HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S66/2020
File Title:	DVO16 v. Minister for Immigration and Border Protection & A
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	05 Jun 2020

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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 SUBMISSIONS

Part I: Internet certification

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

Part II: Issues arising in this appeal

2 Did the second respondent (in conducting a review of a decision of a delegate of the first respondent under Part 7AA of the *Migration Act 1958* (Cth) (**Act**)) fail to complete its statutory task by reason of the fact that the review material before it was, due to material translation error in the interview conducted by the delegate with the applicant, necessarily incomplete?

3 Did the second respondent fail to complete its statutory task because it conducted its review under a material misapprehension of fact, due to translation error in the interview conducted by the delegate, being an incorrect belief that the applicant had been afforded an opportunity to properly advance his claims and had no further evidence to give?

Part III: Sec 78B of the *Judiciary Act 1903*

4 Notice under sec 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

5 This is an appeal from the whole of the judgment of Justices Greenwood, Flick and Stewart JJ in [2019] FCAFC 157 (9 September 2019).[1] The decision of the Full Court was on appeal from a judgment of the Federal Circuit Court of Australia (Emmett J) in [2018] FCCA 3058 (24 October 2018).[2]

Part V: Facts

6 These facts are largely drawn from the judgment of Stewart J in the full court below {Reasons for Judgment 9th September 2019 (**FFC**)} found at Core Appeal Book (**CAB**) pages 60 – 83.

10 7 The appellant is a Shi'a Muslim of Arab ethnicity from Khuzestan Province, Iran. He identifies as Ahwazi Arab. He arrived in Australia (Christmas Island) in August 2012 by boat, having come via Dubai and Indonesia as an "unauthorised maritime arrival" {FFC [20] – [21]}.

8 After spending five and a half months in immigration detention, the appellant was released and made a valid application for a Temporary Protection visa (the refusal of which is the subject of these proceedings) {FFC [22]}. By way of a statutory declaration annexed to his application,[3] the appellant made for a claim for protection on *inter alia* two separate grounds. The first claim concerned harm he feared from another tribal group in Iran (referred to variously as the Jalali or Chanani tribe), by reason of an incident on a bus

20 during which it was alleged that he had physical contact with a woman from that tribe, resulting in a desire for revenge by members of the woman's tribe (**the tribal claim**) {see FFC [33]}.

9 The appellant also articulated a claim of persecution by the Iranian state on the basis of his ethnicity, that identified a risk of direct discrimination by the State and anticipated a failure to protect from the appellant from harm by third parties such as the Jalali or Chanani tribe (**the ethnicity claim**) {FFC [23]}. These proceedings concern the disposal of that aspect of the appellant's claims by the second respondent, and in particular the risk he faced of direct discrimination.

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[1] CAB 52.
[2] CAB 24.
[3] Appellant's Book of Further Materials (**ABFM**) 41.

10 On 10 February 2016, the appellant was "invited to attend an interview to discuss [his] visa application and [his] claims that [he is] a person in respect of whom Australia has protection obligations."[4]

11 On 1 March 2016, the appellant attended at that interview with a delegate of the first respondent ("the delegate") {FFC [23]}. The appellant was interviewed by the delegate through an Arabic interpreter {FFC [24]} and questioned about the ethnicity claim. Relevantly, the delegate asked the appellant what he meant by his claim (as identified in the written materials) that he would be persecuted by reason of his ethnicity {FFC [76]}. That question was mistranslated and by reason of that, the delegate misapprehended that the appellant "did not understand what was meant by 'ethnicity' […] whereas in truth the appellant did not understand what was meant by 'persecution'" {FFC [77]}, resulting in a comment by the delegate that, "Well obviously you don't hold a fear of that then it if you don't know what it means." {FFC [76]}.

