FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Citizenship v SZQOT [2012] FCAFC 141

Citation:	Minister for Immigration & Citizenship v SZQOT [2012] FCAFC 141
Appeal from:	SZQOT v Minister for Immigration & Anor [2012] FMCA 84
Parties:	**MINISTER FOR IMMIGRATION & CITIZENSHIP v SZQOT and JOHN GODFREY IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number:	NSD 339 of 2012
Judges:	**MARSHALL, NICHOLAS AND YATES JJ**
Date of judgment:	12 October 2012

Catchwords:	**MIGRATION –** whether Independent Merits Reviewer applied incorrect test when assessing first respondent's refugee status – whether reference to "severe harm" as opposed to "serious harm" reflected jurisdictional error – whether harm suffered by husband as a result of being separated from his wife was capable of supporting the husband's claim for refugee status
Legislation:	*Migration Act 1958* (Cth) s 91R(1) and (2) UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p 137
Cases cited:	*Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *Collector of Customs and Pozzolanic Enterprises Pty Ltd* [(1993) 43 FCR 280 *Craig v State of South Australia* (1995) 184 CLR 163 *Gersten v Minister for Immigration & Multicultural Affairs* [2000] FCA 855 *Kanagasabai v Minister for Immigration & Multicultural Affairs* [1999] FCA 205 *Minister for Immigration & Multicultural Affairs v Khawar* (2000) 101 FCR 501

	Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158
Date of hearing:	22 May 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	80

Counsel for the Appellant:	Mr G R Kennett SC
Solicitor for the Appellant:	Clayton Utz
Counsel for the First Respondent:	Mr J D Smith
Solicitor for the First Respondent:	Legal Aid NSW
Solicitor for the Second Respondent:	The Second Respondent submitted save as to costs

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	

GENERAL DIVISION	NSD 339 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION & CITIZENSHIP Appellant
AND:	SZQOT First Respondent JOHN GODFREY IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent
JUDGES:	MARSHALL, NICHOLAS AND YATES JJ
DATE OF ORDER:	12 OCTOBER 2012
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appellant is given leave to rely upon the supplementary notice of appeal filed 30 March 2012.

2. The appeal is dismissed.

3. The appellant pay the first respondent's costs of the appeal.

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

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DATE:	12 OCTOBER 2012
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MARSHALL J

INTRODUCTION

1 The appellant Minister ('the Minister') appeals from a judgment of the Federal Magistrates Court which allowed the first respondent's application for judicial review of a recommendation that he not be recognised as a refugee to whom Australia owes protection obligations under the United Nations *Convention Relating to the Status of Refugees* (1951) and its *1967 Protocol* ('the Convention'). The first respondent is a citizen of Iraq and a Shia Muslim. He entered Christmas Island after being intercepted on a vessel which he boarded in Indonesia. He applied for a protection visa on Christmas Island. The second respondent, an Independent Merits Reviewer ('the Reviewer') assessed the first respondent's claims after a delegate of the Minister rejected his application for a protection visa.

2 The Reviewer rejected the first respondent's claim that he feared persecution if returned to Iraq in the reasonably foreseeable future on the ground of his political opinion. The first respondent did not contend that the Reviewer's finding was affected by jurisdictional error when seeking judicial review in the court below.

3 The second claim made by the first respondent before the Reviewer was that he feared persecution if returned to Iraq in the reasonably foreseeable future on account of his imputed religious views due to his marriage to a Thai woman of Sunni Muslim faith. The Reviewer rejected that claim. The Federal Magistrates Court held that the Reviewer made a jurisdictional error by rejecting that claim and by failing to deal with a claim by the first respondent of psychological harm by reason of the separation from his wife. The Minister challenges, in this appeal, each of the above holdings of the court below.

4 The issues at the heart of this appeal stem from what is contained in the Reviewer's recommendation at [63] and [64].

5 At [63], the Reviewer found as follows:

> the first respondent does not face a risk of "severe harm" in Iraq because of his marriage to a Thai Sunni Muslim;

the fact that he cannot live in Thailand and that his wife is not in Iraq arises from the operation of the laws of each country;

the first respondent's wife is not willing to return to Iraq and she and the couple's child have no automatic right to enter Iraq;

the first respondent has not sought to register his marriage or the birth of his daughter with Iraqi authorities;

absent the willingness of his wife to return to Iraq and absent the right for his wife and child to enter Iraq, the first respondent does not have a well-founded fear of persecution for a Convention reason because he is in a mixed marriage;

should his wife return to Iraq, *she* would be subject to harassment faced by other non-Iraqi women but the first respondent would not be at risk of severe harm because he is married to a Sunni Muslim woman from Thailand.

