IN THE HIGH OF AUSTRALIA
MELBOURNE REGISTRY

M109/2020

BETWEEN:

BNB17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

I. SUITABLE FOR PUBLICATION

1. These submissions are suitable for publication on the internet.

II. ISSUES

2. The principal issues raised by this appeal are:

   2.1. whether the appellant should be granted leave to advance a new ground, to the effect that the second respondent (the **Authority**) was unable to perform its statutory function under section 473CC(1) or 473DB(1) of the *Migration Act 1958* due to two alleged misinterpretations at the appellant's interview with the delegate of the first respondent (the **Minister**) based on evidence that was not before the Authority;

   2.2. if so, (a) whether material misinterpretation has been demonstrated based on evidence that was not before the Authority and; (b) if so, whether that prevented the Authority from performing its function; and

   2.3. alternatively, whether material misinterpretation was demonstrated based on evidence that was before the Authority and, accordingly, it was legally

unreasonable for the Authority not to exercise its power under section 473DC to interview the appellant.

III. SECTION 78B NOTICES

3. It is unnecessary for notices to be given under section 78B of the *Judiciary Act 1903*.

IV. MATERIAL FACTS

4. Subject to the following additions and clarifications, the Minister agrees with the appellant's narrative of facts set out in his submissions (AS [5]-[18]).

Misinterpretations alleged at the Departmental interview

5. The appellant attended an interview with a delegate of the Minister on 13 January 2017, which was conducted with the assistance of a Tamil interpreter (the **Interviewer's Interpreter**). On 27 January 2017, the appellant's representative identified three examples of allegedly inaccurate interpretations by the Interviewer's Interpreter, which had been identified with the assistance of a different, unidentified Tamil interpreter.

6. The appellant's case focuses on the second of these three "examples". In respect of this example, the appellant's representative's submission to the Department was as follows:[1]

> [W]e note the exchange at 1:06:10 of the interview recording:
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> > *Case officer: I understand the kind of questions that one might be asked if they were moving from Colombo to Karaveddy, but I want to know specifically what you mean by many times they were beating you.*
> >
> > *Applicant [interpreter]: Their nature is, is… their nature is… they have to keep us always intimidated, intimidating, and making fear, and that sort of thing. In this condition, we may say anything about LTTE involvement. This why time to time, not a particular authority, personnel, but different personnel, would involve this matter and ask questions.*
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> On review, the interpreter advised that this interpretation was largely inaccurate and did not reflect the substance of what the applicant had said, which was to the effect of '*They beat me because they want to find out, by inflicting pain, whether I am a member of the LTTE or*

[1] Appellant's Book of Further Material (**AFM**) 141 – 142.

> *supporting the LTTE*' – but rather the interpreter had gone on a 'tangent'.

7. However, the delegate, in his reasons for decision on 3 February 2017, stated:

> For the most part during the interview it appeared that all parties were able to communicate clearly.
>
> I am satisfied that the applicant was able to understand the interpreter and that he provided detailed responses to questions asked of him. I have considered the concerns with interpreting as it relates to claims I have not found to be credible.[2]

and also stated that he found the applicant's testimony to be "vague and evasive".[3]

8. On 6 February 2017, the Authority wrote to the appellant and confirmed that it would "proceed to make a decision on your case on the basis of the information sent to us by the department, unless we decide to consider new information". It explained that it could "only consider new information in limited circumstances, which are explained in the attached fact sheet and Practice Direction."[4] The Practice Direction confirmed *inter alia* that the appellant could provide a written submission to the Authority as to why he disagreed with the decision of the Department, and "any claim or matter that you presented to the Department that was overlooked".[5]

9. However, the appellant did not identify to the Authority any further examples of alleged inaccurate interpretations by the Interviewer's Interpreter. That would have come within the scope of the Practice Direction as a "claim or matter" that he presented to the delegate but which was overlooked (because of some error by the Interviewer's Interpreter).

