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

APPELLANT'S REPLY

Part I:

1 We certify that this submission is in a form suitable for publication on the internet.

Part II:

As to the issues presented on appeal

2 There is no inconsistency in the issues identified as between the ground of appeal and the appellant's written submissions filed 5 June 2020 (**AWS**) at [2] – [3]. The question that arises is whether the second respondent failed to complete its statutory task by reason of material mistranslation in the course of the interview between the delegate and the appellant. The finding that there was such material mistranslation necessitates a conclusion either that the review material was incomplete, or that the second respondent proceeded under a material misapprehension of fact that the applicant had been afforded an opportunity to properly advance his claims and had no further evidence to give {cf. first respondent's written submissions filed 3 July 2020 (**RWS**) at [2] – [4]}.

As to the need for awareness of the mistranslation on part of the second respondent

3 The first respondent accepts {RWS at [22]} that an awareness on part of the second respondent of "[p]roblems in the presentation of [the applicant's] claims might … call for consideration of its power to get new information." A failure on the part of the second respondent to exercise discretionary powers available to remedy material mistranslation, had it been aware of same, would necessarily be unreasonable (in the sense considered by *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 per French CJ at [26] – [29]).

4 The material defect that requires remedy, whether by the exercise of the second respondent's discretionary power under section 473DC of the *Migration Act 1958* (Cth) to obtain new information or through other means, is the mistranslation in the course of the

interview. The requisite quality of unreasonableness is provided from the failure to redress that underlying defect. So much the first respondent appears to agree with.

4 However, the first respondent does not identify any principled basis on which the materiality of the error can depend on the subjective or constructive knowledge of the second respondent. The second respondent's lack of knowledge of the existence of the mistranslation does not alter the nature of the underlying flaw.

5 Contrary to the first respondent's submissions, the characterisation by the appellant of the error caused by deficiencies in translation as being jurisdictional in nature are not drawn from the "ether" {RWS at [26]}.

6 The gravity of an error being the discerning principle to distinguish between jurisdictional and non-jurisdictional error dates at least from Professor Jaffe's seminal 1957 article (*Judicial Review: Constitutional and Jurisdictional Fact*, (1957) 70 *Harvard Law Review* 953) which has since been repeatedly cited with approval by decisions of this Court as consistent with the parameters of jurisdictional error including *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at [64] and *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (Kiefel CJ, Gageler and Keane JJ at [18], as set out in AWS at [37]).

7 As noted in *Kirk* at 239 CLR 539 ([64], per French CJ, Gummow, Hayne, Crennan, Bell JJ, and Keifel J as her Honour then was) citing Professor Jaffe, "'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error".

8 A requirement that a decision maker be aware of the relevant defect in order for an error to be jurisdictional is also inconsistent with now well-established precepts as to the circumstances in which jurisdictional error might be found to arise – for instance a decision that falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Li* (2013) 249 CLR at [105] per Gageler J) might be legally unreasonable "because the court cannot identify how the decision was arrived at" (*Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [44] per Allsop CJ, Robertson and Mortimer JJ).

9 The concept of awareness of error plays no part in this framework (see also in this regard AWS at [38]). Also of relevance are the analogous principles applicable to the review of a judicial discretion (as set out in *House v The King* (1936) 55 CLR 499 at pp 504-505), where error may be inferred by reason that the "outcome is unreasonable or plainly unjust … although the nature of the error may not be discoverable."

As to procedural fairness

10 While mistranslation may *also* be a breach of procedural fairness (and therefore in a different context such as a Part 7 review amount to jurisdictional error for that reason), in the context of a Part 7AA review it disables the second respondent from completing its review if the mistranslation is sufficiently material and is not otherwise remedied {cf. RWS at [24]}. In this context, it is relevant to note that the modern development of power to quash by *certiorari* was influenced by the writ of error (*McBain, Re; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [256] – [258] per Hayne J, citing *Certiorari and the Revival of Error in Fact*, (1926) 42 Law Quarterly Review 521, D M Gordon QC).

10 Gordon QC traces the writ of error to at least the early 1400s (at 524) and says of that writ that (at 526 – 527):

> The complaint is not of an error in the decision, but of something that never came before the Court for decision, not of any mistake in the judgment, but that it was a mistake to proceed to judgment at all. Error in fact arises from matters which are not only outside the issues before the trial Court, but as to which ordinarily that Court does not inquire at all.
>
> In general, it is the non-performance of some condition of a regular trial (often preliminary in time) which the Court presumes to have been duly carried out, and the non-observance of which would ordinarily induce the Court to stay its hand if it had
20 knowledge, or to re-open its judgment had it the power. Thus such error may consist in the failure to take a necessary step, or in the non-existence of normal capacity or status in actor, reus, or index, which makes it improper for the trial to go on as if all capacities were normal.

