FEDERAL COURT OF AUSTRALIA

BDQ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 492

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| Appeal from: | *BDQ17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCCA 1285 |
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| File number: | WAD 365 of 2019 |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 20 April 2020 |
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| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court dismissing application for judicial review of decision of Immigration Assessment Authority – where applicant was unrepresented and required a translator – where Federal Circuit Court gave oral reasons and published written reasons after notice of appeal filed – whether applicant denied procedural fairness – consideration of role of reasons in exercise of judicial power – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951*BKL15 v Minister for Immigration and Border Protection* [2016] FCA 802; 241 FCR 450*Bradken Ltd v Norcast S.ár.L* [2013] FCAFC 123; 219 FCR 101*COZ16 v Minister for Immigration and Border Protection* [2018] FCA 46; 259 FCR 1*CQX18 v Minister for Home Affairs* [2019] FCA 386*CQX18 v Minister for Home Affairs* [2019] FCAFC 142; 372 ALR 137*DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; 258 FCR 175*ELR18 v Minister for Home Affairs* [2019] FCA 1583*Kaur v Minister for Immigration and Border Protection* [2019] FCAFC 53 |
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| Date of hearing: | 27 February 2020 |
|  |  |
| Date of last submissions: | 12 March 2020 |
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| Registry: | Western Australia |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 45 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Solicitor for the First Respondent: | Mr P R Macliver of the Australian Government Solicitor |
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| Counsel for the Second Respondent: | The second respondent entered a submitting appearance |

ORDERS

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|  | WAD 365 of 2019 |
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| BETWEEN: | BDQ17Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 20 April 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
2. The appeal be dismissed.
3. The appellant pay the costs of the first respondent, to be fixed by way of a lump sum.
4. The lump sum referred to in order 3 is to be:
	1. agreed between the parties and notified to the Court on or before or 4 pm on 20 May 2020; or
	2. referred to a Registrar for determination in the absence of agreement.

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

REASONS FOR JUDGMENT

MORTIMER J:

# Introduction and summary

1. This is an appeal from orders made by the Federal Circuit Court on 15 May 2019, dismissing the appellant’s application for judicial review of a decision of the Immigration Assessment Authority and ordering the appellant to pay the first respondent’s costs in the amount of $4,600.00: see *BDQ17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCCA 1285.
2. For the reasons set out below, the appeal will be dismissed.

# Relevant background

1. The appellant is a citizen of Vietnam and was accepted by the Authority to be a Catholic. The appellant arrived in Australia as an unauthorised maritime arrival on 17 March 2013 and was first interviewed on 13 April 2013.
2. It was not until 29 October 2015 that the appellant was invited to apply for a protection visa, after the “bar” under s 46A of the *Migration Act 1958* (Cth) was lifted. On 1 July 2016, with assistance from a migration agent, the appellant applied for a Safe Haven Enterprise (subclass 790) visa (SHEV) and participated in an interview with a delegate of the Minister on 23 November 2016. The appellant’s visa application was refused in a decision made on 6 December 2016.
3. Pursuant to s 473CA of the Migration Act, the delegate’s refusal was referred to the Immigration Assessment Authority for review. The appellant’s migration agent made submissions to the Authority on his behalf on 9 January 2017, and made further submissions on 22 February 2017 and 23 February 2017.
4. On 24 February 2017, the Authority affirmed the decision of the delegate of the Minister not to grant a protection visa.
5. The appellant applied for judicial review of the Authority’s decision on 20 March 2017.
6. Orders were made by the Federal Circuit Court on 15 May 2019 dismissing the appellant’s judicial review application. It appears that reasons were given orally at the time of making the orders.
7. The appellant filed a notice of appeal on 16 July 2019.
8. On 1 August 2019, the Federal Circuit Court published written reasons for its decision.
9. The appellant’s notice of appeal contains four grounds of appeal:

The Federal Circuit Court did not properly consider my application by failing to give me an opportunity to present my case.

The Federal Circuit Court did not give any written reasons for dismissing my application.

The Federal Circuit Court failed to find that the Immigration Assessment Authority did not give proper weight to my evidence and reaching an unreasonable conclusion.

The Cost order is too high because I cannot pay the fee.

