HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND STEWARD JJ

Matter No S66/2020

DVO16 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

Matter No M109/2020

BNB17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

DVO16 v Minister for Immigration and Border Protection
BNB17 v Minister for Immigration and Border Protection
[2021] HCA 12
Date of Hearing: 10 February 2021
Date of Judgment: 14 April 2021
S66/2020 & M109/2020

ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with S G Lawrence for the appellant in S66/2020 (instructed by Norton Rose Fulbright)

G A Costello QC with A Aleksov and M J Kenneally for the appellant in M109/2020 (instructed by Lander & Rogers)

G R Kennett SC with H P T Bevan for the first respondent in S66/2020 (instructed by Clayton Utz)

G R Kennett SC with N M Wood for the first respondent in M109/2020 (instructed by Clayton Utz)

Submitting appearance for the second respondent in both matters

CATCHWORDS

DVO16 v Minister for Immigration and Border Protection
BNB17 v Minister for Immigration and Border Protection

Immigration – Refugees – Application for protection visa – Where appellants each applied for protection visas – Where each appellant interviewed by delegate of Minister – Where each appellant assisted by interpreter in interview – Where interviews affected by translation errors in questions asked and responses given – Where Immigration Assessment Authority ("Authority") conducted review under Pt 7AA of *Migration Act 1958* (Cth) – Where in case of DVO16, Authority not aware of translation errors – Where in case of BNB17, Authority aware of three translation errors – Where in each case Authority did not exercise powers to get new information under Pt 7AA – Where in each case Authority affirmed delegate's decision to refuse visa – Whether Authority's exercise of powers unreasonable – Whether Authority failed to comply with statutory duty to "review" decision under Pt 7AA.

Words and phrases – "automatic merits review", "claims to protection in fact made", "de novo assessment of the merits", "failing to consider substance of claim", "fast track reviewable decision", "Immigration Assessment Authority", "interpretation", "interpretation error", "interpreter", "jurisdictional error", "mistranslation", "new information", "overriding duty", "reasonableness condition", "translation", "translation error".

Migration Act 1958 (Cth), ss 51A(1), 54, 55, 56, 65, Pt 7AA.

1 KIEFEL CJ, GAGELER, GORDON AND STEWARD JJ. These appeals from judgments of the Federal Court of Australia concern the effect on a review by the Immigration Assessment Authority under Pt 7AA of the *Migration Act 1958* (Cth) of errors in the translation of questions asked and answers given at an interview between a referred applicant and a delegate of the Minister for Immigration and Border Protection conducted after the applicant applied for a protection visa and before the delegate decided to refuse the applicant a protection visa.

2 One of the judgments under appeal, *DVO16*[1], is that of a Full Court constituted by Greenwood, Flick and Stewart JJ. The other, *BNB17*[2], is that of Anderson J alone exercising appellate jurisdiction. Each judgment dismissed an appeal from a judgment of the Federal Circuit Court of Australia. The Federal Circuit Court had in each case dismissed an application for judicial review of a decision of the Authority which had affirmed a decision of a delegate to refuse the applicant a protection visa.

3 The conclusion reached in each case, by the Federal Circuit Court and again on appeal by the Federal Court, was that such translation errors as had occurred at an interview between the applicant and the delegate did not result in the decision of the Authority being affected by jurisdictional error. The conclusion was in each case correct.

Translation and mistranslation

4 The function of translation in a curial or administrative setting is interpretation of communications as accurately and completely as possible. The process of interpretation involves comprehension of words spoken or written in a source language, conversion to a target language, and delivery in a manner faithful both to the content of the words and to the register and style of the speaker or writer[3]. That, at least, is the ideal.

5 Long past is the time when an interpreter might have been thought to be appropriately described as a "translating machine" or "bilingual transmitter" performing a function "not different in principle from that which in another case

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1 *DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342.

2 *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304.

3 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) at 78-83.

an electrical instrument might fulfil in overcoming the barrier of distance"[4]. More accurate is to conceive of an interpreter as a "bilingual mediating agent between monolingual communication participants in two different language communities"[5] and to recognise that "total equivalence" between words spoken or written in a source language and words translated into a target language is a "chimera"[6]. Translation is not a "simple word-matching exercise"[7] but "a difficult and sophisticated art" which, "[t]o be done well", "requires not only linguistic sophistication and sensitivity to 'minor' linguistic details (which may be correlated with vast differences in conceptualization), but also an intimate knowledge of the cultures associated with the language in question, of the social and political organization of the relevant countries, and of the world-views and life styles reflected in the linguistic structure"[8].

6 Professor Wigmore noted the "peculiarity" of language that "the most perfect system of signs, the most richly developed language, leads only to a partial comprehension ... whose degree of completeness depends upon the nature of the subject treated, and the acquaintance of the hearer with the mental and moral character of the speaker"[9]. Imperfections in communication arising out of mistranslation of words spoken or written in one language into another language are inherent in the human condition, as are imperfections in communication arising out of misuse or misunderstanding of words spoken or written in a common language. "Perfect interpretations" simply "do not exist"[10].

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4 *Gaio v The Queen* (1960) 104 CLR 419 at 430-431. See also at 429, 432-433.

5 Bell, *Translation and Translating: Theory and Practice* (1991) at 15, quoting House, *A Model for Translation Quality Assessment* (1977) at 1.

6 Bell, *Translation and Translating: Theory and Practice* (1991) at 6.

7 Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (2011) at 2.

8 Dixon, Hogan and Wierzbicka, "Interpreters: Some basic problems" (1980) 5 *Legal Service Bulletin* 162 at 163.

9 Wigmore, *The Science of Judicial Proof*, 3rd ed (1937) at 569-571, quoting Whitney, *Language and the Study of Language*, 4th ed (1869) at 111.

10 Shulman, "No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants" (1993) 46 *Vanderbilt Law Review* 175 at

7 Unsurprisingly therefore, questions not infrequently arise as to the effect of mistranslation on curial or administrative outcomes. Those questions cannot be answered through the application of a simple or uniform mode of analysis.

8 Whether and if so in what circumstances mistranslation might result in invalidity of an administrative decision turns necessarily on whether and if so in what circumstances mistranslation might result in non-compliance with a condition expressed in or implied into the statute which authorises the decision-making process and sets the limits of decision-making authority[11]. In a decision-making process conditioned by a requirement to afford procedural fairness the content of which is implied by the common law, the effect of mistranslation on the resultant decision will turn on whether the mistranslation has resulted in "unfairness" in the decision-making process[12] amounting to "practical injustice"[13]. In a decision-making process in which procedural fairness is excluded or is sufficiently provided if specific statutory requirements are met, the effect of a mistranslation on the resultant decision will turn on the "blunter question"[14] of whether the mistranslation has resulted in one or more specific statutory requirements not being met.

177, quoted in *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at 18 [26].

11 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 [23], 145 [66]; *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 59 [15]; 385 ALR 212 at 217.

12 *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 215-216 [9]-[10], 219 [24], 224-225 [46]-[48], 229-230 [65]-[75].

13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37].

14 *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 230 [74], citing *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6. See also *Singh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 1 at 6 [26]-[28].

Mistranslation in the context of Pt 7AA

9 Part 7AA, which has previously been examined in detail[15], provides for the Authority to engage in "automatic merits review"[16] of a "fast track reviewable decision", referred to it by the Minister, by which a delegate of the Minister has refused to grant a protection visa to the referred applicant at the conclusion of a primary decision-making process which commences with the applicant applying for a protection visa and which is governed by the Code of Procedure for dealing with visa applications in Subdiv AB of Div 3 of Pt 2.

