HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **BNB17**
Appellant

and

Minister for Immigration and Border Protection
First Respondent

Immigration Assessment Authority
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication.

Part II: Statement of Issues

2. The issues for this Court to decide are:
   2.1. Does the Immigration Assessment Authority (**Authority**) fail to perform its review function under s 473DB of the *Migration Act 1958* (Cth) (**the Act**) when the interview with the applicant done at the primary level is affected by mistranslation, and the Authority is not aware of the mistranslation?
   2.2. Is it legally unreasonable for the Authority to make adverse credibility findings based on an applicant's testimony given in the interview with the primary decision maker where the Authority is aware of alleged defects in interpretation in the interview and does not exercise its powers to cure the defects?

Part III: Notices

3. This appeal does not attract the operation of s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

4. The judgments below are unreported and have the following medium neutral citations:
   4.1. *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304.
   4.2. *BNB17 v Minister for Immigration & Anor* [2019] FCCA 1314.

Part V: Relevant facts

5. These facts are largely set out in the judgment of Anderson J {Reasons for Judgment of Federal Court 12 March 2020 (**FC**), found at Core Appeal Book (**CAB**) 70 – 111}.
6. The appellant is a Sri Lankan citizen of Tamil ethnicity. He came to Australia as an unauthorised maritime arrival and applied for a Safe Haven Enterprise Visa {FC [2], [7], CAB 77 – 78}. He made protection claims in a statutory declaration annexed to his application and in an interview (**Interview**) with the Minister's delegate on 13 January 2017 {FC [9], CAB 78; Appellant's Book of Further Materials, (**FM**) 129-133}.
7. The appellant claimed that the Sri Lankan authorities would impute him to be an LTTE supporter due to his father's involvement in LTTE and his Tamil ethnicity {FC [7], CAB 78; Authority's Decision CAB 8 – 10}. He claimed that between 2007 and 2009, police detained him five times while he resided in Colombo. In 2010, the Appellant returned to his home province of Jaffna; and he claimed he was harassed and blackmailed by the CID upon return there. He claimed he was required to report to the police station while living in Jaffna and was forced to drive CID members in his vehicle. He left Sri Lanka in breach of his reporting obligations and feared harm on return as a result. In his Interview on 13 January 2017, he claimed for the first time that authorities beat him in Jaffna in 2010 {FC [7] – [9], CAB 78}.
8. On 27 January 2017, the appellant's legal representative at Refugee Legal community legal centre provided written submissions to the Department of Immigration and Border Protection stating that a qualified interpreter had reviewed portions of the recorded Interview and identified errors {FC [11], CAB 79 – 81, FM 141 – 144}. The submissions identified three examples of interpretation errors. The second example related to an exchange in which the delegate asked the appellant what he meant by the statement "many times they were beating you". The representative submitted that the interpreter's answer did not reflect the substance of the appellant's evidence. The representative urged the delegate to bear in mind in assessing the appellant's credibility that other questions and answers may have not have been properly interpreted {FC [11], CAB 80}.

9. On 3 February 2017, the delegate refused the appellant's SHEV application {FC [12], CAB 81; FM 170}. The application was automatically referred to the Authority for review pursuant to Part 7AA of the Act.

10. On 28 February 2017, the appellant's representatives provided written submissions to the Authority {FM 123 – 128}. The representative argued there were errors in interpretation in the Interview, and that before making adverse credit findings the Authority should invite the appellant to an interview {FC [15], CAB 81 – 82, FM 126}. Refugee Legal made specific submissions in relation to an exchange between the delegate and the appellant regarding his claim to have been beaten by authorities on return to Jaffna during which the delegate had repeatedly asked the appellant to describe the way he had been beaten {FM 125}. The appellant had responded by addressing the reasons he had been beaten {FC [71], CAB 99 – 101}. Refugee Legal argued that the appellant had clearly not understood the question {Decision and Reasons of the Immigration Assessment Authority (**IAA**) [23], CAB 11 – 12}.

11. Furthermore, in its 28 February 2017 submission, Refugee Legal reiterated earlier concerns about the interpreter problems and submitted that if the Authority had doubts about the appellant's credibility, it was not possible for the Authority to make a decision reaching the state of satisfaction required by s 65 of the Act, or to provide the applicant with procedural fairness, without a further interview. {FC [15], CAB 81 - 82, FM 126}.

12. On 22 March 2017, the Authority affirmed the delegate's decision {IAA, CAB 5}. The Authority refused the appellant's request for an interview {IAA [6], CAB 6}.

