

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, EDELMAN AND STEWARD JJ

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS

APPELLANT

AND

AAM17 & ANOR

RESPONDENTS

*Minister for Immigration, Citizenship, Migrant Services and Multicultural
Affairs v AAM17*

[2021] HCA 6

Date of Hearing: 3 December 2020

Date of Judgment: 4 March 2021

P23/2020

ORDER

1. *Appeal allowed.*
2. *Set aside orders 3 to 5 of the orders made by the Federal Court of Australia on 25 November 2019 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

G R Kennett SC with C I Taggart for the appellant (instructed by Australian Government Solicitor)

P E Cahill SC with D V Blades for the first respondent (instructed by Rothstein Lawyers)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17

Immigration – Visas – Application for protection visa – Procedural fairness – Where delegate of Minister rejected first respondent's application for protection visa – Where Administrative Appeals Tribunal affirmed delegate's decision – Where first respondent sought judicial review of that decision in Federal Circuit Court – Where first respondent unrepresented before Circuit Court and obtained assistance of interpreter – Where Circuit Court dismissed application for judicial review and delivered *ex tempore* judgment – Where Circuit Court orders were translated to first respondent but *ex tempore* reasons were not – Where written reasons delivered by Circuit Court after first respondent filed notice of appeal in Federal Court of Australia – Where Federal Court held that failure of Circuit Court to have *ex tempore* reasons for judgment translated resulted in denial of procedural fairness – Whether Federal Court erred in holding that Circuit Court denied first respondent procedural fairness – Whether Federal Court erred in holding that setting aside Circuit Court's judgment necessary to provide first respondent with practical justice.

Words and phrases – "assistance of an interpreter", "*ex tempore* reasons", "failure to translate", "judicial function", "operative reasons", "oral reasons", "practical injustice", "practical unfairness", "procedural fairness", "written reasons".

Federal Circuit Court of Australia Act 1999 (Cth), ss 5, 42, 57, 74, 75.

Federal Circuit Court Rules 2001 (Cth), rr 15.27, 16.01, 16.02.

1 KIEFEL CJ. I agree with Steward J.

2.

2 KEANE J. I agree with Steward J.

3.

3 GORDON J. I agree with Steward J.

4 EDELMAN J. I agree with Steward J.

5 STEWARD J. The first respondent is a citizen of Pakistan who, in 2014, applied for a Protection (Class XA) visa after his application for a Student (subclass TU-572) visa was refused. The first respondent had previously visited Australia on multiple occasions between 2009 and 2012 as the holder of successive Business Short Stay (subclass UC-456) visas. His protection visa application was rejected in 2015 by a delegate of the appellant Minister. In 2016, the Administrative Appeals Tribunal ("the Tribunal") affirmed the delegate's decision. The first respondent sought judicial review of that decision in the Federal Circuit Court of Australia. The first respondent was not represented before the Federal Circuit Court, but had asked for, and obtained, the assistance of an interpreter because, inferentially, he does not speak English. The primary judge dismissed the application and delivered an *ex tempore* judgment. Whilst the Federal Circuit Court's orders were translated for the benefit of the first respondent, the oral reasons for judgment were not. The first respondent appealed from that judgment to the Federal Court of Australia. The primary judge delivered written reasons for judgment after the first respondent filed his notice of appeal in the Federal Court.

6 On appeal in the Federal Court, the first respondent was again unrepresented. For that reason, Mortimer J, exercising the Federal Court's appellate jurisdiction as a single judge, reviewed the reasons of the Tribunal and of the Federal Circuit Court "at a level broader than the express grounds of appeal, in order to ensure there is no obvious jurisdictional error"¹ attending the Tribunal's decision. At a general level, Mortimer J concluded that the written reasons of the Tribunal and the primary judge did not disclose "any possible error deserving of close consideration"² by the Federal Court, and that there was otherwise no error affecting the Tribunal's decision³. Nonetheless, Mortimer J allowed the appeal, set aside the orders made by the Federal Circuit Court and remitted the matter to that Court to be reheard by a different judge⁴. Mortimer J so decided because her Honour considered⁵ that the failure by the primary judge to have his oral reasons

1 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [9].

2 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [43].

3 See *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [9], [43]-[48].

4 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [42], [51].

5 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [37], [51].

6.

for judgment translated for the benefit of the first respondent constituted a denial of procedural fairness, and that undoing this denial required the setting aside of the judgment of the Federal Circuit Court.

