



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M109/2020
File Title: BNB17 v. Minister for Immigration and Border Protection & A
Registry: Melbourne
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 10 Feb 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BNB 17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

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IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

OUTLINE OF THE APPELLANT'S ORAL SUBMISSIONS

Part I:

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

Part II:

20 **Unreasonableness**

2. The appellant addresses the unreasonableness ground (ground 2) first.
3. The IAA's power in s 473DC of the Act to get new information is subject to the implied condition that it be exercised reasonably: *ABT17*, JBA 1245 at [3].
4. Having received notice of the relevant translation deficiencies affecting the SHEV interview (submissions ABFM 126; ABFM 141 – 142), it was unreasonable for the IAA to find that the appellant was vague and evasive without exercising its powers under s 473DC to obtain further information by interviewing the appellant.
5. The IAA had power under s 473DC to invite the appellant to a new interview.
6. Or it could have obtained a fresh translation of the appellant's interview.
- 30 7. Or it could also have declined to conclude that the appellant had been vague and evasive.
8. Instead, the IAA found the appellant had understood the question about how he was beaten and avoided answering it.
9. In fact, the English parts of the interview (of which the IAA had a recording as part of the review materials) did not support the inference the appellant understood the delegate's questions. The appellant revealed no understanding of the question.

10. The appellant answered a different question to that asked, and never restated or acknowledged the correct question: see Transcript (without Tamil translations), ABFM 35 – 36, L 601 – 623.
11. The IAA was not only on notice of interpretation errors in the SHEV interview but that interpretation errors could explain why the appellant had not understood the questions regarding being beaten (submissions ABFM, 146 (10); ABFM 125 (30)).
12. The IAA at [25] substantially rejected the appellant’s claims to have suffered harm at the hands of Sri Lankan authorities in the post-war period in his home area, based on the assumption that he had been “vague and evasive” in not answering the question as to how he had been beaten: CAB, 12; *ABT17*, JBA 1253 at [25].
13. The translation errors are significant both in their place in the appellant’s claims and in their relevance to the IAA’s reasoning that the appellant was evasive.
14. The IAA’s reasons at [6] for refusing an interview were defective. The IAA merely considered whether the appellant could have corrected the claimed mistranslation before the delegate, and decided he should not be given any further opportunity to deal with it. That was too narrow a focus. The IAA failed to consider the gravity of the risk that its credit finding may be compromised by interpretation errors: CAB, 6.

Failure to complete statutory task

15. Translation errors affected the SHEV interview as set out in written submissions at [23]-[31].
16. Questions regarding how the appellant was beaten were mistranslated: see Transcript, ABFM, 96 – 97, L 600 – 622; as were matters regarding why he had not raised claims of physical harm post-war prior to the SHEV interview ABFM, 98, L 628 – 640. It can reasonably be inferred that as a result of the errors the appellant’s evidence did not address questions asked.
17. The IAA must review a fast track reviewable decision referred to it (s 473CC) and must consider the review material pursuant to s 473DB, which included the SHEV interview.
18. The interpretation errors were significant, indeed they were critical, because the finding that the appellant had been evasive was a substantial basis for the IAA finding at [25] that the appellant did not suffer harm in his home area post-war: CAB, 12.
19. Where the SHEV interview is affected by material mistranslation, the IAA cannot carry out its jurisdiction to review the decision and the referred material. Defective translation

can impede the IAA from: (a) assessing claims for protection; (b) making safe credit findings; (c) reviewing the case as required by s 473CC of the Act; or (d) in substance considering the review material as obliged by s 473DB(1).

20. Here, the IAA’s capacity to conduct the review by considering the review material was fundamentally compromised as it could not understand and therefore could not consider parts of the review material – the SHEV interview – critical to the IAA’s assessment of the appellant’s credit and claims. The IAA was disabled from properly reviewing the fast track decision.
- 10 21. By relying only on the English language segments of the SHEV interview, and assuming that those segments were accurately translated, the IAA was misled about the content and substance of this segment of the review material. That does not undercut the general rule that the business of the IAA is to be conducted in the English language. Rather, it highlights that the English language material before the IAA did not actually reflect the appellant’s evidence at the SHEV interview. A review conducted on that basis is not a review as required by the Act.
22. The IAA was disabled from substantively performing its statutory review task because the translation in the SHEV interview contained errors that were critical to the findings the IAA reached: *EVS17* at JBA, 1420, [35].
- 20 23. If it is not already subsumed within the grant of special leave to appeal, the appellant seeks leave to raise ground one for the reasons articulated in the reply, particularly given the risks for the appellant as an asylum seeker and the merely theoretical prejudice to the Minister: *CGA15* at JBA, 1381 – 1382, [36] – [37].
24. The appellant seeks leave to correct the first appeal ground to refer to “s 473DB and 473CC” rather than “s 473CD”.

Dated: 9 February 2021



GEORGINA COSTELLO
Aickin Chambers
(03) 9225 6139

ANGEL ALEKSOV
Castan Chambers
(03) 9225 6736

MATHEW KENNEALLY
Owen Dixon Chambers
(03) 9225 8213