FEDERAL COURT OF AUSTRALIA

ELR18 v Minister for Home Affairs [2019] FCA 1583

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| Appeal from: | *ELR18 & Anor v Minister for Home Affairs & Anor* [2019] FCCA 251 |
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| File number: | NSD 267 of 2019 |
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| Judge: | **SNADEN J** |
|  |  |
| Date of judgment: | 1 October 2019 |
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| Catchwords: | **MIGRATION** – protection visa – appeal from a decision of the Federal Circuit Court of Australia (“**FCCA**”) – judgment of the FCCA delivered *ex tempore* – *ex tempore* reasons were not interpreted – written reasons of FCCA not published until after expiration of appeal period to this court – application for judicial review of a decision of the Administrative Appeals Tribunal – decision by the first respondent refusing applications for protection visas – whether the Tribunal decision was a product of jurisdictional error – whether the FCCA failed to afford the appellants procedural fairness – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36, 412*Federal Court Rules 2011* (Cth) r 36.03  |
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| Cases cited: | *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170*CQX18 v Minister for Home Affairs* [2019] FCAFC 142*DKX17 v Federal Circuit Court of Australia* [2019] FCAFC 10*House v R* (1936) 55 CLR 499*Maere v Minister for Home Affairs* [2018] FCA 1694*Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6*Sali v SPC Ltd* (1993) 116 ALR 625*SZQRU v Minister for Immigration and Citizenship* [2012] FCA 1234  |
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| Date of hearing: | 23 August 2019 |
|  |  |
| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 50 |
|  |  |
| Counsel for the Appellants: | The Appellants appeared in person with the assistance of an interpreter |
|  |  |
| Solicitor for the First Respondent: | Mr A Keevers of Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | NSD 267 of 2019 |
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| BETWEEN: | ELR18First AppellantELS18Second Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | SNADEN J |
| DATE OF ORDER: | 1 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants are to pay the first respondent’s costs, to be assessed or agreed.

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

REASONS FOR JUDGMENT

SNADEN J:

# BACKGROUND

1 The appellants—a married couple—are citizens of Nepal. On 30 March 2015 and 4 May 2015, the husband and wife, respectively, travelled to Australia, each holding a valid tourist visa. On 15 May 2015, they each made an application under the *Migration Act 1958* (Cth) (hereafter, the“**Act**”) for a protection visa (within the meaning attributed to that phrase by the Act). I shall refer to those applications collectively as, the “**Visa Application**”.

2 By a decision dated 21 January 2016, a delegate of the first respondent (hereafter, the “**Minister**”) rejected the appellants’ Visa Application. They applied to the second respondent (hereafter, the “**Tribunal**”) for a review of that decision under s 412 of the Act. On 31 July 2018, the Tribunal affirmed the decision of the delegate to refuse the appellants’ Visa Application (that decision is referred to, hereafter, as the “**Tribunal Decision**”).

3 In support of their Visa Application, both appellants claimed that, if removed from Australia back to Nepal, they would (or there was a real or significant chance that they would) be subjected to persecution or harm of a kind or kinds in respect of which the Act conditions the grant of protection visas.

4 In the case of the first appellant, the wife, that likelihood of persecution or harm was said to arise by reason of the following circumstances, namely:

(1) her former marriage to a man who was abusive and overbearing, and by whom she claims to have been slandered, made the subject of false rumours (including that she is a prostitute and a brothel madam) and publicly harassed;

(2) attempts made by people connected to her former husband (including—and perhaps constituted only by—members of his family) to harm her, apparently on account of the fact that she hails (or hailed) from a caste different to that from which her former husband hailed;

(3) the likelihood that her former husband or his associates (including family associates) will subject her to physical and mental “torture”;

(4) the verbal harassment to which family associates of the second appellant (her husband) have subjected her, again apparently on account of the fact that she is not from the same social caste as he is; and

(5) the financial difficulties to which her husband, the second appellant, has become subject (about which more is said below).

