HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

DVO16
Appellant

AND:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: ISSUES PRESENTED IN THE APPEAL

2. The issue raised by the ground of appeal is whether errors in interpretation in an interview before the Minister's delegate, not brought to the attention of the delegate or the second respondent (**the Authority**), rendered the "review material" incomplete and thereby vitiated the Authority's decision.

3. The issue that arises from the written submissions is less confined: whether the errors in interpretation in some way disabled the Authority from carrying out its statutory task. The appellant's submissions (**AS**) frame the problem at one point in terms of a material misapprehension of fact on the part of the Authority (at [3])), and at another in terms of whether the interview was a "manifestly inadequate basis upon which a 'review' can lawfully be undertaken" (at [21]).

4. Correctly understood, the issues are:

   (a) whether anything in Part 7AA of the *Migration Act 1958* (**the Act**) renders ineffective a decision made by the Authority, where the review material includes

the record of an interview in which material errors of interpretation occurred; and

(b) whether the errors that occurred in the present case were material in that sense.

Part III: SECTION 78B OF THE *JUDICIARY ACT* 1903

5. Notice under s 78B of the *Judiciary Act* 1903 is not required.

Part IV: FACTS

6. Subject to the following additions and clarifications, the first respondent agrees with the summary in AS paragraphs 6 to 19. References to the Full Court's reasons for judgment (Core Appeal Book (**CAB**) at 53) appear as "**FFC**" and the primary judge's reasons for judgment (CAB at 25) as "**PJ**".

7. At the commencement of the interview, the delegate said that she was "*to gather as much more* [sic] *information as possible regarding [the appellant's] claims for protection in Australia*" (Applicant's Book of Further Materials (**ABFM**) at 141.15). As it was important that the appellant understand what the interview process involved, the delegate gave the appellant a copy, in Arabic and Persian, of the "*Important Information About Your Protection Visa Interview*" information sheet referred to in the invitation to attend the hearing (ABFM at 57) and gave him the opportunity to read and understand it (ABFM at 141.16–142.22). The delegate then explained to the appellant that it was "*extremely important that you give the department your full personal and accurate protection claims as early as possible, including during this interview*" and warned that there may not be "*another chance to provide these claims*" (ABFM at 148.11-15; PJ [20]).

8. As to the progress of the interview concerning the appellant's ethnicity claim: the first respondent agrees with AS paragraph 11, the first two phrases of AS paragraph 12 (to the end of the first reference) and the first phrase in paragraph 13 (also to the end of the first reference). The first respondent does not agree with the characterisation given in the balance of AS paragraphs 12 and 13 to the extent it is asserted that *all* of the "*open questions*" listed at FFC [63] are those to which reference referred to at FFC [79] as being "*related to or a continuation of the enquiries about, as he understood, his tribal disputes*". This is now explained.

9. The untranslated passage of transcript at FFC [60] is to be read with the passage with the translations at FFC [76] and [78]. The extract at FFC [78] does not include the final portion of the passage at FFC [60], which significantly includes the two open questions "*… just tell me exactly what it is that you fear will happen to you if you return to Iran*" and "*Okay and why would that be?*". It is these two questions that the appellant "*likely understood … to be related to or a continuation of the enquiries about, as he understood, his tribal disputes*" (FFC [79]). And it is only the first of these that appears as the first dot point at FFC [63].

10. This view is supported by the description of the next part of transcript as a "*later passage*" (FFC [80]). The conclusion of that "*later passage*" ends with the delegate's statement, "*All right, so this is the Chanani tribe*". That statement, and the appellant's interpreted response, "*Yeah, I'm talking about them, yeah*" (ABFM at 215.22) marks the end of that portion of the interview that was the subject of the expert evidence (see the English transcript at ABFM at 214.16–215.22 and the expert evidence commencing with the instructions at ABFM at 101.20-25 and ending at ABFM at 110.5).