7 For the reasons given below, I respectfully disagree with the conclusion reached by the Federal Court.

The applicable facts

8 The applicable facts were not in dispute. They were summarised⁶ by Mortimer J as follows:

- (1) the first respondent relied upon an interpreter for his participation in the hearing before the Federal Circuit Court and was not represented by a lawyer;
- (2) the Federal Circuit Court delivered *ex tempore* reasons for the orders it had pronounced;
- (3) the Federal Circuit Court hearing lasted for one hour, including the delivery of reasons;
- (4) the Federal Circuit Court's orders were interpreted to the first respondent;
- (5) the first respondent did not receive a copy of the transcript of the *ex tempore* reasons for judgment;
- (6) the first respondent had to prepare and file his notice of appeal in the Federal Court without having received any written version of the reasons for judgment of the Federal Circuit Court;
- (7) the written reasons of the Federal Circuit Court were published on 18 July 2019, more than a month after the first respondent had filed his notice of appeal in the Federal Court, and well outside the period in which a notice of appeal was required to be filed; and
- (8) there was no way the Federal Court could compare what had been said by the primary judge in his *ex tempore* reasons with what his Honour had written in the published reasons of the Federal Circuit Court.

6 AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1951 at [20].

7.

9 Importantly, because the *ex tempore* reasons delivered by the primary judge had not been translated when the reasons were delivered, Mortimer J found that the first respondent, at that time, had "no explanation at all, which was intelligible to him, of how or why the Court had made those orders"⁷. That explanation was only provided to the first respondent when written reasons were published on 18 July 2019.

10 Certain further facts should be noted:

- (1) First, whilst the published reasons incorrectly record that the Federal Circuit Court judgment had been delivered in Sydney rather than in Perth, the published reasons nonetheless included the primary judge's associate's certification that the paragraphs comprising those reasons were "a true copy of the reasons for judgment" of the primary judge.
- (2) Secondly, for the purpose of preparing his notice of appeal, the first respondent made no attempt to obtain a transcript of the *ex tempore* reasons for judgment. Nor did he make any such attempt after filing the notice of appeal.
- (3) Thirdly, the first respondent never sought to amend his grounds of appeal to take account of the published reasons of the Federal Circuit Court.
- (4) Finally, notwithstanding the circumstances and chronology of what occurred in the first respondent's judicial review application in the Federal Circuit Court, the Federal Court did not adjourn the hearing of the appeal to give the first respondent an opportunity to obtain a transcript of the primary judge's *ex tempore* reasons in order to determine whether they differed, in any way, from the published reasons.

The reasons of the Federal Court

11 Mortimer J reasoned that an exercise of judicial power is conditioned by an obligation to afford procedural fairness to the parties before the court⁸. Her Honour was of the view, however, that this obligation extended to the giving of reasons for

7 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [23].

8 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [34], quoting *SZRUR v Minister for Immigration and Border Protection* (2013) 216 FCR 445 at 456 [55] per Allsop CJ.

final orders⁹. Mortimer J was also of the view that there was an available inference that a practice may have developed amongst some judges of the Federal Circuit Court of only preparing written reasons for judgment as a reaction to the filing of a notice of appeal. Such a practice, if it existed, could only be justified, according to her Honour, if the relevant litigant had previously been given, within a period that did not prejudice that person's right of appeal, "reasonable and timely access to *some* form"¹⁰ of the Court's reasons that were intelligible to that person. Absent this, Mortimer J was of the view that the pronouncement of *ex tempore* reasons to a non-English-speaking self-represented litigant, without translation, and which are not followed by written reasons "as soon as practicable after the orders are pronounced", is "an unfair procedure, and a denial of procedural fairness"¹¹. In support of that conclusion, her Honour relied upon the decision of the Full Court of the Federal Court in *CQX18 v Minister for Home Affairs*¹². In that case, the Full Court expressed concern that the primary judge had delivered *ex tempore* reasons which, pursuant to an instruction given by that judge, had not been translated¹³. There was no suggestion that any such instruction had been given in this proceeding.

- 12 Mortimer J rejected¹⁴ the Minister's submission that there was no denial of procedural fairness on the facts of this case because the first respondent had filed his notice of appeal on time, and thereafter had not sought to amend his grounds of appeal following the publication of the primary judge's written reasons. That was so for two reasons. First, the submission was said to have "little weight with a

9 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [35], citing *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58] per French CJ and Kiefel J, 225-226 [92], [94] per Gummow, Hayne, Crennan and Bell JJ and *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71-72 [67] per French CJ.

10 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [31] (emphasis in original).

11 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [37].

12 (2019) 372 ALR 137.

13 *CQX18 v Minister for Home Affairs* (2019) 372 ALR 137 at 140 [11] per Allsop CJ, Perry and Gleeson JJ.

14 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [38].

self-represented asylum seeker"¹⁵. Secondly, the first respondent lost "in a real and practical sense"¹⁶ the opportunity to take a document containing the reasons of the Federal Circuit Court to a person or persons who might assist him in formulating and preparing an appeal. He was "denied the opportunity to understand at all why he had lost his case"¹⁷.