5 In the case of the second appellant, the husband, the likelihood of that persecution or harm is said to arise predominantly as a product of the financial predicament into which he had descended with Maoist loan sharks prior to his arrival in Australia. In the Tribunal Decision, the Tribunal summarised the second appellant’s claim in that respect as follows:

23. [The second appellant] claims he met [R], a businessman like himself, who came from his home district and, like him, moved to Kathmandu. He claims [R] had profited from the laundering of ill-gotten gains accumulated by the once-outlaw Maoists, prior to their being brought into the democratic political process in Nepal. He claims [R] convinced him to build his business with money from a Maoist source. He claims he went into the deal prepared to pay a minimum of 15% interest or 50% of his profits, whichever was the greater sum. He claims he also understood at the time of entering into the arrangement that the Maoists would kill him if he defaulted on any of the arrangements. He claims he agreed because he saw this as an “ample opportunity”.

24. [The second appellant] claims he never met any Maoists. He claims that [R] dealt directly with them on his own. He said his personal agreement was with [R] only and that it was purely an oral agreement. He claims he never signed any undertaking. He claims he bought and sold vehicles and land, dealt solely in cash and did not register any of these businesses. Essentially according to what he clams, there is no material evidence to support his claims about ever having set up a business on f[u]nds borrowed from or through [R].

25. [The second appellant] claims his business went well and that he was able to meet the conditions of the loan/investment until his own bank tightened his home loan. He said that returns on his land investment dropped and the strain affected his first “marriage”, an unregistered relationship that later collapsed. He claimed he later met and married [the first appellant] and registered their marriage.

26. [The second appellant] claimed in his protection visa application that the problems with his land investments led him to focus more on his vehicle-selling business which improved. He claimed, however, that he was losing more money because loans he provided and investments he made went bad due to his clients defaulting and absconding on him. He claims he launched and won a court case to recover debts but was unable to recoup anything because his debtor had disappeared. [H]e provided untranslated evidence of this case, and although it is not translated, I accept that there was just such a court case that went in his favour and that the judgment was essentially moot because the debtor could not be located. [The second appellant] claims that repayment cheques from another debtor repeatedly bounced. He provided the Tribunal with credible and satisfactory evidence of this problem.

27. [The second appellant] claims that [R] passed to him threats from the Maoist lender to pay or die. He claims that [R] was only the messenger and that the situation was difficult for him as well. He claims that in December 2012 a group of masked men kidnapped him from his home and held him for three days of beatings and other harassment. He said they gave him five weeks to pay what he owed or be killed. He claims they demanded and confiscated his and [the first appellant]’s passports. He claims he and [the first appellant] were able to obtain replacement passports which they used for visa-free overland escape into India. He says he chose the town of Jogmani in India as it was near where he lived and worked, enabling him to use his mobile telephone service to try further to recall debts owed to him, the better to repay the Maoist lenders. He claims [R] later called him in Jogmani to say that he, [R], had been caught by the Maoist lenders and threate[ne]d.

28. At the Tribunal hearing, [the second appellant] claimed that [R] was his “middle man”. In later evidence he said that [R] too was a Maoist, but this claim struck me as being inconsistent with claims to the Department and at the hearing about [the second appellant] never having personally met any Maoists. [The second appellant] did not resolve the apparent discrepancy when I raised it with him. He did, however, confirm that he and [R] had no written records of their end the [*sic*] transactions described in this matter. Meanwhile, [the second appellant]’s claim about the Maoists catching [R], with whom [the second appellant] lost contact, suggests that they did not regard [R] as one of their own but, rather, as an independent entity.

