FEDERAL COURT OF AUSTRALIA

ELA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 230

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| Appeal from: | Application for leave to appeal: *ELA18 v Minister for Home Affairs (No 2)* [2020] FCA 782  Application for extension of time and leave to appeal: *EEZ18 v Minister for Home Affairs* (Federal Court of Australia, NSD 234/2019, Orders dated 30 April 2020)  *BBE15 v Federal Circuit Court of Australia* [2020] FCA 965 |
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| File numbers: | NSD 670 of 2020  NSD 781 of 2020  NSD 870 of 2020 |
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| Judgment of: | **BESANKO, FLICK AND PERRY JJ** |
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| Date of judgment: | 22 December 2020 |
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| Catchwords: | **MIGRATION** – protection visa applicants  **ADMINISTRATIVE LAW** –disclosure of information in reasons for decision of primary Judge – whether disclosure of unnecessary information without inviting submissions from party affected constitutes a denial of procedural fairness – where information once disclosed may found a claim for protection  **PRACTICE AND PROCEDURE** –the re-listing of applications once dismissed – the making of supplemental orders – jurisdiction of the Court to make orders for the suppression of information disclosed in reasons – the recalling of a judgment  **ADMINISTRATIVE LAW** — appeal from an order made by the Federal Court of Australia dismissing an application by the appellant for declarations that the Federal Circuit Court of Australia made an error of law in failing to afford procedural fairness to the appellant in that the Court disclosed personal information about the appellant in its reasons for judgment and had acted in breach of s 91X of the *Migration Act 1958* (Cth) — whether the appellant’s complaint was in reality one of substantive unfairness rather than procedural unfairness — whether the declaration sought would resolve a real controversy regarding the legal rights and liabilities of the parties — whether the declaration sought would have foreseeable consequences for the parties — the significance of the declaration sought to a request for ministerial intervention under s 48B of the Migration Act — whether there is error in the primary judge’s decision with respect to s 91X of the Migration Act — where there is no ongoing breach of s 91X of the Migration Act — appeal dismissed — application to the Full Court for suppression orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) — where no detailed submissions were filed in support of application — where similar or related orders were refused by the primary judge and no appeal is brought from primary judge’s decision |
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| Legislation: | *Federal Circuit Court of Australia Act 1999* (Cth) s 88G  *Federal Court of Australia Act 1976* (Cth) ss 24, 25, 27, 37AE, 37AF, 37AG, 50  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth) ss 46A, 48A, 48B, 65, 91X, 195A, 197AB  *Federal Court Rules 2011* (Cth) r 35.13 |
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| Cases cited: | *Abebe v The Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510  *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564  *Ashby v Slipper (No 2)* [2016] FCA 550; (2016) 343 ALR 351  *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584  *AZAFH v Minister for Immigration and Border Protection* [2016] FCA 1363  *BBE15 v Minister for Immigration and Anor* [2016] FCCA 2281  *BBE15 v Minister for Immigration and Border Protection* [2017] FCA 111  *Bromby v Offenders’ Review Board* (1990) 51 A Crim R 249  *C7A/2017 v Minister for Immigration and Border Protection (No 2)* [2020] FCAFC 70  *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224  *Chau v Director of Public Prosecutions* (1995) 127 FLR 404  *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)* [2009] FCA 498  *Commonwealth v McCormack* [1984] HCA 57; (1984) 155 CLR 273  *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* [2012] FCA 141  *EAU17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2086  *EEZ18 v Minister for Home Affairs* [2019] FCA 959  *EEZ18 v Minister for Home Affairs* [2019] FCCA 178  *ELA18 v Minister for Home Affairs* [2019] FCA 1482  *ELA18 v Minister for Home Affairs* [2019] FCCA 213  *ELA18 v Minister for Home Affairs* [2020] HCASL 18  *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421  *Francuziak v Minister for Justice* [2015] FCAFC 162; (2015) 238 FCR 332  *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180  *Heavener v Loomes* [192] HCA 10; (1924) 34 CLR 306  *House v The King* (1936) 55 CLR 499  *Johnston v Cameron* [2002] FCAFC 251; (2002) 124 FCR 160  *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550  *Minister for Immigration and Ethnic Affairs v Ozmanian* (1996) 71 FCR 1  *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475  *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41; (2010) 243 CLR 319  *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636  *The Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2)* [2020] FCAFC 44; (2020) 275 FCR 377  *WZAUP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 116 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 131 |
|  |  |
| Date of hearing: | 4 November 2020 |
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| **NSD 670 of 2020** |  |
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| Solicitor for the Applicant: | Mr D Taylor of Sydney West Legal and Migration |
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| Counsel for the First Respondent: | Mr P M Knowles with Ms A Poukchanski |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
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| **NSD 781 of 2020** |  |
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| Counsel for the Appellant: | Mr J F Gormly |
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| Solicitor for the Appellant: | Mr D Taylor of Sydney West Legal and Migration |
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| Solicitor for the First Respondent: | The First Respondent filed a submitting notice save as to costs |
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| Counsel for the Second Respondent: | Mr P M Knowles with Ms A Poukchanski |
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| Solicitor for the Second Respondent: | Sparke Helmore |
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| **NSD 870 of 2020** |  |
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| Solicitor for the Applicant: | Mr D Taylor of Sydney West Legal and Migration |
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| Counsel for the First Respondent: | Mr P M Knowles with Ms A Poukchanski |
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| Solicitor for the First Respondent: | Mills Oakley |
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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 670 of 2020 |
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| BETWEEN: | ELA18  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | BESANKO, FLICK AND PERRY JJ |
| DATE OF ORDER: | 22 DECEMBER 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 *Notice of Objection to Competency* filed on 26 June 2020 is upheld.

3. The proceeding is dismissed.

4. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

5. The Applicant is to pay the costs of the First Respondent, either as taxed or agreed.

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

ORDERS

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|  | | NSD 781 of 2020 |
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| BETWEEN: | BBE15  Appellant | |
| AND: | FEDERAL CIRCUIT COURT OF AUSTRALIA  First Respondent  MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Second Respondent | |

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| order made by: | BESANKO, FLICK AND PERRY JJ |
| DATE OF ORDER: | 22 DECEMBER 2020 |

THE COURT ORDERS THAT:

1. The Appellant have leave to file and serve the Second Amended Notice of Appeal.

2. The appeal is dismissed.

3. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

4. The Appellant is to pay the costs of the Second Respondent, either as taxed or agreed.

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

ORDERS

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|  | | NSD 870 of 2020 |
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| BETWEEN: | EEZ18  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | BESANKO, FLICK AND PERRY JJ |
| DATE OF ORDER: | 22 DECEMBER 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 *Notice of Objection to Competency* filed on 20 August 2020 is upheld.

3. The proceeding is dismissed.

4. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

5. The Applicant is to pay the costs of the First Respondent, either as taxed or agreed.

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

REASONS FOR JUDGMENT

BESANKO AND PERRY JJ:

# ELA18 V MINISTER FOR BORDER PROTECTION AND CITIZENSHIP (NSD 670 OF 2020); EEZ18 V MINISTER FOR HOME AFFAIRS (NSD 870 OF 2020)

1 We have had the advantage of reading the reasons for judgment of Flick J with respect to the respective applications made by ELA18 and EEZ18. We agree with the orders that his Honour proposes with respect to the disposition of each of those applications and, subject to what follows, we agree with the substance of his Honour’s reasons for reaching the conclusions that he has. We would not go as far as his Honour has in paragraph 113 and, to the extent paragraph 127 is informed by the observations in paragraph 113, paragraph 127. First, whilst we have no difficulty with the proposition that judges should avoid, as far as possible, needlessly disclosing personal information that may identify the applicant in a case to which s 91X of the *Migration Act 1958* (Cth) applies, it seems to us far more contestable to say (if it is being said) that a judge should avoid referring to information that is part of his or her reasoning in the normal course. Secondly, we are not presently convinced that there is any obligation on a judge (in many cases unassisted by the parties) with respect to information which “falls short” of, in the sense of does not satisfy, the ground in s 37AF(1)(a) of the *Federal Court of Australia Act 1976* (Cth) of “information tending to reveal the identity of or otherwise concerning any party to … a proceeding”. Finally, and relatedly, whilst judges should be mindful of the possibility of information being collated in a way that identifies the applicant, it should at the same time be recognised that there are endless ways information might be collated and the vital piece of the puzzle might differ from one case to another. For example, the vital piece in one case might be the precise date of arrival in Australia, whilst in another because of other information, the year of arrival might be enough. A fear that information may be collated in a particular way (unknown to the Judge) should not inhibit the provision of reasons which clearly expose the essence of the judge’s reasoning process.

# BBE15 V FEDERAL CIRCUIT COURT OF AUSTRALIA (NSD 781 OF 2020)

2 We have reached the conclusion that the appeal in BBE15 should be dismissed with costs. Our reasons follow.

# INTRODUCTION

3 This is an appeal from an order made by a judge of the Court. On 10 July 2020, the primary judge made an order that the Further Amended Originating application brought by BBE15 (the appellant) be dismissed. The respondents to that application were the Federal Circuit Court of Australia and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the Minister). The Federal Circuit Court filed a submitting appearance and the appeal was defended by the Minister. For convenience, we will refer to the Minister as the respondent. The appellant appeals to this Court against the primary judge’s order. In addition to the appeal, the appellant made a fresh or new “application” to this Court for suppression or non-publication orders under s 37AF of the Federal Court of Australia Act. The Court was advised that that application would be made the day before the hearing of the appeal when draft minutes of order seeking such orders were sent to the Court.

