FEDERAL COURT OF AUSTRALIA

Francuziak v Minister for Justice [2015] FCAFC 162

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| Citation: | Francuziak v Minister for Justice [2015] FCAFC 162 |
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| Appeal from: | Francuziak v The Honourable Michael Keenan MP, Minister for Justice [2015] FCA 464 |
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| Parties: | **PAWEL FRANCUZIAK v MINISTER FOR JUSTICE** |
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| File number: | WAD 265 of 2015 |
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| Judges: | **SIOPIS, FLICK AND KATZMANN JJ** |
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| Date of judgment: | 16 November 2015 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** leave to raise new argument on appeal – grounds relied upon before primary Judge abandoned – leave refused – appellant bound by the conduct of his case  **PRACTICE AND PROCEDURE** – duty on primary Judge to go beyond factual and legal issues identified by the parties in public law litigation  **EXTRADITION –** departmental brief – claim for privilege over parts – no denial of procedural fairness  **ADMINISTRATIVE LAW** – public law litigation – duty placed on Judge to go beyond legal and factual issues as identified by the parties |
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| Legislation: | *Extradition Act* *1988* (Cth), s 22(3)(b)  *Judiciary Act* *1903* (Cth), s 39B  *Federal Court Rules* *2011* (Cth), r 20.35  *Legal Services Directions 2005* (Cth), App B, item 2, note 4 |
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| Cases cited: | *Assistant Treasurer v Cathay Pacific Airways Ltd* [2009] FCAFC 105, (2009) 179 FCR 323  *Escobar v Spindaleri* (1986) 7 NSWLR 51  *Hamod v New South Wales* [2011] NSWCA 375  *Iyer v Minister for Immigration and Multicultural Affairs* [2001] FCA 929, (2001) 64 ALD 9  *Metwally v University of Wollongong* (1985) 59 ALJR 481  *Re* *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1  *Neil v Nott* (1994) 68 ALJR 509  *Summers v Repatriation Commission* [2015] FCAFC 36, (2015) 145 ALD 30  *SZIAI v Minister for Immigration and Citizenship* [2008] FCA 1372, (2008) 104 ALD 22  *SZKMS v Minister for Immigration and Citizenship* [2008] FCA 499  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158  *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106, (2004) 204 ALR 624  *Water Board v Moustakas* (1988) 180 CLR 491 |
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| Date of hearing: | 19 October 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 47 |
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| Counsel for the Appellant: | Dr J L Cameron (Pro Bono) |
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| Counsel for the Respondent: | Dr E M Heenan |
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| Solicitor for the Respondent: | Attorney-General’s Department |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 265 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | PAWEL FRANCUZIAK  Appellant |
| AND: | MINISTER FOR JUSTICE  Respondent |

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| JUDGES: | SIOPIS, FLICK AND KATZMANN JJ |
| DATE OF ORDER: | 16 NOVEMBER 2015 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. The name of the Respondent is amended to “Minister for Justice”.
2. Leave is granted to file the Re‑Amended Notice of Appeal dated 30 September 2015.
3. To the extent that leave is necessary to now rely upon grounds 1, 2 and 4 of the Re‑Amended Notice of Appeal, leave is refused.
4. The appeal is dismissed.
5. The Appellant pay the Respondent’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 265 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | PAWEL FRANCUZIAK  Appellant |
| AND: | MINISTER FOR JUSTICE  Respondent |

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| JUDGES: | SIOPIS, FLICK AND KATZMANN JJ |
| DATE: | 16 NOVEMBER 2015 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

# THE COURT

1. In March 2014 the Minister for Justice acceded to a request made by the Republic of Poland that Pawel Francuziak be surrendered to the Republic of Poland pursuant to the *Extradition Act* *1988* (Cth) (the “*Extradition Act*”). The Minister did not give reasons for his decision. The common assumption was that his decision was based on the material supplied to him in a “departmental brief”.
2. Mr Francuziak applied for judicial review of the Minister’s decision pursuant to s 39B of the *Judiciary Act* *1903* (Cth) (the “*Judiciary Act*”). The application was filed by a law firm and apparently prepared by a lawyer. At the hearing both Mr Francuziak and the Minister were represented by Counsel.
3. Two grounds of review were pressed. They were that:

* the Minister had applied the wrong test in considering Australia’s non‑refoulement obligations under s 22(3)(b) of the *Extradition Act* in that the ill-treatment of inmates by some prison officials need not be the result of “deliberate Polish government policy designed to punish and harm inmates” – it was sufficient for there to be a “real chance of it occurring irrespective of government policy” ([2015] FCA 464 at [21]); and
* the determination that Mr Francuziak be surrendered to Poland was irrational, capricious or unreasonable.