13. The Authority made the following findings regarding the appellant's claim to have faced harassment on return to Jaffna:

    13.1. Without having interviewed the appellant itself, the Authority found the appellant's response to questioning about the way he was beaten was "evasive". The Authority rejected the appellant's submission that he had misunderstood the question {IAA [22] – [23], CAB 11 – 12}.

    13.2. The Authority noted the appellant claimed – erroneously – that he referred to the "beating" in Jaffna in his written claims {IAA [22] – [23], CAB 11}.

    13.3. The Authority rejected the claim the appellant had been beaten, harassed, or forced to drive CID members around on return to Jaffna because his evidence

was "vague and evasive" regarding how he was beaten and he had not made this claim prior to his interview with the delegate {IAA [25], CAB 12}.

14. The appellant sought judicial review of the Authority's decision in the Federal Circuit Court. Ground 1 of the appellant's amended application argued that the Authority d had erred by not fashioning its procedure to cure interpreter errors that affected the Interview, and that not inviting the appellant to an interview under s 473DC of the Act in the circumstances of this case was unreasonable {CAB, 31}.

15. The Federal Circuit Court judgment records at [64] {CAB 52}:

> It was submitted for the applicant that without a complete record of the applicant's interview with the delegate, the IAA could not determine if the delegate had mischaracterised the applicant's evidence or failed to consider any of the applicant's claims or evidence or make an assessment as to whether the applicant understood the interpreter for the entire interview. Ultimately, it was submitted that the IAA could not properly assess whether the applicant's claims for protection should be accepted.

16. The appellant relied on a transcript of the delegate's interview that had been prepared by a Tamil translator identifying what was said by the interpreter and appellant in Tamil {Transcript of SHEV interview[1] (**T**), FM 65 – 121}. The Minister argued that only material that had been before the Authority was relevant to the question of reasonableness. The Court accepted the Minister's submission {Judgment of the Federal Circuit Court (**FCC**), [76] – [80], CAB 54 – 55}. The Federal Circuit Court dismissed the application.

17. On appeal to the Federal Court, the appellant maintained ground 1 below. He also argued that the Circuit Court erred by finding that the interpretation errors were not material (ground 2). Ground 3 of the notice of appeal was that the Authority's decision was affected by jurisdictional error because it was disabled from conducting the review in the absence of an adequate interpretation of the appellant's testimony {CAB 67}. The appellant sought leave to argue ground 3 on the basis that the argument arose out of an argument accepted by the Full Federal Court in *EVS17 v Minister for Immigration and Border Protection*[2] (**EVS17**) on 11 February 2019.

18. On 12 March 2020, the Federal Court dismissed the appeal {FC [48] – [89], CAB 92 – 106} and refused leave to rely on ground 3 {FC [90] – [99], CAB 106 – 108}.

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[1]Annexure KCHR-3 to the affidavit of Kate Cristabel Haynes Reitdyk dated 3 October 2018 (FM 65 - 121).
[2] The new argument arose out of an argument accepted by the Full Federal Court in *EVS17 v Minister for Immigration and Border Protection* (2019) 268 FCR 299 on 11 February 2019. The hearing in the Federal Circuit Court had taken place in October 2018 and judgment was delivered on 24 May 2019.

Part VI: Argument

Ground 1

19. As the appellant argued in the Federal Circuit Court,[3] and the Federal Court[4] the Authority could not properly conduct its review because it did not understand mistranslated portions of the interview.

20. The appellant continues to submit, as recorded in FC [41][5] that without an accurate translation of the appellant's claims and evidence, the Authority could not:

    20.1. determine if the delegate had mischaracterised the appellant's evidence;

    20.2. assess whether the claims for protection should be accepted;

    20.3. make credit findings open to it;

    20.4. review the case, as obliged by s 473CC of the Act; or

    20.5. consider the "review material" as obliged by s 473DB(1) of the Act.

21. As a matter of principle, the Federal Court in *EVS17* at [35] held that failure by the Secretary to provide the review material to the Authority in contravention of s 473CB(1) can disable the Authority from conducting the review required by s 473DB (*EVS17*, [35]). The appellant respectfully adopts that statement of principle as correct, and submits that it should be accepted by this Court. From that premise, and by analogy, the appellant submits that if the Authority does not understand a material part of the review material due to a translation error it cannot exercise its jurisdiction.

22. The Authority's statutory task is to conduct a review by considering the "review material" (s 473DB). The "review material" is defined as material given by the "referred applicant" to the person making the decision (s 473CB(1)(b)) or material the Secretary considers to be relevant to the review (s 473CB(1)(c)). The audio recording of the interview was part of the "review material". That audio recording contained information that was in Tamil and English.

23. The interpreter at the Interview made the following errors:

    23.1. The interpreter incorrectly translated the delegate's questions to the appellant regarding how he had been beaten by authorities in Jaffna (**first error**). The appellant as a result, failed to answer the delegate's question.

    23.2. The delegate asked the appellant why he had not raised his claim to have been beaten in Jaffna in his written claims. The interpreter asked the appellant why

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[3] AS [14] above citing the Federal Circuit Court's judgment at [64] {CAB 52}.
[4] {CAB 90 at [41]}.
[5] Ibid.

he had not raised claims to have experienced harm before 2009 in his written claims (**second error**).

24. The errors were material. The Authority reached adverse credit findings based on the appellant's responses. The Authority's findings assumed the questions had been meaningfully conveyed to the appellant. They had not.

25. The Authority found the appellant to be vague and evasive in relation to how he was beaten. The Authority rejected the appellant's argument that he had misunderstood the question based on the fact the delegate had asked the question "what do you mean be beaten" three times, and then asked "what did they do?"{IAA [23], CAB 11 – 12}.

26. The Authority wrongly assumed that the question had been meaningfully conveyed to the appellant. In fact, the question was not asked three times, nor was it rephrased.

27. First, the delegate asked the appellant what he meant by being beaten. The interpreter translated this as "explain the phrase 'they beat me many times'". The delegate asked "what do you mean by that?" which the interpreter translated as "what are you trying to tell?" {FC [71], Line (**L**) 600 – 604, CAB 99 – 100; FM 96}. There was no indication to the appellant that he was being asked to describe the physical act of beating.

28. Secondly, the delegate asked "what you mean by many times they were beating you?" {L 607, CAB 100; FM 96}. The interpreter said "Explain that. Why they beat you? How many time? The action 'beating'" {FC at [71], L 608, CAB 100; FM 97}. The reference to "action 'beating'" was not in the form of a question. The interpreter clearly asked the appellant how often and why he was beaten. The appellant attempted to answer those questions.

29. Thirdly, the delegate asked the appellant what the authorities "physically" did to him. The interpreter asked, "When you use the word 'beating'. What you mean by 'beating'?" {L 611 – 613, CAB 100; FM 97}. This did not fairly convey to the appellant what the delegate was interested in, which involved some nuance. The appellant's response focused on the fact he was beaten for "no reason".

30. Finally, the delegate rephrased the question in English, expressly stating that he was not asking <u>why</u> the appellant was beaten, but what the appellant meant by beaten. The interpreter omitted the delegate's explanation and simply said "When you tell 'they beat you' what you mean by 'beaten'? What is that?" {L 618 – 622, CAB 101; FM 97}. The appellant answered "What is beating means … I didn't do an thing wrong. No wrong thing. Getting beaten was the issue for me" {L 621, CAB 101; FM 97} which

the interpreter translated as "I didn't do any wrong thing for them of for … the society or for the community, but, err, I was beaten by them when ever I go..." {L 622, CAB 101, FM 97}.

31. The mistranslations were such as to have led the Authority to identify a wrong impression of evasiveness by the appellant in giving evidence. The appellant was not aware that the delegate was asking him to describe the physical act of beating. The appellant thought that he was asked questions relating to how often and why he was beaten.

32. The Federal Court wrongly found that the errors relating to the questions regarding "beatings" were not material. The Federal Court considered that the conversation "reset" with the final question being rephrased and thereby ameliorated the miscommunication {FC [72] – [73], CAB 101 – 102}, and that despite the misunderstanding, the claim was nevertheless considered {FC [74], CAB 102}.

33. That analysis is wrong for the following reasons:

    33.1. The first clear question asked of the appellant was why he was beaten. That set the context for the exchange, in which the appellant was not told in Tamil that he was not (or no longer) being asked why he was beaten.

    33.2. The conversation only "reset" based on the English dialogue, in which the delegate expressly explained to the interpreter that he was not asking about the reasons he was beaten {FC [71], L 614 – 619, CAB 101 – 102, FM 97}. The appellant was not privy to that "resetting" exchange because he could not understand English.

    33.3. The Authority's finding that the appellant had been vague and evasive was based on the Authority's perception that the appellant had failed to answer the question on four occasions. Even if the final question directed the appellant to give evidence regarding the physical act of beating, the appellant only failed to answer the question on one occasion. Had the Authority been aware the appellant had only been asked the question once, it may have accepted he had misunderstood the question.

Materiality

34. At the level of principle, if mistranslation of the interview with the primary decision maker (or some other mistranslation) is sufficiently important to warrant a conclusion

that the Authority did not understand a material aspect of the review material before it, that would usually, if not always, entail a conclusion that the error was material to the outcome, obviating any separate materiality analysis.

35. To the extent that any separate materiality analysis is required, the appellant submits that the error in this case was material to the outcome.

36. The Authority's finding that the appellant had been vague and evasive was material to the outcome. The Authority specifically relied on the apparent vagueness and evasiveness for its lack of satisfaction about the appellant's claims to have faced harm in Jaffna. Further, noting that credibility findings are not linear, the finding materially contributed to the overall finding that the appellant was not a credible witness.[6]

37. As to the second error, the appellant was not asked in Tamil why he had not raised the Jaffna claim in his written statement {T, L 624 – 643; FM 98 – 99}. The delegate attempted put to the appellant that his written claims made no reference to him being physically harmed after 2009 {T, L 628 – 633, FM 98}. The interpreter's translation bore no resemblance to the questions asked; instead the interpreter asked the appellant to explain how he had been physically harmed {T, L 632, 634, FM 98}. The delegate again put the question. The interpreter asked the appellant why he had not referred to being beaten "before 2009" {T, L 638, FM 98}. The appellant responded, correctly, that he had included these claims of harm prior to 2009 in his written statements {T, L 639, 643, FM 98}. This interpretation error was material, in that it contributed to the Authority finding the appellant was not a witness of credit and rejecting his claims of harm in Jaffna.

38. The Federal Court's erroneous reasoning in respect to the interpretation errors led that Court to wrongly dismiss grounds 1 and 2 below and refuse leave to argue ground 3 below.

Ground 2

39. The decision of the Authority is affected by legal unreasonableness in that the Authority found that the appellant had been "vague and evasive", in circumstances where the Authority was on notice of material mistranslation of the delegate's interview, and did not take any step to correct for error.

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[6] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [4] (Gleeson CJ); *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 [81] (Kirby J).

40. The Authority has discretionary power to obtain new information under s 473DC. That power must be exercised within the bounds of legal reasonableness.[7] In the circumstances of this case it was legally unreasonable for the Authority to find that the appellant had been evasive in his evidence because:

    40.1. the Authority was faced with credible claims that the interview had been affected by material mistranslation;

    40.2. there was no evidence before the Authority to establish that mistranslation had not occurred; and

    40.3. the Authority did not take any step to resolve the claim or correct for mistranslation.

41. The Authority had various options available to it within the boundaries of legal reasonableness. It could have taken some step to cure the defective translation, which might have been to interview the appellant. Or it could have sought new information in the form of a properly translated transcript of the delegate's interview, or at least the relevant exchange. Or, not taking either step, the Authority might have identified that there was an insufficient basis on which to conclude that the appellant had given evasive evidence to the delegate. There might well be other options.

42. In the absence of taking some corrective step, the Authority acted unreasonably.

Part VII: Orders

43. The appeal be allowed.

44. The orders of the Federal Court be set aside and, in their place, it be ordered that:

    44.1. the appellant be given leave to rely on ground 1;

    44.2. the appeal from the Federal Circuit Court be allowed;

    44.3. the orders of the Federal Circuit Court be set aside and in their place it be ordered that the decision of the Second Respondent be quashed and the matter be remitted to the Second Respondent, with the First Respondent to pay the appellant's costs of the Federal Circuit Court proceeding; and

    44.4. the First Respondent pay the Appellant's costs of the appeal in the Federal Court.

45. The First Respondent pay the Appellant's costs of and incidental to the proceeding in this Court.

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[7] *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34, [3] (Kiefel CJ, Bell, Gageler, and Keane JJ.

Part VIII: Time estimate

46. The estimate of time for the appellant's oral argument is 1 hour.

Dated: 26 November 2020

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ANNEXURE

LIST OF STATUTES REFERRED TO IN SUBMISSIONS

1. *Migration Act 1958* (Cth), Compilation 134 (23 February 2017 to 5 September 2017), Part 7AA.