4 In his Further Amended Originating application, the appellant sought the following declarations:

2. Declaration that the Judge of the Federal Circuit Court of Australia who delivered the judgment *BBE15 v Minister for Immigration* [2016] FCCA 2281 (2 September 2016) made an error of law and failed to afford the applicant procedural fairness by publishing in the judgment information of the applicant’s date of birth and arrival in Australia which tended to reveal the applicant’s identity to the authorities of his country of origin of whom the applicant had made claims for protection.

...

4. Declaration that the publication by the Federal Circuit Court of the name of the applicant on the digital register known as the Commonwealth Courts Portal is in breach of s 91X *Migration Act 1958.*

The appellant’s appeal to this Court is against the primary judge’s refusal to make those declarations.

5 In his Further Amended Originating application, the appellant sought injunctions against the Minister, his officers and agents. The primary judge refused to grant injunctions and his decision in that respect is not the subject of the appeal. The appellant also sought orders under s 37AF of the Federal Court of Australia Act directed to the particular matters referred to in the reasons for judgment of the Federal Circuit Court and of this Court on appeal from the Federal Circuit Court which are identified below. That application was refused by the primary judge and the appellant does not appeal to this Court against his Honour’s decision in that respect.

6 On the appeal, the appellant sought to rely on a proposed Second Amended Notice of appeal. Leave to rely on that notice was not opposed by the Minister and leave was granted. The grounds of appeal are as follows:

1. The Court erred in failing to recognise as a basis for declaratory relief the procedural unfairness by the first respondent in publishing in its reasons for judgment the dates of birth and arrival in Australia of the appellant.

2. The Court erred in finding that the declaratory relief sought in respect of the claimed procedural unfairness was inappropriate.

3. The Court erred in holding that a breach of s 91X *Migration Act 1958* (Cth), would not be sufficient to warrant declaratory relief because s 91X gave rise to a duty of imperfect obligation.

7 The fresh or new application for suppression or non-publication orders under s 37AF of the Federal Court of Australia Act is for orders in the following terms:

1. Pursuant to s 37AF of the Federal Court of Australia Act 1976 (Cth) and on the grounds contained in s 37AG(1)(a) and (c):

a. the appellant be assigned a new pseudonym;

b. these proceedings and the proceedings in the Federal Circuit Court BRG543/2015 and PEG489/2018; and in the Federal Court QUD742/2016, NSD2080/2019 be assigned new proceedings numbers;

c. the judgments in each of the proceedings in the Federal Circuit Court BRG543/2015 and PEG489/2018 and in the Federal Court QUD742/2016, NSD2080/2019 (the said proceedings) be recalled and the judgments be republished using the appellant’s new pseudonym and the new proceeding numbers;

d. the publication or disclosure of the original pseudonym and the original proceedings numbers of these proceedings and the said proceedings in the Federal Circuit Court and the Federal Court is prohibited;

e. the following material be suppressed:

i. any material filed in these proceedings and the said proceedings in the Federal Circuit Court and in the Federal Court tending to identify the appellant.

ii. the pseudonym originally issued to the appellant or otherwise used by the appellant for the purpose of these proceedings and the said proceedings in the Federal Circuit Court and in the Federal Court.

iii. the original file numbers of these proceedings and the said proceedings in the Federal Circuit Court and the Federal Court.

We will deal with the appeal first and then with this application.

# THE BACKGROUND TO THE APPEAL

8 In late 2012, the appellant applied for a Protection (Class XA) visa under s 65 of the Migration Act. A delegate of the Minister refused his application. The appellant then lodged an application for a review of the delegate’s decision with the Refugee Review Tribunal (the Tribunal). The Tribunal decided to affirm the delegate’s decision not to grant a protection visa to the appellant. The appellant filed an application for judicial review of the Tribunal’s decision in the Federal Circuit Court (BRG543/2015). The appellant was represented before the Federal Circuit Court. The Court made an order in the proceeding on 2 September 2016 that the application be dismissed (*BBE15 v Minister for Immigration and Anor* [2016] FCCA 2281). In the Court’s reasons for judgment, the Court identified the appellant’s date of birth and the date upon which he arrived in Australia.

9 The appellant appealed against the order of dismissal made by the Federal Circuit Court to the Full Court of this Court. On that appeal, the appellate jurisdiction of the Court was exercised by a single judge (see Federal Court of Australia Act, s 25(1AA)). At that point, the appellant appeared in person. His appeal was dismissed on 16 February 2017 (*BBE15 v Minister for Immigration and Border Protection* [2017] FCA 111). In the reasons for judgment of this Court, the Court identified the appellant’s employer at a particular point in time.

10 In the early part of September 2018, the Minister began the process of arranging for the removal of the appellant from Australia. The appellant was placed on an aircraft, but then, as a result of an injunction granted by the Federal Circuit Court in what was a separate proceeding (PEG489/2018), the appellant was removed from that aircraft. A part of the appellant’s luggage was left on the aircraft and was subsequently left in his country of origin. In his evidence before the primary judge, the appellant identified the contents of that luggage.

11 Sometime later, the appellant’s solicitor discovered the fact that the respective reasons for judgment of the Federal Circuit Court and the Federal Court contained matters which he considered could be used to identify the appellant.

12 It seems that the appellant has made more than one application for Ministerial intervention. The precise sequence of events does not clearly emerge from the evidence. Doing the best one can on the material, it seems that an application for Ministerial invention was made at some point prior to 7 September 2018 and then refused on that date. A further application for Ministerial intervention was lodged on or about 18 September 2019. This application for Ministerial intervention was made under s 48B of the Migration Act and was accompanied by a request for a bridging visa under s 195A of the Migration Act or a community detention order.

13 In early November 2019, the appellant’s solicitor sent a request to the associate of the judge of the Federal Circuit Court who had determined his application for judicial review and a request to the associate of the judge of this Court who had heard the appeal therefrom that the respective judgments be amended to remove references to the appellant’s personal particulars. The reasons for judgment of the Federal Circuit Court were so amended, but no amendments were made to the judgment of this Court.

14 On 4 December 2019, these proceedings were commenced.

15 On 10 February 2020, the appellant’s then outstanding application for Ministerial intervention was refused.

16 On 24 February 2020, the appellant’s solicitor accessed the Federal law search page of the Commonwealth Courts Portal website to seek information concerning the appellant’s matter. He states that he accessed this page “as might any member of the public, that is, without being logged into the Commonwealth Courts Portal as a registered user”. He accessed a page showing the orders made in the proceeding in the Federal Circuit Court bearing the description, PEG489/2018. He then activated the “print orders” link on that page which took him to another page which showed the name and alias of the appellant in association with his court pseudonym, BBE15.

17 On 19 March 2020, the appellant withdrew his applications or requests for Ministerial intervention under ss 48B and 195A of the Migration Act. He asked for his application for a residence determination under s 197AB to be progressed.

18 There are guidelines for the consideration and exercise of the Ministerial intervention power in s 48B of the Migration Act and the guidelines which were current as at May 2020 were put before the primary judge. The purpose of the guidelines is said to be to explain the administration process for departmental officers receiving requests for consideration of the s 48B Ministerial intervention power. Section 48B(1) empowers the Minister if he or she thinks that it is in the public interest to do so, to determine that s 48A, which prevents a further application for a protection visa in the case where there has been a prior application and refusal, does not apply to a non-citizen making an application within the period specified in the subsection. The guidelines current as at May 2020 are detailed and contain, among other statements, the following statement:

The public interest may also be served by providing a way for new information or changed country conditions, in relation to persons who have previously been found not to engage Australia’s protection obligations, to be considered if there are exceptional and compelling circumstances. In these limited circumstances, the public interest is served by allowing those new claims to be assessed through a statutory process to ensure that Australia upholds its international non-refoulment obligations.

19 On 10 July 2020, the primary judge handed down his reasons for judgment and made the order which is challenged in this appeal (*BBE15 v Federal Circuit Court of Australia* [2020] FCA 965).

# GROUNDS 1 AND 2 OF THE APPEAL

20 It is convenient to deal with the first two grounds of appeal together. Both grounds focus on the primary judge’s conclusion that a declaration that the reasons of the Federal Circuit Court involved an error of law because they contained information about the appellant’s date of birth and date of arrival in Australia should not be granted.

21 The primary judge had a number of reasons for reaching that conclusion. As the appellant developed his arguments, Ground 1 of the appeal involved a challenge to his Honour’s conclusion that there was no procedural unfairness in the Federal Circuit Court publishing the appellant’s date of birth and date of arrival in Australia in its reasons for judgment. As developed, Ground 2 of the appeal involved a challenge to his Honour’s conclusion that the declaratory relief sought by the appellant was inappropriate on the basis that his Honour failed to take into account “the material consideration that the s 48B Guidelines were a decision of the Minister of the process for referring cases for his consideration”.

22 We start with a summary of the primary judge’s reasons with respect to these conclusions. His Honour said that he did not need to deal with a preliminary argument advanced by the Minister to the effect that the appellant’s claim for the declaration with respect to the information in the Federal Circuit Court’s reasons for judgment was an abuse of process because the appellant should have, but did not, raise his present complaints in the appeal to this Court from the orders of the Federal Circuit Court in 2017 and in either of the appellant’s two applications for special leave to appeal to the High Court of Australia. We are in a similar position in that we can determine the appeal without addressing this argument.

23 With respect to the appellant’s contention that the Federal Circuit Court had made an error of law or denied him procedural fairness, the primary judge said that the act of publishing the appellant’s date of birth and the date upon which he arrived in Australia did not contravene any statutory provision and, in particular, it did not contravene s 91X of the Migration Act which is limited to the publication of the person’s name. He referred in this context to *EAU17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2086.

24 The primary judge said that although there may be procedural fairness requirements on a court in relation to adverse findings the court is proposing to make, such as unfavourable findings as to credit, findings about a person’s date of birth and date of arrival in Australia are not adverse findings “in the relevant sense” (at [58]). Those factual matters do not relevantly affect any right or interest of the appellant and, in this context, his Honour referred to *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 (*Kioa v West*) at 616–617 per Brennan J and *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636 (*Plaintiff S10/2011*) at [66] per Gummow, Hayne, Crennan and Bell JJ.