1. Mr Francuziak filed a Notice of Appeal in May 2015 and an Amended Notice of Appeal in September 2015. There were four grounds of appeal in the Amended Notice of Appeal but the written submissions filed for Mr Francuziak only addressed the first two grounds. At the outset of the hearing of the appeal, he applied for leave to file a “Re-Amended Notice of Appeal” abandoning the third ground and recasting the fourth. In that document Mr Francuziak pleaded that the primary Judge erred when his Honour:
2. allowed the Minister “to produce to the Court documents containing redacted material without having first laid the foundation for any claim of privilege upon which the redactions were based, and without the Court first having considered and ruled upon the claim of privilege”;
3. proceeded to conduct a judicial review of the Minister’s decision to surrender Mr Francuziak to Poland, based on evidence contained in the departmental brief, “in reliance upon which the Minister had made his determination, but from which he had redacted material in the copy filed in Court”;
4. [omitted];
5. (by reason of “the errors” referred to in grounds 1 and 2) failed to exercise the Court’s jurisdiction under s 39B of the *Judiciary Act* by failing to carry out the judicial review required by the application and, by this failure, further failed adequately to consider whether the evidence revealed jurisdictional error on the part of the Minister by his failure:

4.1 to consider the real chance that under legislation recently introduced in Poland Mr Francuziak, a convicted paedophile, would upon completion of his sentence be prevented from returning to Australia by being detained in a treatment facility, or by otherwise being required to undergo treatment that would prevent his return to Australia; and

4.2 to correctly construe statutory provisions related to torture and humanitarian considerations before deciding to surrender … Mr Francuziak to Poland when in the circumstances the Minister was required to consider whether:

4.2.1 there was a real chance that, if [Mr Francuziak] were surrendered to Poland, he would be confined in a prison facility that was overcrowded to such an extent that it was in breach of Poland’s obligations under international conventions by which it is bound; and

4.2.2 there was a real chance that as a consequence of being confined in an overcrowded facility that [Mr Francuziak] would contract disease causing him serious harm; and

4.2.3 there was a real chance that as a consequence of being confined in an overcrowded facility no steps would be taken to place Mr Francuziak as a convicted paedophile in a form of protective custody in which he would [be] at reduced risk of serious assault and other serious harm including treatment amounting to torture.

1. Although ground 4 was not abandoned, no submissions were directed to the matters raised by this ground. Dr Cameron of Counsel, who appeared for Mr Francuziak on the appeal but not in the Court below, characterised the ground as a conclusion that followed from grounds 1 and 2. It follows that, unless grounds 1 and 2 are made out, ground 4 must fail.
2. The focus of the written and oral argument was on the departmental brief which had been forwarded to the Minister. The departmental brief had been provided to the legal representatives of Mr Francuziak with redactions to disguise those parts which the Minister claimed were protected from disclosure by legal professional privilege. The redacted document was admitted into evidence without objection. The essence of the complaint made on Mr Francuziak’s behalf on the appeal was that the primary Judge erred by not adjudicating the privilege claim, despite the position taken by Mr Francuziak’s then legal representatives.
3. The issues on the appeal identified in the written submissions for Mr Francuziak were:
4. whether the primary Judge erred by failing to require the Minister to formally prove his claim for legal professional privilege over the redacted parts of the departmental brief;
5. whether that error prevented his Honour from conducting the review “in accordance with legal principle”; and
6. whether his Honour was deprived by the redactions in the departmental brief of the opportunity of assessing whether the Minister had failed to apply the “real chance” test.
7. Shortly put, through his new Counsel, Mr Francuziak contended that:

* natural justice required the whole of the departmental brief to be disclosed and that “absent an established claim to privilege” there has been a breach of the requirements of procedural fairness; and/or
* there has been a breach of the Model Litigant Guidelines binding the Minister in that “in the circumstances” the Minister was “required to either provide an unredacted copy of the brief to the opposing party and to the Court, or to provide evidence and legal argument in support of any claim to privilege”.

1. There was some uncertainty as to whether a consideration of these arguments required the leave of the Court.
2. The importance to Mr Francuziak of having his claims for relief dealt with in accordance with law may be accepted. He is an Australian citizen who has resided in Australia since 2006. His return to Poland will unquestionably occasion him great stress and will prejudice the personal relationships he has formed in Australia. The critical question of present relevance, however, is whether his re-formulated claims of error can be raised on appeal.