10 The Code of Procedure is "taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with"[17]. Though it contains no requirement for a visa applicant to be interviewed, the Code of Procedure permits the Minister or a delegate, "if he or she wants to", to "get any information that he or she considers relevant" by means which include an interview between the applicant and an officer of the Department of Immigration and Border Protection[18]. In practice, officers of the Department who are delegates of the Minister and who will go on to make the primary decisions to grant or refuse protection visas routinely conduct interviews with the applicants for those visas. The interviews, known as "protection interviews", are conducted with the assistance of interpreters and are routinely audio-recorded but not routinely transcribed.

11 Despite containing no requirement for the applicant to be interviewed, the Code of Procedure imposes obligations on a delegate having conducted an interview with the applicant in going on to decide whether to grant or refuse the protection visa both to "have regard to" relevant information "given" by the

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15 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 222-232 [6]-[38]; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144-145 [2]-[8]; 375 ALR 47 at 48-50; *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 932-937 [1]-[25]; 383 ALR 407 at 408-414.

16 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144 [2]; 375 ALR 47 at 48; *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 949 [79]; 383 ALR 407 at 431.

17 Section 51A(1) of the *Migration Act*.

18 Sections 56 and 58(1)(d) of the *Migration Act*.

applicant in the interview[19] and to "have regard to" information "got" by the delegate in the interview considered by the delegate to be relevant[20]. Non-compliance with either of those obligations can result in invalidity of the delegate's decision[21].

12 Each obligation to "have regard to" information is an obligation to engage in "'an active intellectual process' directed at the information"[22]. Mistranslation of words spoken during the protection interview has the potential to cause the intellectual process in fact engaged in by the delegate to be misdirected. Mistranslation in that way has the potential to result in non-compliance with a condition of validity of the decision of the delegate imposed by the Code of Procedure.

13 More fundamentally, mistranslation has the potential to result in the delegate failing to understand and therefore to consider the substance of a claim to protection in fact raised by the applicant in words spoken in his or her own language during the protection interview. Mistranslation in that way has the potential to result in the delegate failing to discharge the core element of the primary statutory duty to decide whether to grant or refuse the protection visa[23], being to assess the claims to protection in fact raised by the applicant against the criteria for the grant of a protection visa to determine whether or not the delegate is satisfied on the totality of the information available to the delegate that those criteria have been met[24].

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19 Sections 54(1), (2)(c) and 55(1) of the *Migration Act*.

20 Section 56(1) of the *Migration Act*.

21 *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536 at 556-558 [95]-[102].

22 *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536 at 557 [101], quoting *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at 164 [59].

23 Section 65 of the *Migration Act*.

24 cf *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]-[25], 1101 [86]-[89], 1102 [95]; 197 ALR 389 at 394, 406-407, 408.

14 Non-compliance by a delegate with one or other of those conditions of the making of a valid primary decision to grant or refuse a protection visa, however, is of itself of no consequence for the subsequent exercise of jurisdiction by the Authority. That is because the statutory duty of the Authority to "review" a fast track reviewable decision[25] is triggered simply by referral by the Minister of a decision to refuse to grant a protection visa that has been made by a delegate in fact[26].

15 Nor is compliance by the Secretary of the Department with the consequent procedural duty to give to the Authority specified categories of "review material"[27] affected by errors in the translation of words spoken during the protection interview. Words spoken by the applicant during the interview, having no enduring physical existence, are not themselves within the category of "material provided by the referred applicant to the person making the decision before the decision was made"[28]. Rather, the physical embodiment of the totality of the words spoken during the interview (by the applicant, the delegate and the interpreter) in the form of the recording of the interview is within the separate category of "other material that is in the Secretary's possession or control"[29]. Whether or not analysis of the recording might reveal translation errors, the Secretary could not but consider the recording to be "capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding"[30] and, for that reason, to be "relevant to the review"[31]. The Secretary would on that basis be obliged to give the recording to the

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25 Section 473CC of the *Migration Act*.

26 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 221 [3]-[4].

27 Section 473CB of the *Migration Act*.

28 Section 473CB(1)(b) of the *Migration Act*.

29 Section 473CB(1)(c) of the *Migration Act*.

30 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 933 [6]; 383 ALR 407 at 410, quoting *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144-145 [6]; 375 ALR 47 at 50.

31 Section 473CB(1)(c) of the *Migration Act*.

Authority[32] irrespective of the translation errors it might contain. Save to the extent that translation errors might be indicated or corrected by other material in the Secretary's possession or control, which the Secretary would similarly be required to give to the Authority, the Secretary has no obligation under the Part to investigate or correct translation errors that might exist in any of the review material given to the Authority.

16 The overriding duty of the Authority to "review" the fast track reviewable decision referred to it by the Minister[33] is accompanied by a procedural duty to conduct that review by "considering" the review material provided to it by the Secretary without accepting or requesting "new information", being "a communication of knowledge about some particular fact, subject or event"[34] that was not before the Minister when the delegate made the referred decision, and without interviewing the referred applicant[35]. That procedural duty as to the manner of conduct of the review is qualified only by the Authority having specific procedural powers to "get"[36] new information and in specified circumstances[37], and on specified conditions[38], to "consider" that new information. Performance of the procedural duty subject to the potential for exercise of these powers exhausts the requirements of "the natural justice hearing rule"[39] in relation to the review[40].

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32 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 934 [12]; 383 ALR 407 at 411.

33 Section 473CC of the *Migration Act*.

34 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 228 [24].

35 Section 473DB of the *Migration Act*.

36 Section 473DC of the *Migration Act*.

37 Section 473DD of the *Migration Act*.

38 Sections 473DE and 473DF of the *Migration Act*.

39 Section 473DA of the *Migration Act*.

40 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1099 [33]-[35]; 373 ALR 196 at 204-205.

17 The Authority performs its duty to consider the review material provided to it by the Secretary by examining the review material physically provided to it so as to form and act on its own assessment of the relevance of that material to the review of the referred decision[41]. It is then up to the Authority to give each part of the material that it thinks relevant such weight in making findings of fact as it thinks is warranted in arriving at its decision on the review. The Authority is not disabled from performing its duty to consider the review material by translation errors that might exist in any part of the review material.

18 How then, if at all, might translation errors in a recording of a protection interview provided to the Authority by the Secretary as part of the review material result in non-compliance with any condition of a decision of the Authority expressed in or implied into Pt 7AA? Two potentialities present themselves, but only two.

19 The first arises from the condition of reasonableness implied into the procedural duty of the Authority to review the referred decision by considering the review material and implied as well into the procedural powers of the Authority to get new information at an interview with the referred applicant and then to consider that new information if the Authority is satisfied that specified conditions are met[42]. The conditions for the consideration of new information are met if the Authority is satisfied, relevantly, that it is credible information about the referred applicant not previously known to the Minister which may have affected consideration of the referred applicant's claims had the new information been known to the Minister[43] and that "exceptional circumstances" justify its consideration[44]. Where the referred applicant's testimony as given at a protection interview was incorrectly translated, testimony able to be given by the referred applicant at an interview with the Authority as correctly translated would amount

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41 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 933 [7]; 383 ALR 407 at 410, quoting *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [7]; 375 ALR 47 at 50.

42 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 933 [3]; 383 ALR 407 at 409.

43 Section 473DD(b)(ii) of the *Migration Act*. See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 230-231 [33]-[34].

44 Section 473DD(a) of the *Migration Act*. See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 229 [30].

to new information which might well meet those conditions for consideration by the Authority.

20 Faced with translation errors in a recording of a protection interview revealed or suggested by the review material provided by the Secretary, considered alone or in light of such submissions as might be made on behalf of the referred applicant during the course of the review, the Authority would have the potential to breach the reasonableness condition implied into its powers to get and consider new information were it to fail to exercise those powers to interview the referred applicant and then to consider the referred applicant's testimony as correctly translated. Equally, the Authority would have the potential to breach the reasonableness condition implied into its duty to review the referred decision by considering the review material were it to make findings adverse to the referred applicant with knowledge of translation errors without having exercised its procedural powers to get and consider new information which might address those errors.

