

SHORT PARTICULARS OF CASES
APPEALS

FEBRUARY 2021

No.	Name of Matter	Page No
<u>Tuesday, 2 February</u>		
1.	Davidson v The Queen	1
<u>Wednesday, 3 February</u>		
2.	Bell v State of Tasmania	3
<u>Thursday, 4 February</u>		
3.	DQU16 & Ors v Minister for Home Affairs & Anor	4
<u>Tuesday, 9 February</u>		
4.	Victoria International Container Terminal Limited v Lunt & Ors	6
<u>Wednesday, 10 February</u>		
5.	DVO16 v Minister for Immigration and Border Protection & Anor	7
6.	BNB17 v Minister for Immigration and Border Protection & Anor	9

DAVIDSON v THE QUEEN (B6/2020)

Court appealed from: Court of Appeal of the Supreme Court
of Queensland
[2019] QCA 120

Date of judgment: 18 June 2019

Application referred to enlarged Court: 11 September 2020

The Applicant was tried before a jury on an indictment containing 18 counts of sexual assault and three counts of rape, relating to nine female complainants. The offences charged allegedly occurred during professional massages conducted by the Applicant. The sexual assault charges variously alleged the touching of breasts, nipples, buttocks and genitals without consent. The rape charges each alleged digital penetration of the vagina without consent. Of those three charges, count 15 in the indictment pertained to one complainant while counts 16 and 17 both pertained to another complainant.

Prior to the trial, the Applicant unsuccessfully sought orders for separate trials in respect of counts 15 to 17, on the basis that it would be unfairly prejudicial to him for “similar fact” evidence to be cross-admissible in relation to various counts. The jury was unable to reach a unanimous verdict on counts 16 and 17 but found the Applicant guilty of all other counts, whereupon the Applicant was sentenced to imprisonment for five and a half years with a non-parole period of two and a half years.

On appeal, the Applicant’s contentions included (in essence) that the trial had miscarried because the evidence of all complainants ought not have been admissible in respect of all charges and his application for separate trials should have been granted.

The Applicant’s appeal was dismissed by the Court of Appeal (Gotterson and McMurdo JJA; Boddice J dissenting). The majority of the Court of Appeal held that there was a sufficient link between the rape offences and the other offences so as to make the evidence of one offence strongly probative in the proof of another, given the relevantly identical circumstances. Those circumstances included the alleged conduct occurring during a massage under the guise of having a therapeutic benefit, an unsuspecting and vulnerable complainant having her breasts exposed with little or no warning, and a lack of other persons in the room.

Justice Boddice however would have allowed the Applicant’s appeal. His Honour held that a miscarriage of justice had arisen due to the lack of separate trials on some of the counts, as highly prejudicial evidence had been impermissibly cross-admitted. This was because there were stark differences in the alleged conduct in relation to count 15 as compared with that in relation to counts 16 and 17, such that the formulation of an underlying pattern of conduct was undermined. Justice Boddice held that the evidence in relation to count 15 therefore was not admissible as similar fact evidence in relation to counts 16 and 17, nor was it admissible in relation to any of the other counts.

The proposed ground of appeal is:

- The majority of the Court of Appeal erred in finding that there was no miscarriage of justice from the joinder of all charges, by which the jury was permitted to use the evidence of the conduct that was the subject of each of counts 15, 16 and 17 as probative of whether the conduct alleged in each of the 21 charges occurred.

BELL v STATE OF TASMANIA (H2/2020)

Court appealed from: Court of Criminal Appeal of the Supreme Court
of Tasmania
[2019] TASCCA 19

Date of judgment: 15 November 2019

Special leave granted: 5 June 2020

The Appellant was indicted and tried on charges that included a charge of supplying a controlled drug to a child, contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas). It was not in dispute that the alleged victim, a 15 year old female, had attended the Appellant's premises and he had injected her with methylamphetamine. During his interview with the police, the Appellant had claimed that she told him, and he believed that, she was 20 years old. The trial judge directed the jury it made no difference if the Appellant held an honest and reasonable mistaken belief that the person was aged 18 years or over. The jury found the Appellant guilty of the offence.

At trial, both the Appellant and the State of Tasmania (the Prosecution) accepted that honest and reasonable mistaken belief was available as a potential defence.

On appeal against conviction to the Court of Criminal Appeal, the Appellant argued that the trial judge had erred by directing the jury that the defence was not available. However, the Respondent State of Tasmania submitted that the trial judge correctly stated and applied the law.