25 His Honour also noted that in *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584 (*AVN20*) (at [113]), Kenny J said with respect to the appellant’s procedural fairness argument in that case (which her Honour summarised at [32]) that it could not succeed in the face of the unqualified prohibition in s 91X of the Migration Act. In other words, it is not a matter of being heard on whether or not s 91X is complied with.

26 The primary judge considered that the appellant’s complaint was, in effect, one of substantive unfairness rather than procedural unfairness. As we understood it, his Honour reached that conclusion because, although the appellant’s argument was one of unfairness, he (the appellant) did not suggest that he was entitled by reason of the rules of procedural fairness to see and comment on a *draft* of the Federal Circuit Court’s reasons for judgment.

27 His Honour said, absent an established legal error, there was no basis upon which to grant declaratory relief and he rejected the appellant’s argument that binding declarations of right do not require the identification of an antecedent right. He referred to the well-known authorities of *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421 at 436–438 and *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 (*Ainsworth*) at 581–582 to the effect that the purpose of a declaration is to resolve a real controversy regarding the legal rights and liabilities of the parties.

28 The primary judge dealt with the appellant’s reliance on the decision of the High Court in *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41; (2010) 243 CLR 319 (*Plaintiff M61/2010E*). His Honour did not consider that the decision assisted the appellant because unlike the case before him, *Plaintiff M61/2010E* involved a situation where the Minister had commenced to consider whether or not to exercise the relevant non-compellable powers, that is, the powers in ss 46A and 195A of the Migration Act. The effect of the Minister’s public announcement was that instead of removing offshore entry persons from Australia to a declared country under the power given in s 198A of the Migration Act, consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations (at [70]). His Honour said that, in fact, the case before him was analogous to the circumstances in the decision of the High Court in *Plaintiff S10/2011* (at [66]) per Gummow, Hayne, Crennan and Bell JJ where no such consideration had commenced.

29 The primary judge also considered the declaratory relief which the appellant sought was inappropriate. It was not directed to a matter in controversy between the parties. The appellant acknowledged before the primary judge that his purpose in seeking declaratory relief was to attempt to influence the outcome of a future application to the Minister in respect of the non-compellable power in s 48B of the Migration Act. That prospect was insufficient to fulfil the requirement that before a declaration is granted, it must be clear that it will have foreseeable consequences for the parties.

30 The two broad issues are whether the Federal Circuit Court breached the rules of procedural fairness or failed to accord procedural fairness to the appellant and whether a declaration should be granted and, in that context, whether the declaration will resolve a real controversy regarding the legal rights and liabilities of the parties and whether a declaration will have foreseeable consequences for the parties. Although the issues can be separated that way, the fact is that in this case, the major considerations overlap and run together.

31 We turn now to the submissions of the parties and how we consider they should be dealt with. The emphasis will be on the appellant’s submissions because the respondent largely relied on the primary judge’s reasons.

32 The appellant made it clear in his submissions to this Court that he does not argue that the error of law upon which he relies, being a failure to accord procedural fairness, is a jurisdictional error. He made it clear that his argument proceeds on the basis that the error is an error within jurisdiction.

33 The appellant spent a good deal of time distinguishing between a Federal court obliged to accord procedural fairness and an administrative tribunal or body bound to accord procedural fairness. The appellant’s purpose in seeking to draw this distinction was to undermine the primary judge’s conclusion that the appellant lacked a relevant right or interest to attract the rules of procedural fairness and his conclusion that the appellant’s real complaint was of substantive, not procedural unfairness. The appellant submitted that there is a distinction between, on the one hand, the obligation on a court to accord procedural fairness to the parties before it and, on the other, the obligation implied by a statute on an administrative body to accord procedural fairness to those persons who have been or would be adversely affected by the exercise of a statutory power. The obligation on a Federal court to accord procedural fairness is, according to the appellant’s submission, “a concomitant of the vesting of the judicial power of the Commonwealth in the Federal Circuit Court”. The obligation is “mandated by Chapter III [of the] Constitution as an immutable and defining characteristic of a court”. The appellant submitted that unlike an applicant before an administrative body, there is no need for a litigant before a Chapter III Court to prove a right or an interest before an obligation of “judicial fairness” arises. Furthermore, the appellant submitted that the obligation of judicial fairness applies to the provision of reasons and the provision of reasons is an important incident or aspect of the judicial process. As we understood the appellant’s submission, an error of or concerning the provision of reasons is of a procedural nature.

34 The appellant submitted that the Federal Circuit Court did not accord judicial fairness in publishing details of his date of birth and the date upon which he arrived in Australia in its reasons for judgment because that enables him to be identified and, with the details of his claims, could place him at risk if he is returned to his country of origin. Further, the appellant relied on the observation of Kenny J in *AVN20* (at [97]) to the effect that a purpose of s 91X may well be to restrict the possibility of claims of a need to remain in Australia based on the public exposure of the facts and alleged facts of the cases of those who apply unsuccessfully for protection visas (see also *AZAFH v Minister for Immigration and Border Protection* [2016] FCA 1363). Furthermore, the appellant sought to place some reliance on what he said was a duty on the judiciary as an institution “to take care that no act of the Court in the course of the whole proceedings does an injury to the suitors in the Court” referring in support of that proposition to *WZAUP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 116 (*WZAUP*) at [22] per Rares J.

35 We do not accept any of these arguments.

36 Of course there are many differences between a Chapter III Court and an administrative tribunal or body. Those differences extend to the nature and type of hearing accorded to a party or interested person as indeed may be the case as between different types of administrative tribunals and bodies (*Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475 (*Mobil Oil v Federal Commissioner of Taxation*) at 504 per Kitto J). None of that is to say, however, that statements in reasons for judgment of a Federal court which are not apparently adverse in terms of the result in the case, or perhaps a party’s reputation (*Ainsworth*) engage an obligation of procedural fairness.

37 That was all his Honour was saying, it seems to us, when he observed that statements about a person’s date of birth and date of arrival in Australia cannot be considered adverse in the relevant sense and do not relevantly affect any right or interest of the appellant. In our respectful opinion, his Honour was surely right in reaching those conclusions. Nor is the appellant assisted by reference to the concept of judicial fairness. So far as this Court was referred to authority, that was a phrase coined by Kitto J in *Mobil Oil v Federal Commissioner of Taxation* in describing the duty attaching to a quasi-judicial function as may be seen in the following passage (at 504):

As Tucker L.J. said in *Russell v. Duke of Norfolk*, in a passage approved by the Privy Council in *University of Ceylon v. Fernando*, there are no words which are of universal application to every kind of inquiry and every kind of tribunal: “the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth”. *What the law requires in the discharge of a quasi-judicial function is judicial fairness.* That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.

(Emphasis added, citations omitted.)

38 The appellant’s case is not advanced by emphasising the importance of the reasons of judgment of a Chapter III Court. The appellant was at no stage able to provide an answer to the point made by the primary judge that, absent a contention that he was entitled to see and comment on a draft of the Federal Circuit Court’s reasons for judgment, it was evident that his complaint was one of substantive, not procedural unfairness.

39 The appellant’s reference to the maxim that an act of the court shall prejudice no-one or the court should take care that the act of the court does no injury to any of the suitors (*Heavener v Loomes* [1924] HCA 10;(1924) 34 CLR 306 at 323–324 per Isaacs and Rich JJ; *Commonwealth v McCormack* [1984] HCA 57; (1984) 155 CLR 273 at 276–277) is of no assistance in the circumstances of this case.

40 The appellant submitted that the primary judge erred in concluding that this case was not similar to *Plaintiff M61/2010E*, but rather was similar to *Plaintiff S10/2011*.

41 In *Plaintiff M61/2010E*, the statutory power which was in issue was the power of the Minister in s 46A(2) of the Migration Act to determine, if he or she thinks that it is in the public interest to do so, that the prohibition on the making of a valid application by an unauthorised maritime arrival (as defined in s 46A(1)) not apply to specified applications. That power could only be exercised by the Minister and the section expressly provided that the Minister did not have a duty “to consider whether to exercise the power”. The other relevant power in *Plaintiff M61/*2010E was s 195A and it authorised the Minister, if the Minister considered it to be in the public interest to do so, to grant a visa to a particular class of person who was in detention under s 189.

42 The Minister had decided to consider exercising the power under s 46A or s 195A in every case where an offshore entry person claimed to be a person to whom Australia owed protection obligations.

43 In deciding that the rules of natural justice applied, the Court said (at [78]):

The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant's liberty. There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to *consider* the exercise of power, is to be understood as “conditioned on the observance of the principles of natural justice”. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.

(Emphasis in original, citation omitted.)

44 In deciding that a declaration of an error of law would produce foreseeable consequences for the parties, the Court said (at [103]):

In the circumstances of this litigation it cannot be said that a declaratory order by the Court will produce no foreseeable consequences for the parties. Declaratory relief is directed here to determining a legal controversy; it is not directed to answering some abstract or hypothetical question. Each plaintiff has a “real interest” in raising the questions to which the declaration would go. In these cases, the procedures which are said to be infirm were conducted for the purpose of informing the Minister of matters directly bearing upon the exercise of power to avoid breach by Australia of its international obligations. The statutory powers to the exercise of which the inquiries were directed are placed in the statutory and historical context earlier described. That context demonstrates the importance attached to the performance of the relevant international obligations by both the legislative and executive branches of the Government of the Commonwealth. Moreover, there is a considerable public interest in the observance of the requirements of procedural fairness in the exercise of the relevant powers.

(Citations omitted.)