1. The appellant was not legally represented before the Federal Circuit Court, nor before this Court.
2. Given the nature of his grounds of appeal, and the fact he was not legally represented, the Court sought to obtain a copy of the transcript of the Federal Circuit Court’s oral reasons. A copy was provided by the chambers of the relevant Federal Circuit Court judge, and the Court provided it to the appellant and the Minister.
3. The appellant participated in the appeal hearing through an interpreter. At the hearing of the appeal, the Court asked the appellant if he had some assistance in drafting the grounds of appeal, and he agreed he had. Accordingly, the Court took the appellant through the grounds, through the interpreter, to ensure he understood as best he could what was in the notice of appeal.
4. After explaining the Court’s role on appeal, and the role of the Federal Circuit Court, the Court invited the appellant to explain each of his grounds, by way of submission. The appellant did not in terms address the grounds, but rather sought to explain to the Court that he was a member of the Viet Tan party, and to explain why he feared persecution in Vietnam if he were forced to return there, including by reason of his activities in Australia, which he described to the Court.
5. The Court explained again why those were not matters which it could consider in performing its task on appeal, and invited the appellant to say anything further about the Federal Circuit Court’s decision. The appellant did not have anything further to say in that regard.
6. The Minister’s counsel was invited to, and did, summarise the Minister’s submissions in plain English, so that the summary could be interpreted to the appellant. The Minister contended each of the grounds of appeal should be rejected. The Minister was also given the opportunity to, and did, file and serve supplementary written submissions on the observations made by Perram J in *CQX18 v Minister for Home Affairs* [2019] FCA 386 at [16] raising a question whether the Federal Circuit Court has the power to revise its oral judgments.

# Resolution

1. After setting out the background, the version of the Federal Circuit Court’s reasons published on 1 August 2019 give the following reasons for dismissing the judicial review application at [30]-[36]:

**Grounds**

The grounds in the application are as follows:

1. *I think the Decision maker did not consider all of the evidence or did not take into account relevant considerations.*
2. *I was not afforded procedural fairness.*
3. *I think the Decision is affected by bias.*
4. *I think the Decision maker misinterpreted the law.*

**Ground 1**

In relation to ground 1, unparticularised, there is no part of the applicant’s evidence that has been identified by the applicant which the Authority did not consider or did not take into account. On the face of the Authority’s reasons, the Authority took into account the whole of the evidence and the submissions made on behalf of the applicant. The Authority had a real and meaningful engagement with the applicant’s claims and made dispositive findings which were open for the reasons summarised above. Insofar as ground 1 is understood to be referring to the deliberations of the Authority under s 473DD of the Act, on the face of the Authority’s reasons, it is apparent that the Authority took into account the whole of the provisions under s 473DD of the *Act*. Accordingly, no jurisdictional error as alleged in ground 1 is made out.

**Ground 2**

In relation to ground 2, the review under Part 7AA of the *Act* is not one which required the Authority to invite the applicant to attend an interview. On the material before the Court, the applicant was given an opportunity by the Authority to put on submissions and new evidence. By emails dated 9 February 2017 and 23 February 2017, the applicant twice put on submissions. The Authority considered the same in accordance with the statutory requirements.

There is no issue that has been identified by the applicant which would have warranted the Authority expressly considering its powers under s 473DC of the *Act*. The statutory provisions of Part 7AA of the *Act* otherwise exclude the requirements of procedural fairness. On the face of the material before the Court, the Authority complied with its statutory obligations and the review was conducted in accordance with the statutory regime. No denial of procedural fairness is made out in relation to ground 2. No jurisdictional error as alleged in ground 2 is made out.

**Ground 3**

In relation to ground 3, bias is a matter which must be clearly alleged and properly proven. The adverse findings of the Authority are not conduct by reason of which a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and an impartial mind to the determination of the matter on its merits. On the face of the material before the Court, there is nothing to support the contention that the Authority did other than approach the review with an open mind reasonably capable of persuasion as to the merits. No jurisdictional error is made out by ground 3.

**Ground 4**

In relation to ground 4, the Authority correctly identified the relevant law and, on the face of the Authority’s reasons, made dispositive findings in respect to the applicant’s claims and evidence that were open to the Authority and do not reveal any misinterpretation of the law. No jurisdictional error is made out by ground 4.