6 At [64] the Reviewer said:

Unfortunately I am unable to solve this real humanitarian problem of a separated family. I am able only to consider the claimant against the Refugees Convention. I find the circumstances of this case do not ground a well-founded fear of persecution for a Convention reason.

the court below

7 The federal magistrate set out the text of [63] of the Reviewer's recommendation. His Honour observed that the Reviewer referred to the first respondent not facing a risk of "severe harm" when s 91R(1)(b) of the *Migration Act 1958* (Cth) ('the Act') refers to "serious harm".

8 At [21] – [22], the federal magistrate said:

It is, in my view, imperative that decision-makers dealing with claims of persecution use the same language as is employed in the Refugees Convention and in relevant provisions of the Migration Act…If decision-makers depart from the language of the section a question arises whether they are applying a different test of harm to that mandated by Parliament. Such a departure is so problematic that, in my view, it is likely to point to jurisdictional error unless the Court is able to conclude that the facts as found by the decision-maker could not constitute a finding of persecution on a test of serious harm.

9 At [23], his Honour rejected a submission made by Counsel for the Minister that the Reviewer had found that the first respondent would not be subject to any harm if returned to Iraq. The federal magistrate said that there was no clear finding to that effect.

10 His Honour also said at [23] that:

…there was a sufficiently clearly articulated claim of psychological harm made by the applicant by reason of his separation from his wife in Iraq which required consideration by the Reviewer.

The federal magistrate referred to notes made in the original entry interview of the first respondent. Those notes record the first respondent pointing to photos of his wife and daughter and referring to his inability to see them. The federal magistrate said at [24] that:

…there was no abandonment of the claim of psychological harm by reason of the separation.

11 Further at [25], his Honour said:

The material before the Reviewer…required a consideration of whether the applicant would suffer serious harm if he were required to live in Iraq without his family, namely his wife and child. That claim was not considered except as a humanitarian issue, and, in failing to consider that claim as a claim of persecution…I find that the Reviewer fell into jurisdictional error.

the appeal grounds

12 In his Notice of Appeal filed on 1 March 2012, the Minister raised the following two grounds of appeal:

1. The Federal Magistrate erred in holding that the Second Respondent mistakenly applied a different test from the test he was required to apply pursuant to s 91R(2) of the *Migration Act 1958* (Cth).

2. The Federal Magistrate erred in holding that there was a sufficiently articulated claim of psychological harm made by the Applicant by reason of his separation from his wife in Iraq which required consideration by the Reviewer.

13 On 30 March 2012, the Minister filed a supplementary Notice of Appeal in which Ground 2 was reformulated as follows:

2. The Federal Magistrate erred in holding that:

(a) the Second Respondent had failed to consider whether the First Respondent's separation from his family constituted persecution of a kind that would give rise to protection obligations under the Refugees Convention; and

(b) the First Respondent's separation from his family was capable of being found to constitute persecution of that kind.

leave to raise grounds not advanced below

14 Before the court below, the Minister submitted that the first respondent did not make a claim of persecution based on family separation before the Reviewer. The

Minister now wishes to submit that, to the extent that such a claim was made, the Reviewer dealt with it. That is why proposed Appeal Ground 2(a) is so formulated. The Minister says that proposed Ground 2(b) deals with whether the Reviewer fell into jurisdictional error by the way in which he dealt with the claim.

15 The Minister submits that leave should be granted to advance the newly formulated grounds of appeal because it is in the interests of justice to do so. He contends that the supplementary grounds do not require consideration of material additional to that which was before the Reviewer and involve no real prejudice to the first respondent. The Minister refers to the judgment of the Full Court in *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158, where at [46] the Full Court said:

Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so…

16 At [48] in *VUAX* the Full Court said:

The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated.