10. The appellant's representative submitted to the Authority as follows:[6]

> [The applicant] confirms his evidence that during this period [2010-2012], he was slapped by SLA officers while being questioned by them. [The applicant] has explained that he may not have mentioned this treatment prior to his interview because of the seriousness of the torture he faced in 2009. He stated that '*the 2009 is the culmination in my life, that is why I focus that incident, after that many things happened to me, but compared to 2009…*'. The treatment he claims to have faced is entirely consistent with country information – it would be expected that a person who was regularly questioned and harassed by the SLA during

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2 AFM 175.
3 AFM 179.
4 Respondent's Book of Further Material (**RFM**) 6.
5 RFM 9.
6 AFM 125.

> this period may also have been slapped while being questioned. In terms of the delegate's finding that his evidence was 'vague and evasive', we refer again to our submissions raising concerns about the interpreting at the interview. Whether due to the interpreting or the phrasing of the question, it was clearly apparent that the applicant was not understanding the question when the delegate repeated '*What do you mean when you say "beaten"*'. In such a circumstance, the delegate should have rephrased the question to address the evident difficulties in communication. We submit that [the applicant's] evidence that he was slapped on some occasions when he questioned by the SLA from 2010-2012 should be accepted.

11. The Authority, in its reasons for decision on 22 March 2017, relevantly stated ([23]):

> … The representative has referred to concerns about the interpreting at his interview and stated it was clear that the applicant simply didn't understand the question when the delegate asked what he meant by being beaten and that the delegate should have rephrased the question to address the evident difficulties in communication. I reject this submission. After finding the applicant unresponsive to the question (repeated on 3 occasions) of 'what do you mean by beaten?' the delegate then asked the applicant 'what did they do?' The applicant was still unable to provide any detailed around his claim to have been beaten.

Application to the Federal Circuit Court

12. In his amended application to the Federal Circuit Court, the appellant relied on two grounds of review.[7] Only ground 1 of that application is presently relevant. That ground was to the effect that the Authority unreasonably failed to exercise powers available to it under section 473DC to "cure" alleged misinterpretations that affected his interview with the delegate.

13. On 24 May 2019, the Federal Circuit Court dismissed that application.[8]

Appeal to the Federal Court

14. In an amended notice of appeal to the Federal Court, the applicant sought to advance four grounds of appeal.[9]

15. Grounds 1 and 2 alleged error by the primary judge in dismissing ground 1 of the amended application for judicial review (unreasonableness by the Authority).

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7 Core Appeal Book (**CAB**) 29, 31.
8 CAB 35.
9 CAB 65, 67.

16. Ground 3 of appeal was new. Ground 3 was that the Authority was "disabled from carrying out its jurisdiction" "in the absence of adequate interpretation of the appellant's testimony". However, in written submissions, the appellant clarified his argument.[10] The appellant said that proposed ground 3 was based on the reasoning of the Full Court of the Federal Court in *EVS17 v Minister for Immigration* (2019) 268 FCR 299.

17. In *EVS17*, the Full Court held that the Secretary had failed to comply with his obligation under section 473CB(1)(b) of the *Migration Act 1958* to give to the Authority "material" provided by the referred applicant to the delegate (certain documents), and that this caused the Authority's decision to be affected by jurisdictional error on the basis that the giving of the documents could have resulted in the making of a different decision by the Authority.

18. The appellant argued below that, because of alleged inaccuracies in interpretation by the Interviewer's Interpreter, the Secretary had (as the Secretary had in *EVS17*) failed to comply with his obligation under section 473CB(1)(b) of the Act to give "material" provided by the appellant to the delegate at the interview on 13 January 2017, and that this caused the Authority's decision to be affected by jurisdictional error.

19. On 12 March 2020, the Federal Court (Anderson J) dismissed the appeal.[11]

20. With respect to grounds 1 and 2 of the appeal, Anderson J held that the primary judge had not erred in dismissing the ground of judicial review (unreasonableness by the Authority).