29. [The second appellant] claims he and [the first appellant] stayed a further two months in Jogmani. I note again that that [*sic*] they resided a year in New Delhi. I put to [the second appellant] that, looking at his evidence overall, neither he nor [the first appellant] were harmed in India. He said this was because he and [the first appellant] hid themselves, scared of their own shadows, as he put it, and never went outside. However, I note that he claimed in his protection visa application that after [R] was allegedly caught, and during the next two months in Jogmani, he and [the first appellant] observed that they were being followed and monitored by some Nepalese people including one person who, as mentioned above, he recognised individually as a Maoist youth leader.

30. Seeming to contradict this at the Tribunal hearing, [the second appellant] did not claim to have seen any people following him. He did not claim to have had any encounter with the alleged Maoist youth leader either. Instead, he merely speculated on what might have happened had he been monitored by them: “If they find me, they would kill me.” He said he avoided being spotted due to hiding in Jogmani with [the first appellant]. When I put to him that he had previously made claims about being followed and personally monitored by Maoists specifically including one who he recognised from Nepal, he said he had merely been “paranoid”, which I took to mean that he had been fearful in Jogmani without actually being followed or monitored, let alone by anyone he recognised. Again I put to [the second appellant] that he had claimed to the Department that the Maoist youth leader had located him. In reply, he said he saw the Maoists but, essentially, they did not see him, or else they would not have let him go. I reminded him that he had claimed that the Maoists had been following and monitoring him: this was a claim to the effect that they were aware of him and some of his movements in Jogmani. In response, [the second appellant] said they did not see him. I asked him then to say whether it was true or false that they were following and monitoring him and he said, “I feel they were.” On the evidence before me, [the second appellant]’s claim about having been located in India by or on behalf of his “Maoist” creditors/investors, including the reference to the Maoist youth leader, is false and unreliable. I give it no weight.

6 Ignoring, for the time being, the Tribunal’s own commentary (including for example, the opening words of [30]), the above is a fair summary of what the second appellant claimed in support of his Visa Application. Additionally, he claimed that he was at risk of relevant harm because of his marriage to the first appellant, who is his second wife and who is, by background, of a different caste.

# THE TRIBUNAL DECISION

7 The Tribunal did not accept that the circumstances that the appellants advanced—or such of them as it was minded to believe—were sufficient to warrant that they be granted protection visas. With the exception of her claims based on her husband’s borrowings (about which more is said below), and about her treatment at the hands of her husband’s and ex-husband’s families and associates, the Tribunal accepted as true—which is to say that it believed that there existed—the circumstances that the first appellant advanced in support of her Visa Application (above, [4]). It did not, however, accept that any of those circumstances individually, or any combination of them collectively, gave rise to a genuine prospect that the first appellant would face a real chance of physical or mental harm, or any other form of harm sufficient to qualify her for a grant of a protection visa.

8 Insofar as concerned the second appellant, the Tribunal made the following findings:

41. I accept that [the second appellant] was previously legally married and divorced before he married [the first appellant] in 2009. I accept that they are of different castes. I am not satisfied on the evidence before me that [the second appellant] faces a real chance of being persecuted in Nepal, either directly or indirectly, for reasons of marrying [the first appellant], or for reasons of entering into a second marriage, or for reasons of marrying a woman of a different caste, or for any other reason involving inferences about their relationship.

42. I accept that [the second appellant] is owed money from people to whom he previously lent and in whom he invested. I accept that the courts intervened, and I accept that they found for [the second appellant] in what was a moot victory for him because his debtors have disappeared (conceivably, for example, to India). I am not satisfied that [the second appellant] faces a real chance of being persecuted for a reason cited in s.5J(1)(a) of the Act due, either separately or cumulatively, to his predicament as a disaffected lender/investor.

43. [The second appellant] claims, as noted[,] that his inability to be repaid affects his ability to pay. Relevant to this, it seems reasonable to observe, his claims about borrowing money from people he did not know or meet, with only verbally-agreed terms through an intermediary, strikes me as implausible, not least since he provided evidence of the way he does business in matters financial: knowing his clients and contracting in writing to record amounts to be transferred and repaid. On the evidence before me, it seems out of character for [the second appellant] to be distracted by the amount offered into borrowing on the terms and in the circumstances claimed. It may conceivably be that he has different ways of operating, depending on whether he is parting with his money to help others and others are parting with their money to help him, but it still strikes me as incongruous that [the second appellant] did not engage in a more secure and accountable arrangement when he purportedly borrowed money to grow his vehicle and real estate businesses.