The Court dismissed the appeal. Brett J found that there were only two tests available for when the defence of honest and reasonable mistaken belief applied: 1) the belief would render the conduct innocent of the offence charged, or 2) the belief would render the conduct innocent of any criminal charge whatsoever. Brett J held that the second test applied.

Martin AJ also found that a similar test applied but for different reasons. His Honour held that the language of s 14 of the *Criminal Code 1924* (Tas) requires that the belief excused the act in the sense that it would not amount to a criminal offence. Pearce J agreed with the reasons of Martin AJ.

The Court therefore found that the trial judge's instruction to the jury was correct.

The ground of appeal is that:

- The Court of Criminal Appeal erred in law by upholding the learned trial judge's ruling that the defence of honest and reasonable mistake as to age was not available to the Appellant as a defence to the charge.

DQU16 & ORS v MINISTER FOR HOME AFFAIRS & ANOR (S169/2020)

Court appealed from: Federal Court of Australia
[2020] FCA 518

Date of judgment: 22 April 2020

Special leave granted: 9 September 2020

The Appellants, a husband, wife and their child, are Shia Muslims and nationals of Iraq. In August 2012, DQU16 and his wife, DQV16, arrived in Australia by boat, without visas. Their child, DQW16, was born in Australia in August 2013.

In September 2015 the Appellants applied for temporary protection visas, claiming that DQU16 feared he would be harmed in Iraq by Islamic groups for having engaged in the distribution of alcohol in Iraq and that Iraqi authorities could not protect him. DQV16 and DQW16 were included in DQU16's claim as members of the same family unit.

In September 2016 a delegate of the First Respondent ("the Delegate") refused the application. The Delegate considered that DQU16 could take reasonable steps to modify his behaviour by finding another type of employment upon return to Iraq to avoid a real chance of persecution and that he faced no real chance of harm in Iraq. Consequently DQV16 and DQW16 did not satisfy the family unit requirements of ss 36(2)(b) or (c) of the *Migration Act 1958* (Cth) ("the Act").

Upon review, the Immigration Assessment Authority ("the IAA") affirmed the Delegate's decision, concluding that DQU16 did not qualify for a protection visa either as a refugee or on the basis of complementary protection under s 36(2)(aa) of the Act, and that it followed DQV16 and DQW16 did not meet the family unit criteria. The IAA accepted that alcohol sellers are targeted by religious groups in Iraq but found that if DQU16 were returned to Iraq he could, and would, modify his behaviour by ceasing to sell alcohol to avoid a real chance of harm. He therefore did not have a well-founded fear of persecution under s 5J(3) of the Act, nor did he face a real risk of significant harm as a necessary and foreseeable consequence of being removed to Iraq so as to satisfy s 36(2)(aa) of the Act.

An application by the Appellants to the Federal Circuit Court for judicial review of the IAA's decision was dismissed by Judge Street in August 2017.

An appeal by the Appellants to the Federal Court was dismissed by Justice Reeves. His Honour found that the IAA had implicitly adopted its finding as to why DQU16 would modify his behaviour to avoid a real chance of harm, being that he would be concerned about his own safety and the safety of his wife and child, in determining his complementary protection claims under s 36(2)(aa) of the Act. Justice Reeves rejected the submission that the IAA was obliged by the decision of this Court in *Appellant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 473 ("*Appellant S395/2002*") to go on to assess whether the harm that would be avoided by DQU16's behavioural modification would amount to significant harm as defined in the Act. His Honour found that the IAA properly undertook the assessment of whether DQU16 was likely to suffer significant harm in the terms expressed in ss 36(2)(aa) and 36(2B) of the Act on his return to Iraq by assuming that DQU16 would act rationally to avoid harm of the kind previously inflicted on him for reasons unconnected with a Refugee Convention characteristic.

The sole ground of appeal is:

- The Federal Court erred in failing to find that the IAA committed jurisdictional error by failing to apply the principles in *Appellant S395/2002* when considering the complementary protection criterion under s 36(2)(aa) of the Act.

**VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED v LUNT & ORS
(M96/2020)**

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 40

Date of judgment: 18 March 2020

Special leave granted: 11 September 2020

On 19 October 2016, the Fair Work Commission ('Commission') approved the *Victoria International Container Operations Agreement 2016* ('Enterprise Agreement'). At the time, the Maritime Union of Australia, now part of the Fourth Respondent ('CFMMEU'), supported the application for approval of the Enterprise Agreement. On 4 May 2018, the First Respondent ('Mr Lunt') commenced proceedings in the Federal Court of Australia in which he sought a writ quashing the Commission's approval of the Enterprise Agreement. In that proceeding, the Appellant made an application for dismissal on the ground that it was an abuse of process. On 2 July 2019, Justice Rangiah granted the application and dismissed the proceeding as an abuse of process.

Justice Rangiah found that Mr Lunt brought the proceeding for the predominant purpose of enabling the CFMMEU to obtain relief which it was unlikely to obtain if the proceeding were brought in its own name. He found that it would bring the administration of justice into disrepute if the CFMMEU were permitted, by using Mr Lunt as a 'front man', to bring the proceeding to challenge the approval of the Enterprise Agreement while avoiding scrutiny of its prior support for the approval.

Mr Lunt then sought leave to appeal to the Full Court of the Federal Court. The application for leave to appeal was granted. On 18 March 2020, the Full Court upheld the appeal, setting aside the order dismissing the proceeding as an abuse of process.

The Full Court observed that there is a distinction between motive and purpose. Where a person's purpose in commencing proceedings is to obtain a particular legal remedy, the presence of a motive which may be achieved by that remedy does not result in an abuse of process. Although Mr Lunt's motive may have been to benefit the CFMMEU, his purpose in bringing the proceedings was to have the approval of the Enterprise Agreement quashed. That purpose was the remedy sought in the proceeding and therefore, there was not an abuse of process.

The ground of appeal is that:

- The Full Court of the Federal Court erred in failing to find that the proceeding brought the administration of justice into disrepute.

DVO16 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S66/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 157

Date of judgment: 9 September 2019

Special leave granted: 17 April 2020

DVO16 is a Shia Muslim and Ahwazi Arab from Iran. In 2012 he arrived in Australia by boat without a visa, claiming that he feared he would be killed in Iran as a member of a minority group. His fear was based in part on his being an ethnic Arab, on account of which he would face discrimination and a lack of protection by the authorities. He also feared harm from members of a certain tribe from whom he had gone into hiding after being abducted and beaten by them in 2007, following a minor incident on a bus.

In August 2016 a delegate of the First Respondent (“the Delegate”) refused an application by DVO16 for a temporary protection visa. The Delegate stated that there was no evidence of undue discrimination or harassment of DVO16 by Iranian authorities and that the reasonable possibility of his facing discrimination as an Ahwazi Arab did not constitute persecution.

Upon a fast-track review under Part 7AA of the Act, the Immigration Assessment Authority (“the IAA”) affirmed the delegate’s decision, concluding that DVO16 did not qualify for a protection visa either as a refugee or on the basis of complementary protection under s 36(2)(aa) of the *Migration Act 1958* (Cth) (“the Act”).

DVO16 then commenced proceedings in the Federal Circuit Court for judicial review of the IAA’s decision. During those proceedings, expert evidence showed that an interview of DVO16 conducted by the Delegate through an Arabic interpreter was beset by errors in the interpretation of questions and responses. It was also evident that some of DVO16’s responses had not been translated at all.

An application for judicial review of the IAA’s decision was dismissed by Judge Emmett in October 2018, after her Honour had found that, despite the interpretation errors, DVO16 had had every opportunity to explain the harm that he feared were he to return to Iran. Her Honour then held that DVO16 had not been denied procedural fairness before the Delegate and consequently the IAA had not erred by failing to invite DVO16 to give new information under s 473DC(3) of the Act.

An appeal by DVO16 was unanimously dismissed by the Full Court of the Federal Court (Greenwood, Flick and Stewart JJ). Their Honours found that, although DVO16 apparently had not understood when the Delegate asked him specifically about persecution on grounds of ethnicity, open questions that were asked by the Delegate had given DVO16 ample opportunity to speak to his ethnic persecution claim. Nothing in the circumstances of the case gave rise to a requirement that the IAA consider whether to interview DVO16 or seek further information from him. The Full Court also rejected a submission by DVO16 that the IAA review had miscarried due to the interpretation errors such that the IAA had been deprived of a proper consideration of exercising its discretion under s 473DC of the Act. Their Honours found that although there were errors in the IAA’s reasoning based on interpretation

errors, the IAA had gone on to consider the likelihood that DVO16 would face discrimination in Iran based on his being an Ahwazi Arab. The detrimental impact on the review process was not particularly material and the decision-making therefore was not infected to such a degree that the IAA's decision could be set aside on the basis asserted by DVO16.

