IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M140 of 2019

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

ABT17
Appellant
And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

APPELLANT'S REPLY

Part I: Internet certification

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

Part II: Submissions in reply

Ground 1: Unreasonable failure to get new information

Significance of demeanour and observation to warrant exercise of s 473DC

2. The Minister asserts (MS [2.2], [7]) that there is nothing in the delegate's findings as to the significance of the appellant's demeanour sufficient to warrant departure from the ordinary course of review on the papers.
3. The significance of demeanour is revealed in the IAA's own observations at [23] of its decision record, in which the IAA gave its reasons for disbelieving the appellant's account.
4. The IAA emphasised the hesitancy of the appellant ("*he was unable to talk about it and was unable to provide any details of what happened to him other than saying there were 2 or 3 SLA men and that he was unconscious for a lot of the time*"). That reasoning immediately followed the IAA's observation that the capacity of the appellant to be forthcoming in his evidence on the subject of sexual torture may

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have been impaired by "*the shame sensed in Tamil culture around the issue of rape*", the difficulty describing traumatic events and "*the fact that the delegate and the* [appellant's] *representative were both female.*"

5. The IAA in its own reasons therefore demonstrated the significance of being able to observe demeanour in the particular circumstances of the appellant's case. It was in that context that Bromberg J observed at FC [24] that the IAA must have recognised that the delegate's findings as to the plausibility of the appellant's evidence may have been based, at least in part, on the delegate's positive assessment of the appellant's demeanour, and that it may be considered unreasonable not to invite the appellant to an interview so the IAA could make its own assessment of the appellant's demeanour.

6. Accordingly, although the specific circumstances in this case were somewhat different from the circumstances in *DPI17* (emphasised at MS [35]), the unreasonableness in both cases derives from the way the IAA dealt with the evidence of the visa applicant without inviting the applicant to an interview, in circumstances where the IAA was deprived of seeing aspects of the evidence that may have made a difference to the assessment of the appellant's case.

7. A further reason for the IAA to conduct its own interview with the appellant was to observe the scarring of the appellant that had been shown to the delegate at her request, but had not been seen by the IAA. In circumstances where the delegate had seen the scarring and concluded that the appellant's evidence was plausible, the IAA was deprived of that potentially corroborating evidence.

8. It is clear that viewing the scars might have made a difference (cf MS [39]) to the IAA's conclusion that the appellant had not been detained and tortured if their appearance was consistent with the appellant's claims about the manner in which he had been tortured. As such, the IAA's failure to exercise the power at its disposal under s 473DC to rectify the problem of not having access to corroborating evidence was unreasonable.

9. Furthermore, the Minister's submission at MS [12] that the IAA had already rejected the appellant's claim before considering his evidence about sexual violence misconstrues the IAA's reasons. The reasons within IAA [23], cited by the Minister at MS [11], relate to the IAA disputing the duration of any detention that may have occurred. The reasoning as to whether sexual torture occurred during any detention

commences with the sentence beginning: "In regard to his claim to have been sexually tortured as well, ...". The other reasoning in that paragraph does not diminish the unreasonableness of the failure to exercise the power in s 473DC to invite the appellant to an interview.

Demeanour and observation of scarring are capable of constituting new information

10. Contrary to the Minister's assertion at MS [27.1], demeanour is capable of being "*information*" under s 473DC. "*Information*", in this context, means a "*communication of knowledge about some particular fact, subject or event*"[emphasis added].[1] The Shorter Oxford English Dictionary defines "*demeanour*" to mean:

> 1. Conduct, way of acting, behaviour, esp. towards others. Formerly also, an action (cf. MISDEAMEANOUR). Now *rare*
> 2. Bearing, mien, outward manner.