12 The delegate then attempted a "recommencement of the interview" (at least in so far as it concerned the ethnicity claim), saying to the appellant "I think we will start again maybe" {FFC [62] – [63], [76]} and proceeded to ask the applicant a number of "open questions" in an apparent attempt to give the appellant an "opportunity to say whatever he wished to say with regard to his claim of persecution on the ground of ethnicity" {FFC [62] – [63], and see [63] for an identification of the "open questions"}.

13 Critically however, that "indication to start again … was not interpreted" {FFC [78]} with the result that "the appellant's attention was not directed to what [the delegate] was interested in, which was his ethnic persecution claim. His attention was also not directed to the fact that she was starting again. Thus he likely understood the open questions that followed to be related to or a continuation of the enquiries about, as he understood, his tribal disputes" {FFC [79]}.

14 On 19 August 2016, the appellant's visa application was refused by the delegate {Decision record of the delegate dated 19 August 2016 (**DR-Delegate**)}.[5] The delegate considered both the tribal and ethnicity claims and dismissed the former on the basis that the delegate was not satisfied the relevant events on the bus occurred {DR-Delegate [93]}. As to the ethnicity claim, the delegate accepted that the appellant was of Arab ethnicity {DR-Delegate [111]}, and considered a range of country information that indicated that

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[4] ABFM 56.
[5] ABFM 60.

Ahwazi Arabs were marginalised and discriminated against by the Iranian State "in the areas of employment, education, housing and civil and political rights", including by way of restrictions on the practice of their culture {DR-Delegate at [142] – [153]}.

15 However, the delegate while satisfied that the appellant faced "a reasonable possibility that he would face discriminatory treatment due to his ethnicity" did not consider that it would amount to persecution {DR-Delegate at [156]}, and considered it material that there was no evidence that the "applicant or his family had been subjected to undue discrimination or harassment" {DR-Delegate at [155]} or that the applicant considered the "curtailment of the right to express his culture … to be so oppressive that he cannot be expected to tolerate it" {DR-Delegate at [159]}.

16 The decision of the delegate was automatically referred to the Authority under the 'fast track' review process set out in Part 7AA of the Act {[FFC [28]}. Submissions filed on behalf of the appellant alluded to the possibility that there had been translation error in the course of the interview with the delegate {[FFC [61]}.

17 On 1 December 2016, the second respondent affirmed the decision of the delegate.[6] In its decision, the second respondent set out what it understood to be the applicant's oral evidence on the ethnicity claim:[7]

> In his written statement the applicant also claimed he would be persecuted due to his ethnicity. During the TPV interview the delegate asked the applicant what this meant. The applicant responded that he did not know. He further stated that apart from the tribal conflict and fearing harm from the Chanani tribe, he does not fear returning to Iran for any other reason. He later said he fears from the Iranian authorities because they will cover up any harm he faced from the Chanani tribe as they have connections. He did not claim to fear harm from the authorities on the basis of being an Ahwazi Arab.

18 That materially misunderstood and misstated the appellant's oral evidence in two ways. Firstly he did indicate that he did not understand the concept of ethnicity. Secondly he failed to understand that he was being asked about his claims more generally (apart from those that arose in the context of his tribal claim) with the result that he was unintentionally non-responsive to the 'open ended' questions asked of him by the delegate.

19 The second respondent in proceeding paragraphs then considered the ethnicity claim, setting out country information that indicated that Ahwazi Arabs "have endured various forms of abuse and repression by the state on account of their ethnic and cultural identity"[8]

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[6] CAB 5.
[7] CAB 10 [22].
[8] CAB 10 [23] – [25].

but for reasons similar to the delegate (and being materially that there was no evidence before the second respondent that the appellant would be unable to obtain housing or employment if returned to Iran)[9] was not satisfied that "the discriminatory treatment the applicant may face on return amounts to serious harm".[10]

Part VI: Argument

20 The full court below found as a matter of fact, in relation to that part of the delegate's interview that traversed ethnicity claim that (Flick and Greenwood JJ {FFC [5]}):

> The errors in translation and the failure to translate responses made by the Appellant were such, with respect, that the questions being asked by the delegate were not being accurately conveyed nor answered and the difficulties being experienced by the Appellant were such that his inability to comprehend what was being asked of him was not being conveyed to the delegate.