13 Mortimer J further reasoned that procedural fairness mandated that one of several different courses be adopted by the primary judge. Her Honour considered that the Federal Circuit Court should have had the oral reasons translated, produced formal reasons "in a few days" (in English), given the first respondent access to the transcript of the Court's reasons, or, finally, stayed the orders the primary judge proposed to make pending the provision of written reasons¹⁸. The primary judge's failure to adopt any of these methods interfered with the way in which the first respondent could have exercised his right of appeal, and "denied him the opportunity to seek any assistance about possible grounds of appeal, or whether indeed he should appeal at all"¹⁹. That failure also denied the first respondent an intelligible account of what had happened, or an opportunity to access such an explanation²⁰. It followed, according to Mortimer J, that in these circumstances there had been no "real exercise of judicial power"²¹. Accordingly, her Honour was

15 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [38].

16 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [38].

17 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [40].

18 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [41].

19 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [41].

20 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [41].

21 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [41], citing *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [74] per Gaudron J, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496-497 per Gaudron J, *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44] per French CJ and Kiefel J, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 593-595 [39] per French CJ, Kiefel and Bell JJ and *Transport Workers' Union of Australia v*

of the view that there was only one way of correcting the denial of procedural fairness: the primary judge's orders had to be set aside and the matter remitted to be reheard by a different Federal Circuit Court judge²².

The parties' contentions

14

The Minister accepted that a requirement to provide reasons is an incident of the judicial process²³. The Minister also accepted that a failure to deliver reasons, or adequate reasons, may ground an appeal²⁴. However, that duty is not a product of any obligation to provide procedural fairness²⁵. The content of the obligation to accord procedural fairness, the Minister submitted, is necessarily directed to the applicable processes before a relevant decision is made, not after²⁶. In that respect, it was said, a critical question in determining whether a court should grant relief is whether any failure of procedure deprived an interested party of the "possibility of a successful outcome"²⁷. It followed from that submission that the task of delivering reasons for final relief could never produce an affirmative answer to that question. For that reason, the Minister contended that the court below thus erred in describing the Federal Circuit Court's failure to have its oral reasons translated as a breach of procedural fairness. In oral argument, the Minister

Registered Organisations Commissioner [No 2] (2018) 267 FCR 40 at 60 [101] per Allsop CJ, Collier and Rangiah JJ.

- 22 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [42], [51].
- 23 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58] per French CJ and Kiefel J.
- 24 See *Thorne v Kennedy* (2017) 263 CLR 85 at 111 [61] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ. See also *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 387-389 per Moffitt JA; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 442-443 per Meagher JA, citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 281 per McHugh JA; see also at 259 per Kirby P, 270-271 per Mahoney JA.
- 25 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 670 per Gibbs CJ.
- 26 See and compare *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 72 [68] per French CJ, 99-100 [156]-[157] per Hayne, Crennan, Kiefel and Bell JJ.
- 27 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-343 [60] per Gageler and Gordon JJ.

contended that if there was some obligation on a court to have its *ex tempore* reasons interpreted, it would then be difficult to distinguish between an applicant who did not speak English and an applicant who had another difficulty in comprehending the *ex tempore* reasons of the court as they were being delivered orally.

15 In any event, it was submitted, the failure to translate the reasons for judgment did not result in any practical unfairness or injustice²⁸. In the Minister's submission, the relevant loss of opportunity was required to be an opportunity to succeed before the primary judge, and not a loss of opportunity to succeed on appeal. Here, as already mentioned, the Federal Circuit Court's failure to translate its reasons could not logically bear upon the first respondent's prospects of success before the Federal Circuit Court. The Minister contended that, if the relevant loss of opportunity did include the opportunity of success on appeal before the Federal Court, the Federal Circuit Court's failure to translate its reasons was still not productive of any practical injustice. That was because the first respondent obtained the written reasons for judgment some months before the hearing of his appeal, yet he took no steps to amend his grounds of appeal. The first respondent never contended that there was some point he was prevented from raising on appeal because the written reasons were delivered after he had filed his notice of appeal. Moreover, it was submitted that any unfairness that might have arisen from the conduct of the primary judge was able to be, and was, cured by the procedurally fair hearing which subsequently took place in the Federal Court. The fact that the first respondent was not represented in either court below did not compel, it was contended, any different conclusion. That was because it had not been shown that the first respondent was unaware that his notice of appeal was capable of being amended.

16 The Minister further submitted that Mortimer J erred in any event by ordering that the proceeding be remitted back to the Federal Circuit Court. He submitted that the Federal Court was able to remedy any denial of procedural fairness through the hearing it provided and, having done so, its duty was to give the judgment that should have been given below. The Minister contended that remittal here had no utility because any judge on remittal, faced with the same grounds of review, would effectively be bound by the conclusion of Mortimer J that the Tribunal's decision was not infected with jurisdictional error. And if the first respondent convinced the judge on remittal that she or he could depart from Mortimer J's conclusion, it would be an abuse of process, inconsistent with the

28 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37] per Gleeson CJ; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443 [38] per Bell, Gageler and Keane JJ.

principle of finality of litigation, to permit the first respondent to raise new grounds of review.