11. It is after this point in the transcript that the remaining open questions in the second to seventh dot points at FFC [63] occur. Thus, neither those remaining open questions nor the appellant's responses to them were the subject of any expert evidence adduced on behalf of the appellant impugning their interpretation. Those questions were:

"• …

- *Is there anything, any other reason you fear return to be around* [sic; scilicet: to Iran]*?*
- *Okay, but apart from those people, apart from issues to do with the Chanani tribe, is there anything else you fear if you were to return to Iran?*
- *So I take it from that answer that there's nothing else that you fear if you were to go back to Iran, apart from that issue?*
- *What I am trying to establish is if there is anything else apart from this issue that we have discussed today.*
- *What is the fear from the government?*
- *So are you saying you would be discriminated against?*" (FFC [63]).

12. The questions in these second to fourth dot points are premised upon a distinction between, on the one hand, the appellant's claims relating to his tribal disputes and, on the other, any other reason he fears harm in Iran. The last two dot points, in terms, ask the appellant about his "*fear from the government*" and whether he was saying he "*would be discriminated against*". The different subject matter of these remaining open questions (FFC [63]) therefore indicates that these are *not* the open questions that the appellant "*likely understood to be related to or a continuation of the enquiries about, as he understood, his tribal disputes*" (FFC [79]).

13. On each of those opportunities being given to the appellant, he referred back to the tribal conflict arising from the bus incident or otherwise failed to say anything to establish a claim for persecution on grounds of ethnicity (FFC [64]; see also PJ [35]-[36] and ABFM at 215.25–217.9). The first respondent accepts that, insofar as this conclusion encompasses the question "*... just tell me exactly what it is that you fear will happen to you if you return to Iran*" in the first dot point at FFC [63], then the appellant's referral to his tribal conflicts on that occasion may have been affected by his likely understanding at FFC [79] but, as submitted, this does not affect the remaining open questions.

14. While the appellant apparently did not understand that he was specifically being asked about persecution on grounds of ethnicity, it is clear that the appellant was asked open questions which gave him ample opportunity to speak to his ethnic persecution claim (FFC [65]-[66]; see also PJ [29]).

15. As to the delegate's decision: in addition to the matters in AS paragraphs 14 and 15, the delegate acknowledged that the appellant claimed that he feels that the outcome of a court case arising from the bus incident was not satisfactory because he is an Arab (FFC [26]; see also ABFM at 84 [154]).

16. As to the submissions to the Authority: these said nothing about the delegate's reasons for rejecting the appellant's claim based on ethnicity (see First Respondent's Book of Further Materials at pages 6 – 9). Contrary to the suggestion in AS paragraph 16, these submissions did not allude to any interpretation error insofar as the appellant's ethnicity claim was concerned. The references to "*other problems with the interview*" mentioned in FFC [61] formed part of the appellant's submissions to the Full Court as to why the Authority should have been on notice that there was a problem with the interview.

17. As to the Authority's decision: the first respondent disagrees with the characterisation given in AS paragraph 18 to the Authority's reasons (CAB 10 [22]), although it is not disputed that there were errors, as identified in FFC [87], flowing directly from the deficiencies in interpretation. Those errors were: *first*, the appellant did not say that he did not know what persecution due to this ethnicity meant and, *secondly*, he did not say that he does not fear returning to Iran for any reason other than the tribal conflict and fearing harm from the Chanani tribe. Despite these errors, the Authority went on, as the delegate had done, to consider the likelihood and consequence of discrimination against the appellant on the basis of him being an Ahwazi Arab (FFC [87] and [34]; CAB 10 [23]-[26]; and as summarised in AS paragraph 19).

Part V: FIRST RESPONDENT'S ARGUMENT

18. The appellant does not appear to submit that, as a consequence of the errors in interpretation, the delegate's decision was vitiated by a denial of procedural fairness. That proposition would not take him far, for reasons which emerge from the decision of this Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217.