As the application fails to make out any jurisdictional error, the application is dismissed.

1. It is clear from a comparison of the oral reasons and the written reasons published on 1 August 2019 that the latter have a number of substantive additions in the section reciting the factual background to the Authority’s decision and in the description of the Authority’s reasoning on the review. The 1 August 2019 reasons also contain a large number of corrections, most of which render the reasons as more compliant with the formalities of written judicial reasons. The part of the reasons where the court’s reasoning on the grounds of review is explained, and which I have extracted above, is not altered in substance, save for the addition of one sentence; namely, the third sentence under Ground 1. In those circumstances it is not apparent why the Federal Circuit Court’s reasons could not have been published within a few days of the orders being made on 15 May 2019.
2. That part of the Federal Circuit Court’s reasons which actually comprises its reasoning on the grounds of review is formulaic and expressed at a high level of generality. It could be applicable to almost any judicial review in respect of a decision by the Authority. In some circumstances, reasoning of that kind will disclose error: see, for example, *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; 258 FCR 175 at [47]-[48]. However, in circumstances where the appellant did not advance any specific submissions to the Federal Circuit Court about the Authority’s reasoning, or its review process, I do not consider that those features of the Federal Circuit Court’s reasons are, on this appeal, sufficient to conclude that the reasons are inadequate, even if (contrary to the conclusion I reach below) ground 2 were to be understood in this way.

## Ground 1

1. As to the first ground of appeal in this Court, relying on [25] of the Federal Circuit Court’s 1 August 2019 reasons, the Minister submits that, prior to the hearing of his judicial review application, the appellant had “ample opportunity” to file further affidavit material, and written submissions, in support of his application, but he did not do so. Relying on statements at [26]-[28] of the Federal Circuit Court’s reasons, the Minister also submits that at the hearing before the Federal Circuit Court on 15 May 2019 the appellant “made submissions to the Court after the nature of the hearing had been explained to him”. The Minister contends “[t]here is nothing to suggest that the appellant was not permitted to make whatever submissions that he wished to make to the Court”.
2. It is possible that a person in the position of the appellant could make good an argument of the kind in ground 1, as a denial of procedural fairness, if there were sufficient evidence about how the hearing was conducted, and if the appellate court were satisfied on such evidence that a person in the position of the appellant was cut off, interrupted, given only the briefest of time to address the court when it was clear she or he had more to say, and the like. There is no such evidence in this case. One reason for that is that the transcript of the hearing is not available to the Court. However, the transcript may itself not reveal the kinds of matters necessary to support this argument, and careful and considered evidence from an appellant, or other witnesses present, might be required. Understandably, because the appellant has no legal representation, he has not been able to undertake such an exercise here.
3. There is no evidence disclosing precisely what was said by the Federal Circuit Court to the appellant about the purpose of the hearing and the role of that court, nor any evidence about how long the hearing took, nor any evidence about what kind or quality of opportunity was afforded to the appellant to say what he wanted to say about the Authority’s decision and why it should be set aside. It might be said that the appellant may have not had much to say, but the point of legal principle is that a party in his position must be given a reasonable opportunity to be heard about why the decision under review should be set aside.
4. Where an asylum seeker is not legally represented and requires an interpreter to understand and communicate in English, it is likely that what she or he may have to say will not touch on the finer points of legal principle, or perhaps indeed on any points of legal principle. However, with a careful and respectful approach it is far from fanciful that a person such as the appellant may have something to say which could touch on certain legal errors, in particular procedural fairness issues. Whether that possibility materialises or not, a person in the position of the appellant is to be treated fairly and respectfully, and not only must a reasonable opportunity in fact be given, it must also be reasonably apprehended to have been given. The administration of justice is brought into disrepute if there is a reasonable apprehension that the moving party in a proceeding engaging a court’s supervisory jurisdiction over exercises of public power is being treated as little more than a bystander to the court’s process.
5. However, as I have noted, there is no evidence as to how the appellant was in fact treated by the Federal Circuit Court at the hearing of his application. Therefore, on this appeal, ground 1 must fail.