17 The first respondent did not support all of the reasons of Mortimer J. He did not, for example, seek to uphold Mortimer J's proposition that it is a general requirement of procedural fairness that reasons for decision should be delivered as soon as practicable after the delivery of judgment or prior to the expiration of the time period for commencing any appeal. Nor did the first respondent support Mortimer J's conclusion that he was denied procedural fairness by the Federal Circuit Court because the reasons were not translated and written reasons were not provided as soon as practicable after pronouncement of orders²⁹. Finally, he also accepted that the way in which the primary judge delivered reasons could not amount to any denial of procedural fairness by *that* court.

18 Instead, the first respondent submitted that the way in which reasons are delivered by a court can be relevant to what is required to ensure that a decision on appeal from that court is made fairly. In that respect, sufficient access to reasons for judgment is integral, it was said, to a determination of whether to appeal, to a determination of whether to respond to an appeal, and in either case to having a "fair opportunity" to advance one's case. In essence, it was submitted, Mortimer J's reasoning was directed to the first respondent's exercise of his rights of appeal to the Federal Court; the failure to translate the primary judge's *ex tempore* reasons impaired the first respondent's ability to pursue those appeal rights.

19 The first respondent also submitted that remittal was the correct remedy for the impairment that he had suffered in connection with the exercise of his appeal rights. That was said to be because the primary judge's oral reasons were the "operative reasons" of the Federal Circuit Court for the purpose of exercising those rights. As Mortimer J could not consider those reasons, or compare them with the written reasons delivered subsequently – because a transcript of the *ex tempore* reasons was not before the Federal Court – her Honour was unable to review the oral reasons for discernible error, as Mortimer J did with the written reasons (and found none). The first respondent submitted that it was therefore appropriate for the decision of the Federal Circuit Court to be set aside and the matter remitted for rehearing. On the first respondent's asserted basis that the primary judge's oral reasons were the "operative reasons", it was submitted that remittal was not "inutile" because Mortimer J's assessment of the primary judge's published reasons did not foreclose the possibility of error in the oral reasons.

20 The first respondent also sought to support the reasons of Mortimer J with a notice of contention which contained three grounds. Those grounds took as their premise that the oral reasons given by the primary judge were the only "operative

29 See *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [37].

reasons" for decision. The first ground contended that there had been a denial of an opportunity for the first respondent to have advanced a case based on those oral reasons. By the second ground, it was contended that the decision of the primary judge should also have been set aside because it was not possible to ascertain whether, and to what extent, the written reasons corresponded to the oral reasons given by the primary judge. Because the first respondent was unrepresented at first instance, and relied upon the assistance of an interpreter, it should be inferred, it was said, that he would not have been aware of the possible existence of a record of the *ex tempore* reasons that had been given. He was thus denied an opportunity of comparing the *ex tempore* reasons with the written reasons to discover whether there existed any disparity between the two expressions of reasons which might itself have constituted an error and, more fundamentally, he was denied the opportunity to present his case on appeal "with regard to ... the operative reasons for decision of the Federal Circuit Court". In that respect, it was contended that there was no onus on the first respondent to show that such a disparity existed in fact; it was enough that he had been denied the opportunity of demonstrating such disparity in reasoning³⁰ in circumstances where there was the potential for, or the possibility of, disparity. The third ground of the notice of contention was that, because the *ex tempore*, "operative reasons" were not before the Federal Court, Mortimer J's conclusion that the primary judge's written reasons did not disclose error in his Honour's assessment of the Tribunal's reasons for decision was of no moment; Mortimer J had considered the wrong set of reasons. In that respect, the first respondent placed particular reliance on the finding made by Mortimer J that there was "no way"³¹ the Federal Court could compare what had been said by the primary judge in his *ex tempore* reasons with what his Honour had written in his reasons.

21 The Minister submitted that the first respondent's notice of contention was misconceived. Contrary to the first respondent's contentions, it was necessary for him to have established some material difference between the *ex tempore* and written reasons. He had failed to do this. It also should not be inferred, by reason of the first respondent's lack of representation and need for an interpreter, that he was unaware that a record of the *ex tempore* reasons was available. In any event, it was said, the premise of the notice of contention – that the *ex tempore* reasons were the only "operative reasons" of the Federal Circuit Court – was mistaken. There was no basis for doubting that the published reasons, bearing as they did the certification of the primary judge's associate, were an expression of the authentic reasons of the Federal Circuit Court. And if there was a basis for doubt, it was

30 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-343 [59]-[60] per Gageler and Gordon JJ.

31 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [20(h)].

submitted that Mortimer J should have adjourned the hearing of the appeal to enable the record of the *ex tempore* reasons, namely the transcript, to be obtained.