44. In any event, I accept that [the second appellant] borrowed money through the man identified as [R] and I am prepared to proceed on the basis of accepting that the loan was from a “loan shark” individual or syndicate. However, as to [R] being a middle-man between Maoist lenders/investors and [the second appellant], I have difficulty accepting that Maoists have anything to do with this case at all.

45. Whereas [the second appellant] gave a quite plausible account of how Maoists, after co-option into the democratic process, continued to launder money through investments and loans, he has been inconsistent in his evidence as to whether he ever had any direct contact with any Maoists themselves. Initially he claimed that he had no direct contact whatsoever. He told me he made no deals with them. As noted, he said he made all his agreements with [R], and none of them on paper. He argued that [R] was somewhat of a buffer between himself and the Maoists who he did not ever meet. However, when I questioned how [R] had survived so long, considering he was purportedly the only person in this matter with whom the Maoists ever dealt, [the second appellant] said that [R] too was a Maoist, which assertion directly contradicted all of his foregoing evidence about his indirect relationship with the Maoists.

46. [The second appellant]’s claim about never having had any direct contact with the Maoists appears somewhat contradicted by the direct contact he claims to have had during his claimed abduction and interrogation in 2012, as he claims his abductors were solely concerned with the money lent to him.

47. Meanwhile, [the second appellant] gave inconsistent evidence, over time, about the presence and actions of Maoists in Jogmani. He gave self-contradicted evidence about having seen Maoists, including a known Maoists youth leader, following and monitoring him in Jogmani. He did not resolve whether he saw them, and saw them following him, or just feared (using the “paranoid” expression) that they could come after him in India.

48. I can accept that [the second appellant] left for India, and took [the first appellant] with him, in order to avoid the problem of not being able to repay debts in Nepal. I can also accept, having regard to the documents tendered at the Tribunal hearing, that [the second appellant] has tried unsuccessfully to recoup loans and investments [h]e made in respect of others. I can thus accept that being a disaffected creditor of sorts has exacerbated [the second appellant]’s predicament with his own lenders. However, on the contradictory evidence before me, I do not accept that [the second appellant]’s creditors/investors were Maoists or Maoist-backed. Also, in view of the inconsistencies in [the second appellant]’s evidence, I am not satisfied that he was abducted in December 2012 and given five weeks, under threat of serious harm, to repay monies either lent to or invested in him.

49. Whether or not the lenders/investors in this case were Maoists is a significant factor in the harm [the second appellant] claims to fear. This is because [the second appellant]’s claims about the real chance of suffering harm relies significantly on the Maoists having wide-ranging social and political networks as well as unscrupulous methods of expressing and maintaining power.

50. On the evidence overall, I am not satisfied that [the second appellant] borrowed from Maoists. However, as noted, I am prepared to accept that he entered into an arrangement with a loan shark or loan shark syndicate.

51. That said, I am not satisfied that [the second appellant]’s claimed fears involve any of the five factors cited in s.5J(1)(a) of the Act. His claims relate purely to individual criminal and mercenary circumstances.

52. I find on evidence provided by [the second appellant] that the Nepalese authorities are willing and able to arbitrate in matters of bad debts. I also find on the evidence before me that the authorities are also willing and able to protect Nepalese society from the unscrupulous actions, demands and terms of loan sharks in Nepal...

53. On the evidence overall, I am not satisfied that [the second appellant] faces a real chance of being persecuted in Nepal in the reasonably foreseeable future, let alone for any of the five reasons cited in s.5J(1)(a) of the Act.