21. His Honour identified a body of Federal Court authority as to claims of misinterpretations giving rise to jurisdictional error ([62]-[64]).[12] Informed by this authority, his Honour noted that "it has been repeated that translation is not a perfect science" and that "[i]t is enough if the translation is sufficiently accurate so as to permit the substance of the idea or concept being translated to be communicated".

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10 RFM 23 – 25.

11 CAB 75.

12 *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at [27]-[31], [45]-[46]; *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 at [63]-[69]; *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212; *SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465 at [71]-[81]; *SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562 at [33]-[40].

In particular, his Honour cited with approval (at [63]) the following observations of Flick J in *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at [46]:

> … it is considered to be a mistake to fix the standard of interpretation by reference to touchstones such as whether a translation has been "accurate" or whether any particular interpreter meets the standard of a "first-flight interpreter". Errors in translation will inevitably occur. Even in the absence of such errors, words or expressions used may initially fall short of conveying an intended meaning. Even when proceedings are being conducted in English by those fluent in the English language, it may require two or more attempts to accurately convey a particular meaning. In those contexts where a claimant is entitled to be heard, that entitlement necessarily demands that any hearing involves a meaningful opportunity where that which is sought to be conveyed by both the claimant and the decision-maker is conveyed in a real and meaningful manner. Initial errors in translation may be corrected by subsequent questioning and answers. A danger necessarily lurks in errors that may go undetected at a hearing and which only emerge after a hearing has concluded. But whether the error emerges during the administrative hearing itself, or subsequently, the fact that an error in translation may have occurred may assume no ultimate significance if the true meaning and content of that which is sought to be expressed ultimately emerges.

22. Informed by these principles, and in light of transcript of the relevant part of the interview adduced in the trial – including reflecting an interpretation by an identified interpreter (the **Appellant's Interpreter**) – his Honour held that, although one purported interpretation by the Interviewer's Interpreter of an answer given by the appellant to a question by the delegate was "garbled" or lacking ([69], read with [71] lines 607-610), any misinterpretation by the Interviewer's Interpreter was remedied by subsequent exchanges. Thus, his Honour held that the delegate asked numerous times "what did the appellant precisely mean when he said he was beaten" ([72], see also [73]), and that it was not demonstrated that "the integrity of the interview was compromised" in this respect ([73]).

23. Ultimately, his Honour held that "the premise underpinning the appellant's solicitor's submissions to the Authority – that there were 'established problems with the interpreting' at the SHEV interview – is not borne out". "In respect of the alleged mistranslations raised on behalf of the appellant, those translations … were not so deficient, either in isolation or collectively, such that the substance of the appellant's evidence at the SHEV interview was distorted in any material way." ([77])

24. With respect to ground 3 of appeal (breach of section 473CB(1)(b)), Anderson J held that it lacked merit ([94]), and refused to grant the appellant leave to advance it ([99]). His Honour explained (citations omitted):

> [94] To start, the mistranslations alleged by the appellant were, as discussed above, not so substantial such as to undermine the exercise of the Authority's review.
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> [95] Moreover, even assuming the mistranslations were material, I do not accept that there was a breach of s 473CB(1) of the *Act* by the Secretary in the present case. It may be that the text of s 473CB(1)(b) of the *Act* is purposive, and is intended to facilitate the Authority comprehending the full body of material before the initial decision-maker … However, in the context of s 473CB, "material" refers to, in my view, physical or electronic documents, objections and information. As such, the oral evidence itself provided by the appellant at the SHEV interview was not "material" provided by the appellant to the delegate.
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> [96] Of course, the oral evidence provided by a visa applicant for the purposes of a fast track reviewable decision may be recorded in written or audio form. Where that occurs, unless the visa applicant (or somebody on his or her behalf) records the oral evidence and then provides it to the initial decision-maker prior to the fast track reviewable decision, that form of material will more naturally fall under s 473CB(1)(c) of the *Act*, namely "any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review …
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> [97] In the present case, the appellant does not rely on any breach of s 473CB(1)(c) to support this ground of appeal. As the Minister submits, there is no evidence that the Secretary failed to give the recording of SHEV interview to the Authority …