21 Whether or not the decision of the Authority was reached in breach of the reasonableness condition implied into its procedural duty and powers would turn, on either analysis, on whether the decision-making course in fact adopted by the Authority in the circumstances known to it[45] was open to a reasonable member of the Authority cognisant of the statutory obligation of the Authority ordinarily to conduct its reviews without accepting or requesting new information or interviewing the referred applicant, cognisant of its powers to get new information in an interview with the referred applicant and to consider that information, and mindful of the statutory exhortation to the Authority to pursue the objective of providing a mechanism of limited review that is both "efficient" and "quick"[46].

22 The second way in which translation errors in a recording of a protection interview provided to the Authority by the Secretary as part of the review material could result in non-compliance with Pt 7AA is through non-compliance with the overriding duty of the Authority to "review" the referred decision[47]. That overriding duty of the Authority is to engage in a de novo assessment of the merits of the decision in fact made by the delegate: "to consider the application for a

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45 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [26]; 385 ALR 212 at 220.

46 Section 473FA of the *Migration Act*.

47 Section 473CC of the *Migration Act*.

protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met"[48]. The Authority's de novo assessment of the merits is not of a lesser standard than that required of the delegate in making the referred decision. No less than the delegate in making the referred decision, the Authority in reviewing the referred decision is required to assess the claims to protection in fact raised by the referred applicant against the criteria for the grant of a protection visa in order to determine whether or not to be satisfied that those criteria have been met.

23 Just as mistranslation of words spoken during a protection interview has the potential to result in the delegate failing to understand and therefore to consider the substance of a claim in fact raised by the applicant in his or her own language, so the same mistranslation has the potential to result in the Authority failing to understand and therefore to consider the substance of the same claim. Mistranslation in that way has the potential to result in the Authority failing to discharge the core element of its overriding duty, namely to assess the claims to protection in fact made by the applicant against the criteria for the grant of the visa in determining for itself whether or not it is satisfied that the criteria for the grant of a visa have been met.

24 Neither of those potentialities manifested in the circumstances considered in the judgments under appeal.

DVO16

25 The appellant in *DVO16* is a Shia Muslim from Khuzestan province in Iran. He identifies as an Ahwazi Arab.

26 In his written application for a protection visa, the appellant raised two overlapping claims to protection. He claimed to fear persecution resulting from the failure of the Iranian state to protect him from harm inflicted by another tribal group in Iran (described as the Jalali or Chanani tribe) resulting from a specific incident on a bus by reference to which he was alleged to have had physical contact with a woman from that other tribe. He also claimed to fear persecution resulting from the failure of the Iranian state to protect him more generally from harm inflicted by another tribal group by reason of his ethnicity as an Ahwazi Arab.

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48 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 933 [5]; 383 ALR 407 at 409, quoting *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 226 [17].

27 The appellant participated in a protection interview with the delegate who went on to decide to refuse him a protection visa at which the appellant spoke an Arabic dialect from the Khuzestan region of Iran. The interpreter spoke urban Levantine Arabic. The interview was audio-recorded.

28 The Minister referred the decision of the delegate refusing the protection visa to the Authority for review, following which the Secretary gave the recording of the protection interview to the Authority as part of the review material. The Authority affirmed the decision of the delegate.

29 Expert evidence later adduced in the Federal Circuit Court on the appellant's application for judicial review of the decision of the Authority revealed mistranslation of a question asked by the delegate about the appellant's claim to fear harm resulting from the failure of the Iranian state to protect him from persecution inflicted by reason of his ethnicity. The result of the mistranslation was that the delegate, and later the Authority, misapprehended that the appellant did not understand what was meant by "ethnicity". The truth was that the appellant did not understand what was meant by "persecution". The delegate then said that the interview would "start again", which the interpreter failed to interpret. In an exchange imperfectly interpreted, the delegate then went on to ask the appellant what exactly he feared would happen to him if he were to return to Iran, to which the appellant responded that he feared that he might be killed by members of the Chanani tribe. In later exchanges, the delegate also asked a number of open-ended questions giving the appellant the opportunity to give evidence about whether there was anything he feared if he were to return to Iran "apart from issues to do with the Chanani tribe". In response to each question, the appellant referred back to the tribal dispute or otherwise failed to say anything to establish his claim of persecution on the basis of ethnicity.

30 The Authority recorded in its reasons for decision that the appellant claimed that he feared persecution by reason of his ethnicity. The Authority went on to explain in its reasons for decision that, having regard to country information which it specified and to aspects of the appellant's circumstances which it also specified, it was not satisfied that the appellant would face a real chance of serious harm on return to Iran as an Ahwazi Arab.

31 The mistranslations indicated by the expert witness could not have borne on the reasonableness of the course adopted by the Authority in reaching its decision. Nor did the mistranslations result in the Authority failing to understand and consider the substance of either of the appellant's claims.

BNB17

32 The appellant in *BNB17* is a Hindu Tamil from Sri Lanka. He claimed in his written application for a protection visa to fear persecution by reason of imputed links to the Liberation Tigers of Tamil Eelam ("LTTE"). He claimed that he had been detained by police in Colombo on some five occasions between 2006 and 2009, had been tortured by the Criminal Investigation Division ("CID") on the second occasion and had been detained for a number of hours on the last occasion. He also claimed that he had been required to report to the local police station and answer questions after returning from Colombo to his home in Karaveddy in 2010.

33 The appellant participated in a protection interview with the delegate who later refused the protection visa. He was legally represented. The appellant claimed in the interview for the first time that he had been sexually tortured by the CID when detained in Colombo in 2009 and that he had been beaten by police when required to report to the local police station after returning to Karaveddy in 2010. The interview was audio-recorded and the recording was evidently provided to the appellant's legal representative.

34 Not long after the protection interview, the appellant's legal representative made a "post-hearing submission" to the delegate. The legal representative wrote in the post-hearing submission that she had reviewed parts of the recording of the interview with the assistance of a Tamil interpreter and had concerns about the accuracy of the translation. The legal representative gave three examples of interpretation errors. The first was that a straightforward statement of the appellant that he feared harm from "army, CID, police" had been mistranslated as a statement that he feared harm as well from "other people". The second was that, when asked to explain what he meant by his claim to have been beaten, the appellant had given an answer to the effect that he had been beaten to find out whether he was a member of the LTTE or supported the LTTE. The substance of his answer had not been translated and the interpreter had instead gone off on a "tangent". The third was that, apparently by reason of the discomfort of the interpreter in dealing with the subject matter, a reference by the appellant to "sexual assault" had been mistranslated as "sexual harassment". The legal representative urged that the appellant be "afforded the benefit of the doubt in assessing the evidence given at his interview" and that the conduct of the interpreter "be given weight" in that assessment. Attached to the post-hearing submission was a statutory declaration of the appellant restating his claim to have been sexually tortured by the CID when in Colombo in 2009 and giving a cultural explanation for why he had not made the claim before the interview.

35 In his written reasons for his decision refusing a protection visa, the delegate directly addressed the concerns about the accuracy of the translation that had been

raised by the legal representative in the post-hearing submission and rejected them as not "credible". The delegate noted that the interview had been conducted with the assistance of an accredited Tamil interpreter, recorded that "[f]or the most part during the interview it appeared that all parties were able to communicate clearly", and stated that he was "satisfied that the [appellant] was able to understand the interpreter and that he provided detailed responses to questions asked of him".

36 After referral by the Minister of the delegate's decision to the Authority for review and provision by the Secretary of the recording of the protection interview to the Authority as part of the review material, the appellant's legal representative made a written submission to the Authority drawing attention to the concerns about the accuracy of the translation that had been raised in the post-hearing submission. The legal representative requested that the Authority itself interview the appellant if it had concerns about his credibility.