11. Demeanour is as much a way in which knowledge about some fact, subject or event may be *communicated* as the spoken word.[2]

12. Further, contrary to the Minister's assertion at MS [27.2], information communicated by the appellant at an interview conducted pursuant to s 473DC would necessarily be "new information" because knowledge communicated to the IAA at such an interview - whether by means of the spoken word, physical manifestation or demeanour - would not have been before the delegate in making the decision under s 65. That such communications may traverse facts, subjects or events that were the subject of the delegate's questioning before making the s 65 decision does not alter that conclusion. Further, scarring shown at the time of the delegate interview is not necessarily identical in appearance to what would be observed at the IAA interview, such that it is capable of constituting new information.[3]

13. Having obtained such new information by inviting the appellant to an interview, it would plainly be open to the IAA to find that there were exceptional circumstances to permit the consideration of that information under s 473DD, given that the

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[1] *Plaintiff M174/2006 v Minister for Immigration* (2018) 264 CLR 217, [24] (Gageler, Keane and Nettle JJ).

[2] *SZEEU v Minister for Immigration* (2006) 150 FCR 214, [205]-[206] (Allsop J); cited with approval in the context of part 7AA in *Plaintiff M174/2006 v Minister for Immigration* (2018) 264 CLR 217, [24] (Gageler, Keane and Nettle JJ).

[3] *BJK17 v Minister for Immigration* [2019] FCAFC 171, [30]-[31] (Middleton, Bromberg and Snaden JJ).

circumstances warranting the interview were outside the usual course under part 7AA.[4]

Scope of the exercise of s 473DC

14. The Minister asserts repeatedly (MS [20], [25], [27.3], [34]) that the appellant's construction would require an interview under s 473DC every time the IAA proposed to depart from the delegate's credit findings. That is not the appellant's case (see AS [42]). Rather, it is the circumstances of this specific case – including the fact that the IAA was deprived of reviewing some critical aspects of the appellant's evidence and the fact that the IAA itself noted possible reasons why the appellant may have been reticent in his evidence about sexual torture – that made it unreasonable to complete the review without exercising the powers at the IAA's disposal to ensure that the totality of the appellant's evidence could be considered, including his demeanour and the visual appearance of his scars.

Ground 2: Materiality

15. The Minister's assertion that the country information relied on by the IAA was independent of its finding that the appellant had not been detained and tortured (MS [44]-[46]) rests on the premise that, had the IAA accepted the appellant's claims about his treatment at the hands of Sri Lankan authorities, it could not have altered the IAA's assessment that the appellant did not have "*a profile that would be of interest to the SLA or the Sri Lankan authorities*" (IAA [25] and [31]), which was the basis on which the country information was assessed.

16. The Minister makes that assertion despite the finding about the appellant's profile at IAA [25] following immediately after the IAA's findings that the appellant was not detained or sexually tortured in 2011 (IAA [23]) and was not questioned, detained and beaten in 2012 (IAA [24]). The fact that the appellant had claimed that he had not been a member of the LTTE, which the IAA accepted, does not preclude the Sri Lankan authorities having an "interest" in the appellant, nor does it preclude the IAA's acceptance or rejection of the appellant's claims of torture being probative of the likelihood and extent of any such interest.

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[4] *Plaintiff M174/2006 v Minister for Immigration* (2018) 264 CLR 217, [30] (Gageler, Keane and Nettle JJ); *AQU17 v Minister for Immigration* [2018] FCAFC 111, [13] (McKerracher, Murphy and Davies JJ).

17. Once that premise is displaced, having regard to the context of the IAA reasons as a whole it is apparent that the IAA's reliance on the country information, applied to the appellant's circumstances as found by the IAA, was not a basis for the IAA decision that was entirely independent of the findings regarding detention, beatings and sexual torture.

Dated: 3 February 2020

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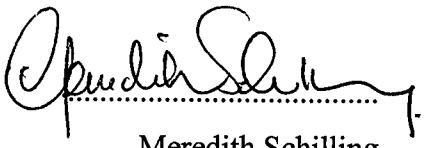

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