    (a) Jurisdictional error in the delegate's decision does not deprive the Authority of jurisdiction to review it (at [52]); nor does it render invalid a decision by the Authority affirming the delegate's decision (at [69], [71]).

    (b) Circumstances may arise in the review that make it unreasonable for the Authority not to exercise its power under s 473DC to obtain further information from the applicant, and consider that information under s 473DD (at [49]-[50]); but that depends on the problem being apparent to the Authority. This was the subject of the first ground of appeal in the Federal Court, which is not pursued in this appeal.

    (c) It is the decision as affirmed by the Authority that constitutes the determination of the applicant's valid application for a protection visa (at [18], [70]); so that flaws in the primary decision cease to have legal consequences.

19. Rather, the argument appears to be that the interpreting errors vitiated the decision of the Authority because they resulted in a defect – unknown to the Authority – in the "review material" upon which it was required to conduct its review.

20. That argument is to be approached by reference to the statute. The "review material" referred to in s 473DB(1) is the material required to be provided by the Secretary under s 473CB(1). Relevantly, that includes material "provided by the referred applicant to the person making the decision" (para (b)). The Authority was given (and listened to) the recording of the interview (see eg CAB 71 at [59]). Thus, to the extent that the appellant's answers to questions (in his own language or as translated by the interpreter) constituted "material" that he provided to the delegate, the Authority had that material and was no less capable of analysing it than the delegate had been. The "review material" was not in any relevant sense "incomplete".

21. To succeed, therefore, the appellant's argument requires an implication to the effect that the Authority's review function is not successfully performed if the material presented to it is affected by interpreting errors that affected the presentation of the referred person's case. Necessarily (given the findings below which are not challenged), that implication must have application where the flaw in the material is not apparent to the Authority. There is no support in the statute for such an implication.

22. So far as the effective presentation of the referred person's claims is concerned, it is significant that Part 7AA proceeds on the assumption that those claims have been properly heard by the delegate (*M174* at [45]) and affords no right to be heard except in response to certain "new information" (s 473DE). Its limited provisions exhaustively state the requirements of natural justice (s 473DA), consistently with the intention that review is normally to proceed by reference to the material presented to the delegate (s 473DB). Scope for the consideration of "new information" is strictly limited. What emerges is that the Authority was intended – subject to it being persuaded of particular matters including that "exceptional circumstances" exist (s 473DD) – to consider the claims as they are advanced before the delegate. Problems in the presentation of those claims might, if brought to the Authority's attention, call for consideration of its power to get new information; but that is not this case.

23. In this regard, also, the appellant's submissions at [22]-[33] overstate the significance of the protection visa interview in the statutory scheme. True it is that, as a matter of policy, all protection visa applicants are interviewed. But that is not a process required by s 57, as that provision is not engaged by a mere lack of persuasion (see *Minister for Immigration and Border Protection v CED16* [2020] HCA 24 at [14]), and it can in any

event be satisfied by a written process (cf AS [24]). Nor does any other provision of the code of procedure in Subdivision AB of Division 3 of Part 2 require an interview. It can be accepted that, where an interview is conducted, it must be conducted fairly. But it does not follow, at the level of statutory construction, that the interview is the main or only opportunity for the visa applicant's claims to be advanced.

24. The appellant's argument may go further and say that the errors undermined not only the presentation of his claims but the Authority's ability to understand them (cf AS [39]-[41]). That should not be accepted. The claims that the delegate and the Authority are required to understand and consider are claims put to them in English (either directly or through an interpreter), that being the language in which the business of government is transacted: *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 at 319D, 325-326. Of course, where an interview is conducted, fairness requires the provision of an interpreter to assist an applicant who does not speak English well. But failures of interpretation constitute failures to facilitate the presentation of the applicant's case, properly analysed through the lens of procedural fairness (as, for example, in *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212) rather than failures to grapple with the claims as presented. If that were not so, delegates, Tribunals and the Authority would require expert translations of what was said at interviews in order to avoid errors of the kind identified in *Dranichnikov* (2003) 197 ALR 389.

