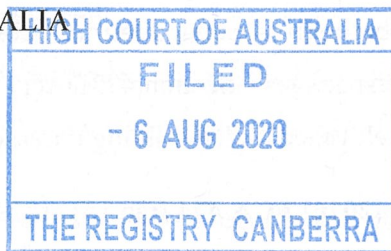


IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY



No. M140 of 2019

BETWEEN:

**ABT17**  
Appellant

and

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Respondent

**IMMIGRATION ASSESSMENT AUTHORITY**

Second Respondent

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### FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

#### **PART I CERTIFICATION**

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1. This outline is in a form suitable for publication on the Internet.

#### **PART II OUTLINE OF PROPOSITIONS**

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##### **Ground 1: Not legally unreasonable for the IAA not to interview the Appellant**

2. Purpose of s 473DC: Under Pt 7AA, the Authority generally conducts a de novo review on the papers (a "limited" review), and only considers new information in exceptional circumstances. The Authority is not required to interview an applicant simply because credit is in issue. *Respondent's submissions (RS) [20], [24]*
  - ss 473DB(1)(b), 473DD(a), 473FA(1); s 473DC(1)(b)
3. The s 473DC discretion must be exercised reasonably. But in deciding whether to get new information under s 473DC, it is permissible to decline to exercise the discretion because the circumstances are not sufficiently exceptional. *RS [21]*
  - EMJ17 [2018] FCA 1462 at [60](7)
4. Section 473DA(1) codifies the incidents of the Authority's procedural fairness obligations. Procedural fairness is not the lens to view the content of procedural obligations, except to the extent of overlap with unreasonableness. *RS [22]*
  - **BVD17 (2019) 93 ALJR 1091** (tab 12) at [33]-[34]

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5. The overlap between procedural fairness and unreasonableness is small, as they have different perspectives. Section 473DA(1) means that procedural fairness has diminished relevance in determining unreasonableness under s 473DC. *RS [23]*
  - **CSR16 [2016] FCA 474** (tab 15) at [29]; contra **BVD17** (tab 12) at [62]
  - **DGZ16 (2018) 258 FCR 551** (tab 16) at [75], [78] (no equivalent to s 425); **DVO16 [2019] FCAFC 157** (tab 18) at [4]-[5], [10] (translation errors)
6. The purpose of s 473DC is not to give a referred applicant an opportunity to respond, but is to enable the Authority to make an informed decision. *RS [32]*
7. *Demeanour not a substantial part of delegate's decision:* The question of unreasonableness would only arise if demeanour played a substantial part in the delegate's decision. Only then would the question arise whether the Authority had a sufficient basis to reach a different conclusion. *RS [35]*
  - **DPI17 (2019) 366 ALR 665; FND17 [2019] FCA 1369** (tab 19) at [36]; contra Bromberg J [24] ("may have been, at least in part" based on demeanour)
8. There is no basis for concluding that the delegate's acceptance of the Appellant's factual claims was substantially based on demeanour. The delegate did not make any separate finding about the claimed sexual assault, and did not say anything about the basis of accepting the claims as summarised. And the Authority accepted that the Appellant had scarring on his back. *RS [38]-[39]*
  - See delegate pp 2-3: Appellant's further materials (**AFM**) 5-6
9. Demeanour in itself is not "information" or "new information". *RS [27]*
  - **ABJ17 [2018] FCA 950** at [23]; cf **CED16 [2020] HCA 24** at [21]-[22], [30]
10. In assessing the reasonableness of not conducting an interview, it is relevant that the findings on sexual assault were not a critical step in Authority's decision. *RS[9]-[12]*

**Ground 2: Any error would not be material**

11. Even if there were an error, the Authority's analysis of country information provides a wholly independent basis for its decision: Bromberg J [26]-[27]. *RS [40]*
12. Materiality: Unreasonableness is subject to a requirement of materiality. *RS [41]*
  - **SZMTA (2019) 264 CLR 421** (tab 7) at [45]-[47]; **DPI17** (tab 17) at [49]-[50]
13. Materiality is assessed by reference to the findings actually made by the decision-maker (that are independent of the error), and the courts take a robust view on whether there is a "realistic" possibility of a different outcome. *RS [43]*
  - **Hossain (2018) 264 CLR 123** (tab 5) at [35], [78]; **SZMTA** (tab 7) at [70]-[71]
14. Authority's reasons: Here, the Authority found that there was no real chance of persecution, having regard to the number of years since the Appellant left Sri Lanka; his personal circumstances; and the country information referred to: IAA [33] **Core Appeal Book (CAB) 13**. The "personal circumstances" are set out in IAA [31] **CAB 12**. The Appellant had not claimed any connection with the LTTE. The claimed sexual assault was part of harassment of the Appellant as a Tamil, not because the Appellant had any "perceived links" with the LTTE. Therefore the Authority's conclusions on the country information were independent of its findings on the sexual assault. *RS [46]*
15. By comparison, the delegate accepted the Appellant's claims, but did not consider that the Appellant had any profile connecting him to the LTTE. The delegate considered any issue of imputed support only arose from the Appellant being Tamil, and a young Tamil from northern Sri Lanka: delegate pp 5, 7: **AFM 8, 10**. *RS [46]*

Dated: 6 August 2020



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