With the result that (Flick and Greenwood JJ {FFC [5]}):

> Had the common law rules of procedural fairness applied to the present decision-making process, it would probably have been concluded that there was a denial of procedural fairness on the part of both the delegate and the Authority.

21 The question that arises in this appeal is whether, in the statutory context of a review under Part 7AA of the Act, actual or constructive knowledge on part of the second respondent of the deficiency in the interview process was necessary before it could be considered that the deficient interview was "a manifestly inadequate basis upon which a 'review' can lawfully be undertaken" (Flick and Greenwood JJ {FFC [12]}).

22 The interview held by the delegate occupies a central position in the assessment of the appellant's claims, both with respect to the delegate's assessment and the later *review* undertaken of that decision of the second respondent pursuant to its statutory obligation under sec 473CC of the Act.

23 The code of procedure applicable to the assessment of that visa application by the delegate, in so far as it concerns notice to the applicant of material adverse to his claims, is in materially similar terms to that applicable to the Administrative Appeals Tribunal in its conduct of a review under Part 7 of the Act (see sec 57 contrasted with sec 424A); that is, subject to certain conditions, the applicant had to be put on notice of information that "would be the reason, or part of the reason ... for refusing to grant a visa" (*Plaintiff*

[9] CAB 10 [23] – [25].
[10] CAB 11 [25].

M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 per Gageler, Keane and Nettle JJ at [9]).

24 Sec 57 thereby mandates that some process be instituted in a given visa application to ensure the statutorily mandated natural justice obligations owed by a delegate are satisfied. That process, in the circumstances of this visa application, relevantly took the form of an interview during the course of which the delegate attempted to put to the appellant as required concerns as to a paucity of evidence concerning the appellant's ethnicity claims.

25 If sec 57 did not require the process of an interview whereby the delegate's concerns as to any weakness in the application were put to the appellant, then procedural fairness more generally did so require. The granting of that interview was in addition consistent with departmental policy that no decision to refuse a temporary protection visa would be taken by a delegate of the first respondent without first conducting an interview with the applicant,[11] which in effect provided a further assurance to the applicant of an opportunity to be heard before the delegate.

26 As identified above, in the course of that interview the delegate misapprehended (by reason of translation errors) that the appellant did not understand the concept of ethnicity, and had no further evidence to give with respect to his ethnicity claim. The lack of further evidence was ultimately fatal to the appellant's application at the delegate level.

27 The appellant's rights to be heard (and any associated rights to procedural fairness) were statutorily truncated in the subsequent review by the second respondent. The second respondent was required to conduct a review without accepting or requesting "new information"[12] and without interviewing the referred applicant, except in exceptional circumstances (subsec 473DD(a)). Further the applicant's rights to procedural fairness were confined only to issues arising from any new information that the second respondent may consider relevant (see sec 473DA read with sec 473DE).

28 *Instead* the second respondent was required to consider the "review material" (see sec 473DB) provided to it by the Secretary of the Department, which material the Secretary was obliged to provide to the second respondent, and which was mandated to include all of the material that was provided by the appellant to the delegate (subsec 473CB(1)(b)).

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[11] Procedural Instruction, *[Ref-Onshore] The Protection Visa Processing Guidelines* (document ID VM-4825), 3.23.1.

[12] As defined in subsec 473DC(1).

29 Reviews under Part 7AA are automatic (the Secretary "must refer a fast track reviewable decision" to the Authority – see sec 473CA), and the ambit of the review is ordinarily bound by the extent of the review material, which would invariably (and in these proceedings did) include an interview conducted by the delegate.