17 In *VUAX,* the appeal ground sought to be raised by the appellant, unsuccessfully, was not raised by him as the moving party in his primary application and there was "no adequate explanation for the failure to take the point"; see [48] in *VUAX*. Here, the matters sought to be agitated on appeal arise directly from the reasons of the federal magistrate. No valid criticism can be made about the Minister's failure to predict that his Honour would approach the matter in the way he did. The issues sought to be raised by proposed Ground 2 of the appeal have sufficient merit to warrant the granting of leave to permit them to be raised. Counsel for the first respondent contends that real prejudice arises as a result of his continued stay in immigration detention. However, on 12 April 2012, the first respondent was released from immigration detention and is currently residing in Brisbane. There is otherwise no such prejudice which would outweigh the utility of strongly arguable points being raised.

18 Counsel for the first respondent submits that Ground 1 of the Notice of Appeal also raises a new matter. That is not correct. The significance of the use of the term "serious harm" was a matter in respect of which the Minister made submissions by his contention that the Reviewer had found that the first respondent would not be subject to harm at all. No leave is necessary for the Minister to seek to raise this ground. If such leave were necessary, it should be granted for the avoidance of doubt.

the substantive issues on the appeal

19 There are two substantive issues on the appeal. They are:

1. Did the Reviewer's reference to "severe harm" rather than "serious harm" when assessing the first respondent's claim to fear persecution on the ground of imputed religious belief involve a jurisdictional error?; and

2. Did the Reviewer consider the first respondent's claim concerning separation from his family? If so, did he correctly consider that any ensuing harm would not be caused for a Convention reason?

(a) The "severe harm" issue

20 The Reviewer was aware that the relevant test of harm for the purposes of an application for a protection visa was that set out in s 91R of the Act. The Reviewer referred to that section of the Act at [8] and [9] of his recommendation. The Reviewer would not have been unaware that s 91R(2) sets out, in a non-exhaustive way, instances of serious harm for the purposes of s 91R(1)(b). It is noteworthy that all six of the examples given in s 91R(2) of what constitutes "serious harm" would also fit the description of "severe harm" as those common words are ordinarily understood. They are:

(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.

21 It is more likely than not that the Reviewer's reference to "severe harm" instead of "serious harm" was a slip. In context, it was a slip of no practical consequence. The degree of harm which the first respondent may suffer if returned to Iraq was not a topic of controversy before the Reviewer or the court below. Courts exercising judicial review of decisions of administrative tribunals and decision-makers should not be distracted from determining whether a decision is affected by jurisdictional error by fastening on "looseness in the language" or examining reasons "with an eye keenly attuned to the perception of error"; see *Collector of Customs and Pozzolanic Enterprises Pty Ltd* [(1993) 43 FCR 280 at 287, as approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ. See also Kirby J at 291.

22 The Reviewer did not impose a test for assessing qualification for a protection visa by reference to a wrong standard by referring to "severe harm". In short, nothing turned on his use of the words "severe harm" in place of what is referred to as "serious harm" in s 91R of the Act. The court below erred in considering that the

reference by the Reviewer to “severe harm” involved jurisdictional error by the Reviewer applying an incorrect test. This ground of appeal must be upheld.

(b) The separation from family issue

23 The Reviewer’s reasons show that he did consider the first respondent’s claim that he would be separated from his family in the context of the Convention. At [63] of his recommendation, the Reviewer said:

Absent the willingness of his wife to return to Iraq, and absent the right for his wife and child to enter Iraq, I find that the claimant does not have a well-founded fear of persecution for his imputed religion or any Convention reason because he is in a mixed marriage in Iraq now, or in the reasonably foreseeable future.

24 At [64], the Reviewer referred to his inability to solve a humanitarian problem of a separated family. This does not mean that, by saying those words, the Reviewer was ignoring a claim by the first respondent that separation from his family was causing the first respondent anxiety. The Reviewer was stating, in effect, that such anxiety was not a matter which he could ameliorate, as it was not harm caused for a Convention reason. Consequently, Appeal Ground 2(a) is a meritorious one. The Reviewer did not fail to consider whether the first respondent’s separation from his family constituted persecution of a kind that would give rise to protection obligations under the Convention. The federal magistrate erred in holding to the contrary.

25 His Honour also erred in considering that the first respondent’s separation from his family was capable of being found to be serious harm giving rise to persecution for a Convention reason. The separation arose from the laws of Thailand which prohibit the entry of Iraqis into Thailand. It also arose from the unwillingness of the first respondent’s wife to return to Iraq. It did not arise from a specific act carried out by any person or body in Iraq singling out the first respondent, or those in a similar position to him, for discriminatory treatment amounting to serious harm.