25. Properly understood, therefore, the Authority was not disabled from understanding the appellant's claims by the fact that problems occurred in interpreting the questions and answers at the interview. At worst, the appellant had been hampered in articulating and elaborating those claims and the Authority was unaware of the extent to which that had occurred. That, in the context of Part 7AA, does not point to any failure to conduct a "review".

26. The appellant's submissions on this point effectively proceed in the ether, without reference to the statutory scheme. Paragraph 35 fastens upon an observation at FFC [12] (CAB 59) in which Greenwood and Flick JJ put to one side cases in which deficiencies in translation are "so manifestly apparent" that the delegate and the Authority must be taken to be on notice. The following paragraphs argue that a requirement for actual or constructive knowledge is not part of the understanding of jurisdictional error in Australia. That may be so. But the point being alluded to by their Honours was that

actual or constructive knowledge on the part of the Authority might have forced it to act under s 473DC to try to fix the problem (cf *Plaintiff M174* at [49]-[50]). Absent that factor, one is left with the bare requirement that the Authority consider the "review material" – which, as their Honours noted at [11], could not be read as requiring the consideration only of factually accurate transcriptions.

27. Further, neither the presentation of the appellant's claims nor the Authority's understanding of them was hampered to a material extent. As outlined above (and see FFC [62]-[64], [66]), the delegate took steps at the hearing to ensure that the appellant could say whatever he wanted to say about the bases upon which he feared persecution. The Authority itself, despite misstating what the appellant had said at the interview about the reasons he feared returning to Iran (CAB 10 [22]), considered whether he faced harm on the basis of being an Ahwazi Arab (at [23]-[26]). Consideration of the totality of his claims by the Authority was not prevented, or compromised to any material extent, by what had occurred at the interview. It may be that those claims would have been presented more convincingly if the interpretation at the interview had not been affected by errors. However, the appellant does not say that he was denied procedural fairness; and, as outlined above, that factor does not affect the validity of the Authority's decision.

Part VI: NOTICE OF CONTENTION

28. As noted above, the appellant does not appear to allege that he was denied procedural fairness by the delegate or the Authority. That makes it unnecessary to determine what was meant by Greenwood and Flick JJ in the first sentence of FFC [5] (CAB [57]). If relevant, the Minister would contend that no denial of procedural fairness occurred. It does not appear necessary to file a notice of contention, as their Honours do not express a firm conclusion on the point and it does not require a conclusion in this appeal. However, this may need to be revisited in the light of the appellant's submissions in reply.

29. Put shortly, there was no denial of procedural fairness because the appellant was given ample opportunity to speak to his ethnicity claim, having regard to: *first*, the obligations imposed on an applicant by s 5AAA and the concomitant absence of such obligations on the Minister (or his delegate) (FFC [65]); *secondly*, the ample opportunity given to the applicant by the delegate to speak to his ethnic persecution claim (FFC [62]-[64], [66]); *thirdly*, the absence of any duty on the Authority to interview the appellant (FFC [66]); *fourthly*, the absence of any circumstances to have required the Authority to consider

whether or not to interview the applicant or seek further information from him with regard to his ethnic persecution claim (FFC [66]); and, *fifthly*, the fact that the errors in interpretation were not material because the Authority considered the risk of harm on the basis of his being an Ahwazi Arab (FFC [87]) and they did not deny him any opportunity to give evidence (FFC [91]).

Part VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

30. The estimate of time required for presentation of the first respondent's oral argument is 1.5 hours.

Dated: 3 July 2020

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ANNEXURE – FIRST RESPONDENT'S LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act 1958* (Cth) (consolidated as at 18 November 2016), ss 5AAA, 57, 473CB, 473DA, 473DB, 473DC, 473DD, 473DE.