30 "Part 7AA is undoubtedly framed on the assumption that a decision to refuse to grant a protection visa to a fast track applicant will ordinarily have been made in compliance with the code of procedure set out in subdiv AB of Div 3 of Pt 2." (*Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 per Gageler, Keane and Nettle JJ at [45]).

10 31 Translator error in the interview process is a matter that arises from a failure or omission in the first respondent's administrative processes. In this respect it is not in a category of error such as representative error where an applicant might sometimes be considered to be bound by the conduct of their representative. The consequences that flow from it should (in a jurisdictional sense) be dependent on the severity of the mistranslation and the adverse consequences that flow from it for a visa applicant.

32 That interview is the only assurance an applicant has within the fast track visa application process (including on review) to be heard. It would ordinarily be an applicant's principal means of addressing issues considered determinative by the delegate. The second respondent conversely has no obligation to raise with an applicant reservations it might
20 hold, in so far as those issues might arise from the review material (*DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12 at [72]). Further, errors by the delegate are not "as likely to be corrected or rendered immaterial by reason of an opportunity to be heard being provided in the review, as may occur under Part 7" (*EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20 per Allsop CJ, Markovic and Steward JJ at [31]).

33 A hearing "provides the reviewer with opportunities for direct questioning of the applicant; for clarification of areas of confusion or poor understanding on both sides; and for the observation of the demeanour of the applicant" (*Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [37])". The interview process therefore
30 serves a dual function, firstly as a general opportunity for an applicant to give evidence of their claims, and secondly to allow the applicant to respond to the delegate's concerns (if any) and any other issues arising.

34 Here, the delegate of the first respondent plainly had questions concerning the appellant's ethnicity claim and attempted to put those questions to him. It also, properly, sought to ensure that the appellant had a meaningful opportunity to give evidence by asking of the appellant open-ended questions concerning his claim as to ethnicity. The delegate's intentions in both respects were defeated by the translation error that affected the interview. That translation error was material in that it denied to the appellant his only opportunity to give evidence and be heard on the dispositive issues, and it resulted in the delegate (and likewise the second respondent) proceeding on the fundamental misapprehension that the appellant had been given that opportunity, but was non-responsive to the concerns identified.

35 The full court below appears to have accepted that the statutory obligation imposed on the second respondent to *review* a fast track reviewable decision could not be satisfied in "cases in which deficiencies in translation services are so manifestly apparent that both the delegate and the Authority must be taken to be on notice that any interview process was manifestly deficient and a manifestly inadequate basis upon which a "*review*" can lawfully be undertaken" {FFC [12]}.

36 That is a proposition that does not accord with either the present or historical understanding of the concept of jurisdictional error in this country. Approaching the question in this manner is to require actual or constructive knowledge of an accepted, *material* deficiency in the processes or deliberations of an administrative decision maker.

37 As noted by this Court recently in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 (Kiefel CJ, Gageler and Keane JJ) at [18],[13] the "language of jurisdiction is a traditional expression of the function of a court, acting within the limits of its own jurisdiction where no statutory mode of review existed, of ensuring that a repository of statutory power did not strain the statutory limits of that power." "In short … the concept is almost entirely functional: it is used to validate review when review is felt to be necessary." That is (at [23]):

> A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions [which the statute expressly or impliedly requires to be observed] to have "such force and effect as is given to it by the law pursuant to which it was made".

[13] Citing Professor Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact', (1957) 70 *Harvard Law Review* 953, 963.

38 There is no scope in that analysis for the existence of jurisdictional error to be contingent on whether the relevant decision maker was (or should reasonably have been so) aware of the matters said to result in the vitiation of the decision maker's jurisdiction. Indeed, none of the recognized categories of jurisdictional error by a statutory decision-maker (as set out in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179: identifying a wrong issue; asking the wrong question; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; and failing to observe some applicable requirement of procedural fairness) rest on any conception of an awareness on part of the decision maker as to the deficiency in the process undertaken, and ordinarily in each of those categories one would anticipate the decision maker to be oblivious of the existence of the error, even if aware of the salient facts.