26 Mr Smith, Counsel for the first respondent, submitted that the Reviewer failed to deal with a claim that the first respondent faced persecution if returned to Iraq because of his membership of a particular social group. That claim is said to arise out of a statement made by the first respondent when making his application for a protection visa. That statement, contained at [37] of a formal statement made on 17 September 2010, said:

Due to my wife’s nationality and religion, I would also face ongoing harassment, abuse and other serious harm if she was to live with me in Iraq. Due to these problems I would continue to face separation from my wife and children.

27 The above statement does not make a claim that the first respondent feared persecution if returned to Iraq on any account, whether or not he was a member of a particular social group, however defined. On the contrary, it asserts that he would face harassment, abuse and other serious harm if his wife came to Iraq but also that she would not come to Iraq, in part for such a reason. If there is no prospect of the first respondent’s wife coming to Iraq, the first respondent cannot have a well-founded fear of persecution on account of living with a Thai Sunni Muslim woman in

Iraq. The issue simply does not arise. Appeal Ground 2(b) is also a meritorious ground of appeal.

conclusion

28 I would allow the appeal with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated:

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REASONS FOR JUDGMENT

NICHOLAS J

29 I have had the advantage of reading in draft the reasons for judgment of Marshall J. I agree with his Honour that the appellant should be granted the leave he seeks to raise the matters addressed in ground 2 of the supplementary notice of appeal (**the notice of appeal**). I also agree that no such leave is required in relation to ground 1 of the notice of appeal. However, for reasons which I will now explain, it is my view that the appeal should be dismissed with costs.

Ground 1

30 In my opinion the primary judge was correct in holding that the Reviewer applied a different test to that which the Reviewer was required to apply pursuant to s 91R(1) of the *Migration Act 1958* (Cth) (**the Act**). I also agree with the conclusion of the primary judge that the Reviewer's error was a jurisdictional error.

The Statement of Reasons

31 The critical passage in the Reviewer's statement of reasons is at para [63]. The primary judge described para [63] as "difficult to interpret". There is some force in this observation. Because it is a lengthy and heavily laden paragraph, it is useful to break it down into smaller components. In doing so I have paraphrased the Reviewer's words slightly:

a. The issue under consideration is whether the first respondent faces a risk of *severe harm* in Iraq because of his marriage to a Thai born Sunni Muslim.

b. The first respondent's wife is not living with him in Iraq and he is unable to live with her in Thailand.

c. This situation has arisen because of lawful regulations surrounding entry into and exit from Thailand.

d. Because the first respondent's marriage to his wife was not registered in Iraq, his wife has no automatic right to enter Iraq.

e. This would cause significant problems should she wish to visit the first respondent in Iraq at this time.

f. The wife has not attempted to visit the first respondent in Iraq since 2006.

g. Absent the willingness of the wife to return to Iraq, and absent the right of the wife and daughter to enter Iraq, the first respondent does not have a well founded fear of persecution for any Convention reason because he is in a mixed marriage in Iraq now or in the reasonably foreseeable future.

h. While she would be subject to harassment common to that faced by non-Iraqi, non-Muslim women in Iraq, if she was ever able to return there, the first respondent would not be at risk of *severe harm* because he is married to a Muslim woman from Thailand.

i. The first respondent does not have a well founded fear of persecution for a Convention reason because he is married to a Thai Muslim should he return to Iraq now or in the reasonably foreseeable future.

32 The Reviewer concluded at para [64]:

Unfortunately I am unable to solve this real humanitarian problem of a separated family. I am able only to consider the claimant against the Refugees Convention. I find the circumstances of this case do not ground a well-founded fear of persecution for a Convention reason.

33 There are some preliminary observations to make about para [63]. The first is that the Reviewer uses the expression "severe harm" twice. The first occurrence appears at the beginning of the paragraph where the Reviewer identifies the issue under consideration [**a**]. The expression is used again toward the end of the paragraph where the Reviewer refers to the risk to the first respondent if his wife was to return to Iraq [**h**].

34 The second observation relates to the Reviewer's apparent reference to the immigration laws of Thailand [**c**]. This reference is puzzling in so far as it implies that the first respondent's predicament has anything to do with Thailand's exit requirements. In particular, there is no suggestion elsewhere in the statement of

reasons or the other material before us that there was any regulatory impediment to the first respondent's wife leaving Thailand. None of the parties suggested that the wife was not free to leave Thailand if she chose to do so. In the circumstances, the word "exit" in the sentence in which it appears is almost certainly a slip.