Procedural fairness and practical justice

22

Underlying the Federal Court's decision, and the first respondent's submissions in this Court, was a conception of procedural fairness that exceeds the range of matters with which that concept is concerned. In this case, as the Minister rightly submitted, the *final* instance of any right or entitlement of either party arising from the primary judge's obligation to afford procedural fairness occurred at the time the parties made their concluding submissions³². Thereafter, the trial having finished, procedural fairness had no role to play in respect of the matters the subject of the primary judge's decision³³. That is not to gainsay the Minister's concession, properly made, that the duty to give reasons is an inherent aspect of the exercise of judicial power³⁴ and that the need for fairness applies to the discharge of that duty³⁵. As a matter of general fairness, rather than independent legal duty, the first respondent ought to have had the benefit of translated *ex tempore* reasons or written reasons at an earlier time. But to the extent that the practical manifestations of the first respondent's entitlement to be accorded procedural fairness were diminished as a result of the primary judge's failure to translate his *ex tempore* reasons or to produce written reasons timeously, any consequent practical unfairness³⁶ to the first respondent could only logically arise

32 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 670 per Gibbs CJ.

33 If further matters arose requiring the primary judge's consideration, such as enforcement of orders or costs, the primary judge's obligation to accord procedural fairness in respect of the adjudication of those matters would arise.

34 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58] per French CJ and Kiefel J.

35 See *Dietrich v The Queen* (1992) 177 CLR 292. See also *AMF15 v Minister for Immigration and Border Protection* (2016) 241 FCR 30.

36 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37] per Gleeson CJ; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443 [38] per Bell, Gageler and Keane JJ.

in the conduct of the first respondent's appeal to the Federal Court. That, however, was not the basis on which the appeal to the Federal Court was allowed³⁷.

23 The following propositions should be expressed.

24 First, this appeal is not concerned with whether an unrepresented litigant, who does not understand English, is always entitled to have oral, or written, reasons for judgment translated for her or his benefit. The first respondent made no such general claim.

25 Secondly, this is not a case where reasons were never delivered, or where the content of the given reasons was inadequate. The primary judge discharged his judicial duty to give reasons. In that respect, the first respondent did not dispute the Minister's contention that the giving of reasons in open court by the primary judge was not an aspect of the duty to provide procedural fairness, but rather a vital incident of the judicial function³⁸. The first respondent's complaint was directed at the more narrow proposition that, in his precise circumstances, procedural fairness for the purposes of considering, and then exercising, his appeal rights required the primary judge's *ex tempore* reasons to be translated or written reasons to have been provided more promptly.

26 Thirdly, the Federal Circuit Court is an inferior court, and as such has no inherent powers³⁹. Being a creation of Parliament, that Court has no authority other than that found in the powers and functions conferred upon it by legislation⁴⁰. Neither the *Federal Circuit Court of Australia Act 1999* (Cth) ("the FCCA Act") nor the *Federal Circuit Court Rules 2001* (Cth) ("the FCCA Rules") address the topic of whether the Federal Circuit Court is obliged to give written reasons, or, if the Court is to deliver *ex tempore* reasons, whether such reasons need to be translated for the benefit of an unrepresented non-English-speaking party. However, s 42 of the FCCA Act obliges the Federal Circuit Court to "proceed without undue formality" and to "endeavour to ensure that the proceedings are not

37 See *AAMI17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [37], [51] per Mortimer J.

38 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666-667 per Gibbs CJ, citing *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386 per Mahoney JA. See also *De Iacovo v Lacanale* [1957] VR 553 at 557-558 per Monahan J; *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-214 [54] per French CJ and Kiefel J.

39 See *Palmer v Clarke* (1989) 19 NSWLR 158 at 167 per Kirby P.

40 *Palmer v Clarke* (1989) 19 NSWLR 158 at 167 per Kirby P.

protracted". Section 57 of the FCCA Act provides that proceedings in that Court are not invalidated by reason of "a formal defect or an irregularity" unless it is productive of substantial injustice that cannot be remedied by an order of the Federal Circuit Court.

27 Section 74(1) of the FCCA Act requires an order of the Federal Circuit Court to "be in writing" or to "be reduced to writing as soon as practicable". That provision does not stipulate what language is to be used to express the orders of the Court. However, in *Nguyen v Refugee Review Tribunal*⁴¹, Sundberg J observed:

"The official language of Australia is English. The Constitution, statutes, regulations and bylaws are written in English. Proceedings in Parliament and the Courts are conducted in English. Governments correspond with their citizens in English."

That passage applies to orders made, and reasons for judgment given, by a judge of the Federal Circuit Court.