45 In *Plaintiff S10/2011*, the decision in *Plaintiff M61/2010E* was distinguished because in that case the Minister had not commenced to consider whether or not to exercise the relevant non-compellable powers. The point of contrast may be seen in the following observations of French CJ and Kiefel J (at [45]–[46]):

As the Minister and the Secretary pointed out, there has not been, in relation to the cases presently before the Court, any ministerial announcement of the kind which applied to the assessment and review processes considered in the *Offshore Processing Case*. The function of the guidelines in issue in these cases was significantly different from the function of the assessment and review procedures under consideration in the *Offshore Processing Case*. Those were procedures which were undertaken as an incident of the exercise of a statutory power which the Minister had effectively announced was to be undertaken, namely, the power to consider whether to exercise the substantive powers conferred by ss 46A and 195A of the Act.

In this case the Minister has taken no statutory step equivalent to that taken in the *Offshore Processing Case*. It was submitted for the Minister and the Secretary that, properly understood, each of the guidelines in this case does no more than facilitate the provision of advice to the Minister in particular cases and otherwise operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention. The issue of the guidelines itself did not involve a decision on the part of the Minister, acting under the relevant section, to consider the exercise of the power conferred by it. That submission should be accepted.

46 It seems to us that, in light of these passages, the primary judge did not err in concluding that the circumstances in this case are similar to those in *Plaintiff S10/2011* and different from those in *Plaintiff M6/12010E*.

47 The declaration sought by the appellant is to the effect that the Federal Circuit Court had made an error of law in failing to afford the appellant procedural fairness by the act identified in the declaration.

48 The appellant did not challenge the proposition that a declaration will not be granted if it will not produce foreseeable consequences for the parties. In any event, that proposition is well‑established by the authorities: *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180; *Ainsworth* at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Minister for Immigration and Ethnic Affairs v Ozmanian* (1996) 71 FCR 1 at 31 per Kiefel J (as her Honour then was); *Plaintiff M61/2010E* at [99]–[103].

49 The appellant’s argument is that “a declaration will complete the conditions for the referral of the matter to the Minister for his consideration under s 48B of the Act”.

50 This submission is revealing because it brings to the fore the difficulties with the appellant’s submission.

51 There is presently no application for Ministerial intervention under s 48B of the Migration Act. It is fair to assume that one is likely to be made at the conclusion of these proceedings. However, what is important is that the declaration is not a declaration that the appellant falls within the guidelines, or even the first step or steps of a process identified in the guidelines. Furthermore, the declaration sought by the appellant is not a declaration that gives rise to a sur place claim. Finally, there would appear to be nothing to stop the appellant from referring to the information about him which has been disclosed in any application for Ministerial intervention he makes in the future. In fact, he appears to have already done that in past applications.

52 We do not think the primary judge erred in concluding that the appellant’s claim fell foul of the requirement that the declaration produce foreseeable consequences for the parties.

53 We reject Grounds 1 and 2 of the appeal.

# GROUND 3

54 Section 91X of the Migration Act is in the following terms:

**91X Names of applicants for protection visas not to be published by the High Court, Federal Court or Federal Circuit Court**

(1) This section applies to a proceeding before the High Court, the Federal Court or the Federal Circuit Court if the proceeding relates to a person in the person’s capacity as:

(a) a person who applied for a protection visa; or

(b) a person who applied for a protection related bridging visa; or

(c) a person whose protection visa has been cancelled; or

(d) a person whose protection related bridging visa has been cancelled.

(2) The court must not publish (in electronic form or otherwise), in relation to the proceeding, the person’s name.

(3) In this section:

***application for a protection related bridging visa*** means an application for a bridging visa, where the applicant for the bridging visa is, or has been, an applicant for a protection visa.

***proceeding*** means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

***protection related bridging visa*** means a bridging visa granted as a result of an application for a protection related bridging visa.

55 The primary judge rejected the appellant’s claim for a declaration that the publication by the Federal Circuit Court of the name of the appellant on the digital register known as the Commonwealth Courts Portal is in breach of s 91X because he said that even if the appellant had established that there had been a breach of s 91X of the Migration Act, such a breach would not be sufficient to warrant declaratory relief. His Honour said (at [67]):

… That is because, as Kenny J found in *AVN20*, s 91X of the Act gives rise to a duty of imperfect obligation, breach of which neither invalidates the FCCA’s earlier decision, nor sounds in a judicial remedy, including declaratory relief: see *AVN20* at [108]-[111]. As her Honour noted at [111] and [117], which is set out at [38(h)] above, even though no judicial remedy is available, a person whose name is published in breach of s 91X could request the Minister to exercise his or her non-compellable power under s 48B and there are other statutory powers vested in the Executive Branch which could be exercised by the Minister in those circumstances. As Kenny J emphasised, however, that is a matter for the Executive Branch, not this Court. I respectfully agree with her Honour’s observations and findings regarding s 91X.

56 As we have said, there was an issue before the primary judge as to whether there had been publication of the appellant’s name within s 91X, which his Honour did not need to resolve. It was not that the solicitor’s evidence was challenged, but rather the argument was that the solicitor’s evidence did not establish publication within the section.

57 On the appeal, the appellant sought leave under s 27 of the Federal Court of Australia Act to tender further evidence directed to this issue. That further evidence consisted of the following:

(1) A letter dated 8 July 2020 to the appellant’s solicitor from the Acting Deputy Principal Registrar of the Federal Court of Australia referring to an incident that may have enabled the appellant’s name to be accessed on the Commonwealth Courts Portal through Federal Law Search contrary to s 91X of the Migration Act. The letter describes how a name may have been accessed and states that on being advised of the possibility on 20 March 2020, the Court immediately shut down the Commonwealth Courts Portal and Federal Law Search. The letter advises the appellant that an internal investigation had been undertaken and that Mr John McMillan AO had been appointed to conduct an independent investigation. Finally, the letter advises the appellant that if he had previously had a protection visa refused or cancelled, then he may be eligible to request Ministerial intervention from the Minister for Home Affairs under s 48B of the Migration Act; and

(2) Report of Professor John McMillan AO dated August 2020 and entitled as follows:

“REPORT TO THE FEDERAL COURT OF AUSTRALIA

Report of an Independent Review of action taken by the Federal Court following a data breach contrary to section 91X of the *Migration Act 1958*”.

It is not necessary to refer to the report in detail. It is sufficient to say that Professor McMillan was advised that the Court had identified as many as 1,037 people who were potentially affected by the data breach and had sent letters to those people and their legal representatives with information about the data breach and the steps that they might consider taking.

58 The appellant’s solicitor appears to have received the letter between the date of the hearing before the primary judge on 3 July 2020 and the date his Honour delivered judgment, being 10 July 2020. It could have been provided to the primary judge before he delivered judgment. By contrast, the report could not have been put before the primary judge.

59 The respondent opposed the application to adduce this further evidence on the basis that: (1) it does not advance the appellant’s case that his name was published; and (2) the evidence the appellant now seeks to adduce is replete with references to the appellant’s name and yet the Court was not informed of that fact.

60 Although what is referred to as a data breach is a serious matter, we, like the primary judge, do not need to decide whether the appellant’s name was published within s 91X because we have reached the conclusion that there is no error in his Honour’s reasoning.

61 The primary judge summarised Kenny J’s principal conclusions in *AVN20* concerning the claims in relation to the breach of s 91X. His Honour’s summary, which in our respectful view is accurate, is as follows (at [38]):

It is unnecessary to summarise her Honour’s comprehensive reasons for rejecting the abuse of process claim (see at [58]-[92]). It is desirable, however, to focus on Kenny J’s reasons for rejecting the applicants’ claims concerning breach of s 91X. Those reasons may be summarised as follows:

(a) One purpose of s 91X is to protect certain litigants, especially those who engage the statutory judicial review and appeal processes relating to their asylum claims. Another possible purpose may be to restrict the possibility of claims of a need to remain in Australia based on the public exposure of the facts and alleged facts of the cases of those who apply unsuccessful for protection visas. There is little in the text and history of s 91X to support the applicants’ contention that s 91X was intended to differentiate *sur place* claims arising from participation in relevant court proceedings from other *sur place* claims (at [97]).

(b) Previous cases concerning s 91X did not support the applicants’ contention that the FCCA’s judgment was vitiated by the disclosure of their names in the online versions of the FCCA’s reasons for judgment (referring to ***EAU17*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2086 and *DSO18 v Minister for Home Affairs* [2020] FCA 286) (at [98]-[101]).

(c) Having regard to these authorities, Kenny J found that breach of s 91X did not give rise to jurisdictional error, with the consequence that a Court’s judgment was not rendered invalid merely because of an inadvertent breach of s 91X (at [107]).

(d) Her Honour noted that in *C7A/2017*, the Full Court dismissed an interlocutory application seeking a suppression order under s 37AF to suppress several names. However, as noted further below, at [18] the Full Court made an order under s 37AF to suppress the name of the first appellant, which appeared in the reasons for decision of the Administrative Appeals Tribunal (**AAT**) and also in part of the Full Court’s earlier reasons for judgment reported at [2020] FCAFC 63.

