD

This issue features a transcript of an address given by Judge San Juan-Torres of the Philippines, during the 7th Annual Geneva Forum of Judges and Lawyers in November 2016. The Forum had the theme "Large Movements of Refugees and Migrants: The Role of Judges and Lawyers" and was organized by the International Commission of Jurists and the Republic and Canton of Geneva, Switzerland. Judge Torres was introducing the workshop topic "General Reflections on Separation of Powers and the Special Role of the Judiciary in the Rule of Law".

Fellow participants, good afternoon.

To the organizers, the ICJ and co-organizers, I have to thank you for this opportunity to participate in this event. It is my first time to be with a group of highly eminent and experienced migration and asylum experts and for this I am truly grateful and at the same time humbled. I must admit though that in sharing my general reflections, I speak before you not only as a judge but also on a personal perspective, having worked in a refugee camp as a teacher before I entered law school and having done my Masters' thesis and again worked as a legal intern in appeals processing in a refugee camp during my law school years .

Let me begin with this reality anecdote.

On my first day in Geneva, I had an interesting and surreal conversation with someone while on a brief walk around town. I had a little difficulty finding my way back to the hotel so I asked help from a young lady who, incidentally, was on her last year of her master's degree in law. While walking me to the correct bus stop, I learned that she intended to specialize in asylum law and so we had quite a short but enlightening chat. When I told her that, at least in our part of Asia we have not as yet experienced a massive and critical exodus as what we see in Europe today for instance, the Syrian refugees, she simply remarked "please don't do another Dublin, that was a mess".

This struck me as a gentle warning with the realization that this is why we are in this gathering. As we see in current human migration movements, everywhere there are issues of arbitrariness, violence, discrimination, and at some point a breakdown of the rule of law.

The realities we witness today, with the vast masses in daily misery, economic breakdowns, social alienation and cultural degeneracy, are a flagrant contradiction of the dream of a compassionate and humanized global community.

So, they ask for justice and this century is now tasked to answer for those who hunger for right and justice. Who will answer? Who will adjudicate? Who will enforce these demands for right and justice? That is our purpose. That is our challenge as judges and lawyers.

The Judiciary at all levels must be able to respond wherever they get an opportunity to do so, on the very lines on which our respective Supreme Courts are laying down the law and jurisprudence, to make justice accessible to the common person at the lowest court level, regardless of race, nationality, gender or creed.

Some questions we may reflect on the role of judges in large-scale migration and refugee movement are:

1. Is it enough for a judge to act in accordance with law, regardless of one's personal conscience, even when the human movement environment is highly charged with confusion, despair, poverty, and violence? What can a judge who follows their conscience do under such circumstances, except to accept that they are functioning in accordance with law? Should it not require a different philosophical disposition for a judge to intervene decisively in critical situations?

2. How can a judge, who follows the dictates of conscience, deal with the limitations to judicial review brought about by way of legislation and particularly by the Constitution itself? Can a judge escape from accepting the limitations/restrictions or does it require the acceptance of other norms such as the inherent powers of the judiciary and the universal norms established by the international legal instruments to address those situations?

3. What is the link between justice and the work of a judge? How does one deal with legally sanctioned injustice? How about the link between equity, transparency and accountability vis-a-vis the rule of law from a judge's point of view?

4. Acting on the premise that of all three (3) principal branches of government, the Judiciary is the last bastion of justice that people go to, is the Judiciary performing this role as the people's remedy of last resort? The executive and legislative branches may be perceived not only as less reliable but in some cases, may also be seemingly dangerous, a we see now in some countries. Can the Executive undermine this role by executive action and can the Legislature also undermine this, by bringing legislation to curtail and limit the role of the Judiciary as the remedy of last resort? Has there been a trend? If so, can we not trace how this was developed?

In our world today, there are international instruments which have laid down norms, values and standards after discussions involving representations of various countries. These international conventions need to be part of each country's law. But it is not necessary to wait until these international instruments are incorporated into domestic legislation. Judges could bring in the norms and standards set out in international instruments into the law of the country by incorporating these in their jurisprudence particularly in the area of refugee and asylum law. The Judiciary, while exercising its power of judicial review, could incorporate these international conventions. For this purpose, there needs to be a more in-depth knowledge of migration and asylum law among the members of the Bench, from the top and down the line.

For the Judiciary to play this role, much transformation has to take place in its philosophical outlook determining the basic tenets of the jurisprudence that guide them in their approach to the administration of justice.

Also, the limited concepts of justice which have found expression in the countries' respective Constitutions, the laws and even some of the customs and traditions are major challenges faced by the Judiciary that affect judicial intervention based on professional ideals. An **enlightened public opinion** plays a crucial role in lifting these legal barriers so as to constitutionally recondition and expand judicial review without violating the separation of powers doctrine.

Thus, the Judiciary must be **sensitive to the public outcry and outrage on injustice**. It is only in this manner that public confidence in justice could be restored particularly in critical issues like large-scale migration and refugee flows, dislocation of people, and other similar crisis charged environment which require a GENUINE response from the Judiciary.

As judges, how then can the rule of law transform the rule of life? After all, when we consider large scale migration and refugee flow, it all boils down to the essence on the right to life?

Ultimately, large scale migration and refugee flow being a multi-layered issue, I believe it is still the holistic best practices approach, through consultations with stakeholders that will point the way forward for judges and lawyers to raise awareness of and to address viable and durable solutions. I hope that we as judges and lawyers can start creating ripples and be the harbingers of putting migration and asylum law into a new dimension within our respective jurisdictions.

Thank you.

MARIA JOSEFINA G. SAN JUAN-TORRES

Footnote from the President:

I have just returned from a week in Taiwan, undertaking judicial training there because there is a Refugee Bill currently before the Legislative Yuan (Parliament). It has passed its first reading and will, hopefully, pass the second after some further revision and be enacted. Although Taiwan is not a member of the United Nations, it plans to adopt Article 1A(2) as the threshold for recognition of refugee status and it already adheres to the ICCPR, leading (one hopes) to a consolidated complementary protection regime. These are encouraging and positive developments. Judges in Taiwan expressed great interest in the Association and I hope that a number will join.

Time does not permit a detailed explanation here of the provisions of the Refugee Bill but I will go into it in more depth in the next issue.

Best wishes

Martin Treadwell