## The need for leave

1. On one view, the arguments now sought to be raised on appeal were arguments that could and should have been put to the primary Judge. Normally a party is bound by the manner in which the case has been conducted at first instance. An appellate Court may allow a party to rely upon an argument not previously relied upon, but leave to do so is required, and leave will generally only be granted where it is “expedient in the interests of justice to do so”: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [46] per Kiefel, Weinberg and Stone JJ. “The court must be satisfied that allowing a new point to be argued would work no injustice to the other party”: *Summers v Repatriation Commission* [2015] FCAFC 36 at [94], (2015) 145 ALD 30 at 57.
2. If this view is correct, leave to raise these new arguments should be refused for several reasons.
3. First, Mr Francuziak was represented by Counsel in the proceeding before the primary Judge where the arguments which it was then considered appropriate to raise for resolution were raised and resolved.
4. Second, no explanation was given as to why the new arguments were not put below.
5. Third, the arguments now sought to be raised would render the hearing before the primary Judge “almost irrelevant” (*WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106 at [19], (2004) 204 ALR 624 at 629 per French J (as his Honour then was)), the arguments previously relied upon before the primary Judge having been abandoned before this Court.
6. Fourth, no application was made to the primary Judge pursuant to r 20.35 of the *Federal Court Rules* *2011* (Cth) for the departmental brief in its unexpurgated form to be produced to the Court “for the purpose of deciding the validity of the claim or objection to production”: see *Assistant Treasurer v Cathay Pacific Airways Ltd* [2009] FCAFC 105 at [64], (2009) 179 FCR 323 at 340 per Flick J (Spender and Lander JJ agreeing).
7. Fifth, had the claim for privilege been disputed below, the Minister would have had an opportunity to adduce additional evidence to substantiate the claim. As the High Court observed in *Water Board v Moustakas* (1988) 180 CLR 491 at 497, “a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below”.
8. Sixth, this Court is deprived of the benefit of the primary Judge’s consideration of the question.
9. Seventh, to allow the new arguments to be put would be contrary to the general principle of finality in litigation and the need for decisions involving administrative decisions made pursuant to statutory authority being quickly resolved (c.f., *Iyer v Minister for Immigration and Multicultural Affairs* [2001] FCA 929 at [62], (2001) 64 ALD 9 at 24 per Gyles J; *SZKMS v Minister for Immigration and Citizenship* [2008] FCA 499 at [30] per Lander J). As Flick J observed in *SZIAI v Minister for Immigration and Citizenship* [2008] FCA 1372 at [34], (2008) 104 ALD 22 at 30, “[t]here is a legitimate interest in public law matters being resolved in a timely and efficient manner”.
10. In any case, for the reasons set out below there is no merit in the new arguments.

## A right of appeal without leave

1. While Dr Cameron seemed to think he required leave, Dr Heenan, who appeared for the Minister, submitted that leave was not required because the allegation being made was that Mr Francuziak was denied procedural fairness at the hearing because the primary Judge did not require the Minister to prove his claim to privilege. Counsel for Mr Francuziak submitted that:

* procedural fairness in the conduct of the hearing required the Minister to disclose to the Court the entirety of the departmental brief and not merely a redacted version; and that
* there was a duty imposed upon the Court to itself require the production of the entirety of the departmental brief or at least satisfy itself that the claim for privilege was properly founded, regardless of the attitude of Mr Francuziak’s then legal representatives.

1. Whichever way the submission is advanced, it faces a number of difficulties, namely:

* the Commonwealth’s obligations to act as a model litigant do not preclude the Commonwealth or its Ministers from acting properly to protect the Commonwealth’s interests: *Legal Services Directions 2005* (Cth), Appendix B, item 2, note 4;
* Mr Francuziak did not challenge the Commonwealth’s claim for privilege and through his legal representatives consented to the course adopted by the Minister and the primary Judge;
* Mr Francuziak has not shown any reason why he should be permitted to depart from the manner in which he conducted his case before the primary Judge;
* there was no denial of procedural fairness in the conduct of the hearing; and/or
* if there were a duty of the kind espoused, there was no breach on the facts of the present case.

The submissions, with respect, are without merit.