(e) At [109] her Honour made the following observations concerning the duty of imperfect perfection created by s 91X (emphasis in original):

This is not the occasion to examine in detail the complexities of a duty of imperfect obligation. It suffices to say the concept of a duty of imperfect obligation is known in diverse areas of the law. It is, for example, not uncommon for Commonwealth and State legislatures to impose a “duty” on a public office holder or corporation to take or not to take certain action, even though the duty is not enforceable in the courts: compare *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739 at 749-750 and ***Environment East Gippsland*** *Inc v VicForests* [2010] VSC 335; 30 VR 1 at [304]-[311]. Such a duty has been described as a duty of imperfect obligation: see, for example, *Environment East Gippsland* at [305]. A duty of imperfect obligation is recognised in many other contexts: see, for example, *Re New World Alliance Pty Limited; Sycotex Pty Ltd v Baseler (No 2)* (1994) 51 FCR 425 at 445; ***Glennan*** *v Commissioner of Taxation* [2003] HCA 31; 198 ALR 250 at [13]; ***Bromby*** *v Offenders’ Review Board* (1990) 51 A Crim R 249 at 255-256; *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 330-332 (Kirby A-CJ, Mahoney JA agreeing at 340-344); *Attorney-General (Qld) (Ex rel Nye) v Cathedral Church of Brisbane* [1977] HCA 15; 136 CLR 353 at 371; and HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters, 2016) at [5.12110]; cf. *The King v The Governor of the State of South Australia* [1907] HCA 31; 4 CLR 1497 at 1511; *Werrin v Commonwealth* [1938] HCA 3; 59 CLR 150 at 168 (Dixon J).

(f) Where s 91X has been breached, an aggrieved person may request the Minister to allow him or her to make a further protection visa application under s 48B of the *Act* and the Minister also has a power of intervention under s 417 (at [111]).

(g) The applicants’ complaint of procedural unfairness relating to the s 91X breach was rejected on the basis that no issue of procedural fairness could arise in the face of the unqualified prohibition in s 91X (at [113]).

(h) Her Honour made the following important observations at [117] concerning the declaratory relief sought by the applicants:

The authorities establish that the declaration sought by the applicants at the hearing should not be made. There is no dispute between the parties that the FCCA breached the prohibition in s 91X in the manner set out above. A declaration of the kind contemplated in *WZAUP* would not have utility, in that it would not serve to resolve matters in controversy between the parties. The possible effect of the undisputed breaches of s 91X on the applicants as asylum seekers is a matter for the Minister to consider in relation to any future exercise of statutory power under the *Migration Act*.

62 The appellant accepted that s 91X created a duty of imperfect obligation, that a breach of the section did not give rise to a jurisdictional error and that a breach did not invalidate the Court’s orders. He submitted that it did not follow that a breach of s 91X could not be the subject of declaratory relief. He submitted that in none of the cases which her Honour cited was a claim made or rejected on the basis that the duty was one of imperfect obligation.

63 The appellant submitted that the decisions in *WZAUP* and *Bromby v Offenders’ Review Board* (1990) 51 A Crim R 249 (*Bromby*) supported his claim for a declaration of a breach of s 91X. We do not accept that submission. In *WZAUP*, Rares J was dealing with a “data breach” by the Department which involved the disclosure of some of the appellant’s personal information. This information might have been accessed in his country of origin. In the result, no declaratory relief was granted by the Court and the appeal was dismissed. In *Bromby*, Kirby P’s observation that the appellant could have sought declaratory relief to the effect that the Parole Board in that case had not complied with its statutory obligation to state the reason for the revocation of the prisoner’s parole were made by reference to a particular statutory context and related to a particular point in time in that statutory process. His Honour referred to the possibility of the prisoner obtaining declaratory relief before the review hearing. However, once the review hearing had occurred, “the effective statutory purpose, at least, for stating the reason for the revocation had passed” (at 256). We do not think that these observations assist in the resolution of the issues before this Court.

64 This case does not involve an ongoing breach of s 91X. Whether some relief might be granted in what would be the highly unusual circumstance of an ongoing breach where the evidence was that the breach would continue absent a court order, is not a matter that we need to consider.

65 In our respectful opinion, the reasoning of Kenny J in *AVN20* is correct and the primary judge did not err in applying that reasoning.

66 We reject Ground 3 of the appeal.

# THE FRESH OR NEW APPLICATION FOR ORDERS UNDER S 37AF OF THE *FEDERAL COURT OF AUSTRALIA ACT 1976* (CTH)

67 It is convenient to begin by setting out the terms of ss 37AE, 37AF and 37AG of the Federal Court of Australia Act:

**37AE Safeguarding public interest in open justice**

In deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

**37AF Power to make orders**

(1) The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or

(b) information that relates to a proceeding before the Court and is:

(i) information that comprises evidence or information about evidence; or

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

**37AG Grounds for making an order**

(1) The Court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

68 These provisions were inserted by the *Access to Justice (Federal Jurisdiction) Amendment Act* 2012 (Cth), the amendments taking effect as from December 2012. Although the present proceedings do not occasion any necessity to review the authorities concerning these provisions in any great detail, the constraints imposed upon the exercise of the discretion conferred by s 37AF(2) to make an “*appropriate*” order by s 37AG assumes some considerable importance. In *The Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2)* [2020] FCAFC 44, (2020) 275 FCR 377 at 379, Allsop CJ, Wigney and Abraham JJ summarised the position as follows:

[7] The relevant principles in relation to the making of suppression or non-publication orders under s 37AF of the FCA Act are fairly well settled.

[8] Suppression or non-publication orders should only be made in exceptional circumstances: … That is both because the operative word in s 37AG(1)(a) is “necessary” and because the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice: ... The paramount consideration is the need to do justice; publication can only be avoided where necessity compels departure from the open justice principle: …

[9] The critical question is whether the making of a suppression or non-publication order is “necessary to prevent prejudice to the proper administration of justice”. The word “necessary” in that context is a “strong word”: *…*. It is nevertheless not to be given an unduly narrow construction: … The question whether an order is necessary will depend on the particular circumstances of the case. Once the court is satisfied that an order is necessary, it would be an error not to make it: *…*. There is no exercise of discretion or balancing exercise involved: …

(Citations omitted.)

69 The order which the appellant sought before the primary judge was an order pursuant to s 37AF of the Federal Court of Australia Act that the publication or disclosure of information in judgments *BBE15 v Minister for Immigration & Anor* [2016] FCCA 2281 (2 September 2016) and *BBE15 v Minister for Immigration and Border Protection* [2017] FCA 111 (16 February 2016) tending to reveal the identity of the appellant to the authorities of his country of origin, being the appellant’s dates of birth and arrival in Australia, and the name of the appellant’s employer in Sri Lanka in May 2012, be prohibited. As we have said, the primary judge refused to make such an order, and the appellant does not appeal from that refusal.

70 The reasons the primary judge refused to make the suppression order were as follows. His Honour began by noting a submission by the Minister that it was not appropriate to commence a fresh proceeding to seek suppression or non-publication orders in relation to material in concluded proceedings, as the appellant had done. The Minister had submitted that the appropriate course was to make an interlocutory application in the concluded proceeding, as occurred in *C7A/2017 v Minister for Immigration and Border Protection (No 2)* [2020] FCAFC 70 (*C7A/2017*). The primary judge considered that there was “some force” in that contention, but that it was unnecessary for him to determine the matter (at [71]). He considered that the appellant had not demonstrated a sufficient basis upon which such an order should be made having regard to the observations made by the Full Court of this Court in *C7A/2017* at [7], [11], [12], [13], [15], [16] and [18]. His Honour said that even if it be assumed that publication of the appellant’s date of birth and the date upon which he arrived in Australia, as well as publication of the name of the appellant’s employer in his country of origin, is information tending to reveal his identity (which his Honour considered to be far from clear), the appellant had not provided any evidence to support his claim that a suppression order should now be made under s 37AG(1)(c) on the ground that it is necessary to protect his safety. In that respect, his Honour noted that the information which the appellant sought to have suppressed was published on 2 September 2016 and 16 February 2017 respectively, and that in the case of the reasons for judgment of the Federal Circuit Court, it was accessible until it was redacted in late 2019. The material of which the appellant complained in this Court’s reasons for judgment published on 16 February 2017 was never redacted and has been accessible for over three years. The primary judge considered that, having regard to those circumstances and that chronology of events, the appellant had not demonstrated to his satisfaction that a suppression order was now necessary to protect his safety. He considered that having regard to the length of time that the relevant unredacted information was available before it was redacted in late 2019 in the case of the Federal Circuit Court, it would now be an exercise in futility to make the suppression order sought by the appellant.

71 The orders which the appellant now seeks in his fresh or new application are set out above (at [7]). The application for the orders was made late and was not supported by detailed submissions. It is made to an appeal court in circumstances in which the orders sought overlap, to some extent at least, with the orders sought and refused by the primary judge exercising original jurisdiction. There is no appeal from that refusal. These matters alone are probably sufficient to justify refusal of the application.

72 In addition, there are problems with a number of the individual orders sought which were never dealt with in a satisfactory way in submissions. The orders now sought may be divided into two categories. The first category consists of paragraphs 1(a), (b) and (c) and the second category consists of paragraphs 1(d) and (e).

73 With respect to the first category, it may be that s 37AF of the Federal Court of Australia Act is not the only source of power to make these orders, at least insofar as they relate to proceedings in this Court. Nevertheless, insofar as the orders relate to proceedings in the Federal Circuit Court, it was never explained, for example, how it was that this Court has the power to order the Federal Circuit Court to recall a judgment of that Court.

74 With respect to the second category, in our opinion, at least as to paragraph 1(e), the terms of the order are not appropriate. We would not make an order that any material tending to identify the appellant be suppressed. The appellant has had ample opportunity to identify the material of which he complains. It is not appropriate to, in effect, require the Court or a court officer at this stage, and having regard to the history of the matter, to identify the material that might tend to identify the appellant.

75 Finally, insofar as the orders are based on s 37AF of the Federal Court of Australia Act, the appellant has not addressed those matters which led the primary judge to conclude that the appellant had not demonstrated to his satisfaction that a suppression is now necessary to protect his safety.

76 These matters in combination lead us to the view that the fresh or new application for orders under s 37AF of the Federal Court of Australia Act should be refused.