28 Section 75 of the FCCA Act addresses what is to happen if the Federal Circuit Court "reserves judgment" and "the Judge who heard the proceeding subsequently prepares orders and reasons, but is not available to publish those orders and reasons". The term "judgment" is defined in s 5 of the FCCA Act to mean "a judgment, decree or order, whether final or interlocutory, or a sentence, and includes a decree within the meaning of the *Family Law Act 1975*". An unstated premise of s 75 is that a judge of the Federal Circuit Court is under no obligation to deliver orders and reasons immediately upon completion of a hearing; judgment may instead be reserved and, in some circumstances, the Court's orders and reasons may be published by a judge who did not hear the matter. It follows that the FCCA Act authorises a Federal Circuit Court judge to give *ex tempore* reasons and final orders upon completion of a hearing where it is possible to do so. The Act also authorises a judge to reserve judgment where it is not possible or desirable to deliver *ex tempore* reasons.

29 The FCCA Rules do not resolve the issues for determination in this appeal, not least because the Federal Circuit Court may dispense with those rules⁴². However, I note that although the FCCA Rules make certain provision for the receipt of translated documents, no such provision is made in respect of giving judgment. Rule 16.01 authorises the Court to give "any judgment" and to make "any order". Rule 16.02 provides that "[u]nless the Court otherwise orders, a judgment or order takes effect on the day when it is given or made". By contrast to the FCCA Rules' silence on the translation of reasons and orders, r 15.27

41 (1997) 74 FCR 311 at 325-326.

42 *Federal Circuit Court Rules 2001* (Cth), r 1.06.

provides for the use of a translator to facilitate the making of affidavits in English by persons who do not have an adequate command of English. More fundamentally, however, there is no reason to suppose that a "judgment" or "order" for the purposes of the FCCA Rules is subject to a requirement that it be translated to a non-English-speaking litigant, where no such obligation conditions the power to give judgment or make orders under the FCCA Act⁴³.

30 Fourthly, the nature of the Federal Circuit Court's jurisdiction also supports the giving of *ex tempore* reasons which are then published in written form with revisions. As Gleeson CJ, writing extra-curially, has observed⁴⁴:

"There is no reason, in law or in policy, why a judicial officer who delivers a judgment *ex tempore* should be strictly bound to the precise manner in which the reasons were expressed. On the contrary, judges and magistrates are encouraged, where it is possible and appropriate to do so, to decide cases promptly and to give their judgments immediately. It would not advance that policy to prevent them from later improving the manner of expression of their reasons, provided, of course, that they do not alter the substance."

31 Fifthly, as recognised in the above passage, a judge has some ability to improve the expression of her or his judgment in published reasons, so long as she or he does not change the substance of what was said in *ex tempore* reasons or make other material changes. Depending upon any applicable rules of court, it may be accepted that in civil proceedings (without a jury) there is latitude for a judge to revise *ex tempore* reasons. That capacity may not be limited to slips, or to mistakes, or to matters of style. However, changes of substance are not permitted⁴⁵.

32 Sixthly, and contrary to the submission of the first respondent, where written reasons of a court are published following the giving of *ex tempore* reasons, those written reasons must be taken to be the authentic expression of the judgment of the court unless it is otherwise shown that those reasons had materially deviated from what had been announced in court. Such deviations might be demonstrated by calling for the transcript (or other recording) of the *ex tempore* judgment; by the production of notes taken by counsel or by an instructing solicitor of what was

43 See *Legislation Act 2003* (Cth), s 13(1)(b); *Federal Circuit Court Rules 2001* (Cth), r 1.02A.

44 Gleeson, "Revising Transcripts of Summings-Up" (1997) 9 *Judicial Officers' Bulletin* 25 at 25.

45 *Spencer v Bamber* [2012] NSWCA 274 at [137] per Campbell JA (Basten and Macfarlan JJA agreeing), quoting *Todorovic v Moussa* (2001) 53 NSWLR 463 at 467-468 [41]-[47] per Beazley JA (Powell JA and Sperling J agreeing).

said; or even by evidence given by counsel or an instructing solicitor in lieu of such notes. In *Bromley v Bromley*⁴⁶, following the grant of a decree nisi of divorce, the wife sought the transcript of the judge's reasons for judgment. With two days left to appeal, a photograph of a revised transcript was produced by the shorthand writer to the wife, bearing the marked-up amendments and deletions made by the judge⁴⁷. The wife submitted that the changes that had been made were material in nature and urged the Court of Appeal to examine the original transcript. It was said that certain of the judge's findings of fact in the original transcript, or the way in which he expressed his findings of fact as recorded in that transcript, ill-accommodated with the conclusion at which he ultimately arrived. The Court of Appeal refused to inspect the original transcript. Willmer LJ said⁴⁸ that in the absence of evidence to show that the judge had "so altered his judgment as to change its whole character", it would be "improper" for an appellate court to look at the original transcript "merely because it is the original transcript". Importantly, his Lordship said⁴⁹:

"What we must look at is that which bears the stamp of the judge's approval, and on that must stand or fall the success of the appeal."