54. I am also not satisfied that [the second appellant] faces a real chance of being persecuted in Nepal for reasons involving [the first appellant]’s claimed concerns about caste, remarriage and imputed moral standing in Nepalese society.

55. For the reasons given above, I am not satisfied that [the second appellant] is a person in respect of whom Australia has protection obligations under s.36(2)(a).

9 The Tribunal went on to find, in light of those conclusions about the second appellant’s borrowings, that the equivalent or related concerns of the first appellant were also insufficient to warrant that she be granted a protection visa.

10 The Tribunal also considered whether the appellants satisfied the criteria for which s 36(2)(aa) of the Act provides. In light of the conclusions set out above, it concluded that they did not.

11 The Tribunal also considered the application of s 36(3) of the Act to the appellants’ circumstances. That consideration does not appear to arise in the present appeal, so it is not necessary here to set out the matters to which the Tribunal directed itself or the conclusions that it drew in that regard.

12 For those reasons, the Tribunal affirmed the decision of the delegate not to grant the appellants’ Visa Application.

# APPLICATION FOR JUDICIAL REVIEW AND THIS APPEAL

13 Having failed to convince the Tribunal that it should overturn the delegate’s decision to refuse their Visa Application, the appellants commenced an action in the Federal Circuit Court of Australia (hereafter, the “**FCCA**”) for orders in the nature of certiorari and mandamus, by which they sought to have the Tribunal Decision quashed and the Visa Application remitted back to the Tribunal for determination according to law. That application (hereafter, the “**FCCA Application**”) alleged that the Tribunal Decision was, in a number of respects, the product of jurisdictional error.

14 It appears that the appellants were legally represented when their FCCA Application was filed (on 23 August 2018). However, that representation was withdrawn on 21 December 2018. It is not clear whether a hearing had, by that point, been scheduled (although it seems likely that one would have been). Regardless, the application was the subject of a hearing on 6 February 2019. Upon its commencement, the appellants sought an adjournment to allow them to seek alternative legal representation. That indulgence was declined and the matter proceeded. Immediately upon its conclusion, the court delivered an *ex tempore* judgment, by which the appellants’ application was dismissed with costs (the “**FCCA Judgment**”).

15 On 25 February 2019, the appellants commenced this appeal. At that point, no written reasons for the FCCA Judgment had been published. It appears that they were prepared and published—and provided to the appellants—on or about 8 March 2018, after the expiry of the 21-day period (as it then was) within which the appeal was required to be filed (see *Federal Court Rules 2011* (Cth), r 36.03).

16 The appellants charge the FCCA with error in three respects, namely that:

1. His Honour failed to consider the Appellants[’] request to adjourn the matter, so that the Appellants may seek legal representation.

2. The Appellants were denied procedural fairness.

3. His Honour did not provide reasons for his decision…

Only the third ground was particularised: the appellants cited that “[h]is Honour’s judgment/decision was not published on the internet or on the Commonwealth Courts Portal.”

17 As can be seen, the grounds that the appellants press now are not of the kind with which this court is usually confronted in appeals of this nature. With the exception of the second ground (the intended effect of which is expanded upon below), they do not charge the FCCA with having erred by its failure to impugn the decision of the Tribunal as the product of jurisdictional error. Instead, they charge the FCCA with having failed to afford the appellants the measure of procedural fairness to which they were entitled in prosecuting their FCCA Application.

18 Except insofar as concerns the FCCA’s decision not to grant the adjournment that the appellants sought, it is not necessary to explore why it was that the FCCA decided as it did; that is to say, there need not here be set out a summary as to why the FCCA took the view that the Tribunal Decision was untainted by jurisdictional error.

19 Instead, what is primarily required is an analysis of the hearing that the appellants were afforded in the FCCA. I turn, then, to each of the appeal grounds individually.

# GROUND 1—THE ADJOURNMENT

20 By ground 1 of their appeal, the appellants contend that the FCCA erred by its “fail[ure] to consider” their request for an adjournment.