# CONCLUSION

77 The appeal should be dismissed with costs.

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| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Besanko and Perry. |

Associate:

Dated: 22 December 2020

REASONS FOR JUDGMENT

FLICK J:

78 There are presently three proceedings before the Court, namely:

(1) an appeal from a decision of a Judge of this Court published on 10 July 2020: *BBE15 v Federal Circuit Court of Australia* [2020] FCA 965;

(2) an *Application for leave to appeal* from a decision of a Judge of this Court published on 5 June 2020: *ELA18 v Minister for Home Affairs (No 2)* [2020] FCA 782; and

(3) an *Application for an extension of time in which to seek leave to appeal* *and leave to appeal* from an interlocutory decision of another Judge of this Court made on 30 April 2020.

All three proceedings concerned applicants who had unsuccessfully sought protection visas under the *Migration Act* *1958* (Cth) (the “*Migration Act*”). The proceedings each agitated a legitimate concern that reasons for decision published by both the Federal Circuit Court of Australia and Judges of this Court had disclosed information enabling the applicants’ identities to be ascertained. Their plight upon their return to their country of origin was said to be dire. Such applicants, it is to be constantly recalled, are “*engaged in an often desperate battle for freedom, if not life itself*”: *Abebe v The Commonwealth of Australia* [1999] HCA 14 at [191], (1999) 197 CLR 510 at 577-578 per Gummow and Hayne JJ. Common to all three proceedings, accordingly, was a question as to the power to make a “*suppression order*” under s 37AF of the *Federal Court of Australia Act* *1976* (Cth) (the “*Federal Court Act*”) and the circumstances in which the discretion to make such an order should be exercised. The latter two proceedings had as a further common element a question as to the competency of the applications being made.

79 Underlying each proceeding were a number of further common threads, including the duty of a Court to unrepresented parties. In much of the litigation before this Court, the parties are represented and the interests of an individual party can largely be left to the legal representatives to protect their interests. But the reverse is commonly the experience of this Court in litigation arising under the *Migration Act*.

80 In very summary form, it has been concluded that:

 the appeal in *BBE15* should be dismissed; and

 the applications in *ELA18* and *EEZ18* should both be dismissed as incompetent.

## BBE15 – Matter NSD 781 of 2020

81 The factual background to this appeal has been set forth by Besanko and Perry JJ, and need not be repeated.

82 The opportunity has been taken to read in draft form the reasons of their Honours. Concurrence is expressed with those reasons and with the orders proposed by their Honours that the appeal be dismissed with costs.

83 The only additional comment which should be made is to add emphasis to their Honours’ rejection of any contention that the rules of procedural fairness may require the disclosure by a Court in advance to a party of its draft reasons for decision.

84 The central concern advanced on behalf of the Appellant was the need to ensure that information is not disclosed or available for public inspection which would disclose his identity. Such information may be found in affidavits or submissions filed with the Court or even in the reasons for decisions of the Court itself.

85 The concern may be accepted as real and well-founded. The information or pieces of information which may inadvertently disclose the identity of a protection visa claimant, however, is less certain of identification.

86 The responsibility for identifying the information which should or may properly be the subject of a claim for a suppression order, however, is a responsibility which must primarily rest upon the visa claimant.

87 Rejected is any suggestion that a Court is obliged or otherwise required by any concept of “*judicial procedural fairness*” to afford parties an opportunity to comment on or make submissions as to draft reasons for a decision in advance of judgment being published.

88 Considerable difficulty is also experienced in imposing some form of enforceable duty upon a Court to ensure that its findings of fact and reasons do not cause unnecessary prejudice to a protection visa claimant, in this case a duty to ensure that information is not disclosed that may potentially enable the identity of a protection visa applicant to be ascertained.

89 Although those proceedings in which a party is unrepresented occasion particular concern, the long-prevailing practice of the Court is to leave it to the parties to identify the legal and factual issues to be resolved.

90 This Court has previously and soundly rejected a submission which sought to transfer from a party to the Court itself the responsibility for making any inquiry as to factual matters not otherwise brought to its attention: *Francuziak v Minister for Justice* [2015] FCAFC 162, (2015) 238 FCR 332. In rejecting an argument that there was a duty in public law cases, imposed upon a Judge hearing an application to call for materials to satisfy itself that a claim for privilege has been properly made, Siopis, Flick and Katzmann JJ concluded:

*A duty upon the primary Judge? — a truly worrying prospect*

[34] The last of the arguments advanced on appeal on behalf of Mr Francuziak is truly worrying.

[35] 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.

[36] 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.

[37] 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“ (eg, *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 [Counsel for the Appellant] 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.

[38] 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.

[39] However expressed, the argument should be rejected for either of at least two reasons.

[40] 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 brief in 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.

[41] 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 *University of Wollongong v Metwally (No 2)* (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.

[42] Second, and for the same reasons as it has been concluded that there has been no denial of procedural fairness, [Counsel for the Appellant] was unable to demonstrate that any breach of the alleged duty has occasioned any prejudice to Mr Francuziak …

91 The same observations may be made in respect to the submission advanced in the present appeal that the responsibility for identifying information which may disclose the identity of a protection visa applicant rests upon the Court itself. It is forever a responsibility resting upon the party seeking non-disclosure to identify the information in question. And the responsibility resting upon the protection visa applicant to identify that information is a responsibility which should form the subject matter of submissions made at the conclusion of a hearing and in advance of judgment. That responsibility cannot be subverted by requiring the Court to disclose draft reasons for decision so that a party can then make submissions as to what can and cannot be included in those reasons. It is for the Judge once final submissions have been made to thereafter publish such reasons for decision, including such references to the evidence and other material before the Court, as the Judge sees fit. Any concept that a party has some form of right or other entitlement to vet draft reasons with a view to making submissions as to what should be withheld would be – with great respect – unthinkable. Equally unthinkable would be a more confined contention which sought the advance disclosure of so much of a Judge’s proposed reasons which address the evidence and proposed findings of fact.

92 No argument was sought to be advanced and, with respect, no such argument could have been advanced that a failure to disclose to a party a Judge’s draft reasons for decision or parts of such a draft, would be contrary to some form of “*constitutional guarantee of fair process*”: cf. *Chau v Director of Public Prosecutions* (1995) 127 FLR 404 at 417-419 per Kirby P (as his Honour then was).

## ELA18 – MATTER NSD 670 of 2020

93 This proceeding relevantly had its origins in the arrival in Australia of the Applicant as an unauthorised maritime arrival in 2013. Applications were made and pursued seeking the grant of a Safe Haven Enterprise Visa. When the matter came before the Immigration Assessment Authority, it was concluded that he was not a person in respect of whom Australia owed protection obligations.

94 On 4 February 2019, a Judge of the Federal Circuit Court published reasons and made orders dismissing an application seeking to challenge the decision of the Authority: *ELA18 v Minister for Home Affairs* [2019] FCCA 213. A *Notice of Appeal* from that decision was filed on 22 February 2019.

95 On 10 September 2019, a Judge of this Court, her Honour Justice Abraham, published reasons and made orders dismissing the appeal: *ELA18 v Minister for Home Affairs* [2019] FCA 1482. An application for special leave to appeal to the High Court was refused on 12 February 2020: *ELA18 v Minister for Home Affairs* [2020] HCASL 18.

96 On 9 March 2020, the Applicant sought to file an *Interlocutory Application* seeking suppression orders with respect to “*aspects*” of the judgment as published on 10 September 2019 and an order pursuant to “*s 88G(1)(a) and (c) of Part 6A of the Federal Circuit Court of Australia Act 1999 (Cth) prohibiting the publication of so much of the reasons as may tend to reveal the identity of the applicant*”. Section 88G, it may be noted, is the counterpart provision to s 37AG of the *Federal Court Act*. On 20 April 2020, a further interlocutory application was filed applying for “*non-publication orders … supressing so much of the reasons as may tend to reveal the identity of the applicant*”. Her Honour determined the matter on the papers, and on 5 June 2020 published reasons and made orders dismissing the application: *ELA18 v Minister for Home Affairs (No 2)* [2020] FCA 782.

97 An *Application for leave to appeal* from the 5 June 2020 judgment was filed on 17 June 2020. It was this *Application* which is to be now resolved by this Court. The *Grounds of Appeal* included an allegation as to a failure to afford natural justice by reason of failing to take into consideration an affidavit that had been filed and a failure to “*deal with the primary claim of the appellant that he was identifiable together with his claims, from the publication within the Court [judgment] of personal identifying information*”. There then followed a *Ground* setting forth the “*identifying information*”.

98 A *Notice of objection to competency* was filed on 23 June 2020. A proposed *Amended Draft Notice of Appeal* was filed on 16 October 2020. The proposed amendments added clarification to the *Ground* challenging the disclosure of “*identifying information*”.

99 In summary form, it is respectfully concluded that:

 the objection to competency should be upheld and the *Application for leave to appeal* should be dismissed. This Court, it has been concluded, has no jurisdiction to entertain an appeal from the 5 June 2020 decision.

But for the fact that this Court has no jurisdiction to entertain any appeal from the 5 June 2020 decision, it would otherwise have been concluded that:

 leave to appeal would have been granted,

but that:

 the appeal would have been dismissed.

Each of these conclusions should be briefly addressed. Although it is unnecessary to decide the question, it would have been further concluded that the applications on behalf of the Applicant to adduce further evidence on appeal would have been rejected. The first application was to adduce a copy of a *Report of a Home Office fact-finding mission in Sri Lanka* published in January 2020. The second application was to adduce a copy of the *UNHCR Eligibility Guidelines for Assessing the International Protections Needs of Asylum-Seekers from Sri Lanka* dated 21 December 2012. Both applications were opposed by the First Respondent. Had the Court as presently constituted had jurisdiction to entertain an appeal from the decision of the primary Judge, the further evidence may have assumed some relevance to the making of an order under s 37AF; but this Court has no such jurisdiction and there was, moreover, no reason advanced as to why neither document had been relied upon before the primary Judge. The application to further amend the *Draft Notice of Appeal* attracted no opposition from Counsel for the Respondent.