## Ground 2

1. As to the second ground, there is an initial question of what is intended to be encompassed by the ground: that is, whether it is only concerned with whether any reasons at all were given at the time the Federal Circuit Court’s orders were made, or whether it extended to an allegation that the reasons given by the Federal Circuit Court were inadequate. The Minister submitted it was only the former and not the latter.
2. I accept that submission. Nevertheless, even if the focus of this ground is accepted to be the Federal Circuit Court’s failure to provide written reasons at or shortly after the pronouncement of its orders, rather than the adequacy of the reasons given, it is as well to recall some of the more general principles about the giving of reasons.
3. I explained the importance of the giving of reasons as an aspect of an exercise of judicial power in *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951 at [33]-[41]. In *Kaur v Minister for Immigration and Border Protection* [2019] FCAFC 53 at [163]-[193], the Full Court explained the purpose of the giving of reasons and the state of authority about when reasons given for the exercise of judicial power will, and will not, be considered adequate to constitute a lawful discharge of the judicial function.
4. In the present case, there is no dispute that oral reasons were given at the time of the orders being pronounced. There is no factual basis to infer that the oral reasons were not translated to the appellant at that time. Here, the appellant had no active recollection of the Federal Circuit Court hearing and made no positive assertion that the reasons had not been interpreted to him: cf *AAM17*.
5. The ground of appeal revolves around the failure to provide any written reasons until 1 August 2019. There is no evidence, one way or the other, about whether the appellant was informed that he could access a copy of the transcript of the oral reasons. As I noted in *AAM17*, it is important for persons in the position of the appellant, whose liberty might well ultimately be at stake as a result of an adverse decision by the reviewing court, that the court’s reasons for decisions are intelligible to them. Subject to presently irrelevant exceptions, it is also a core characteristic of the exercise of judicial power that it occurs in public. The publication of a court’s reasons for decision is an aspect of this characteristic.
6. I infer, and find, that the publication of the Federal Circuit Court’s reasons for decision on 1 August 2019 was entirely responsive to the filing of a notice of appeal. There does not appear to be any court rule or practice authorising, as a matter of policy, judges of the Federal Circuit Court to refrain from providing *any* form of written reasons to the parties affected by the court’s orders. Nor does there appear to be any court rule or practice authorising, as a matter of policy, judges of the Federal Circuit Court to publish written reasons only as a response to a notice of appeal. There may be a number of difficulties with that practice, including that it may be perceived as a way of insulating the Federal Circuit Court’s decision from any successful appeal.
7. This is not to criticise or discourage the giving of oral reasons at the time of making orders. Subject to the kinds of qualifications noted by Flick J in *BKL15 v Minister for Immigration and Border Protection* [2016] FCA 802; 241 FCR 450 at [16], it is a practice which is capable of facilitating the effective and efficient use of judicial resources, without comprising the fairness and accountability which is also a feature of the exercise of judicial power. However, when a judge gives oral reasons, the appropriate and reasonable expectation of the parties is that the court will give the parties a copy of the reasons in written form as soon as reasonably practicable, and that this will occur whether or not a party is contemplating an appeal.
8. As I have explained in *AAM17*, and as was explained in *Kaur* and the authorities there cited, the purpose of giving reasons is not limited to the facilitation of the exercise of a right of appeal, although that may be one purpose in applicable circumstances, and indeed the adequacy of reasons as giving rise to appellable error may be closely tied to the existence of a right of appeal from a court’s orders and reasons: see, for example, *DAO16* at [47]-[48]; *COZ16 v Minister for Immigration and Border Protection* [2018] FCA 46; 259 FCR 1 at [31]-[56].
9. Litigants in the migration jurisdiction are entitled to expect, and be given, the same quality of judicial processes as other litigants, including wealthy and amply legally resourced litigants. This is no second-class jurisdiction, particularly given what is at stake for applicants. It is difficult to conceive of a judge, by way of final orders, disposing of a commercial dispute between legally represented litigants involving a considerable sum of money by giving oral reasons which were not then published either to the parties or the public, or only published responsively after the lodging of a notice of appeal. No different approach should be applied in jurisdictions such as migration.
10. There is, of course, a distinction in any event between any revision and publication of oral reasons that occurs within days of the giving of oral reasons, and a revision which is only responsive to the filing of an appeal against the orders which the oral reasons support. The former practice is unlikely to be attended by any reasonable apprehension that the written reasons have been published in the form and at the time they have in an attempt to insulate the court’s decision from any successful appeal. Nor could there be any reasonable apprehension the appellate court might be misled as to the reasons of the court from which the appeal lies for making the orders it did.
11. So far as I have been able to ascertain, to this point there has been no developed legal challenge to the giving of written reasons responsively to the filing of an appeal, and otherwise non-publication of written reasons to the parties at all (even by way of a revised transcript of oral reasons). There are appellate decisions of this Court which describe the practice as “undesirable” and refer to the ability of a party to seek an order under rule 36.03(b) of the Federal Court Rules deferring the commencement of the date from which the time for appeal commences to run because of the absence of written reasons. Unless it is suggested and explained to them, the latter option is of little assistance to unrepresented asylum seekers, especially those with no functional English.
12. Relying on *ELR18 v Minister for Home Affairs* [2019] FCA 1583 at [45], the Minister contended that the fact that no written reasons had been published at the time the appeal was instituted is, alone, not a ground upon which a finding of appellable error could be made. In that decision, Snaden J said (at [45]):