37 The Authority made its decision to affirm the decision of the delegate without conducting the requested interview. The Authority explained in its reasons for decision that it was not satisfied that the circumstances of the case required it to invite the appellant to attend an interview but that it had borne the appellant's legal representative's post-hearing submission in mind in making its decision.

38 The Authority went on to explain in its reasons for decision that it rejected the appellant's claims to have been sexually tortured by the CID in Colombo in 2009 and to have been beaten by police in Karaveddy in 2010. The Authority rejected those claims in part by reference to the appellant having failed to raise them at any time before the protection interview and in part by reference to the Authority's assessment of the appellant's responses to questions asked by the delegate during the interview. The Authority found his responses to have been "vague" and "evasive".

39 On the appellant's application for judicial review of the decision of the Authority in the Federal Circuit Court, a transcript of the audio-recording of the protection interview was adduced in evidence on his behalf. The transcript was explained to have been compiled by a graduate lawyer having transcribed the words spoken in English and a Tamil interpreter having translated the words spoken in Tamil. On the hearing of the appeal to this Court, attention was focussed on two translation errors revealed by the transcript.

40 The first translation error revealed by the transcript pertains to the subject matter of the second of the examples given by the appellant's legal representative in her post-hearing submission to the delegate: the appellant's response when asked by the delegate to explain what he meant by his claim to have been beaten. The delegate's initial question as to what the appellant meant when he used the word

"beating" was part of a somewhat confused exchange between the delegate, the interpreter and the appellant in the course of which the interpreter did not convey the appellant's use of the word "tortured" but instead said "beaten many time". Yet, as Anderson J found in the Federal Court[49], the conversation is shown by the transcript to have "reset". The substance of the question was repeated and correctly translated several times.

41 The second translation error revealed by the transcript concerns a question asked by the delegate as to why the appellant had not previously claimed to have been physically harmed after 2009. The question was wrongly translated as asking why the appellant had not claimed to have been physically harmed before 2009. The mistranslation led again to some confusion in communication between the delegate, the interpreter and the appellant. However, the question was asked again at a later stage of the interview, when it was correctly translated and answered by the appellant.

42 Neither individually nor in combination do the translation errors revealed by the transcript provide a basis for concluding that the Authority failed to understand and therefore to consider the substance of the claims in fact made by the appellant in the Tamil language during the interview. The Authority did not fail in its fundamental and overriding duty to conduct the review.

43 The distinct question of reasonableness must be determined by reference to the information available to the Authority in conducting the review at a time when the transcript did not exist. The Authority had the recording of the protection interview as part of the review material and was made aware of the three examples of translation errors set out in the post-hearing submission. Those errors were not so grave or extensive as to compel the Authority to the conclusion that it was incapable of assessing the appellant's claims by reference to the recording. The Authority, moreover, was entitled to place weight on the delegate's opinion that the translation errors had not impeded clear communication during the interview. The choice of the Authority to proceed on its own assessment of the appellant's claims as recorded and translated in the protection interview rather than conduct a new interview with the appellant was well within the bounds of reasonableness.

Disposition

44 Each appeal is to be dismissed with costs.

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49 *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304 at [72].

EDELMAN J.

Introduction

45 The common theme across these two appeals is the effect of erroneous interpretations of a visa applicant's evidence given in a foreign language. The appeals raise the question of when the Immigration Assessment Authority will fall into jurisdictional error in its conduct of a review under Pt 7AA of the *Migration Act 1958* (Cth) where such erroneous interpretations are contained within the review material provided to it by the Secretary of the Department.

46 In each of these matters, the appellant, DVO16 and BNB17 respectively, had applied for a protection visa. Each had been interviewed by a delegate of the Minister who, in each case, subsequently refused the application. In each case, the Authority affirmed the decision of the delegate. DVO16 and BNB17 each sought judicial review of the decision of the Authority in the Federal Circuit Court of Australia. Each application was dismissed[50]. Appeals from the decisions of the Federal Circuit Court were dismissed by, respectively, the Full Court of the Federal Court of Australia[51] and a single Justice of the Federal Court of Australia exercising the power of a Full Court[52]. In each case, a central issue on appeal concerned whether errors in interpretation during the interview with the delegate resulted in the decision of the Authority being affected by jurisdictional error. In each case, the audio recording of the interview with the delegate formed part of the review material provided by the Secretary to the Authority to conduct its review.

47 There are at least three categories of error by an interpreter which might lead to a jurisdictional error by the Authority or a failure of a condition of the Authority's jurisdiction. The three categories of interpretation error discussed below are in ascending order of seriousness. First, if significant interpretation errors are apparent to the Authority then the errors might require, as a matter of legal reasonableness, the exercise of statutory power by the Authority to remedy the errors. The power might be to get new information under s 473DC of the *Migration Act* such as by obtaining a fresh interpretation of the foreign language spoken in the interview or, more exceptionally, by an invitation to the applicant to an interview with the Authority. Secondly, the interpretation errors might be so significant in critical respects that the Secretary will be unable, even by the

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50 *DVO16 v Minister for Immigration and Border Protection* [2018] FCCA 3058; *BNB17 v Minister for Immigration and Border Protection* [2019] FCCA 1314.

51 *DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342.

52 *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304.

broadest or most general of descriptions, to perform the duty – which is a precondition for a valid review by the Authority – of giving the Authority a statement that contains reference to the evidence on which the findings of the delegate were based[53]. Thirdly, and whether or not the interpretation errors are known to the Authority, the interpretation errors might be so extreme that they deprive the assessment by the Authority of its required character as a "review" under s 473CC of the *Migration Act*.

48 A fourth possibility can be put to one side. This possibility is that interpretation errors might result in a breach of the natural justice hearing rule that would be implied as part of the interpretation of express provisions[54] in Div 3 of Pt 7AA concerning the conduct of a review. The present state of the law is that the terms of s 473DA(1) – requiring the rules for the conduct of a review in Div 3[55] to be "taken to be an exhaustive statement of the requirements of the natural justice hearing rule" – mean that, unlike other Divisions with similar provisions[56], Div 3, being said not to have excluded any expressions of natural justice but somehow excluding implications from those expressions, has effectively excluded the requirements of the natural justice hearing rule[57].

49 The grounds of appeal in both appeals raise matters related to each of the three categories of error by an interpreter which might lead to lack of jurisdiction of the Authority. One ground of appeal in *BNB17 v Minister for Immigration and Border Protection* concerns the first category: the interpretation errors were sufficiently significant as to require the Authority to get new information under s 473DC or to take any other step to mould its procedure to cure the errors. The other ground of appeal in *BNB17*, and the sole ground of appeal in *DVO16 v Minister for Immigration and Border Protection*, concerns the second and third categories: the errors in interpretation during the interview meant that the review material provided by the Secretary to the Authority was incomplete and that the Authority failed to complete its statutory review task.

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53 *Migration Act 1958* (Cth), s 473CB(1)(a)(ii).

54 See *Merchant Service Guild of Australasia v Newcastle and Hunter River Steamship Co Ltd [No 1]* (1913) 16 CLR 591 at 624; *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113 at 118; *R v Rigby* (1956) 100 CLR 146 at 151; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [120].

55 Together with *Migration Act*, ss 473GA and 473GB.

56 *Migration Act*, ss 51A, 97A, 118A, 127A, 357A, 422B.

57 See *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091; 373 ALR 196. But compare *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 442 [34].

50 For the reasons below, although the interpretation errors resulted in erroneous reasoning by the Authority in the *BNB17* case and potential procedural unfairness in the *DVO16* case if DVO16 had been denied the opportunity to put any material aspect of his case at an interview with the delegate, the Authority committed no jurisdictional error and did not lack jurisdiction. The appeals must be dismissed.