### The competency of an appeal?

100 Albeit belatedly and after final judgment and orders had been made, the *Interlocutory Applications* made on 9 March 2020 and 20 April 2020 seeking the suppression orders were applications made in the same proceeding as the appeal from the decision of the Federal Circuit Court. It is not possible to construe the *Interlocutory Applications* as applications made pursuant to s 39B of the *Judiciary Act* *1903* (Cth). In those *Applications* the Applicant did not seek any orders in the nature of prohibition, mandamus or an injunction.

101 Although there was no express consideration given by her Honour to the jurisdiction or power being exercised when making the 5 June 2020 orders, no question was raised in this Court as to the power of her Honour to make supplemental orders in a proceeding which had properly invoked the jurisdiction of the Court: cf. *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 230-231 per Lee, Hill and Cooper JJ; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)* [2009] FCA 498 at [11] to [13] per Collier J; *Ashby v Slipper (No 2)* [2016] FCA 550 at [9], (2016) 343 ALR 351 at 353 per Flick J.

102 The *Notice of objection to competency* filed on behalf of the First Respondent refers to the 5 June 2020 decision and goes on to contend in relevant part as follows:

… A decision of that kind does not fall within s 24(1) of the *Federal Court of Australia Act 1976* (Cth) nor does the appellate jurisdiction of the Federal Court of Australia otherwise extend to an application for leave to appeal from a decision of a single judge exercising the appellate jurisdiction of the Federal Court of Australia.

103 The orders made on 5 June 2020 were orders made by her Honour when exercising the appellate jurisdiction of this Court. The proceeding before her Honour was an appeal from a decision of the Federal Circuit Court. An appeal from such a decision lies to this Court: *Federal Court Act*, s 24(1)(d) . And this Court constituted by a single Judge may exercise that jurisdiction: s 25(1AA).

104 The flexibility for this Court to be so constituted was effected by way of legislative amendment in 2009 and reversed what was previously the necessity for three Judges of this Court to hear an appeal from the then Federal Magistrates Court: *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* [2012] FCA 141. In explaining the change, Gilmour J there observed:

[1] Pursuant to s 25(1AA)(b) of the *Federal Court Act 1976* (Cth) (FCA) the appellant seeks that the appellate jurisdiction of the court in relation to this appeal be exercised by a Full Court rather than a single Judge.

[2] The appellate jurisdiction of the Court in relation to appeals from a judgment of the Federal Magistrates Court, is to be exercised by a single Judge of the Court, unless a Judge “*considers that it is appropriate*” for a Full Court to determine the matter: s 25(1AA) of the FCA

[3] Prior to 1 January 2010, the position in relation to the exercise of the court’s appellate jurisdiction in appeals from the Federal Magistrate’s Court was the other way: a Full Court exercised the appellate jurisdiction unless the Chief Justice considered it appropriate for a single Judge to determine the matter.

[4] The legislative reversal was effected by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), the intent of which is that appeals from the Federal Magistrates Court are to be heard by a single Judge, unless circumstances warrant a hearing by a Full Court.

There is thus no longer a legislative necessity for an appeal from a single Judge of the Federal Circuit Court to be necessarily heard and resolved by this Court constituted by three (or more) Judges.

105 The difficulty confronting the Applicant is that no jurisdiction was vested in this Court constituted by Abraham J other than the appellate jurisdiction conferred by s 24. And no provision permits any further appeal from any decision made in the exercise of that appellate jurisdiction. Not surprisingly, any further application that may be made to challenge the decision of her Honour exercising the appellate jurisdiction of this Court is thus to be found, if at all, in an application for special leave to appeal to the High Court.

106 The objection to competency should be upheld. The Court as presently constituted, namely a Full Court constituted by three Judges, has no jurisdiction to entertain an appeal from a decision of the Full Court constituted by a single Judge.

### The grant of leave

107 Assuming, contrary to the finding above, that an appeal lay from the 5 June 2020 judgment and orders, leave to appeal would have been required because that judgment and orders were interlocutory: *Federal Court Act*, s 24(1A). Even though the judgment and orders may be properly characterised as interlocutory, leave may have been more readily granted in the present case than would have been the case in respect to an interlocutory decision going to matters of practice and procedure: *Johnston v Cameron* [2002] FCAFC 251 at [7]-[9], (2002) 124 FCR 160 at 163 per Branson J. Leave was there granted to appeal, but the appeal was dismissed, against an order for partial suppression of documents pursuant to s 50 of the *Federal Court Act*. In doing so, Branson J helpfully summarised the principles to be applied as follows:

**LEAVE TO APPEAL**

7 Section 24(1A) of the Federal Court Act, which prevents the bringing of an appeal from an interlocutory judgment to the Court unless the Court or a judge has given leave to appeal, reveals a legislative intention to restrict the bringing of appeals from interlocutory judgments. The Court or a judge has an unfettered discretion to grant leave to appeal from an interlocutory judgment. Ordinarily that discretion will be exercised having regard to the principles considered in *Niemann v Electronic Industries Ltd* [1978] VR 431 (see *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 (FC); *Multigroup Distribution Services Pty Limited v TNT Australia Pty Limited* [2001] FCA 1721 (FC)). Those principles include whether, in all of the circumstances, the decision from which the appeal is sought to be brought is attended with sufficient doubt to warrant it being reconsidered by the Full Court and additionally whether substantial injustice would result if leave were refused and the decision was erroneous.

8 This is not a case in which the exercise by the primary judge of a discretion with respect to a point of practice and procedure is sought to be challenged. Rather, his Honour’s decision, if allowed to stand, will have the practical effect of determining the claim of the applicant to be entitled to an order under s 50 of the Federal Court Act. Leave to appeal is more readily granted in a case of this kind than in a case concerning practice and procedure only (*Decor Corporation v Dart Industries* at 400; *Minogue v Williams* [2000] FCA 125 at [19] (FC)).

9 The decision of the primary judge flowed from an exercise of a discretion vested in his Honour by s 50 of the Federal Court Act. Accordingly, although an appeal lies from the decision provided leave is granted, this Court would not interfere with his Honour’s exercise of discretion, even if this Court would itself have arrived at the contrary decision, unless his Honour made an error of the kind identified in *House v the King* (1936) 55 CLR 499 at 504-505 (*Australian Broadcasting Commission v Parish* (1980) 43 FLR 129; 29 ALR 228 per Bowen CJ at 131-132; 232).

A comparable approach to the grant of leave should be applied when considering the present application for orders pursuant to s 37AF of the *Federal Court Act*.

108 Given the serious consequences that could potentially be visited upon the Applicant by reason of “*identifying information*” being disclosed, it is respectfully considered that had the occasion arisen for an exercise of the judicial discretion to grant leave to appeal, that discretion would have been granted but for the following considerations:

 no submission had been advanced to the Federal Circuit Court as to the need for care to be exercised in publishing reasons for decision which disclosed “*identifying information*” contained within the materials available to that Court when undertaking its judicial review functions;

 the reasons for decision of the Federal Circuit Court which itself disclosed “*identifying information*” had been available and accessible to the public from about 4 February 2019;

 the reasons for decision of her Honour Justice Abraham which again disclosed much the same “*identifying information*” had been available from about 10 September 2019; and

 the Applicant took no real step to have the “*identifying information*” withheld – even on an interim basis – until (at the earliest) February 2020 when submissions were advanced to the High Court on the special leave application challenging the extent of the information that had been disclosed or (more formally) 17 June 2020 when the present *Application for leave to appeal* was filed annexing a proposed *Notice of Appeal* directed in part to the disclosure of “*identifying information*”.

In short:

 any prejudice suffered by the Applicant in having “*identifying information*” publicly available was a prejudice brought upon himself by reason of his failure to act more promptly.

109 Furthermore, and even if it be the case – as it most probably is – that this Court could make an “*appropriate*” order under s 37AF(2) with respect to identified statements in the reasons for decision of a Judge of this Court, free of any consideration as to whether that Judge was exercising either original or appellate jurisdiction, it would not have done so in the present proceeding because:

 the making of such an order would not be “*necessary to prevent prejudice to the administration of justice*” or “*necessary*” to protect his “*safety*” (s 37AG(1)(a) and (c)) (cf. *The Country Care Group Pty Ltd v Director of Public Prosecutions* [2020] FCAFC 44 at [7]-[9], (2020) 376 ALR 652 at 656 per Allsop CJ, Wigney and Abraham JJ (“*The Country Care Group*”)) so long as the very same information as was sought to be suppressed remained publicly available by reason of the decision of the Federal Circuit Court.

110 The only application before this Court as presently constituted was to resolve the application for leave to appeal. Had the appeal been competent, that application would have been refused.

### The dismissal of the appeal

111 Even had leave to appeal been granted and any appeal been competent, it may be noted at the outset that:

 the only power which this Court could have exercised would have been that conferred by s 37AF of the *Federal Court Act* or the power to make a supplemental order in relation to the proceeding before it.

Even if it were appropriate for this Court to make a suppression order in respect to its own reasons for decision, left accessible to any member of the community would be the reasons for decision of the Federal Circuit Court. No application has been made to the Federal Circuit Court pursuant to s 88G(1) of the *Federal Circuit Court of Australia Act 1999* (Cth)seeking an order from that Court to suppress the same information as is now in issue. And this Court certainly cannot exercise the power vested by s 88G in the Federal Circuit Court alone, s 88G(1) expressly providing that “*[t]he Federal Circuit Court of Australia may make a suppression order or non-publication order*…”. The utility of this Court making any order would be seriously open to question if the very same information as that sought to be protected remained available from a reading of the Federal Circuit Court’s reasons.