### Bound by the manner in which the hearing was conducted

1. The argument advanced on behalf of Mr Francuziak is without merit, primarily, for the simple reason that the case before the primary Judge was conducted upon the basis that the redacted departmental brief was admitted without objection.
2. On 8 May 2014 Barker J ordered, by consent, that, by 16 May 2014, the Minister provide to Mr Francuziak a copy of the departmental brief (together with attachments) “subject to redaction of any parts of that brief (including attachments) over which the [Minister] claims privilege”. In conformity with the order, a copy of the departmental brief with redactions was forwarded to Mr Francuziak’s legal representatives.
3. There is no evidence to suggest that Mr Francuziak ever disputed the Minister’s claim. To the contrary, the evidence adduced by the Minister on Mr Francuziak’s application for leave to rely on the new grounds indicates that Mr Francuziak accepted that the redacted portions were privileged.
4. On 24 July 2014 Mr Francuziak’s then Counsel sent an e-mail to the Minister’s then solicitors in which he stated, among other things, that the parties agreed on the approach to be taken “in the further conduct of the matter”. He attached a minute of proposed orders. Those short minutes relevantly proposed that:

By 7 August 2014, the respondent file and serve a copy of the departmental brief (including attachments) dated 5 March 2014 that was provided to the applicant in accordance with paragraph 1 of the orders of Justice Barker dated 8 May 2014, in lieu of any affidavit evidence, with **the departmental brief so filed to be received by consent as evidence of the material that the Attorney-General's Department provided to the Minister** in respect of the decision made on 17 March 2014 under s 22 of the *Extradition Act 1988* (Cth) that the applicant be surrendered to the Republic of Poland.

(Emphasis added.)

The next day the primary Judge made orders in accordance with the short minutes.

1. If the claim for privilege were to be put in issue, that should have occurred before this order was made. At the very latest, any dispute as to the legitimacy of the claim for privilege should have been canvassed at the hearing before the primary Judge.
2. It matters not, with respect, that the reason for the claimed deletions was founded upon legal professional privilege. Nor would it matter whether deletions to the departmental brief were made to protect some claim for confidentiality or for some other reason.
3. It is generally not open on appeal to seek to challenge the evidential basis upon which a hearing has been conducted where the relevant evidence has been admitted by consent.

### The absence of any procedural unfairness

1. In any event, there has been no procedural unfairness to Mr Francuziak for either of two reasons.
2. First, the rules of procedural fairness are directed to ensuring that a party is given a reasonable opportunity to be heard; the rules do not set out to achieve the impossible objective of ensuring that a party who is legally represented takes the best advantage of that opportunity. The rules of natural justice or procedural fairness are directed to ensuring (as the expression itself conveys) fairness, not procedural perfection.
3. Second, in the particular circumstances of this case, there was no unfairness in the procedure that was adopted.
4. Before the primary Judge, the argument was not so much directed to whether the Minister had been correctly advised as to what was required by the “real chance” test as opposed to a “more likely than not” test; the argument was more directed to the question of whether the prospect of ill-treatment in prisons need be the product of “deliberate Polish government policy designed to punish and harm inmates”. Indeed, the reasons for decision of the primary Judge recited at [28] (and there was no challenge to this part of his Honour’s reasons) that Mr Francuziak “accepts that the Departmental Advice correctly articulated the ‘real chance’ test…”. To the extent that that argument is now recast so as to focus attention upon the advice proffered to the Minister with respect to the “real chance”, the argument must fail. The prejudice to Mr Francuziak in not disclosing the entire departmental brief is not self-evident. As the brief itself advised the Minister, “it [was] appropriate in this case to apply the ‘real chance’ test, which is the lowest threshold and test most favourable to Mr Francuziak”. In these circumstances, there is no reason to infer that disclosure of the redacted parts of the brief might show that the Minister applied a different test.

### A duty upon the primary Judge? – a truly worrying prospect

1. The last of the arguments advanced on appeal on behalf of Mr Francuziak is truly worrying.
2. The argument was expressed in a number of different ways. At its most general, it was argued that there is a duty upon a Judge – at least in public law cases – to ensure procedural fairness; at its most specific, it was argued that there is a duty upon a Judge to require the production of the entire departmental brief or at least for the Court to satisfy itself that the claim for privilege is properly founded. The argument as it progressed shifted the primary focus of attention from an alleged breach by the Minister of the Model Litigant Guidelines to the existence of a duty upon the Court.
3. If accepted, the argument has the potential to impose upon a Judge a duty of unspecified (or at least variable) content. If it were right, it would have the potential to turn on its head the traditional manner in which cases are conducted in this country, where it is for the parties to identify both the evidential basis upon which a case is to be resolved and the relevant legal issues. Indeed, for the Court to depart from the manner in which a case has been advanced for resolution may itself involve a denial of procedural fairness to all parties.
4. Although it has been recognised that in some cases (particularly where there are unrepresented litigants) that the Court should “assume the burden of endeavouring to ascertain the rights of parties” (e.g., *Neil v Nott* (1994) 68 ALJR 509 at 510 per Brennan, Deane, Toohey, Gaudron and McHugh JJ) and although a Judge has “an overriding duty to ensure that a trial is fair” (*Hamod v New South Wales* [2011] NSWCA 375 at [309] per Beazley, Giles and Whealy JJA), the only authority relied upon by Dr Cameron in support of his alleged duty were the following observations of Kirby P (as his Honour then was) in *Escobar v Spindaleri* (1986) 7 NSWLR 51 at 57:

… It is not only the appellant who has an interest in securing justice in the court. There is a public interest in the manifest performance of the court's function in a proper and regular fashion …

These comments were made in a different context and fall well short of providing any support for the existence of a duty as variously formulated on behalf of Mr Francuziak.