At the time that the appeal was instituted, no written reasons had been published in support of the FCCA Judgment. The only reasons given, to that point, were the oral reasons provided on the day of the judgment—which, as is outlined above, the appellants could not fairly be thought to have understood. That, alone, is not a ground upon which this court might impugn the decision below as the product of appellable error, although it *is* a matter in respect of which some stern commentary has recently arisen: *CQX18*, [11] (Allsop CJ, Perry and Gleeson JJ).

1. *CQX18 v Minister for Home Affairs* [2019] FCAFC 142; 372 ALR 137 concerned an appeal where, the Full Court having obtained the transcript of the hearing before the Federal Circuit Court and having raised concerns about the process adopted by that court during the judicial review hearing, the Minister conceded that the court’s decision should be set aside for denial of procedural fairness. Although the orders were therefore made by consent, in accordance with *Bradken Ltd v Norcast S.ár.L* [2013] FCAFC 123; 219 FCR 101, the Full Court identified the error which led it to be satisfied that the setting aside of the Federal Circuit Court’s orders was appropriate. The Full Court said (at [10]-[12]):

We are satisfied that it is appropriate (subject to appropriate changes) for the proposed consent orders in the second appeal to be made on the basis that the FCC judge failed to afford the appellant procedural fairness at the hearing in the exercise of Commonwealth judicial power in all of the circumstances. These circumstances include the following.

1. The appellant did not have legal representation in the Federal Circuit Court.
2. He appeared at the hearing of the application for judicial review via video-link from immigration detention without an interpreter present. The interpreter was located in the courtroom in Sydney.
3. The transcript of the hearing before the primary judge demonstrates difficulties with the video-link transmission of the hearing.
4. The appellant raised the question of unfairness at the hearing as he had to make his submissions “*all on my own*” (ie from a remote location).
5. There was real doubt as to whether the appellant received the Minister’s written submissions or the court book. While the Minister’s counsel offered to assist the Court about service of the court book on the appellant, the primary judge considered it sufficient to have explained the contents of the court book to the appellant before admitting it into evidence. As such, no steps were taken to clarify one way or the other whether these had been served.
6. The appellant explained to the primary judge in any event that he could not read the Minister’s submissions without the assistance of a translator. The Minister’s counsel acknowledged in his submissions before the primary judge that it was not evident that his written submissions had been translated and that “*it may be that the applicant, given the need for interpreting, may not have had the opportunity to consider those submissions fully*.”
7. The appellant explained that there were inaccuracies in the translation of his affidavit which he wanted to correct and he sought a short adjournment of half an hour to an hour to do so with the assistance of the interpreter. However, his application for an adjournment was not dealt with by the primary judge and his affidavit was taken as read without the appellant being afforded the opportunity to correct it by evidence.