35 The third observation concerns what is said about the right of the wife to enter Iraq. At one point the Reviewer refers to the wife not having an "automatic right" to enter Iraq [**d**]. At another point he refers to the absence of any right on the part of the wife to enter Iraq [**g**]. In both cases I understand him to be referring to the wife not having an "automatic right" to enter Iraq in the sense that, not being an Iraqi citizen, she would need to obtain a visa in order to enter Iraq.

36 The Reviewer's reference to "significant problems" in the context of any right of entry is curious. The Reviewer does not explain what "significant problems" stood in the way of the wife re-entering Iraq. In particular, there does not appear to have been any exploration of the difficulties facing a Thai national seeking a visa to enter Iraq. The wife obtained a visa in 2006 when she travelled to Iraq to live with her husband, and there is no suggestion that there was any problem in her doing so. In any event, to say that the wife would face significant problems if she were to attempt to enter Iraq is not the same as saying that it is impossible or even unlikely that she would be able to do so if she wished.

Was there a jurisdictional error?

37 It is convenient at this point to consider whether the first of the errors attributed by the primary judge to the Reviewer was (assuming it was made) a jurisdictional error.

38 In *Craig v South Australia* (1995) 184 CLR 163 at 179 the High Court defined jurisdictional error on the part of an administrative tribunal as follows:

… an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

39 Senior Counsel for the appellant submitted that the Reviewer's finding that the first respondent did not have a well founded fear of persecution for a Convention reason was predicated on an earlier finding that because his wife was unwilling and unable to return to Iraq, the first respondent would not suffer any harm as a result of being married to a Sunni Muslim woman from Thailand. That being so, the application by the Reviewer of a test based upon persecution involving "severe harm" rather than "serious harm" to the first respondent could not have had any effect upon the outcome of the review given the earlier finding.

40 It was further submitted that the consideration given by the Reviewer to the possibility of the wife returning to Iraq at a future time provided an alternative and independent basis for the Reviewer's conclusion founded upon what Senior Counsel characterised as the "counter-factual". He submitted that even if this alternative basis

for the Reviewer's conclusion was affected by error, it did not constitute a jurisdictional error because it could not have affected the outcome of the review.

41 I accept that if the first respondent was not at risk of suffering any harm while he lived in Iraq and his wife lived in Thailand, then it could not have made any difference to the Reviewer's decision in relation to this aspect of the first respondent's claims if he mistakenly thought that s 91R required that there be persecution involving "severe harm" to the first respondent. However, I do not accept that the Reviewer's finding that the first respondent could have no well founded fear of persecution because his wife would not or could not return to Iraq was a truly independent basis for the Reviewer's conclusion.

42 It is apparent from para [63] of the statement of reasons that the Reviewer considered two hypotheses when determining whether or not he was satisfied that the first respondent had a well founded fear of persecution for a Convention reason. That he saw fit to do so is consistent with an understanding that the "significant problems" associated with any future entry by the wife into Iraq were not insurmountable and that she may at some future time wish to travel to Iraq so that she and her daughter could live with the first respondent as a family.

43 The first hypothesis considered by the Reviewer involved the return to Iraq of the first respondent without his wife or daughter. The Reviewer found that in such circumstances the first respondent would not have any well founded fear of persecution for a Convention reason. It is apparent that the Reviewer did not consider the first respondent would be at risk of harm on account of his wife's religion or race for so long as she lived in Thailand rather than Iraq.

44 The second hypothesis considered by the Reviewer assumed that the first respondent would be joined by his wife and child in Iraq. Of course, this could only occur if the wife and child were willing and able to enter Iraq and reside there with the first respondent. Properly understood, however, the statement of reasons does not include any finding by the Reviewer that the wife and daughter would not be able to travel to Iraq. At the very most the Reviewer found that there would be significant problems in them doing so. So far as the wife's willingness to travel to Iraq in the future was concerned, it is apparent that the Reviewer considered that this was a real possibility; it was at least sufficient to move him to consider the risk of harm to the first respondent in the event that he was re-united with his wife in Iraq.

45 Accordingly, I do not accept that the Reviewer's findings in relation to the second hypothesis provided an independent basis for his ultimate conclusion. If he made a legal error in relation to the degree of the apprehended harm that is sufficient to provide a well founded fear of persecution, then the error made was a jurisdictional error.

Did the Reviewer apply the wrong legal test?