The nature of interpretation errors and the alleged errors in these cases

The nature of interpretation errors

51 Interpretation and translation are nouns that are now commonly used interchangeably, although the former is generally used in relation to oral words and the latter is generally used in relation to written words. But this common usage disguises important differences in concept, if not in etymology. The art of interpreting is the art of explaining meaning. It is not an exercise in literal rendering that might be connoted by translation of words. For instance, a sufficient interpretation of Greek words[58] to the effect that "[t]he spirit is willing, but the flesh is weak" might require further elucidation to convey meaning. That elucidation might be that "good intentions can be defeated by human weakness". But it would not be that "alcohol is desired when meat is rotten".

52 Inaccuracy in conveying meaning by literal interpretation is not the only reason that an interpreter will constantly be exercising evaluative judgment. Other reasons include that: in some languages there is no close match for some English words; grammatical constructs can lead to subtle but important changes in meaning; and linguistic devices and habits can change depending upon the region where a language is spoken. Numerous examples were identified decades ago. So it has been said: in English the "morning" finishes, and the "afternoon" starts, at noon but in Polish the morning finishes at 11 am and the afternoon starts at 3.30 pm[59]; the concept of "family" changes dramatically according to cultural context[60]; and the "undifferentiated English 'you' cannot be translated into Italian,

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58 Matthew 26:41.

59 Australian Law Reform Commission, *Manner of Giving Evidence*, Evidence Reference Research Paper No 8 (1982) at 94-95.

60 Dixon, Hogan and Wierzbicka, "Interpreters: Some basic problems" (1980) 5 *Legal Service Bulletin* 162 at 163.

Spanish, Polish, German, Russian or Serbian" because a more or less formal method of address must be chosen in those languages[61].

53 The goal of interpretation therefore is to use judgment in order to "express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language"[62]. Of course, perfect accuracy and complete clarity in expressing a concept from a foreign language are impossible. And as interpretation moves along a spectrum from the reasonably accurate to the clearly erroneous, the dangers of misunderstanding can also be multiplied by other matters. The possibility or extent of error is further enhanced where, as unfortunately occurred on occasion in the interpretations in these appeals, an interpreter does not interpret all the words spoken by one person and engages in uninterpreted conversation with the interviewer or interviewee.

54 The errors that can arise from interpretation are not limited to the consequences of incorrect interpretation. They extend also to the pernicious effect of adverse credibility assessments based upon matters of demeanour and impression. A former member of the Refugee Review Tribunal has correctly described how "[t]he utilisation of demeanour, without more, to substantiate adverse credibility findings is 'fraught with dangers'"[63]. Empirical studies have also suggested that the medium of an interpreter can affect assessment of demeanour, and therefore credibility, "by the interpreter's voice, dress, mannerisms, linguistic competence, age, race and gender"[64]. As Professor Groves has observed, decision-makers "may struggle to distinguish between the words and demeanour of an interpreter and those of the person being interpreted"[65]. Further, the unspoken relationship between the interviewee and the interpreter, especially if there is not

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61 Dixon, Hogan and Wierzbicka, "Interpreters: Some basic problems" (1980) 5 *Legal Service Bulletin* 162 at 164.

62 *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at 19 [29]; *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 222-223 [42].

63 Norman, "Assessing the Credibility of Refugee Applicants: A Judicial Perspective" (2007) 19 *International Journal of Refugee Law* 273 at 289. See also *WAEJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 597 at 601-602 [17].

64 Barnett, "Mind your Language – Interpreters in Australian Immigration Proceedings" (2006) 10 *University of Western Sydney Law Review* 109 at 111-112.

65 Groves, "Interpreters and Fairness in Administrative Hearings" (2016) 40 *Melbourne University Law Review* 506 at 512-513.

complete trust between them, can sometimes present a distorted impression of, or distorted context for, the interpreted words[66]. These problems for credibility assessments based, in part, upon impression and demeanour are compounded by cultural issues that may not be known to the decision-maker such as the impoliteness in some cultures of direct responses to questions or the extreme discomfort involved in discussion of some topics in particular cultures[67]. All of these considerations compound the usual problems of assessment of demeanour, particularly in the context of evidence in an atmosphere that is very commonly one of high pressure and which also can commonly concern highly distressing matters. Indeed, in the *BNB17* case itself, the Authority observed, of circumstances of sexual assault against those of BNB17's ethnicity, that there was "ample credible country information that sexual assault has been engaged in by the authorities" in a systematic way.

55 As explained below, part of the reasoning of the Authority in the *BNB17* case was that BNB17 gave his evidence in a manner that was "vague and evasive". This finding by the Authority was an intermediate step in the Authority's reasoning. It was not submitted, nor could it have been submitted, that the finding meant that the Authority's reasons for decision were so irrational or illogical or so unsupported by any intelligible justification as to involve an unreasonable exercise of the Authority's duty to give reasons[68]. And the Authority's reasoning in this respect was not the subject of any other duty, function, or power to which the requirement of legal reasonableness could attach. Hence, even if the finding was not open it was not a jurisdictional error. Nevertheless, and in light of the understandable focus by counsel for BNB17 upon this aspect of the Authority's reasoning, it is necessary to reiterate the extreme caution that should be exercised by an Authority before making, or accepting, adverse demeanour findings based upon an audio recording of an interview that involved interpreted evidence.

56 The assessment by the Authority, based upon the audio recording, that BNB17 was "vague and evasive" is the type of reasoning that should be made with great caution and only in rare circumstances. In the *BNB17* case it is unclear whether the Authority considered any of the following matters, each of which, individually, might have been sufficient to preclude the "vague and evasive" conclusion. First, an impression of vagueness or evasiveness is often the

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66 See also Taylor, "Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions" (1994) 13 *University of Tasmania Law Review* 43 at 69-70.

67 Norman, "Assessing the Credibility of Refugee Applicants: A Judicial Perspective" (2007) 19 *International Journal of Refugee Law* 273 at 287.

68 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 959 [128]-[129]; 383 ALR 407 at 444-445.

consequence of even minor errors or imprecisions in interpretation or context. And there were, at least, imperfections in the interpretation of parts of the interview, to which imperfections the Authority had been alerted. Secondly, the interview plainly had very large consequences for BNB17's life, a circumstance of pressure that demands caution even in assessments of demeanour uncomplicated by interpretation or cultural considerations. Thirdly, the manner in which BNB17 gave his evidence was likely to have been affected by cultural considerations. Fourthly, the interview involved matters that on BNB17's account required the recall and expression of highly personal, extremely unpleasant and traumatic experiences.

The interpretation errors alleged by BNB17

57 BNB17's claim for protection was based upon claims that Sri Lankan authorities would persecute him due to his Tamil ethnicity and suspicion of involvement with the Liberation Tigers of Tamil Eelam ("the LTTE"). In his written application he alleged: that his father was a member of the LTTE; that his brother had been arrested, detained for ten months, beaten and tortured; that he had been detained by the police five times between 2006 and 2009 and tortured on the second occasion by members of the Criminal Investigation Division; and that after the war, he felt constantly threatened and harassed and was required to report to the local police station to answer questions and to drive members of the Criminal Investigation Division in his vehicle. At his protection visa interview, BNB17 also alleged that he had been sexually assaulted on an occasion when he was detained by the Criminal Investigation Division in 2009 and that he had been beaten by the police when he reported to the local police station.

58 The Authority accepted some of BNB17's claims but it rejected others. In particular, the Authority rejected BNB17's claim in his protection visa interview that he was beaten by the police when he reported to the local police station. The Authority described BNB17's manner of giving evidence in his interview as "vague and evasive when asked about this claim". The Authority rejected submissions that BNB17 had not understood the question about being beaten and suggestions that the question should have been rephrased. It dismissed concerns expressed by the representative of BNB17 regarding the quality of the interpretation. The Authority observed that during the interview the delegate had repeated on three occasions the question "what do you mean by beaten?" and that the delegate had asked BNB17 "what did they do?". The Authority observed that BNB17 was "unable to provide any detail around his claim to have been beaten". Ultimately, the Authority concluded that BNB17 did not meet the requirements of the definition of a refugee in s 5H(1) of the *Migration Act*.