V. ARGUMENT

Proposed ground 1 – alleged inability of Authority to perform its statutory task

25. Ground 1 of appeal to this Court is that the Federal Court erred in failing to find that the Authority "could not perform its statutory task of considering the 'review material' pursuant to s 473CD of the [Act] due to material interpreter errors affecting the interview". The reference to section 473CD is errant (no such section exists), but the Minister presumes that the intended reference is to sections 473CC(1) and/or 473DB(1). Section 473CC(1) provides that the Authority must "review" a fast track reviewable decision referred to it under section 473CA. And section 473DB(1) relevantly provides that, subject to Part 7AA, the Authority must

"review" such a decision "by considering the review material provided to [it] under section 473CB.

26. In any event, this ground is different from ground 3 which the appellant sought to advance to the Federal Court (but was refused leave to do so), and is therefore yet another new ground. The appellant acknowledges that he requires leave to advance the ground (AS [44.1]).

27. As noted above, proposed ground 3 of the appeal to the Federal Court was to the effect that because of alleged inaccuracies in interpretation by the Interviewer's Interpreter, the Secretary had (as the Secretary had in *EVS17*) failed to comply with his obligation under section 473CB(1)(b) of the Act to give "material" provided by the appellant to the delegate at the interview on 13 January 2017, and that this caused the Authority's decision to be affected by jurisdictional error.

28. However, proposed ground 1 of appeal to this Court does not refer to section 473CB. And while the appellant's submissions refer to section 473CB and the Full Court's decision in *EVS17*, the argument now made does not appear to be that the Secretary breached section 473CB but only that, "by analogy" to the Full Court's decision in *EVS17*, "if the Authority does not understand a material part of the review material due to a translation error it cannot exercise its jurisdiction" (AS [21]). The precise nature of the suggested "analogy" with *EVS17*, and the legal foundation of the new argument (assuming that material misinterpretation is demonstrated based on transcript that was not before the Authority), are unexplained.

29. In the submissions that follow, the Minister outlines:

29.1. why there has been no breach of section 473CB, and the Federal Court was right to conclude that ground 3 of appeal advanced below lacked merit (insofar as the argument that was advanced below still has any relevance to the appellant's case);

29.2. why the appellant should be refused leave to advance the new ground, to the effect that the Authority was unable to perform its statutory function under section 473CC(1) or 473DB(1) due to material misinterpretation by the Interviewer's Interpreter; and

29.3. alternatively, if the appellant is granted leave to advance that ground, why it should be rejected.

No breach of section 473CB

30. The Federal Court was clearly correct to hold (at [95]) that the word "material" in section 473CB(1)(b) connotes something physical (e.g., a document, including as recorded in electronic form). That is reinforced by the heading to section 473DB, which refers to review "on the papers".[13]

31. The *record* of the applicant's interview with the delegate, whether it be an audio or visual record, was clearly "material"; there appears to be no controversy about that (see AS [22]). That "material" (i.e., the *record*), which included both recorded statements in English (by the delegate and the Interviewer's Interpreter) and Tamil (by the appellant and the Interviewer's Interpreter), was given to the Authority, as the Federal Court held (at [97]).

32. That record was not required to be given to the Authority under section 473CB(1)(b) (because the record was not "material" that the appellant gave to the delegate). Rather, as a majority of this Court (Kiefel CJ, Bell, Gageler and Keane JJ) held in *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [12], "the record of the interview is material in the Secretary's possession or control which the Secretary could not but consider relevant to the review" for the purposes of section 473CB(1)(c). "The record can therefore be expected to form part of the review material which the Secretary will be obliged to give to the Authority and which the Authority will be obliged to examine for itself."