46 This brings me to what is in fact the only point raised by the appellant in ground 1 of the notice of appeal.

47 In considering the possibility that the first respondent might suffer harm for a Convention reason in the future if his wife was to move to Iraq, the Reviewer accepted that the first respondent's wife would be the subject of harassment. But he went on to state that he did not accept that the first respondent would be at risk of "severe harm" because he was married to a Muslim woman from Thailand.

48 In accordance with its ordinary usage, the adjective "serious" as it appears in s 91R implies that the harm referred to must be "[w]eighty, important, grave; (of quantity or degree) considerable, not trifling": Oxford English Dictionary. The word "severe", on the other hand, implies that the harm is "grievous" or "extreme": *ibid*. To my mind, to require a claimant for refugee status to have a well founded fear of persecution involving "severe harm" requires more than what is required by the actual words used in s 91R of the Act.

49 Section 91R was introduced into the Act in response to perceived inconsistencies in the case law as to what could amount to persecution for the purposes of the definition of "refugee" in Art 1A(2) of the Convention. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 Mason CJ said:

When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns.

50 In this context, some later decisions of this Court referred not to "serious" or "significant" harm, detriment or disadvantage, but to harm, detriment or disadvantage that is not trivial or insignificant: see, for example, *Kanagasabai v Minister for Immigration & Multicultural Affairs* [1999] FCA 205 (Branson J). A Full Court endorsed such an approach in *Gersten v Minister for Immigration & Multicultural Affairs* [2000] FCA 855 (Hill, Matthews and Lindgren JJ) where their Honours observed (at para [48]) that "persecution involves harm that is more than trivial or insignificant". Similarly, in a latter case heard by a Full Court, Hill J reiterated that "[p]ersecution involves, in a general sense, an element of harm which is not insignificant": *Minister for Immigration & Multicultural Affairs v Khawar* (2000) 101 FCR 501 at para [8].

51 Sub-paragraph (b) of s 91R(1) requires a decision maker who is bound by s 91R to determine whether the persecution feared by the claimant involves "serious harm to the person". Just as a decision maker who is bound by s 91R may err by imposing too easy a test, he or she may also err by imposing too stringent a test.

52 In the present case the appellant did not argue that "severe harm" and "serious harm" are the same. Rather, it was submitted that "they mean close to the same thing" and that the use of the former expression by the Reviewer should be treated as a loose paraphrase of the latter which did not of itself reveal error. The appellant referred to the following matters in support of this submission:

the Reviewer referred to s 91R of the Act early in his statement of reasons when summarising the applicable law;

the Reviewer did not express any intention to depart from s 91R and it would be surprising if this Reviewer considered himself free to ignore it;

the Reviewer did not expand on the concept of the "severe harm" or how it is different, if at all, from the concept of "serious harm" referred to in s 91R; and

there is no reference by the Reviewer to harm that could be "serious" but not "severe" and the distinction did not play any role in the Reviewer's reasoning.

53 I do not find the appellant's submission convincing. As to the first matter, it is true that the Reviewer referred to s 91R early in his statement of reasons. Although he quoted from Art 1A(2) of the Convention, he did not quote from s 91R or any part of it. Instead he merely indicated that it was one of the provisions of the Act relevant to the question whether the first respondent met the criterion for a protection visa set out in s 36(2) of the Act.

54 I do not criticise the Reviewer's summary of the applicable law in any respect. However, it alone does not provide a basis for inferring that the Reviewer was mindful of the specific requirements of s 91R or that, when he twice referred to "severe harm" in para [63] of the statement of reasons, he was intending to refer to "serious harm" as that expression is used in s 91R(1) and explained in s 91R(2).

55 As to the other matters referred to by the appellant, they do no more than assume that the Reviewer was familiar with the specific requirements of s 91R and that he applied them to the facts of the case before him. Yet the indications that the Reviewer applied an incorrect test are in my view quite strong.

56 It is apparent that the Reviewer understood that the Act imposed some minimum threshold as to the degree of harm to which a person seeking protection might be exposed in order to meet the criterion set out in s 36(2). No doubt this is what led the Reviewer to identify the issue the subject of consideration as he did in para [63] of the statement of reasons. Nevertheless, the way in which he formulated the issue was inconsistent with the requirements of the Act. As the appellant rightly conceded, "serious harm" and "severe harm" are not the same. In my opinion, the Reviewer imposed an excessively stringent test.