59 BNB17 had made submissions to the delegate after the interview, but before the delegate's decision, about inaccuracies in the interpretation. Following the delegate's decision, BNB17's representative provided submissions to the Authority about inaccuracies in interpretation. The submissions were made fewer than four

weeks after the delegate's decision, no doubt with an eye to the statutory requirement for the Authority to proceed quickly and efficiently[69]. It was submitted on behalf of BNB17 that conclusions about demeanour need "to be made in the context of an interview with clear and accurate interpreting" and that, in light of doubts about the interpretation, BNB17 should be afforded a further interview by the Authority if it had doubts about his credibility. BNB17's representative explained, as had also been explained to the delegate, that parts of the interview had been reinterpreted from the recording of the interview with the delegate. The reinterpretation had been made with the assistance of an independent Tamil interpreter provided by an interpreting agency, and three alleged errors in the interview interpretation had been identified.

60 The first alleged error concerned an interpretation of BNB17's response to being asked from whom he feared harm. The interpreter at the interview said that BNB17's answer was "Army, CID, police or other people I am in fear". The correct interpretation of BNB17's response was said to be "[t]he forces of the government – Army, CID, police". The second alleged error was a group of misinterpretations concerning BNB17's evidence about being beaten. The interpretation of BNB17's evidence during the interview had led the delegate to ask BNB17 to explain "specifically what you mean by many times they were beating you". BNB17's response to that question was interpreted as "[t]heir nature is ... they have to keep us always intimidated, intimidating, and making fear, and that sort of thing". But the independent interpreter who later reviewed the recording advised that BNB17 had not said that he was beaten many times; rather he had said words to the effect of "[t]hey beat me because they want to find out, by inflicting pain, whether I am a member of the LTTE or supporting the LTTE". The third alleged error concerned BNB17's evidence of sexual assault, which, at one point, had been interpreted using the words "sexual harassment".

61 In this Court, the central focus was upon the second alleged error involving the group of misinterpretations. BNB17 relied upon evidence from an interpreter who provided another interpretation of the oral interview. An extract of the relevant parts of that new interpretation reveals the following exchange between the delegate, the interpreter at the interview, and BNB17:

> "**Delegate**: OK. Is there anything else you would like to talk to me about in regards to things that have occurred since May 2009 onwards?
>
> **INT**: Is there any things else you want to tell happened after 2009 until now which has affected you personally affected you?
>
> **BNB17**: The thing affected me is the thing they tortured me that's it. I had the fear. Because they call me at anytime for their small jobs beat me. It

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69 *Migration Act*, s 473BA.

came to a stage unknown people started to phone me I couldn't even scared to answer the phone.

INT: After 2009 the time...from time to time, on and off, they called...called me and asked me questions like what I'm doing, where I'm going and sort of things and they would ask help me, help me, they need to use my vehicle, and err, beaten many time and in this situation they err...to cause me fear that I wasn't able to, umm, move so...so freely that move around the country.

Delegate: And just to clarify, what do you mean - beaten many times?

INT: Explain the phrase 'they beat me many times'

BNB17: Yes.

Delegate: What do you mean by that

INT: What are you trying to tell?

BNB17: Nothing to tell ... [and elaborated upon questions asked by the authorities]

...

Delegate: So I understand the type of questions one may be asked ... but I want to know specifically about what you mean by many times they were beating you?

INT: ... But you are telling 'beat me several times'. Explain that. Why they beat you? How many time? The action 'beating'.

BNB17: The beating. They beat and ask questions to get the truth. They beat and try to get information to make sure whether I know anything about LTTE. When they ask we tell. 'No. we don't have any connection. I tell 'I don't have anything to that manner'.

INT: Their nature is, err, is...the nature is that they have to keep us always intimidated, intimidating and making fear and that sort of thing. Err, in this condition, err, umm, we may say anything about LTTE involvement, that's why they time to time...not a particular authority but ...a particular personnel but different personnel would involve this matter and would ask questions.

Delegate: So what physically did they do in terms of...what do you mean when you use the word beating?

INT: When you use the word 'beating'. What you mean by 'beating'?

BNB17: No. Beating for no reason. Beat for nothing. Immediately after calling they beat. Because there is no reason. And we even don't know why he is beating us?

INT: Sorry, um, he's trying to tell the reason why they are beating, but...err...but...err...your question is, err, what form of attack. Is it?

Delegate: Um, yeah. I'll get you to, I'll get you to, um, translate and I'll seek to clarify with my next question.

INT: Yep.

Delegate: So he, did he restate that? Does anything need to be translate of what he has just said to me?

INT: [inaudible] so I asked the question what he mean by the beating, he is finding the reason why they are beating.

Delegate: Right, so is there anything...right OK. When you say, when you use the word that you were beaten, I would like to know what you mean by that. Not why someone might want to talk to you or harm you, but specifically what you mean by having been beaten.

INT: When you tell 'they beat you' what you mean by 'beaten'? What is that?

BNB17: What is beating means..... I didn't do an thing wrong. No wrong thing. Getting beaten was the issue for me.

INT: I didn't do any wrong thing for them of for...the society or for the community, but, err, I was beaten by them when ever I go..

...

Delegate: OK, we'll talk about that later on, but right now my question is why did you not raise claims of being physically harmed from 2009 onwards in your written claims and you are now raising them today. I'm seeking to clarify that inconsistency.

INT: Before 2009.ah. In the statements you gave during that period you didn't mention you were physically harmed. Now you are telling 'they beat me' what is that?

BNB17: No. I mentioned. I did mention in that document.

INT: I mentioned in the documents before.

> **Delegate**: Is there anything else you would like to put forward as to why that doesn't appear in your written claims?
>
> **INT**: Do you want to look at it, to see whether you have previously mentioned that or not?
>
> **BNB17**: I have mentioned. I have mentioned it in both times. All the problems happened to me. Including beating and all."

62 BNB17 submitted that the group of interpretation errors revealed by this extract began with the misinterpretation during the interview by which the interpreter conveyed BNB17's evidence as saying that he had been "beaten many time". The later interpreter said that BNB17 had actually conveyed words to the effect of "they tortured me" and "they call me at anytime for their small jobs beat me". This was said to have led to the lengthy confusion. A further error was said to be that the delegate had asked BNB17 about his delay in raising his claim to have been beaten from 2009 onwards but the interpreter asked BNB17 why he had not mentioned being beaten in the period before 2009. Together, BNB17 submitted, these errors contributed to the finding by the Authority that BNB17 had fabricated his claims about being beaten.

The interpretation errors alleged by DVO16

63 DVO16 applied for a protection visa on grounds which included persecution by the State of Iran on the basis of his ethnicity. At his interview with a delegate of the Minister, the following exchange occurred, as subsequently interpreted from the audio recording in evidence before the Federal Circuit Court:

> "**Delegate**: It also says here that you say that you will be persecuted for your ethnicity what do you mean by that?
>
> **Interpreter**: [Arabic] *'You say here that persecution has happened to you, I mean, that you've been persecuted for, what's it called, your belonging to your community.'*
>
> **DVO16**: [Arabic] *'What? Huh? My tribe? My tribe?'*
>
> **Interpreter**: Sometimes because he's Ahwazi, sometimes he doesn't understand my- I think my...
>
> **Delegate**: No, I think it means because you're an Arab.
>
> **Interpreter**: Yeah, because what happened, Arab, sometimes they use different expression.
>
> **Delegate**: Yeah

Interpreter: [Arabic] *'She is saying that you, persecution has happened to you. You have been persecuted, in virtue of your belonging to the community you belong to.'*

DVO16: [Arabic] *'You mean how much "protecution" [i.e. strange hybrid of 'persecution' and 'protection'] I had from them?'*

Interpreter: He doesn't know the meaning of it, even in Arabic.