33. Accordingly, there was no sound basis for the appellant's contention to the Federal Court that the Secretary failed to comply with any limb of his obligation under section 473CB(1) to give certain "material" to the Authority. The Federal Court was right to conclude that proposed ground 3 of appeal below lacked merit, and accordingly to refuse the appellant leave to advance that new ground on appeal. Certainly, no error with the exercise of the Federal Court's discretion in that respect is apparent, or has been identified.

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[13] See also *AWV18 v Minister for Home Affairs (No 3)* [2020] FCA 365 at [67] (Derrington J). Cf. *BVC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 565 at [63]-[68] (Wigney J).

Appellant should be refused leave to advance the proposed new ground

34. The appellant should be refused leave to advance the further new ground, to the effect that the Authority was unable to perform its statutory function under sections 473CC(1) or 473DB(1) due to material misinterpretation by the Interviewer's Interpreter.

35. That is because, if this ground had been advanced at trial, the Minister could have sought to meet it with his own evidence as to the proper interpretation at the interview – including of the delegate's questions (English to Tamil) and the appellant's responses (Tamil to English).

36. As noted above, in the trial before the Federal Circuit Court, the appellant's complaint (in ground 1) was to the effect that the Authority *unreasonably* failed to exercise powers available to it (under section 473DC) to "cure" misinterpretations that affected his interview with the delegate. As the appellant notes in his submissions on this appeal (AS [16]), the Minister responded to that ground on the basis that the reasonableness of the Authority's conduct was to be assessed by reference to the material before it (and not evidence subsequently adduced in the court).[14] That position reflects the view of the Full Court in *DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342.

37. For the reasons advanced by the Minister in the appeal to this Court in *DVO16* (which appeal is to be heard together with this appeal), that position was correct. As this Court held in *Minister for Home Affairs v DUA16* [2020] HCA 46 at [26], "[a]ny legal unreasonableness is to be judged at the time the power is exercised or should have been exercised" and "from the facts and from the matters falling for consideration in the exercise of the statutory power". Thus, the finding of unreasonableness by the Authority in only one of the two matters determined by the Court in that judgment (CHK16) was based on what "was apparent" to the Authority in that case – of that of which the Authority "was aware".[15]

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14 RFM 14 – 15.

15 [2020] HCA [46] at [28]. By contrast, in relation to other matter (DUA16), the Court held that the Authority did not act unreasonably by reference to the information that was known to it: see [34].

38. It follows, and it should be regarded as orthodox,[16] that transgression by a decision-maker of a standard of reasonableness in the exercise of a discretion cannot be demonstrated by pointing to matters not known to the decision-maker. Acceptance of the proposition that unreasonableness can, in certain circumstances, be discerned from the *result* of the exercise (or non-exercise) of a statutory discretion does not point to any different conclusion. As Nettle and Gordon JJ explained in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [83], those cases are where the result is "so unreasonable that it could not have been reached if proper reasoning had been applied in the exercise of the statutory power in the particular circumstances".[17] Thus, in those circumstances too, any error by the decision-maker must be based on what was known to the decision-maker. Accordingly, at trial, the Minister had no need to join issue as to whether material misinterpretations had in fact occurred.

39. In any event, even if somehow, despite the principles outlined above, the interpretation by the Appellant's Interpreter was relevant to the appellant's unreasonableness ground in the trial, the fact remains that, if the new ground now sought to be advanced in this appeal had been advanced at trial, the Minister could (and might well have) adduced his own evidence of the correct interpretation to resist it.[18] No assumption can fairly be made that the interpretation by the Appellant's Interpreter is "correct", or that different but equally available interpretations could not have been provided.[19] That is especially so where, on the

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16 See also, e.g., *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [139], [141] (Edelman J).

17 See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J): "[T]he fact that [the commissioner] has not made known the reasons why he was not satisfied will not prevent review of his decision. The conclusion that he reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, that it may be a proper inference that it is a false supposition."