We also wish to express our concern that:

1. the primary judge delivered an ex tempore judgment which was not translated by reason of an instruction by the primary judge to the interpreter not to do so in circumstances where there was no apparent effort thereafter by the primary judge to have his reasons reduced to writing timeously until they were requested;
2. no orders were made having the legal or practical effect of deferring the commencement of the period within which an appeal must be instituted (see *CQX18 v Minister for Home Affairs* [2019] FCA 386 at [14] (Perram J); *Singh v Minister for Immigration and Border Protection* [2017] FCAFC 195 at [26] (the Court)); and
3. written reasons were not published until 75 days after delivery of the *ex tempore* judgment and 54 days after the expiry of the time within which an appeal could be instituted as of right.

We also note in this regard that Perram J found at [7] that the applicant does not speak good English and that “*I do not hesitate to find as a fact for the purposes of the present proceeding that the Applicant would not have been able either to understand what [the primary judge] was saying or to have been able to reduce what he was saying to writing.*” His Honour’s findings in this regard are amply borne out by a reading of the transcript of proceedings before the FCC which was before this Court.

1. In *ELR18*, Snaden J does not cite any authority for the proposition his Honour sets out at [45] of that decision. In my respectful opinion that matter remains an open question, and the authorities to which I referred in *AAM17*, and to which the Full Court has referred in *DAO16*, *CQX18* and *Kaur*, will be relevant. The combination of circumstances – oral reasons with no provision of even the transcript of those reasons, an unrepresented asylum seeker with limited ability to communicate in or understand English, the consequences of an adverse decision, a limited appeal period, the well-established principles about the need for adequate reasons so as to facilitate the exercise of a right of appeal, the defining characteristics of judicial power under the Constitution, and the principles of procedural fairness – may well support a conclusion such as the one reached – on different facts – in *CQX18*. To that list may be added the matters to which I referred above about the apprehension that provision of written reasons responsively to a notice of appeal may be designed to insulate a court from a successful appeal, and further that differences between the oral reasons and the written reasons provided after an appeal has been filed might also give rise to confusion about the actual reasons for the making of the Court’s orders.
2. The potential significance of these matters is not necessarily diminished by the contention that, so long as an appellant receives written reasons from the court a reasonable time before the hearing of the appeal, there is no legal difficulty with that practice: cf *ELR18* at [46]-[48]. Recalling what I have said at [35] above, if that practice were extended to all first instance proceedings, it takes little imagination to see how quickly the practice would be scrutinised for legality. There are more fundamental issues of principle at stake in this practice than the question of whether there is a sufficient time gap between late-produced reasons and the hearing of any appeal.
3. However, the appellant was in no position to make any arguments on these matters on this appeal. The resolution of these matters should await an occasion where all arguments can be fully developed.
4. Ground 2 should be resolved on this appeal on the basis that, while it is correct that the Federal Circuit Court did not provide written reasons at or shortly after the pronouncement of its orders, no substantive argument has been advanced as to why that failure constitutes an appellable error, and for that reason ground 2 should be dismissed. In those circumstances, it is not necessary to address in detail the matters raised in the Minister’s supplementary submissions, other than to note that the Full Court’s decision in *CQX18* is not inconsistent with the observations made by Perram J.

## Ground 3

1. I accept the Minister’s submissions that this was not a ground of review before the Federal Circuit Court, and leave would be required to raise it for the first time on appeal. There was no contention advanced by the appellant at the hearing which could support such a grant of leave. I accept the Minister’s submission that there is nothing apparent on the face of the Authority’s reasons which would suggest there was an arguable appeal ground on this basis in any event. There is, as the Minister submits, a difficulty in challenging the weight given to evidence before a merits review body. This ground must be rejected.

## Ground 4

1. On instructions, the Minister’s counsel informed the Court that the scale fees operating in the Federal Circuit Court at the time of the Federal Circuit Court’s orders would have entitled the Minister to approximately $7,200 in costs. The Minister sought, and was awarded, $4,600 in costs. In the circumstances there is no basis for assessing the amount of the costs order as disproportionate or excessive. It can be accepted that to the appellant it is a very considerable amount of money indeed, and it can also be accepted that the appellant considers he has no capacity at all to pay such an amount. However, neither of those factors renders the order of the Federal Circuit Court unlawful or affected by an appellable error.

# Conclusion

1. The appeal must be dismissed. There is no basis for anything but the usual order as to costs.

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| I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 20 April 2020