39 Thus if a material deficiency exists that undermines the deliberative or administrative processes of an administrative decision maker such as to vitiate the legal validity of the decision, the error is jurisdictional.

40 It is indisputable here that there was translation error in the interview of the delegate. On the facts as found by the full court below, that error was material. It was material firstly because the errors in translation resulted in the "framing of the question [as to the ethnicity claim] in the incorrect tense giving the impression that it was about past persecution rather than the possibility of future persecution, not adequately conveying that the question was directed to the appellant's ethnicity (as an Ahwazi Arab) and not conveying that the appellant was confused as to whether he was being asked about persecution in relation to his tribal connections and the meaning of the word 'persecution'" {FFC [82]}.

41 It was material for a further reason not considered by the full court. As set out above, this is that the second respondent proceeded on what it *understood* to be the oral evidence of the applicant, which it believed were a series of non-responsive answers in relation to questions on ethnicity that the second respondent misapprehended had been put to the applicant. That is (similar to *Minister for Home Affairs v DUA16* [2019] FCAFC 221) the second respondent was "misled into conducting its review on the basis that the respondents had nothing at all to say to it about why it should accept the factual basis for their claims, and its sufficient connection to what was in the country information" (per Mortimer J at [173]).

42 Considering "afresh" whether a visa applicant satisfies the criteria for a protection visa requires an active intellectual engagement with the factual narrative of past events and the account of what fears of harms may arise on return to the country against which the protection claim is made (*Minister for Home Affairs v DUA16* [2019] FCAFC 221 per Mortimer J at [119]). The second respondent in relying what it understood the be the appellant's evidence on the ethnicity claim proceeded on a material misapprehension of fact brought about by an incorrect assumption of regularity as to the administrative processes by which the delegate had utilised to interview the applicant.

43 If the delegate had either actual or constructive knowledge of the deficiencies in the interview process, it could not be contested that procedural fairness (which applied at the delegate level) would dictate that the appellant be given a further opportunity to give evidence. Had the second respondent held a similar awareness of the deficiencies in the interview process, this likewise would necessarily have required (and notwithstanding that natural justice does not apply to reviews under Part 7AA of the Act) the exercise of its powers under sec 473DC to obtain further information from the appellant. The failure to do so in the possession of that knowledge would have been legally unreasonable.

44 A *lack* of awareness of such a deficiency cannot validate the exercise of the powers of the second respondent.

45 The full court's approach, requiring actual or constructive knowledge in order for an error to be jurisdictional, cannot be correct. As Professor Jaffe noted, there "are other situations, too – organizational or procedural mistakes – in which the lapse is so serious that judges will want a concept which enables them to declare the order 'void.'"

Part VII: Orders sought

46 The appellant seeks the following orders.

47 The orders made by the Full Court of the Federal Court (Flick, Greenwood and Stewart JJ) on 9 September 2019 are set aside.

48 The orders made by the Federal Circuit Court (Emmett J) on 31 October 2018 are set aside.

49 A writ of certiorari issue quashing the decision of the second respondent dated 1 December 2016.

50 A writ of mandamus issue directing that the matter be remitted to the second respondent to be re-determined according to law.

51 The first respondent pay the costs of the appellant in respect of the proceedings before this Court, the Full Federal Court, and in the Federal Circuit Court.

Part VIII: Time for oral argument

52 The appellant estimates he will require 1 hour for oral argument.

Dated: 3 June 2020

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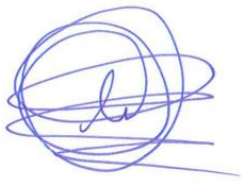

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ANNEXURE - APPELLANT'S LIST OF LEGISLATIVE PROVISIONS

1 *Migration Act 1958* (Cth) (consolidated as at 18 November 2016), ss 51A-64, 57, 424A, 473CA, 473CB, 473CC, 473DA, 473DB, 473DC, 473DD, 473DE