57 The appellant relied upon the well known observations in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. Those observations make it clear that the reasons of an administrative decision maker "are not to be construed minutely and finely with an eye keenly attuned to the perception of error". Nor should the Court be "concerned with looseness in the language … nor with unhappy phrasing" in the reasons. In the present case, however, the concern rises above this. On a fair reading of the statement of reasons, it is apparent that the Reviewer applied an incorrect legal test.

Ground 2

58 I agree with the primary judge that the Reviewer failed to consider whether any psychological harm suffered by the first respondent as a result of being separated

from his family was a consequence of persecution of a kind that would give rise to protection obligations under the Convention. In essence, what I understand the Reviewer to have *assumed* was that any psychological harm suffered by the first respondent as a result of him not being able to be with his wife and child was not the consequence of persecution of the first respondent for a Convention reason. That this was assumed by the Reviewer is apparent from para [64] of the statement of reasons in which he declared himself "unable to solve this real humanitarian problem of a separated family" and "able only to consider the claimant against the Refugees Convention."

59 One reason why the first respondent cannot see his wife and daughter is that he cannot obtain the visa he needs to enter Thailand. Another reason why the first respondent cannot see his wife and daughter is because of his wife's unwillingness to travel to Iraq. The Reviewer accepted that the wife left Iraq in 2006 because of the harassment she suffered and that the wife would be subjected to more harassment if she was to return to Iraq. He did not make an express finding that the wife's unwillingness to return to Iraq was due to her fear of being harassed but I infer that he accepted that to be so.

60 The appellant submitted that any psychological harm suffered by the first respondent as a result of being separated from his family was not capable of constituting persecution of a kind that would give rise to protection obligations under the Convention. The argument was that for so long as the first respondent and his wife continued to live apart, the first respondent was not at risk of harm from persecution for a Convention reason.

61 On my reading of the statement of reasons, the Reviewer was satisfied that the first respondent was not at any risk of harm for a Convention reason for so long as his wife remained outside Iraq. The Reviewer seems to have reasoned that so long as the first respondent was not living with his wife or seen in her company in circumstances implying they were husband and wife, then the first respondent would have no reason to fear harassment.

62 The notion of persecution involves some singling out of the claimant for refugee status for a Convention reason leading to the infliction of serious harm upon the claimant. The claimant must be singled out on account of some relevant characteristic or quality he or she possesses whether as an individual or as a member of a group: see, for example, *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 per Callinan J at [96]; *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 per Burchett J at 568.

63 It is true that on the Reviewer's finding, the first respondent had no well founded fear of harassment while his wife remained in Thailand and, consequently, no well founded fear of persecution. This appears to have been found on the basis that the first respondent would not be singled out for harassment in the absence of his wife. However, I think there is a difficulty in the Reviewer's reasoning. It reflects an unduly narrow view of what might properly be regarded as persecution for the purposes of Art 1A(2) of the Convention.

64 Depending on the facts of a given case, it may be open to a decision maker to conclude that a husband had a well founded fear of persecution if, for example, widespread discrimination against couples on racial or religious grounds made it impossible for the husband to live with his wife without fear of them being harassed. The husband and the wife might then be forced to live apart. The husband's fear of persecution does not necessarily cease once the husband and wife cease to live together unless, of course, the husband and wife do not wish to live together for some reason apart from fear of further harassment.

65 I think this is the claim that the primary judge understood had been overlooked by the Reviewer. I do not think this claim was considered by the Reviewer. Nor do I think it is a claim that is *incapable* of giving rise to protection obligations under the Convention.

66 In my opinion, the appeal should be dismissed with costs.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated:

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 339 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP

	Appellant
AND:	SZQOT First Respondent JOHN GODFREY IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent

JUDGE:	YATES J
DATE:	12 OCTOBER 2012
PLACE:	SYDNEY

REASONS FOR JUDGMENT

yates j

67 I have had the advantage of reading in draft the separate reasons of Marshall J and Nicholas J. Their Honours have each set out the background to this appeal, the essential findings and reasoning of the second respondent in his capacity as Independent Merits Reviewer, and the reasoning and conclusions of the Federal Magistrates Court of Australia (the Federal Magistrates Court). This enables me to express succinctly my own reasons and conclusions on the two issues raised on this appeal.