18 See, e.g., *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [51]; *Park v Brothers* (2005) 80 ALJR 317 at [34]; *SZTVU v Minister for Home Affairs* (2019) 269 FCR 497 at [86]-[87]; *Iannuzzi v Commissioner of Taxation* (2019) 268 FCR 349 at [40]; *TTY167 v Republic of Nauru* (2018) 93 ALJR 111 at [21].

19 As to proof of misinterpretation, see, e.g.: *Tobasi v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 322 at [42]ff; *VWFY v Minister for Immigration and Citizenship* [2005] FCA 1723 at [25].

appellant's case, one alleged misinterpretation was an alleged failure by the Interviewer's Interpreter to convey a "nuance" (AS [29]).

Alternatively, proposed new ground should be dismissed

40. If the Court grants the appellant leave to advance ground 1, the Court should dismiss it on its factual premise (material misinterpretation). The weakness of the factual premise means that it is unnecessary to explore whether, and if so in what circumstances, any misinterpretation in a record of interview may cause the Authority to be unable to perform its statutory functions under section 473CC(1) or 473DB(1).

41. As the Federal Court correctly held (at [63]), consistently with a long line of authority, "translation is not a perfect science".[20] The principles summarised by the Federal Court, and set out [21] above, should be accepted. The appellant gives no reason to doubt them.

42. The Federal Court was correct not to be satisfied, in light of those principles, and based on the interpretation by the Appellant's Interpreter, that there had been material misinterpretation of the delegate's questions seeking to elicit an explanation as to "how he had been beaten by authorities in Jaffna" (being the first of two misinterpretations alleged by the appellant in ground 1: see AS [23.1]).

43. The Federal Court was correct to find (at [70]-[73]) that, having regarded to the interview as a whole, the delegate's question was (at least ultimately) sufficiently clearly interpreted to the applicant. The interpreted question by the Interviewer's Interpreter at line 612 was quite clear ("*When you use the word 'beating'. What you mean by 'beating'?*") So too was the next formulation of the question, as interpreted by the Interviewer's Interpreter at line 620 ("*When you tell 'they beat you' what you mean by 'beaten'? What is that?*").

44. The fact that the appellant never gave a cogent response to these questions does not entail that the Interviewer's Interpreter did not adequately interpret the questions. The failure by the appellant to give a cogent response is, rather, consistent with the conclusion that the Authority reasonably drew – *viz*., that the appellant's responses

[20] See, e.g., *SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465.

were "evasive" ([22]), and that the appellant was "unable to provide any detail around his claim to have been beaten" ([23]).

45. As for the second of the two misinterpretations alleged by the appellant in ground 1 (see AS [23.2]), again, this is a new point. The appellant now contends, referring to lines 624-643, that the delegate asked the appellant why he had not previously claimed (i.e., before the interview) to have been physically harmed "after 2009" but the Interviewer's Interpreter's interpretation to the appellant "bore no resemblance to the questions asked" (AS [37]). But it is not apparent that such a complaint was made below. Again, the Court should not permit the appellant to raise a new complaint, which could have been met by evidence.

46. In any event, even on the appellant's evidence (including the interpretation by the Appellant's Interpreter), the new complaint lacks merit. In his submissions, the appellant invites the Court to look at lines 624-643. But the appellant does not mention lines 889 and following.[21] That evidence suggests that:

46.1. The delegate asked: "In these two documents [the appellant's two written statements in support of his claim] there is no mention to you being physically harmed or mistreated after 2009."

46.2. The Interviewer's Interpreter interpreted: "You have not mentioned in anywhere that you were seriously harmed or physically harmed after 2009."

46.3. Then, there is a discussion leading to the delegate asking the appellant to comment on this. The appellant ultimately seeks to explain: "Yeh, I had severe problem until 2009. From 2009 until 2012 when I was in Karaveddy the treatment was not bad. Just call and beat. So I didn't mentioned about that. The 2009 incident is the one affected me very bad."