33 Willmer LJ did not foreclose the possibility that an appellate court might consider an examination of the original transcript if there was "cogent evidence"⁵⁰ to support such an examination. As his Lordship said⁵¹:

"I am far from saying that in no circumstances is it possible for this court to go behind the official transcript of the judgment with which it is furnished. If there were ever a case in which it could be shown that, after delivering judgment and after the drawing up of the order, the judge had in substance rewritten his judgment, so as to put a completely different complexion on the issues in dispute, then I apprehend that this court would not be slow to censure any such behaviour on the part of the judge, and I have no doubt that in such a case this court would think it not only proper but necessary to look at the transcript of the judgment in its original form.

46 [1965] P 111.

47 *Bromley v Bromley* [1965] P 111 at 114 per Willmer LJ.

48 *Bromley v Bromley* [1965] P 111 at 115.

49 *Bromley v Bromley* [1965] P 111 at 115.

50 *Bromley v Bromley* [1965] P 111 at 114.

51 *Bromley v Bromley* [1965] P 111 at 114-115.

But an application to do anything of that sort would, in my view, have to be supported by cogent evidence. There would have to be evidence from someone who was present at the trial and heard the judgment (preferably somebody who himself or herself took a note of the judgment) and who was able to say, and say in evidence, that the official transcript as approved by the judge was substantially different from what the judge actually said when he delivered his oral judgment at the trial."

34 Danckwerts and Davies LJ agreed with Willmer LJ⁵². Danckwerts LJ affirmed the "general principle" that a court must accept, as the authentic record of a judge's reasons, "that which has been approved by him after consideration of the draft"⁵³.

35 Seventhly, where an applicant is unrepresented or cannot understand English, or both, there are usually rules of court which may be deployed to ensure that a court performs its duty⁵⁴ to give such a person a fair trial and that the person is otherwise accorded procedural fairness⁵⁵. In the Federal Court, there are, for example, rules that permit a single judge exercising the appellate jurisdiction of that Court to extend the time to file a notice of appeal⁵⁶, to permit a notice of appeal to be amended⁵⁷, and to vacate a hearing date⁵⁸. Three decisions of the Federal Court illustrate how court rules may be used to ensure fairness in the prosecution of appeal rights.

36 In *ELR18 v Minister for Home Affairs*⁵⁹, the appellants sought to challenge the Federal Circuit Court's decision – rejecting the appellants' application for judicial review – on the basis that the Federal Circuit Court gave an *ex tempore*

52 *Bromley v Bromley* [1965] P 111 at 116.

53 *Bromley v Bromley* [1965] P 111 at 116. See also *Lam v Beesley* (1992) 7 WAR 88 at 93-94 per Owen J.

54 See *Dietrich v The Queen* (1992) 177 CLR 292.

55 See *AMF15 v Minister for Immigration and Border Protection* (2016) 241 FCR 30 at 44-47 [37]-[42] per Flick, Griffiths and Perry JJ.

56 *Federal Court Rules 2011* (Cth), r 36.05.

57 *Federal Court Rules 2011* (Cth), r 36.11(2)(b).

58 *Federal Court Rules 2011* (Cth), r 36.11(2)(i).

59 [2019] FCA 1583.

judgment which was not translated, even though, it would appear, the appellants needed the assistance of an interpreter. The primary judge's reasons were not published until after the appellants had commenced their appeal to the Federal Court. It was said on appeal that the Federal Circuit Court had erred in law because it had failed to give reasons. That ground was rejected⁶⁰ by Snaden J, who observed that no attempt had been made to extend the time for filing an appeal or to seek leave to amend the grounds of appeal following publication of the written reasons. His Honour said⁶¹:

"In the present case, the delay in the provision of written reasons was not as pronounced as the one upon which the [F]ull [C]ourt in *CQX18* commented. Further and more significantly, the appellants received the [primary judge's reasons] nearly six months prior to the hearing of the present appeal. They indicated to the court that they received at least some (albeit perhaps peremptory) legal advice in respect of those reasons, including as to the merits of an appeal to this court. Plainly, they had ample opportunity in that regard.

Having received the [primary judge's reasons], the appellants did not attempt to amend the grounds upon which they sought to appeal. Had they needed additional time to mount their appeal, or had they sought to amend their grounds on the basis that it was not until after the appeal was lodged that they first had an opportunity to understand why it was that their applications in the [Federal Circuit Court] failed, it is difficult to see how an indulgence either way might reasonably have been denied. But, as history records, none was requested."

37 A similar situation confronted O'Callaghan J in *BIJ16 v Minister for Immigration and Border Protection*⁶². His Honour dismissed a ground of appeal relying upon the delay in the provision of the primary judge's reasons. While those reasons were provided after the expiry of the period within which to bring an appeal, O'Callaghan J considered⁶³ that, given the reasons were provided some six

⁶⁰ *ELR18 v Minister for Home Affairs* [2019] FCA 1583 at [37], [41], [45] per Snaden J.