DVO16: [Arabic] *'What does "persecution" mean?'*

Delegate: Well obviously you don't hold a fear of that then it if you don't know what it means.

Interpreter: [Arabic] *'What it means is they treated you badly.'*

DVO16: [Arabic] *'My tribe?'*

Interpreter: [Arabic] *'Yes. Not your tr- the fact that you belong to the community you belong to.'*

DVO16: [Arabic] *'My tribe...'*

Interpreter: Sorry, he is, persecuted by which,

Delegate: I think we will start again maybe.

...

Interpreter: Just he wanted to know by which group.

Delegate: It doesn't say.

Interpreter: [Speaks in Arabic] *'It's not written here. It's not written.'*

Delegate: After that it talks about the Jalali tribe again, but —

Interpreter: [Arabic] *'Afterwards they mentioned the Jalali, what's it called, tribe. Um, you being, um, you belong, no. And you were persecuted by - sorry - because you belong to the tribe you do, you were persecuted by this tribe, the Jalali.'"*

64 The errors in interpretation relied upon by DVO16, and accepted by the Full Court of the Federal Court[70], were threefold. The first was that at the commencement of this extract, the delegate enquired about future persecution but the interpreter described this as past persecution by DVO16's community. The second alleged error in interpretation concerned the inadequate interpretation of the exchanges concerning persecution: inadequately conveying to DVO16 that he was being asked about his ethnicity as an Ahwazi Arab and inadequately conveying to the delegate that DVO16 was confused about questions concerning persecution by reason of his tribe (indeed, not interpreting some of DVO16's spoken words at all) and the meaning of the word "persecution". The third alleged error in interpretation concerned the failure to interpret for DVO16 the delegate's statement that "we will start again".

65 The delegate refused DVO16's application for a protection visa. The Authority affirmed this decision. The Authority observed that DVO16 had responded to a question about what he meant by his claim that he would be persecuted due to his ethnicity by saying that he did not know. The Authority added that apart from tribal conflict and fearing harm from another tribe, DVO16 said that "he does not fear returning to Iran for any other reason" and did not claim to fear harm from the authorities on the basis of his ethnicity as an Ahwazi Arab. The Authority considered that although DVO16 is a member of an ethnic group that has been marginalised and discriminated against in Iran, he has the ability to obtain housing and employment. Ultimately, the Authority was not satisfied that DVO16 faced a real chance of serious harm on return to Iran.

66 DVO16 accepted in this Court, as he had in the Federal Circuit Court and the Full Court of the Federal Court, that the alleged errors of interpretation were not known to the Authority nor were they the subject of any submission or material before the Authority. But he submitted that the errors in the interpretation of his interview nevertheless invalidated the decision of the Authority. DVO16 submitted that the errors in interpretation had effectively distracted him from giving substantial evidence about the type and extent of persecution that he had suffered and thus deflected him from putting his case.

Interpretation errors and legal unreasonableness

67 BNB17 submitted that in light of the alleged interpretation errors it was legally unreasonable for the Authority not to exercise its power under s 473DC to obtain new information either by obtaining a proper interpretation of the interview, or at least the relevant exchange, or by reinterviewing BNB17. Although the focus of BNB17's submissions was upon the second alleged error involving the group of misinterpretations, there is a further, related issue. This is whether such doubt

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70 *DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342 at 360 [82].

about the accuracy of the interpretation had been raised by the combination of all the errors that it was legally unreasonable for the Authority not to exercise its power under s 473DC.

68 The principles concerning legal reasonableness in the exercise of the power under s 473DC were discussed in *Minister for Home Affairs v DUA16*[71]. Since the reasonableness condition upon the power in s 473DC is derived by implication from the statutory provision, its content is also shaped by the statutory context. That statutory context includes the expressed assumption that the Authority is a body that generally "does not hold hearings" and "is required to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)"[72].

69 The statutory context also includes the fact that the Authority's review task is not "de novo" in the literal ("from the beginning") and usual sense of that expression as a fresh review, "on the evidence presented at that hearing"[73] and "regardless of error"[74] in the decision of the delegate[75]. By contrast with the usual meaning of "de novo", the Authority is provided with the delegate's reasons for decision and must take the reasoning of the delegate into account in its consideration[76]. As Gordon J said very recently in *ABT17 v Minister for Immigration and Border Protection*[77], when the Authority makes a demeanour finding it "is bound to accept [the] finding of the delegate" unless that finding is "glaringly improbable" or "some other sufficient reason" exists to set it aside.

70 Consistently with these aspects of statutory context, where the Authority has serious doubts about the accuracy of significant parts of the interpretation as recorded during the interview with the delegate, the obligation upon the Authority

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71 (2020) 95 ALJR 54 at 61 [26]-[27]; 385 ALR 212 at 220.

72 *Migration Act*, s 473BA.

73 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [13].

74 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23].

75 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 943-944 [59], 950-951 [85], 955 [113]; 383 ALR 407 at 423, 433, 439. But compare (2020) 94 ALJR 928 at 933 [5], 933 [8], 935 [16]; 383 ALR 407 at 409, 410, 412.

76 *Migration Act*, ss 473BB (definition of "review material"), 473CB(1)(a).

77 (2020) 94 ALJR 928 at 952 [93]; 383 ALR 407 at 435.

to exercise its power under s 473DC in a legally reasonable manner will generally require the Authority to obtain a fresh interpretation of the relevant parts of the interview rather than to reinterview the applicant. The latter might be the appropriate response if the hearing by the Authority were truly de novo and independent of the decision by the delegate. But in the context of a review that cannot be described as "de novo" in the ordinary sense, and which must be conducted with efficiency, speed, and usually without a hearing, the simplest response will usually be just to obtain a fresh interpretation of any significant and disputed part of a recorded interview contained in the review material.

71 The legal unreasonableness ground of appeal relied upon by BNB17 must depend upon the concerns about errors in interpretation which were raised with the Authority by BNB17's representative rather than errors later alleged in evidence before the Federal Circuit Court. Whether the Authority acted with legal unreasonableness is to be judged at the time that the power was exercised or should have been exercised[78]. The focus is therefore upon the information about errors in interpretation that was before the Authority. Nevertheless, later interpretations are not irrelevant. They might provide a basis for responding to any submission by the Minister that the exercise of the power under s 473DC would not have had any material effect upon the decision.

72 It may be that an exercise of the power to obtain a fresh interpretation of the part of the interview extracted above[79] would involve the "simple route"[80] of requesting an interpretation of a confined portion of the evidence given in the foreign language contained within no more than a few minutes of the audio recording. It may also be that submissions to the Authority concerning the inaccuracy of the interpretation of BNB17's interview as a whole have additional force in light of the very limited time that BNB17 had to obtain the interpretation and the fact that the fresh interpretation in this time period, obtained from an independent interpreter, reflected only "certain parts of the interview recording". Nevertheless, the three alleged errors of interpretation that were drawn to the Authority's attention were neither individually nor collectively sufficient for a conclusion that it was legally unreasonable for the Authority not to obtain a fresh interpretation of some or all of the interview.

73 The first and third alleged errors in interpretation raised by BNB17 with the Authority, upon which BNB17 placed little reliance in submissions in this Court,

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78 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [26]; 385 ALR 212 at 220.

79 At [61].

80 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 62 [29]; 385 ALR 212 at 221.

involved imperfect interpretation but did not rise to the level of significance of interpretation error. As to the first alleged error, the interpretation "Army, CID, police or other people" captured the same essential meaning as "[t]he forces of the government – Army, CID, police". As to the third alleged error, the interpretation of BNB17's response as "sexual harassment" rather than "sexual assault" also captured the same essential meaning when viewed in the light of the entirety of the interpreted context: the words as interpreted were "[t]hey humiliated, like sexual harassment, folding my hand behind" and the "sexual harassment" was explained as involving "[h]olding back ... binding hand behind, and stripping off clothes, they would, ah, penetrate, with their, their ... body part ... or penis or something like that". No reasonable person could fail to comprehend from this interpretation that the reference to "sexual harassment" was to sexual assault.