21 The written reasons published in support of the FCCA Judgment (hereafter, the “**FCCA Reasons**”) record why it was that the FCCA determined not to grant the appellants an adjournment. In short, the court considered (FCCA Reasons, [20]-[21]):

(1) that the appellants had had ample opportunity to secure alternative representation after 21 December 2018 (when their initial lawyer withdrew);

(2) that there was little reason to think that the appellants would secure alternative representation if an adjournment were granted;

(3) the appeal lacked substantive merit in any event; and

(4) it was not in the interests of the administration of justice that an adjournment be granted.

22 Plainly, the FCCA did consider the appellant’s adjournment application. Not only was it considered, it was ruled upon. The appellants’ complaint, obviously enough, is that it wasn’t ruled upon in the manner that they hoped it would be. I proceed on the basis that, by their first ground of appeal, the appellants should be understood to complain not that their application for an adjournment wasn’t considered, but that it should have been granted (and that the court’s failure to grant it amounts to appellable error, presumably in the form if an impermissible denial of procedural fairness). It is apparent from his written submissions that the Minister anticipated that the first ground might proceed on that basis. He addressed the ground from that angle (sensibly, if I might say so).

23 The FCCA’s decision not to adjourn the hearing before it involved, obviously enough, an exercise of procedural discretion. To succeed in their challenge to it, the appellants would need to establish that the court’s discretion to grant or not grant it miscarried in any one or more of the ways famously outlined in *House v R* (1936) 55 CLR 499 (“***House v R***”), 504-505 (Dixon, Evatt and McTiernan JJ), namely:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

24 Before me, the appellants were unable to identify any such miscarriage. It was evident from my exploration of the issue with them that their complaint, simply enough, is that the FCCA ought to have granted the adjournment that they sought. One might well understand why they take that view; but that submission falls well short of what they would need to establish in order to challenge the outcome to which their first ground of appeal is directed.

25 In *DKX17 v Federal Circuit Court of Australia* [2019] FCAFC 10, Rangiah J (with whom Reeves and Bromwich JJ agreed), considering a trial judge’s refusal to grant an adjournment in a matter not dissimilar to what confronted the FCCA in this case, observed (at [83]):

An adjournment is not granted merely for the asking. Wider issues are at play, even if they were not expressly referred to by the trial judge. As Toohey and Gaudron JJ observed in *Sali v SPC Ltd* (1993) 67 ALJR 841 at 636:

The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales. The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard.

The trial judge must have been conscious that if an adjournment was granted, the time set aside for the hearing would be wasted and another hearing date would have to be found. The Minister had engaged a legal representative for the hearing and was ready to proceed. It is true that allowance must be made for the disadvantages faced by self-represented applicants, particularly those whose first language is not English. However, in circumstances where the appellants had adequate time to seek legal advice, but had delayed in doing so for reasons they did not explain, it was open to the trial judge to give little weight to the mere possibility that they might find an arguable ground.

26 I would add only that a decision not to grant an adjournment, like any other procedural matter, is one with which appellate courts ought not lightly to interfere, and one ordinarily best left to the court seized of the proceeding: *Sali v SPC Ltd* (1993) 116 ALR 625, 632 (Toohey and Gaudron JJ, dissenting, but not on this point); *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177 (Gibbs CJ, and Aickin, Wilson and Brennan JJ), 180 (Murphy J).

27 I do not accept that the FCCA’s decision to refuse the appellants an adjournment of the hearing before it involved any error in the *House v R* sense. The appellants’ first ground of appeal must, therefore, fail.

# GROUND 2—DENIAL OF PROCEDURAL FAIRNESS

28 Ground 2, although wholly unparticularised in the notice of appeal, was the subject of exploration at the hearing. The Minister—again sensibly, if I might say so—raised no objection to the court’s attempts to erect some flesh upon what was otherwise that skeletal contention.