⁶¹ *ELR18 v Minister for Home Affairs* [2019] FCA 1583 at [46]-[47].

⁶² [2018] FCA 1380.

⁶³ *BIJ16 v Minister for Immigration and Border Protection* [2018] FCA 1380 at [21]-[22].

months before the hearing of the appeal, the appellant had "ample opportunity" to review the reasons and to amend his grounds of appeal.

38 Finally, there is the observation of Wigney J in *BTU18 v Minister for Home Affairs*⁶⁴, a case in which there had been a two-month delay in publishing reasons following the giving of an *ex tempore* judgment in the Federal Circuit Court. Wigney J said⁶⁵:

"[T]he appellant has not filed any further material since receipt of the primary judge's written reasons. That may be explained by the fact that there has been no suggestion that the primary judge's written reasons departed or differed in any material way from his *ex tempore* reasons. Even if there had been any difference, it would have been open to the appellant to amend his appeal grounds to reflect those differences. He did not do so."

39 The foregoing cases illustrate how court processes can be used to avoid practical injustice for a litigant in situations similar to that faced by Mortimer J here.

40 The failure in the present case to interpret the primary judge's *ex tempore* reasons was, in a general sense, unfair. So much may be accepted. However, with respect, rather than setting aside the decision of the primary judge, in the circumstances here, Mortimer J could have:

- (1) adjourned the hearing of the appeal so that the transcript of the *ex tempore* reasons could be obtained; or
- (2) invited the first respondent to amend his appeal grounds to address the contents of the published reasons, and, if necessary, adjourned the hearing of the appeal to permit this to take place.

41 Either or both courses of action (depending on the needs of the first respondent) would have supplied the practical justice or fairness needed given the first respondent's inability to understand the *ex tempore* reasons delivered by the primary judge. Setting aside the orders of the primary judge, however, and remitting the matter to be reheard went beyond that which was necessary to provide practical justice.

42 As to the notice of contention, the following propositions should be expressed:

64 [2019] FCA 540.

65 *BTU18 v Minister for Home Affairs* [2019] FCA 540 at [40].

- (1) The first respondent made much of the fact that the Minister did not challenge the finding made by Mortimer J that there was no way to compare the primary judge's *ex tempore* reasons with his Honour's published reasons. It was said that her Honour's finding supported the proposition that any comparison between what was said *ex tempore* and what was published was an impossible task. With respect, that makes too much of the finding, which was limited to what Mortimer J could do (or not do) given that a transcript of the *ex tempore* judgment was not before her Honour. It was not a finding that the first respondent could not himself have obtained such a transcript.
- (2) The premise of the notice of contention was that the *ex tempore* reasons were the "operative reasons" of the Federal Circuit Court. However, the first respondent did not lead any evidence, let alone "cogent evidence"⁶⁶, to demonstrate that the published reasons were not the authentic record of the primary judge's reasons for judgment. In the absence of such evidence, those published reasons must be taken to be the approved, official judgment of the Federal Circuit Court. If it had been shown that the first respondent had been unaware that he could obtain the transcript of the *ex tempore* judgment, any resulting practical injustice could have been avoided by an adjournment of the Federal Court hearing to give the first respondent the opportunity to obtain that transcript. In the circumstances of this matter, there is no reason to suppose that any such application for an adjournment in order to obtain the transcript would have been refused.

43 It follows that the first respondent was not deprived of the opportunity to formulate his argument on appeal because of the fact that the primary judge's *ex tempore* reasons were not translated, nor was he denied the opportunity to investigate any difference in substance between those reasons and the published reasons. The first respondent never demonstrated that the *ex tempore* reasons were, on the facts here, the operative reasons of the Federal Circuit Court.

44 It also follows that the inability of the Federal Court to examine the *ex tempore* reasons for the possible presence of error was of no moment. That is because the Federal Court considered the published reasons of the Federal Circuit Court and it was not shown that these were not the authentic, operative reasons of that Court.

45 The Federal Court found that the primary judge's published reasons contained no error. More emphatically, the Federal Court also reviewed the reasons of the Tribunal for error and found none⁶⁷. In the circumstances of this

66 See [33] above.

67 *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [9], [43] per Mortimer J.

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case, contrary to the first respondent's submissions, the decision to set aside the judgment of the primary judge and to remit the proceeding to the Federal Circuit Court was not justified.

46 The appeal should be allowed. The grounds of the notice of contention are rejected. Orders 3 to 5 below should be set aside, and in their place it should be ordered that the appeal to the Federal Court be dismissed. As the Minister undertook to pay the costs of the first respondent in this Court, there should be no order as to costs.