74 As to the second alleged error, BNB17 submitted to the Authority that the proper interpretation should have been: "They beat me because they want to find out, by inflicting pain, whether I am a member of the LTTE or supporting the LTTE". The interpretation at the interview was far from perfect: "the nature is that they have to keep us always intimidated, intimidating and making fear and that sort of thing. Err, in this condition, err, umm, we may say anything about LTTE involvement, that's why they time to time ...". The other matter in the group of misinterpretations to which BNB17 referred in his submissions to the Authority was the plainly erroneous interpretation of "from 2009" as "before 2009". But neither of these matters, including in combination with the first and third alleged errors, was sufficient to require the Authority to exercise its powers under s 473DC.

75 In the context of a lengthy exchange about BNB17 being beaten by the authorities, the imperfect interpretation about intimidation arising from involvement in the LTTE conveyed a similar meaning to the later interpretation relied upon by BNB17. And the error of interpreting "from 2009" as "before 2009" would not reasonably have caused serious concern because shortly afterwards a similar question was asked in the interview, without any complaint concerning the interpretation. The delegate referred to BNB17's entry interview and his 2013 written claims and put to BNB17 "there is no mention to you being physically harmed or mistreated after 2009". The delegate then said "I give you the opportunity to comment on that now" and BNB17 took that opportunity.

Interpretation errors and material to be given to the Authority

76 In submissions which were broadly embraced by BNB17, DVO16 submitted that the requirement in s 473CB(1)(b) for the Secretary to give to the Authority "material provided by the referred applicant to the person making the decision before the decision was made" obliges the Secretary to give to the Authority any information provided by the applicant during an interview. DVO16 submitted that if oral interview remarks by DVO16 in Arabic constitute "information" given to the delegate then they must also constitute "material"

required to be given to the Authority under s 473CB. Any substantial error in the interpretation of that information given by the applicant would, therefore, mean that the review material provided to the Authority was incomplete. The difficulty for this submission, however, lies in the contrast between the position of an applicant before a delegate of the Minister under Pt 2 and the position of an applicant before the Authority under Pt 7AA.

77 Part 2 of the *Migration Act* requires the Minister, when considering whether to grant or to refuse to grant a non-citizen a visa, to "have regard to all of the information in the application"[81] including "any additional relevant information" given by the applicant[82]. Although an oral interview is not required to be given[83], the requirement for the Minister to consider additional relevant information includes information given by the applicant at an oral interview, and through the medium of an interpreter[84]. The need for the Minister to have regard to that information requires an "active intellectual process" of engagement with material information provided by the applicant[85]. In turn, this active intellectual process requires sufficiently accurate interpretation of the information given by the applicant. The more substantial the interpretation errors, and the more significant the misinterpreted information is to the applicant's claims, the more likely it will be that the interpretation errors will prevent the necessary active intellectual engagement with the applicant's information, thus amounting to jurisdictional error.

78 Unlike Pt 2, there are no general requirements for engagement with "information" in Pt 7AA of the *Migration Act*. Part 7AA is not a de novo review in the sense that it does not require de novo engagement with information, including information provided by an applicant. Instead, it is a "limited"[86] review of a delegate's "decision"[87], which is conducted by "considering the review

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81 *Migration Act*, s 54(1).

82 *Migration Act*, ss 54(2)(c), 55(1).

83 *Migration Act*, s 54(3).

84 See *Migration Act*, ss 56(2), 58(1)(d).

85 *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at 164 [59].

86 *Migration Act*, s 473BA.

87 *Migration Act*, s 473CC(1).

material provided"[88]. The review proceeds generally upon the materials that were before the delegate[89]. The general position is that new information is not to be requested or accepted by the Authority and the applicant is not to be interviewed[90], and even if new information is requested by the Authority it can only consider the information in limited circumstances[91]. In short, the focus of Pt 7AA is almost exclusively upon "material", not upon "information".

79 The submission on this issue by DVO16 would cut across the regime created in Pt 7AA. To reiterate, the regime in Pt 7AA involves a review of the delegate's decision based upon prescribed classes of material rather than a de novo review of information, including information that was considered by the delegate. As Anderson J correctly said[92] of the requirement in s 473CB for the Secretary to give to the Authority various classes of material: "'material' refers to ... *physical or electronic* documents, objects and information. As such, the oral evidence itself provided by the appellant at the ... interview was not 'material' provided by the appellant to the delegate." For these reasons, DVO16's submission cannot be accepted.

80 There may, however, be other ways in which interpretation errors at an interview might invalidate a review through their impact upon the material that is required to be provided to the Authority. One example concerns a different category of material that s 473CB(1)(a)(ii) requires the Secretary to give to the Authority: this material is a statement that refers to the "evidence on which [the delegate's] findings were based". The Secretary's duty to give this material to the Authority is a jurisdictional precondition for the Authority's duty to conduct its review "by considering the review material"[93].

81 Whether the statement of the Secretary is provided separately from the reasons of the delegate or whether the statement of the Secretary incorporates the reasons of the delegate, the "evidence" that must be referred to is the information provided by the applicant. The interpretation is not the "evidence". Thus, if the delegate's findings are based upon a substantial interpretation error concerning an

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88 *Migration Act*, s 473DB.

89 *Migration Act*, s 473CB(1)(a), (b).

90 *Migration Act*, s 473DB(1).

91 *Migration Act*, s 473DD. See *AUS17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 1007; 384 ALR 196.

92 *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304 at [95] (emphasis added).

93 *Migration Act*, s 473DB(1).

applicant's evidence given during an interview then the statement of the Secretary might not reflect the evidence upon which the findings were based. Rather, the statement, like the reasons, will reflect only the erroneous interpretation on which the findings were based. If the erroneous interpretation concerns critical evidence this could result in failure of a jurisdictional condition. But it is unnecessary to explore this issue further since it was not raised and does not have any apparent application in these appeals, where the Secretary's statement has never been in issue.

Interpretation errors and the basic requirement for "review"

82 There remains for consideration the most extreme circumstance of the categories of error by an interpreter which might lead to jurisdictional error or failure of a jurisdictional condition: where the information provided by an applicant at an interview is so poorly interpreted that the gist of the applicant's case has not been conveyed. In the context of procedural fairness, it has been said that the right to a hearing "is a vain thing if the [applicant] is not understood"[94]. So too, the expression "review a fast track reviewable decision" in s 473CC includes the implication that the essence of the applicant's case will be considered when assessing the delegate's decision. On the assumption that this implication is not of the variety of implications said by members of this Court to have been proscribed if derived "through the application of the common law principle of statutory interpretation" relating to procedural fairness[95], it was common ground that interpretation errors might be so extreme as to deprive the exercise of power by the Authority of its character as a "review" of the decision.

83 Neither the interpretation errors in the *BNB17* appeal nor the interpretation errors in the *DVO16* appeal were of this fundamental nature. The interpretation errors in the *BNB17* appeal have been addressed above in the context of the legal unreasonableness issue. As to the interpretation errors in the *DVO16* appeal, senior counsel for DVO16 correctly described the effect of those errors as having deflected DVO16 from speaking further to his case of persecution on the ground of ethnicity. But the errors did not deprive him of the opportunity to put that case altogether, nor did they preclude the Authority from understanding the gist of his case. DVO16's interview focused upon the same incidents and allegations that he had raised in his written claim for protection. The Authority described those incidents and allegations and made findings in relation to them. The process is properly described as one of review of the delegate's decision.

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94 *Gonzales v Zurbrick* (1930) 45 F 2d 934 at 937.

95 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1099 [33]; 373 ALR 196 at 204.

Conclusion

84 Each appeal must be dismissed with costs.