29 The first issue so explored was the forum by which the appellants felt that they were denied procedural fairness. That charge, so they explained, was levelled at both the Tribunal and the FCCA.

30 Insofar as concerned the hearing before the Tribunal, a similar ground—that the Tribunal had denied them procedural fairness—was advanced before the FCCA. The court dealt with it somewhat summarily as follows (FCCA Reasons, [31]):

In relation to ground 5, on the face of the material before the Court, the applicants were properly invited to attend a hearing to give evidence and present arguments. On the face of the material before the Court, the applicants had a real and meaningful hearing. On the face of the material before the Court, including the Tribunal’s reasons, the applicants had a real and meaningful opportunity to address the issues in respect of their claims and the concerns of the Tribunal. There is no basis to find that there was any denial of procedural fairness in the conduct of the review by the Tribunal. Further, no breach of s 425 of the *Act* is made out. No jurisdictional error as alleged in ground 5 is made out.

31 The FCCA Reasons don’t disclose any attempt by that court to explore the particulars of the denial that was alleged (both then and now). That, of course, is not to conclude that no such attempt was made, nor even that one was required (although, given that the appellants were self-represented, it would usually be expected that there would be at least some attempt by the court to elicit some meaningful detail about the nature of the otherwise wholly unparticularised complaint). Nonetheless, it’s not apparent from the FCCA Reasons what the specifics of the appellants’ complaint were.

32 That being so, the appellants were invited to identify them by way of submission at the appeal hearing (again, with no objection from the Minister). Despite some persistence from the court, the appellants were not able to say why it was that they felt that their hearing before the Tribunal was procedurally unfair, save and except for the fact that what they told the Tribunal was largely not believed. They did not, for example, charge the Tribunal with having pre-determined their application, or having wilfully ignored the contentions that they advanced, or having adjudged their Visa Application with a mind not open to persuasion or with some other bias against them. They simply felt that it should have accepted the narrative that they advanced before it. One can well understand why they are disappointed by the outcome of the hearing before the Tribunal; but nothing that they advanced before me suggests that the hearing that they were afforded was anything other than what it should have been, procedurally. That being so, there is no apparent error in the conclusion of the FCCA that the appellants were not denied procedural fairness before the Tribunal.

33 I turn next to consider the contentions advanced in respect of the hearing before the FCCA. The appellants, before me, advanced a number of complaints concerning the manner in which the hearing before the FCCA was conducted, specifically that:

(1) the appellants were forced to appear at the hearing without representation;

(2) the appellants felt that they should have been granted an adjournment to obtain legal representation;

(3) the learned judge’s questions were directed primarily (and, possibly, solely) to the second appellant; and

(4) there were some difficulties with their interpreter, including that he or she appeared by telephone (whereas the appellants appeared in person) and did not interpret the court’s reasons when they were delivered.

34 The first of those contentions, however regrettable, does not amount to a denial of procedural fairness. The proceeding before the FCCA was civil in nature. The appellants were not entitled to legal representation as of right and the affording of procedural fairness did not require that they should have had any: *SZQRU v Minister for Immigration and Citizenship* [2012] FCA 1234 (Katzmann J); *Maere v Minister for Home Affairs* [2018] FCA 1694, 8 (Bromberg J).

35 The second of those contentions is already addressed above and requires no elaboration.

36 The third contention is, with respect, not material. The fact that the judge’s questions focused upon the second appellant (the husband) is not a matter that suggests some want of procedural fairness. The second appellant’s borrowings were, on any view, at the centre of both appellants’ claims. It is neither surprising nor of any moment that the FCCA’s questions might have focused upon that issue (or upon him, as the party chiefly relevant to it). It is to be borne in mind, of course, that the court below was not obliged to ask *any* questions (although, given that the appellants were self-represented, it is to be hoped that it might ask at least some). This circumstance does not indicate that the hearing before the FCCA was, in any way, procedurally unfair.