68 The first issue is whether the second respondent applied the correct statutory test under s 91R(1)(b) of the *Migration Act 1958* (Cth) (the Act) because, in [63] of his reasons, he referred to “severe harm” and not “serious harm”. The Federal Magistrates Court found this ground of review to have been made out.

69 The second issue has two aspects. The first aspect is whether the second respondent considered the first respondent's claim that he suffered persecution by reason of his separation from his wife and child. The second aspect is whether such separation can amount to persecution under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (together, the Convention). This ground requires leave because it does not reflect the way the Minister put the matter in the Federal Magistrates Court. Leave should be granted.

70 Much of this appeal turns on the analysis in [63] of the second respondent's reasons, which Marshall J and Nicholas J have summarised.

71 On the issue of whether the correct statutory test was applied, it is to be noted that the second respondent identified the relevant sections of the Act, but did not set them out. Thus there was no explicit articulation by the second respondent of the requirements of the relevant test. When the second respondent came to deal with the matter in [63] of his reasons, he simply referred to "severe harm". Two such references were made. There was no analysis of what the second respondent understood to be conveyed by those words. It is not possible, therefore, on the face of the reasons to say whether, in substance, the second respondent applied the correct test of "serious harm".

72 The first respondent had placed before the second respondent material to support his claim that he would suffer persecution if his wife were to live with him in Iraq. This was because of her nationality and religion. The second respondent made two relevantly important findings at [63] of his reasons.

73 The first finding was:

Absent the willingness of his wife to return to Iraq, and absent the right for his wife and child to enter Iraq, I find that the claimant does not have a well-founded fear of persecution for his imputed religion or any Convention reason because he is in a mixed marriage in Iraq now, or in the reasonably foreseeable future. On the question of whether the claimant would be at risk of persecution because he is in an inter-racial marriage, I note firstly the points just made about the claimant's wife not having sought to re-enter Iraq since 2006. I also note that there is no suggestion that the claimant's wife is not a Muslim.

74 The second finding was:

While I accept that the claimant's wife, if she were ever able to return to Iraq, would continue to be subject to the harassment common to that faced by other non-Iraqi, non-Muslim women in Iraq, I do not accept that the claimant would be at risk of severe harm because he is married to a Muslim woman from Thailand.

75 A question arises as to the significance of the second finding. The task for the second respondent was to consider whether, if the first respondent were to return to Iraq, he would be persecuted for a Convention reason at that time or within the reasonably foreseeable future: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. The first finding disposed of that issue insofar as it

concerned the question of persecution to be suffered by the first respondent should his wife also return to Iraq with their child to be with him. The second respondent's finding was that the first respondent's wife would not seek to join the first respondent now or in the reasonably foreseeable future, should he be returned to Iraq. Thus the degree of harm which, according to the correct legal standard, the first respondent might suffer under this particular scenario did not arise for consideration on the facts as the second respondent found them to be.

76 In these circumstances I can only view the second finding as speaking of a remote or theoretical possibility of no practical consequence concerning the first respondent's present or reasonably foreseeable future circumstances, which could not have been dispositive of the issue that the second respondent was called upon to consider in this particular regard. Thus, although the second respondent considered that remote or theoretical possibility against the stated standard of "severe harm", this was without legal significance if, as a matter of substance, the second respondent departed from the standard set by s 91R(1)(b) of the Act.

77 On the second issue raised by the appeal, the Minister contends that the Federal Magistrates Court erred in holding that the second respondent failed to consider whether the first respondent's separation from his wife and child constituted persecution of a kind that would give rise to protection obligations under the Convention. In my view, although the second respondent referred to the humanitarian problem of a separated family, he did not consider this as an integer of the first respondent's claim of persecution, even though this was placed before the second respondent for consideration. In [64] of his reasons the second respondent appears to have considered that such a claim was incapable of arising under the Convention. I am not persuaded that that is necessarily the case.

78 The Minister contends that, on the findings of fact made by the second respondent, the separation of which the first respondent complains cannot be seen to be based on a Convention reason. However, if, as I find, this integer of the first respondent's claim was not addressed as a matter of substance then the second respondent's consideration of the facts and his findings in relation to them must be seen to have been correspondingly constrained.

79 I am of the view that the failure of the second respondent to consider this part of the first respondent's claim constituted an error of law that supports the orders made by the Federal Magistrates Court.

80 I would therefore grant leave to the Minister to rely upon the supplementary notice of appeal filed on 30 March 2012 but dismiss the appeal, with costs.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates.