HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **BNB17**
Appellant

and

Minister for Immigration and Border Protection
First Respondent

10 **Immigration Assessment Authority**
Second Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION

1. This reply is suitable for publication on the internet.

Part II: ARGUMENT

2. The reply addresses two issues raised by the First Respondent's submissions (**RS**):

   2.1. Whether the appellant can rely on ground one of the Notice of Appeal in the circumstances of this case, where the Federal Court refused leave to the appellant
20 to raise that ground, which had not been run in the Federal Circuit Court.

   2.2. In relation to ground two, whether it was reasonable for the Authority to find the appellant had been evasive in response to questions about being beaten in light of the interpretation issues.

Ground 1

3. The appellant's reference in the Notice of Appeal to "s 473CD" is mistaken. The correct provision (as identified in the appellant's submissions) is s 473DB {AS, [2.1]}. The appellant seeks leave to amend the ground so that it reads:

> *The Federal Court erred in failing to find that the Second Respondent could not perform its statutory task of considering the "review material" pursuant to*
30 *s 473DB of the Migration Act 1958 (Cth) (Act) due to material interpreter errors affecting the interview conducted with the primary decision maker.*

4. Contrary to the Minister's submissions, ground one is encompassed by proposed ground 3 in the Federal Court {RS, [26]}. The proposed ground below alleged the Authority was "disabled from carrying out its jurisdiction" as the Authority "could not

review the decision in the absence of adequate interpretation of the appellant's testimony" {Amended Notice of Appeal at Core Appeal Book (**CAB**) 67}.

5. In written submissions in the Federal Court, the appellant advanced the ground on two bases: (i) that due to the interpretation errors the Secretary had not complied with s 473CB of the Act to provide the review material; and (ii) as a result of flawed interpretation, the Authority could not comply with s 473DB(1) of the *Migration Act 1958* (Cth) (**the Act**){Appellant's Submissions in the Federal Court [38] – [39], First Respondent's Book of Further Materials, 24}. In this appeal, the appellant relies *only* on the latter basis, which the proposed Federal Court ground encapsulated.

10 6. The Judge below erred in holding that the interpretation error did not disable the Authority from conducting the review pursuant to s 473DB of the Act. In applying that finding to the exercise of the discretion to refuse to allow leave to the appellant to advance ground 3 in the Federal Court, the Judge below erred.

7. The Minister argues leave should be refused to raise ground one as he could have filed evidence in response had the ground been raised in the Federal Circuit Court, {RS, [35] – [39]}. That argument should be rejected for the following reasons.

8. First, the Minister does not suggest that there is, or even might be, any error in the evidence adduced by the appellant. Although the Minister cannot file evidence to that effect in the appeal, he could have done so in the application for special leave. That he

20 has not done so tells against the existence of prejudice suffered by the Minister.

9. Secondly, the primary authority relied upon by the First Respondent, *Coulton v Holcombe* (1986) 162 CLR 1 (*Coulton*), is distinguishable. *Coulton* was a private law case. In public law cases, less weight should be given to prejudice to a respondent, and a fortiori in a judicial review case regarding a protection visa decision. The serious potential consequences for the individual of a protection visa refusal include detention as an unlawful citizen pursuant to s 189 of the Act, followed by involuntary removal to a country where an appellant claims to face a real chance of serious harm.[1] Justice Mortimer's observation in dissent in *Murad v Assistant Minister for Immigration & Border Protection* (2017) 250 FCR 510 is apt, where her Honour described it as

30 generally "inimical to the rule of law" for a migration decision to stand where it is

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[1] *Murad v Assistant Minister for Immigration and Border Protection* (2017) 250 FCR 510 (***Murad***), [55] – [58] (Mortimer J) (dissent); *BKQ16 v Minister for Immigration and Border Protection* (2019) 163 ALD 127 (***BKQ16***), [73], [75] – [76] (Mortimer J); *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362 (***CGA15***), [36] – [37] (Full Court).

capable of challenge based on a clearly arguable ground of appeal.[2] In this statutory context, the merit of the ground should be the primary consideration in granting leave.[3] Any prejudice to the First Respondent is a *consideration* against leave being granted, but in the context of a protection visa refusal it is not necessarily dispositive.

10. Thirdly, in this matter the prejudice is not significant because unlike in a number of the cases cited at footnote 18 by the Minister {RS, 11 [39]}, this matter did not commence with a classic trial where witnesses were called and cross-examined. Rather, in the Federal Circuit Court, the evidence took the form of the contents of a Court Book filed by the Minister as well as affidavit evidence put on by the appellant exhibiting transcript and translation of the SHEV interview. The hearing was – as is typical for migration judicial review cases in the Federal Circuit Court – listed to be heard for half a day and concluded within that time frame. The Minister could have chosen to meet the new ground in the Federal Court with further affidavit evidence from a different interpreter. The sense of injustice arising in cases where multi-day trials with viva voce evidence have occurred and one party would need to reopen a case for further witness examination/ cross-examination is absent from this case.

11. Fourthly, the new argument on appeal sprang from the reasoning of the Full Federal Court authority handed down on 11 February 2019 in *EVS17 v Minister for Immigration and Border Protection* (2019) 268 FCR 299 after the appellant's case in the Federal Circuit Court had been heard. Prior to *EVS17* there was no authority upon which the appellant could rely to the effect that the Authority's task was disabled due to a defect in the review material (here not receiving a correct interpretation of the review material, in *EVS17* non-provision of review material). This is not an instance of a party electing not to take an available argument at first instance and then making a difference forensic choice on appeal. Rather, the appellant brought a judicial review case on the arguments then available to him only to find that case law developed between his first instance case and the appeal.

12. Fifthly, the translation evidence was always relevant to another ground of judicial review that the appellant has maintained from the start, being that the Authority failed to use its powers pursuant to s 473DC to cure the interpretation errors in the SHEV interview. That argument is akin to a failure to inquire and the appellant needed to

[2] *Murad,* [56]. Her Honour did note at [58] that a ground if raised at the primary stage would have been subject to further evidence from the respondent, such prejudice may be dispositive.
[3] *Murad,* [58].

demonstrate that steps taken under s 473DC could have produced a useful result.[4] In addition, the error had to be shown to be material, and the interpreter evidence was relevant to materiality. The Minister's position in the Federal Circuit Court was that the interpretation evidence was irrelevant because the Court could only examine the evidence that had been before the Authority. The Minister's forensic choice about how he responded to the unreasonableness ground caused the Minister not to put on his own interpretation evidence in the Federal Court.

13. There is yet another consideration that arises from the Minister's position in this respect. The Judge below refused leave to the appellant to raise the argument now pressed on the basis of the translation evidence that was in fact before his Honour. In essence, his Honour assumed for the purpose of the leave application that the translation evidence before the Court was correct, and upon that assumption, nonetheless refused leave. If the Minister's objection to the appellant being allowed to rely on this ground in the present appeal is upheld, it remains to be decided whether the Judge below erred in refusing leave, and if so, whether it would be appropriate to remit the matter to the Federal Circuit Court to permit the Minister to adduce further translation evidence.

Ground 2

14. The Authority rejected the appellant's submission that he had failed to answer the question as to how he had been beaten due to errors in interpretation {IAA Decision and Reasons, [23], CAB 11 – 12}. The First Respondent identifies two bases on which this approach was not unreasonable {RS, [53] – [54]}: the appellant had not identified any further errors in interpretation apart from those in its written submissions to the delegate; and the delegate had formed a subjective impression the appellant had been able to "communicate clearly" at the SHEV interview {Appellant's Book of Further Materials, 175}.

15. First, the Authority had no basis to assume that the interpretation errors identified by the appellant were exhaustive. The appellant provided submissions to the delegate identifying three examples of difficulties in interpretation. The submission expressly stated that the appellant's representative had only arranged for an interpreter to selectively review the SHEV interview {Appellant's Book of Further Materials (**AFM**), 141}. The appellant submitted that, based on these examples, other questions and

[4] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [26]).

answers in the interview may not have been correctly interpreted {AFM, 142}. This submission was reiterated on review, where the appellant argued that the Authority should give the appellant the "benefit of the doubt" or conduct an interview before making adverse credit findings {FC, [15], CAB, 81 – 82}. The Authority could not assume the exchange between the appellant and delegate regarding the act of "beating" was correctly interpreted merely due to the absence of further specific corrections.

16. Secondly, the Authority's *specific* finding that the appellant had failed to answer the straight-forward question – how were you beaten? – because he was evasive cannot be bolstered by the delegate's *general* views regarding the quality of interpretation. The delegate was not in any better position than the Authority to identify interpretation errors in the SHEV interview. The delegate's findings in the decision were not based on any specific *visual* observations of the appellant's demeanor. Particularly in relation to the exchange regarding how the appellant had been beaten, the delegate – like the Authority – had no basis for concluding that the appellant had been evasive and that the questions had been correctly interpreted.

Part III: ADDITIONAL CASES CITED

Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123, [26]

CGA15 v Minister for Home Affairs (2019) 268 FCR 362, [36] – [37]

Murad v Assistant Minister for Immigration & Border Protection (2017) 250 FCR 510, [55] – [58]

BKQ16 v Minister for Immigration and Border Protection (2019) 163 ALD 127, [73]– [76]

Dated: 19 January 2021

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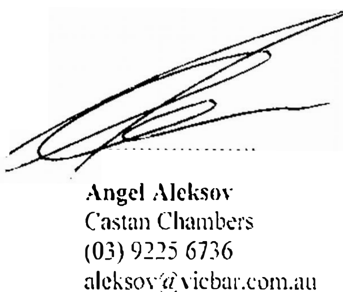

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