11 That passage was relied on shortly afterwards by Gleeson CJ (in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 605 [14]–[15]) to conclude that a failure by the tribunal concerned to deal with an adjournment application that had been made to it but which, by reason of an administrative error, it was unaware of at the time of its original decision, amounted to jurisdictional error[1]:

> In the present case there was a denial of procedural fairness; **but there was more to it**
30 **than that**. There was an error of the kind described as 'error in fact' in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication **such as would ordinarily induce a tribunal 'to stay its hand if it had knowledge, or to re-open its judgment had it the power'** (Emphasis added)

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[1] The facts of the matter concerned a decision by the Immigration Review Tribunal (as it then was) to re-open a decision that it had already made which was adverse to a visa applicant, and decide instead to remit the matter; in considering whether the Tribunal was *functus officio* when it made the second decision, the Court was required to consider whether the first decision was a nullity by reason of jurisdictional error.

Was the mistranslation material?

12 The first respondent contends that the appellant was given "ample opportunity to speak to his ethnic persecution claim" {RWS [14]} by reason of six "open questions" put to the appellant by the delegate {RWS at [11]}, and that Stewart J's finding below {FFC [79]} that the appellant "likely understood the open questions … to be related to or a continuation of the enquiries about, as he understood, his tribal disputes" only relate to the first of those six "open questions" {RWS [12]}. That is incorrect.

13 The question of whether the "open questions" did in fact give the appellant an opportunity to speak to his claim on persecution as to ethnicity arose as the appellant had secured (pro bono) expert evidence on the quality of the translation for only that part of the interview that dealt directly with his "ethnicity claim" (as to which see {AWS [9]}), with the result that the Full Court did not have evidence as to whether the six "open questions" (being the second to the seventh questions identified at {FFC [63]}) were in fact translated correctly.

14 Each of the open questions that the first respondent relies on was specifically set out (and taken into account) in the reasons of Stewart J below {Reasons for Judgment 9th September 2009 (**FFC**) [63]; see also RWS at [11]}. Each of those questions were asked *after* the portion of the interview in respect of which the Full Court had expert translation evidence (and indeed were asked almost immediately afterwards – the translated portion of the transcript can be found at {Appellant's Further Materials (**AFM**) pp 215 - 216} and the "open questions" are at {AFM pp 217 - 218}).

15 It is that sequence of events which led to Stewart J's finding {FFC [79]} that the appellant relies on to demonstrate the materiality of the errors, that is, that the appellant understood the open questions as related to the enquiries about his tribal disputes.

16 That Stewart J's finding applied to each of the open questions is apparent. At {FFC [63]}, Stewart J sets out the "open questions" that the first respondent relies on. In the paragraph immediately following {FFC [64]}, his Honour notes (clearly in respect of each of those "open questions") that the appellant "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 at [64]}. In the next paragraph {FFC at [65]}, his Honour then observed (again clearly with respect to *each* of those "open questions") that:

> It is true that because of an apparent misunderstanding by him arising from the interpretation, a question dealt with in relation to ground 3 below, he apparently did not understand that he was being specifically asked about persecution on grounds of ethnicity. (Emphasis added)

17 It was the observation at {FFC at [65]} that is clearly the basis of Stewart J's later finding at {FFC [79]} (in the context of the appellant's third ground of review before the full court, being the material translation error issue presently before this Court) that the applicant "likely understood the open questions that followed to be related to or a continuation of the enquiries about, as he understood, his tribal disputes." The reference in {FFC at [79]} to "open questions" is clearly a reference to the same "open questions" the subject of analysis at {FFC at [62] – [66]}.

Other Matters

18 With respect to {RWS [20]}, if (as here) there was material translation error in the interview with the delegate, then the review material provided to the second respondent by the Secretary was necessarily incomplete. It was incomplete because it did not contain the applicant's answers but rather transposed inaccurate translations with the effect that the second respondent was not giving consideration to the *appellant's* narrative but rather some other distorted version. To contend that the second respondent was "no less capable of analysing" that deficient factual material "as the delegate had been" is to elide the substantive issue, which is that both were disabled from the performance of their statutory functions by reason of the material mistranslation.

19 Further, the reliance on *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 {RWS at 24} is misplaced. That matter concerned inter alia an unsuccessful attempt to invalidate the notification of a decision by reference to the *Racial Discrimination Act 1975* (Cth), on the basis that the notice was in English (which the applicant could not understand). It has no applicability to the factual circumstances of an interpreted interview for the purposes of obtaining the appellant's version of events, where the interpreter was appointed by the first respondent, and which interpreted answers were relied upon by both the delegate and the second respondent.

20 Finally, the first respondent's submissions in substance only address *one* function of the interview that was conducted – being the opportunity it provided the appellant to give evidence {see for instance RWS at [23]} – but fail to deal with the effect of mistranslation on the interview's other and equally important function, being to allow the appellant to respond to issues arising, and the delegate's concerns. That the delegate had concerns is apparent from the delegate's attempts at questioning the appellant on his ethnicity claim, the (mistranslated) answers to which were relied upon by the second respondent {Core Appeal Book 11 at [22]}.

Dated: 23 July 2020

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