37 The final contention is more problematic. Again, it required some exploration at the appeal hearing (to which, again and sensibly, the Minister did not object). Two concerns arise immediately from what the appellants said about the availability and nature of the interpretation service that was provided for the purposes of the hearing before the FCCA: the first concerned why it was that the interpreter was not present with the appellants in court; the second concerned why it was that the interpreter did not interpret the court’s reasons when they were delivered.

38 The first concern is explicable. When they filed the FCCA Application, the appellants were legally represented. Their application to the FCCA indicated that the appellants did not require an interpreter. In December 2018, the appellants’ legal representative withdrew from their application and, thereafter, they self-represented. They did not, it seems, take any steps to indicate that they would require an interpreter for the purposes of the hearing that took place on 6 February 2019. That should not be understood as a criticism—of them or anybody else. It is to the FCCA’s credit that it appears that it was able to source and deploy a Nepali interpreter as quickly as it was. The fact that that resource appeared by telephone was less than optimal; but so, too, would have been the alternative course of adjourning the application off for hearing on another day.

39 Save for the fact that their interpreter appeared by telephone, the appellants did not, before me, identify any interpretation irregularities by which their hearing before the FCCA was tainted. They did not suggest, for example, that the interpreter misinterpreted anything or otherwise failed to “…place the non-English speaker as nearly as possible in the same position as an English speaker”: *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6, 18 [24] (Kenny J).

40 I do not accept that the appearance of an interpreter by telephone amounts to the appellants having been denied procedural fairness (such that the FCCA Judgment might be impugned as the product of appellable error).

41 The second issue is more concerning. The appellants, for obvious reasons, were not able to say why it was that the interpreter in the FCCA proceeding did not interpret the court’s *ex tempore* judgment. They did not know, for example, whether he or she was directed not to (see, by way of comparison: *CQX18 v Minister for Home Affairs* [2019] FCAFC 142 (“***CQX18***”) (Allsop CJ, Perry and Gleeson JJ)). It, of course, ought to have been clear to the FCCA that its reasons should be conveyed in a manner that the appellants could understand. That that appears not to have occurred is grounds for some concern. However, for the reasons set out in respect of the appellants’ third appeal ground, that concern does not rise to the standard of appellable error.

42 As they did with respect to the hearing before the Tribunal, the appellants ultimately retreated on this ground to what, in truth, was their real concern: the denial of procedural fairness that they alleged arose chiefly from the fact that the court did not accept their narrative, or otherwise did not afford them the relief that they sought. With respect, that is not a denial of procedural fairness.

43 It follows that the appellants’ second ground of appeal was not made out.

# GROUND 3—FAILURE TO PROVIDE REASONS

44 The appellants’ third ground of appeal charges the FCCA with having failed to provide reasons for the FCCA Judgment. That charge cannot, in those terms, be sustained. The FCCA gave oral reasons for its *ex tempore* judgment. 30 days later, it published the FCCA Reasons (including on the internet, in particular on the FCCA’s website). The appellants acknowledged before me that they received a copy of those reasons by post.

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).

46 In the present case, the delay in the provision of written reasons was not as pronounced as the one upon which the full court in *CQX18* commented. Further and more significantly, the appellants received the FCCA 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.

47 Having received the FCCA 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 FCCA failed, it is difficult to see how an indulgence either way might reasonably have been denied. But, as history records, none was requested.

48 The appellants were, then—even in the face of the delay that they endured and the non-translation of the FCCA’s *ex tempore* judgment—in no worse position than they would have been in had the FCCA reserved its judgment and ruled on their application when its written reasons were ready for publication. In those circumstances, I do not accept that the FCCA failed to provide reasons for its decision (plainly, in did), nor that its delay in doing so amounts to appellable error.

49 The appellants’ third ground of appeal also fails.

# CONCLUSION

50 None of the appellants’ grounds of appeal is made out. The appeal must and will, therefore, be dismissed with costs.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Snaden. |

Associate:

Dated: 30 September 2019