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
SYDNEY REGISTRY

No S66 of 2020

BETWEEN:

DVO16
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

2. The sole ground of appeal alleges that the Authority did not complete its statutory task because the review material was *necessarily incomplete*. It is a case where, allegedly, the decision maker was hamstrung as a result of failures by another person. In such a case (as in a case of third party fraud) it is not sufficient to say that the decision-maker's consideration of the case was affected in some way. The failure must be one that affects a particular duty, function or power of the Authority. It is therefore necessary to go to the text of Part 7AA (RWS [20]).

    - *Minister for Immigration v DUA16* [2020] HCA 46 (JBA/BNB17 1426) at [15], [18].

3. It does not appear to be put that the delegate's decision was vitiated by a denial of procedural fairness. That would not suffice to establish error by the Authority in any event (RWS [18]).

    - *Plaintiff M174/2016 v Minister for Immigration* (2018) 264 CLR 217 (JBA 1085) at [52], [69]-[71].

4. Nor was there any failure by the Secretary to provide "material" to the Authority pursuant to s 473CB(1).

(a) If the appellant's oral answers in the interview constituted "material" that he gave to the delegate (s 473CD(1)(b)), that material was given (in the form of an audio recording) to the Authority (RWS [20]).

(b) However, the better view is that those answers were not "material" in the relevant sense, as Anderson J held in *BNB17* (CAB/BNB17 107 [95]). Rather, the *recording* of the interview was required to be provided under s 473DC(1)(c), as noted in *ABT17 v Ministert for Immigration* [2020] HCA 34 (JBA/BNB17 1239) at [12] (and it was provided).

(c) There is no room in s 473CB for an implication that, somehow, the Secretary's duty is not performed if material that is required to be provided to the Authority contains errors.

5. The Authority's duty to conduct a "review" (s 473CC) is shaped by the provisions of Division 3 of Part 7AA. Relevantly, the review is to be carried out by "considering the review material provided to the Authority" (s 473DB) (RWS [22]).

(a) It is no longer put that the Authority was on notice of interpreting errors, so as to make it unreasonable not to seek further information under s 473DC.

(b) No occasion arose for the consideration of "new information" (ss 473DD, 473DE).

(c) Thus, no particular duty, function or power of the Authority was affected by the interpreting errors. The Authority was able to, and did, consider the "review material" provided in compliance with s 473DC.

6. Acceptance of the appellant's position would mean not only that the Authority had failed to complete its statutory task but that it was unable to complete (or even begin) it. That which is said to vitiate the Authority's decision (translation errors in an interview, contained in the "review material") would still exist regardless of any exercise by the Authority of its powers. That is an indication that Parliament did not intend the absence of such errors to be a jurisdictional requirement.

7. Alternatively, the translation errors were not "material" in any relevant sense.

(a) While it was factually wrong to say that the appellant had said he "did not know" what was meant by his claim to fear persecution due to his ethnicity (CAB 10 [22]), this did not deter the Authority from considering whether the appellant

would face harm amounting to persecution by reason of his Ahwadi Arab ethnicity (CAB 10-11 [23]-[26]).

(b) It can be accepted that the claim might have enjoyed more success if the appellant had expanded on it during the interview. But the evidence does not establish that his failure to do so was wholly or even partly caused by the translation errors (or by confusion arising from them). The part of the interview shown to contain errors is at ABFM 214-215 (cf the evidence at 101-110). At 215-217 the delegate asked a series of questions calculated to draw out any fears of persecution that the appellant might have, other than the rival tribe that had been referred to (RWS [9]-[11]).

(c) Thus, even if the test of materiality is whether the outcome could realistically have been different had the error not occurred (cf eg *Hossain v Minister for Immigration* (2018) 264 CLR 123 (JBA 989) at [30]-[31]), it is not shown that the errors were material.

(d) But, properly understood, in the present context, materiality of the translation errors is an integer of the alleged error itself. The question of materiality must therefore go to whether the errors were such as to prevent consideration by the Authority of the totality of the appellant's claims. The translation errors were not material in that sense (RWS [27]).

Dated: 10 February 2021

Geoffrey Kennett SC
Hamish Bevan