112 Separate from the utility in making any order seeking to set aside the 5 June 2020 orders made by her Honour are such further considerations as:

 the absence of any error of the kind identified in *House v The King* (1936) 55 CLR 499 at 504-505, the orders made by her Honour being orders of an interlocutory kind involving an exercise of discretion; and

 the absence of any error in the construction and application of s 37AF of the *Federal Court Act.*

Even though a different Judge of this Court may well have reached the conclusion that the extent of the information disclosed in the reasons for decision could – when placed together – disclose the identity of the Applicant, the decision to be made was one entrusted to her Honour and no error of principle is discernible in her Honour’s reasons.

113 In reaching this conclusion it should nevertheless be observed that all Judges of the Federal Circuit Court and this Court should be careful to ensure that set forth in reasons for decision is not information or sufficient information to enable the identity of a party seeking a “*protection visa*” or a like visa to be ascertained. Although s 91X of the *Migration Act* *1958* (Cth) is confined to a prohibition upon publishing “*(in electronic form or otherwise) … the person’s name*”, the disclosure of other information may enable the identity of a person to be ascertained. Even falling short of such information as may otherwise attract the making of an order under s 37AF of the *Federal Court Act*, the Court should be astute to take such steps when drafting reasons for decision not to inadvertently disclose information or individual pieces of information which – when collated – put at nought the legislative policy behind provisions such as s 91X.

114 As this Court has no jurisdiction to entertain an appeal from the decision of Abraham J, the proceeding should be dismissed. It thereafter becomes unnecessary to resolve any application for leave to appeal.

115 There is no reason why costs should not follow the event.

## EEZ18 – MATTER NSD 870 of 2020

116 This proceeding relevantly has its origins again in the arrival of the Applicant as an unauthorised maritime arrival in September 2012. An application for a protection visa was pursued by the Applicant which resulted in an adverse decision of the Immigration Assessment Authority.

117 It was on 31 January 2019 that a Judge of the Federal Circuit Court published reasons and made orders dismissing an application seeking to challenge the decision of the Authority: *EEZ18 v Minister for Home Affairs* [2019] FCCA 178.

118 A *Notice of Appeal* from that decision was filed in this Court on 19 February 2019. The *Grounds of Appeal* were there set forth as follows (without alteration):

The primary Judge erred by dismissing each and every ground of review of the Immigration Review Assessment Authority’s decision relied upon by the then Applicant.

An *Outline of Submissions* was filed on behalf of the Appellant on 24 May 2019 expressly confining the appeal to a question concerning “*the finding in the FCC that legal error did not affect the IAA’s consideration of whether to admit new information for consideration in the review*”.

119 In this proceeding the appeal was heard by another Judge of this Court, his Honour Justice Bromwich, on 19 June 2019. Reasons for decisions were published and orders were made dismissing the appeal on 21 June 2019: *EEZ18 v Minister for Home Affairs* [2019] FCA 959. Notwithstanding the making of that order, on 6 April 2020 an *Interlocutory Application* was filed in which the Applicant sought “*suppression orders under s.37AF of the Federal Court of Australia Act and 88G(1)(a) and (c) of Part 6A of the Federal Circuit Court of Australia Act 1999 (Cth) prohibiting publication of so much of the reasons as may reveal the identity of the applicant*”. On 30 April 2020, Bromwich J made orders:

 recalling and varying “*the reasons for judgment given on 10 September 2019*” and ordering that it be republished; but

 dismissing the *Interlocutory Application* seeking suppression orders “*over the judgment given on 10 September 2019, and over the prior judgment of the Federal Circuit Court of Australia…*”.

On 7 August 2020, the Applicant filed an *Application for extension of time and leave to appeal* from the interlocutory orders made on 30 April 2020. On 20 August 2020, a *Notice of objection to competency* was filed.

120 Again assuming the competency of any appeal if leave to appeal were granted, an application for an extension of time would have been necessary because any application for leave to appeal from an interlocutory order must be filed within 14 days after the date on which the order was made: *Federal Court Rules 2011* (Cth), r 35.13. But an extension of time is not the impediment to any success on the part of the Applicant. On the facts, there was some evidence explaining the time taken conferring with Counsel as to the prudence of filing an application under s 39B of the *Judiciary Act 1903* (Cth), and whether the orders made on 30 April 2020 were in the original jurisdiction of the Court.

121 The insurmountable impediment to success of any application made on behalf of EEZ18 arises by reason of:

 the fact that this Court does not have jurisdiction to entertain an appeal from a decision of a single Judge of this Court exercising the appellate jurisdiction of the Court. The reasons for reaching this conclusion are the same as those provided in respect to the ELA18 proceeding.

The present proceeding is also in a context where Bromwich J made orders on 30 April 2020 in response to the Applicant’s *Interlocutory Application* seeking suppression orders.

122 Even if jurisdiction were vested in this Court to entertain the present *Application*, and as with the conclusion in ELA18, it would have been concluded that:

 the serious consequences that could potentially be visited upon the Applicant by reason of “*identifying information*” being disclosed

would have warranted the grant of leave to appeal but for the following considerations:

 no submission had been advanced to the Federal Circuit Court as to the need for care to be exercised in publishing reasons for decision which disclosed “*identifying information*” that was contained within the materials available to that Court when undertaking its judicial review functions;

 the reasons for decision of the Federal Circuit Court which itself disclosed “*identifying information*” had been available and accessible from about 31 January 2019;

 the Applicant took no real step to have the “*identifying information*” withheld – even on an interim basis – until 6 April 2020 when the Applicant filed his *Interlocutory Application* claiming (*inter alia*) that “*the reasons … reveal the identity of the applicant*”.

In short, and as with the like conclusion reached in respect to the ELA18 proceeding:

 any prejudice suffered by the Applicant in having “*identifying information*” publicly available was a prejudice brought upon himself by reason of his failure to act more promptly – the making of an order would not have been “*necessary*” to protect either the administration of justice or his “*safety*” (cf. *The Country Care Group* [2020] FCAFC 44 at [7]-[9], (2020) 376 ALR 652 at 656 per Allsop CJ, Wigney and Abraham JJ).

Moreover, the Applicant in the present proceeding has had the benefit of his concerns as to the making of appropriate suppression orders being addressed by Bromwich J, and:

 there is no self-evident reason to question the orders made by his Honour on 30 April 2020.

123 Had it been necessary to resolve an application made on behalf of EEZ18 to read an affidavit annexing two Departmental *Reports*, that application would have been rejected. The affidavit annexed a *DFAT Country Information Report Sri Lanka* dated 23 May 2018 and another dated 4 November 2019. Although the *Reports* may have provided some factual support for the appropriateness of an order under s 37AF of the *Federal Court Act*, this Court has no jurisdiction to hear an appeal from the decision of the primary Judge and there was, moreover, no explanation as to why either *Report* was not sought to be relied upon before the primary Judge.

124 As this Court has no jurisdiction to entertain an appeal from the decision of Bromwich J, the proceeding should be dismissed. It thereafter becomes unnecessary to resolve any application for an extension of time or leave to appeal.

125 There is no reason why costs should not follow the event.

## CONCLUSIONS

126 To the extent that each of the three proceedings gives rise to the manner of exercise of the discretion conferred by s 37AF of the *Federal Court Act*, it should be noted that each case necessarily depends upon its own facts and circumstances. In the context of applicants seeking a protection visa under the *Migration Act*, particular care needs to be exercised in each and every case to exercise the discretion conferred by s 37AF in a manner which seeks to balance:

 the “*primary objective of the administration of justice*” and the “*public interest in open justice*” (s 37AE); and

 the constraint imposed upon the exercise of the discretion conferred (s 37AF(2)) by the necessity for any such order to be “*necessary*” (s 37AG(1)).

against:

 the very real need to protect the identify of those claiming refugee status in Australia (cf. *Abebe v The Commonwealth of Australia* [1999] HCA 14 at [191], (1999) 197 CLR 510 at 577-578 per Gummow and Hayne JJ).

127 In many – if not most – decisions concerning protection visa applicants, the careful drafting of reasons by a reviewing or appellate Court both promotes “*open justice*” and the protection to the visa claimant. But Courts should remain astute to ensure that information is not inadvertently disclosed to the prejudice of the visa applicant. Courts should remain particularly astute in those many cases in which the visa claimant is unrepresented.

128 But any suggestion that a reviewing Court may deny procedural fairness to a visa claimant by not itself inviting submissions as to what should or should not be included in any draft reasons for decision to be published is to be rejected.

129 It has been concluded that:

 the appeal in BBE15 should be dismissed.

and that this Court:

 has no jurisdiction to entertain either the application in ELA18 or EEZ18.

130 Costs should follow the event in each proceeding.

131 It is proposed that the following orders should be made:

## In ELA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs — NSD 670 of 2020

1. The name of the First Respondent be amended to Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

2. The *Notice of Objection to Competency* filed on 26 June 2020 is upheld.

3. The proceeding is dismissed.

4. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

5. The Applicant is to pay the costs of the First Respondent, either as taxed or agreed.

## In BBE15 v Federal Circuit Court of Australia — NSD 781 of 2020

1. The Appellant have leave to file and serve the Second Amended Notice of Appeal.

2. The appeal is dismissed.

3. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

4. The Appellant is to pay the costs of the Second Respondent, either as taxed or agreed.

## In EEZ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs — NSD 870 of 2020

1. The name of the First Respondent be amended to Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

2. The *Notice of Objection to Competency* filed on 20 August 2020 is upheld.

3. The proceeding is dismissed.

4. The application for orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) made at the hearing is refused.

5. The Applicant is to pay the costs of the First Respondent, either as taxed or agreed.

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| --- |
| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Flick. |

Associate:

Dated: 22 December 2020