47. Accordingly, in light of the principles summarised by the Federal Court and set out [21] above, there is no proper basis to conclude that the interview was affected by a material misinterpretation. Even if the Interviewer's Interpreter's interpretations at lines 624-643 were imperfect, the question was clearly interpreted later, the appellant understood it, and answered it. And it was this *later* exchange between the

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21 AFM 113.

delegate and the appellant (assisted by the Interviewer's Interpreter) that was the subject of the Authority's findings at [23].

48. Accordingly, no material misinterpretation is demonstrated. Even if the Court is satisfied that it is fair and appropriate to grant leave to the appellant to advance this ground and determine it on the appellant's evidence as to the "correct" interpretations, it should be dismissed on its factual premise.

49. Alternatively, insofar as that is necessary and appropriate, the Minister relies on his submissions in *DVO16*.

Ground 2 – unreasonableness

50. The Federal Court (at [60]-[61]) disposed of the unreasonableness grounds, in part, on the basis of two aspects of the Full Court's reasoning in *DVO16* at [10]-[12]. The "first aspect" was that "the reasonableness of a decision whether to exercise the power under s 473DC is to be assessed by reference to the information then available to the Authority". The "second aspect" was "the focus on the degree of deficiency in the translation services".

51. The Minister respectfully submits that both of these aspects of the Full Court's reasoning in *DVO16* were correct. *A fortiori*, the appellant's case on ground 2 of appeal (unreasonableness) is even weaker than his case on his first proposed ground of appeal (assuming that he is permitted to advance it). That is because there was minimal evidence before the Authority suggesting material misinterpretation at the interview.

52. None of the three examples of misinterpretation asserted by the appellant to the delegate (and later to the Authority), even considered in isolation, suggested that the substance of the appellant's evidence to the delegate had not been sufficiently communicated. And, certainly, it was not at all apparent that the conduct of the Interviewer's Interpreter, "in the aggregate", had caused the interview to miscarry.

53. Furthermore, relevantly, from the Authority's perspective:

53.1. despite the passage of more than two months after the protection visa interview and before the Authority's decision, the appellant had never identified any more than these three examples of misinterpretation; and

53.2. the delegate, who conducted the interview, considered that "[f]or the most part during the interview it appeared that all parties were able to communicate clearly", and that the appellant's testimony had been "vague and evasive".

54. As to the latter matter, it was open to the Authority to take those "second-hand" impressions or descriptions into account in assessing whether it would exercise its discretionary power under section 473DC to get new information, including by inviting the applicant to a further interview.[22]

55. As to the content of the "framework of rationality" constraining the exercise of the Authority's discretion under section 473DC, it is notable that: (a) procedural fairness is not the lens through which this is assessed;[23] (b) the Act evinces Parliament's intention that generally speaking the Authority will not conduct an interview with an applicant (section 473DB(1)); (c) the Authority does not have a duty to get new information from an applicant in any circumstances (section 473DC(2)); (d) the circumstances in which information obtained at a further interview can be considered are limited (s 473DD); and (e) the Act exhorts the Authority, in carrying out its functions, to "pursue the objective of providing a mechanism of limited review that is efficient [and] quick" (section 473FA(1)).

56. In the circumstances described above, it was within the decisional freedom of the Authority not to be satisfied that there were material errors of interpretation such that it should exercise its discretion under section 473DC to invite the applicant to a further interview. Put negatively, the Authority's approach was not "so devoid of plausible justification that no reasonable person could have taken that course".[24]

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22 *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [23].

23 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at [34]; *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [18].

24 *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [19].

VI. ESTIMATE OF TIME

57. The Minister estimates that he requires one hour for presentation of his oral argument.

Dated: 24 December 2020

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ANNEXURE – FIRST RESPONDENT'S LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act 1958* (Cth), Compilation 134 (23 February 2017 to 5 September 2017) ss 473CA, 473CB, 473CC, 473DB, 473DC, 473DD, 473FA.