The sole ground of appeal is:

- The Full Court of the Federal Court erred in failing to find that the IAA (in conducting a review of a decision of a delegate under Part 7AA of the Act) failed to complete its statutory task as the review material before it was, due to material translation error in the interview conducted by the delegate with DVO16, necessarily incomplete.

BNB17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M109/2020)

Court appealed from: Federal Court of Australia
[2020] FCA 304

Date of judgment: 12 March 2020

Special leave granted: 8 October 2020

BNB17 is a citizen of Sri Lanka who arrived in Australia in 2012. In August 2016 he applied for a protection visa, claiming to fear harm in Sri Lanka because at various times he had been harassed, detained and tortured by police on account of family connections with the Liberation Tigers of Tamil Eelam (“LTTE”).

At an interview conducted by a delegate of the First Respondent (“the Delegate”) with the aid of a Tamil interpreter in January 2017 (“the Interview”), BNB17 claimed for the first time that he had been sexually assaulted while detained by police in Sri Lanka in 2009. In written submissions subsequently provided to the Delegate, BNB17’s solicitors submitted that a review of parts of the recording of the Interview conducted by another interpreter whom they had engaged had found that the interpreting at the Interview was inaccurate. One example given was that the interpreter at the Interview faltered somewhat and used the term “sexual harassment” instead of “sexual assault” when interpreting a certain answer given by BNB17. The solicitors submitted that BNB17 ought to be given an opportunity to respond at a further interview to any concerns that the Delegate might have over BNB17’s evidence on his sexual assault claim.

In February 2017 the Delegate refused BNB17’s application for a protection visa, finding that BNB17 was not owed protection either as a refugee or on a complementary protection basis. The Delegate noted the interpreting concerns raised but stated that “[f]or the most part during the interview it appeared that all parties were able to communicate clearly” and “I have considered the concerns with interpreting as it relates to claims I have not found to be credible”.

Upon a fast-track review of the Delegate’s decision conducted by the Immigration Assessment Authority (“the IAA”), BNB17’s solicitors submitted that the Delegate had not adequately engaged with the interpreting concerns before proceeding to find that BNB17 had been “vague and evasive” in giving evidence, and the solicitors again requested that BNB17 be given a further interview if the IAA had any concerns about his credibility. The IAA however found that a further interview of BNB17 was not required, in view of the circumstances of the case and of the restrictions on new information prescribed by s 473DD of the *Migration Act 1958* (Cth) (“the Act”). In March 2017 the IAA affirmed the Delegate’s decision.

An application by BNB17 to the Federal Circuit Court for judicial review of the IAA’s decision was dismissed in May 2019 by Judge Mercuri, after her Honour had rejected a submission that the IAA’s decision not to invite BNB17 to an interview was unreasonable. Her Honour found that the IAA’s non-acceptance of claims made by BNB17, including that he had been detained and sexually assaulted by police in 2009, was based on a combination of factors and not only on his responses during the Interview. Judge Mercuri also held that none of the mistranslations identified by BNB17 rose to a level of materiality.

An appeal by BNB17 to the Federal Court was dismissed by Justice Anderson. His Honour found that the instances of misinterpretation alleged by BNB17 were not so deficient that the substance of the evidence he gave at the Interview was distorted in any material way. In particular, the initial distortion that arose upon the interpreter's use of "sexual harassment" was cured by elaboration given by BNB17 in his next answer, and the IAA in its reasons duly characterised that claim of BNB17's as one of sexual assault. Justice Anderson held that, although the IAA was empowered to request further information, it was under no duty to do so and it was not required to do so in the circumstances of BNB17's case.

The grounds of appeal are:

- The Federal Court erred in failing to find that the IAA could not perform its statutory task of considering the "review material" pursuant to s 473DC of the Act due to material interpreter errors affecting the interview conducted with the primary decision maker.
- The Federal Court erred in failing to find that the decision of the IAA was affected by legal unreasonableness in that the IAA made a decision in reliance upon aspects of the interview with the primary decision maker that BNB17 alleged had been mistranslated, without getting new information under s 473DC of the Act or taking any other step to mould its procedure to cure the mistranslations.