1. To unquestioningly embrace the argument now sought to be advanced on behalf of Mr Francuziak would be a perilous course. It would have the potential to transform public law litigation into public inquiries.
2. However expressed, the argument should be rejected for either of at least two reasons.
3. First, it is an argument which again should have been expressly raised for consideration in the Court below. If the argument were to be advanced, a submission should have been made to the primary Judge that he had a duty not to proceed upon the basis of the redacted departmental brief and had an independent duty — even in the face of agreement by Mr Francuziak’s Counsel to the course being followed — to himself insist upon the production of the departmental briefin its entirety. On such an important matter of principle, an appellate Court should not be denied the benefit of the reasoning of the primary Judge.
4. It ill befits an appellant to seek to argue that a hearing has miscarried by reason of a failure on the part of a primary Judge to discharge a duty imposed on the Court where the appellant remains silent during the course of the hearing; awaits the decision of the Court; and (being dissatisfied with the result) then seeks to rely upon the alleged breach of duty for the first time on appeal. Moreover, as the High Court said in *Metwally v University of Wollongong* (1985) 59 ALJR 481 at 483:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

These are by no means exceptional circumstances.

1. Second, and for the same reasons as it has been concluded that there has been no denial of procedural fairness, Dr Cameron was unable to demonstrate that any breach of the alleged duty has occasioned any prejudice to Mr Francuziak. The rules of procedural fairness are concerned with avoiding “practical injustice”: *Re* *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6 at [37], (2003) 214 CLR 1 at 14 (per Gleeson CJ). Mr Francuziak did not lose an opportunity to advance his case. The most favourable construction of the test to be applied was the test the Minister was advised to apply. In these circumstances no practical injustice has been shown. A denial of procedural fairness is not made out simply by speculating about the content of the deleted material.
2. This is not to deny that a Judge should intervene in a hearing where there is manifest unfairness or manifest procedural unfairness. And it may be that public law cases involve different considerations than those applicable in private law or commercial litigation. But the identification of those considerations and the content of any such duty must await a future case where it truly arises for consideration and where the question has been properly argued. That is not this case.

## Conclusion

1. There was some uncertainty on the part of Counsel for Mr Francuziak as to whether he needed both leave to file the Re-Amended Notice of Appeal and leave to raise arguments not put to the primary Judge. If the alleged denial of procedural fairness was the failure by the Minister to provide an unexpurgated version of the departmental brief to Mr Francuziak (and/or the primary Judge), that was unquestionably an argument that could have been but was not canvassed prior to or during the hearing below. Leave to raise such an argument on appeal would be required. If the alleged denial of procedural fairness was in the manner in which the case proceeded before the primary Judge and was occasioned by the failure of the primary Judge to discharge his alleged duty to ensure that all material was available for scrutiny by Counsel and the Court itself, leave may not be required. An argument so cast would seek to raise appealable error in the manner in which the hearing was conducted. On one construction of the Re-Amended Notice of Appeal, that argument was embraced by grounds 1, 2 and 4.
2. It matters not, with respect, which of these two approaches is correct.
3. If the denial of procedural fairness is said to lie at the feet of the Minister, leave to raise such an argument on appeal is refused. If the denial of procedural fairness or breach of duty by the primary Judge is said to lie at the feet of either the Minister or the primary Judge with respect to the manner in which the hearing proceeded, the argument, however expressed, is rejected.
4. Either way, the appeal must be dismissed with costs.

THE ORDERS OF THE COURT ARE:

1. The name of the Respondent is amended to “Minister for Justice”.

2. Leave is granted to file the Re‑Amended Notice of Appeal dated 30 September 2015.

3. To the extent that leave is necessary to now rely upon grounds 1, 2 and 4 of the Re‑Amended Notice of Appeal, leave is refused.

4. The appeal is dismissed.

5. The Appellant pay the Respondent’s costs.

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| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Siopis, Flick and Katzmann. |

Associate:

Dated: 16 November 2015