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

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On 4 March 2021, the High Court of Australia (HCA) handed down judgement in the case *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 and Anor*.[1] The case broadly considered whether the first respondent — a self-represented litigant who could not speak English — was denied procedural fairness in his case. In the original jurisdiction *ex tempore* reasons for judgement were delivered in English only, they were not translated for him and he was not provided a translated transcript of proceedings which would have contained those reasons. He claimed that procedural fairness was denied to him because he could not ascertain whether there was a reviewable or appealable error in the original court's reasons for judgement.[2]

Background and issues

Background of the case

The first respondent was a citizen of Pakistan who had pursued long-running proceedings against a decision of a delegate of the Minister's ('appellant') to deny him a Protection (Class XA) visa. His case first failed at the Administrative Appeals Tribunal (AAT), so he launched judicial review proceedings in the Federal Circuit Court of Australia (FCCA) which were heard before Street J, but they were also unsuccessful.[3]

There were issues relating to the delivery of reasons after the hearing by Street J which provided a further avenue of appeal for the first respondent. The hearing in the FCCA occurred on 16 May 2019 and lasted for one hour. At its conclusion Street J delivered *ex tempore* reasons and published orders dismissing the application. While the accompanying orders were translated, the *ex tempore* reasons for those orders were not translated when they were handed down. This was, of course, problematic: the first respondent was self-represented and could not speak English; hence, he could not understand them at the time of their delivery.[4] Additionally, at no point thereafter did the first respondent receive a translated copy of the transcript of proceedings containing the *ex tempore* reasons. However, he did not seek to obtain it.[5] On 18 July 2019, written reasons were subsequently published by Street J, but this occurred over a month after he filed a notice of appeal in the Federal Court of Australia (FCA); that is, well after the expiration of the period within which a notice of appeal has to be filed.[6] It should be noted from the outset, however, that there was time

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1 [2021] HCA 6 (*AAM17*).
2 Ibid 5 [5]−[6] (Steward J).
3 Ibid. See further *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 1567.
4 Ibid 7 [9].
5 Ibid 6 [8] cf 7 [10].
6 Ibid 5−6 [5]−[8].

to amend the appeal between the publication of written reasons and actual hearing of the appeal.[7]

On 6 November 2019, the appeal was heard by Mortimer J in the FCA on procedural fairness grounds. Her Honour allowed the appeal on those grounds.[8] She held, *inter alia*, that failing to translate reasons for judgement to a self-represented litigant who could not speak English, and then not publishing written reasons as soon as possible following the delivery of orders, constituted procedural unfairness.[9] It followed that her Honour considered this was no proper exercise of judicial power and the orders of the FCCA had to therefore be set aside so the matter could be remitted for re-hearing by another judge of that court.[10] Yet, as we know now, the Minister appealed to the HCA. The appeal was allowed.[11]

Summary of issues before the High Court

Overall, there were three interrelated, key issues considered by the HCA:

1. whether the way in which *ex tempore* reasons were handed down by Street J was procedurally unfair, so far as the first respondent was consequently unable to examine whether there was an appealable or reviewable error in his case;[12]

2. collateral to issue (1), whether the subsequent written reasons published by Street J were in fact the true and authentic reasons of the FCCA, given they were published well after the time frame within which the first respondent was required to file a notice of appeal;[13]

3. whether it was necessary for Mortimer J in the FCA to set aside Street J's reasons and remit the case for re-hearing in the FCCA.[14]

Reasons for judgement in the High Court

The newly elevated Steward J wrote the judgement; Kiefel CJ, Keane, Gordon and Edelman JJ agreed with him.[15] Notwithstanding his Honour's acknowledgement that giving adequate and accessible reasons for judgement is an essential tenet of the proper exercise of judicial power,[16] he emphasised that this was not a case where the court was *generally* considering if Street J denied procedural fairness to the first respondent for either failing to give reasons or failing to give adequate reasons.[17] That is to say, the court was not considering some general principle that self-represented non-English speaking litigants are entitled to translated reasons, be they oral or written or a combination of both, as part of their at-large procedural fairness rights. The reasons for this become apparent once one

7 Ibid 7 [10].
8 See *AAM17 v Minister for Immigration, Citizenship, Immigration and Multicultural Affairs* [2019] FCA 1951.
9 [2021] HCA 6, 8 [11].
10 Ibid 9−10 [13].
11 Ibid 23 [46].
12 See ibid 14 [22].
13 See ibid 17−18 [32].
14 See ibid 21 [40].
15 Ibid 1−5.
16 Ibid 10 [14].
17 Ibid 15 [25].

closely observes the procedural history of the case and the facts militating against the first respondent's want for procedural fairness.

Fundamentally, the specific failures of Street J which the first respondent complained of did not fall within the 'range of matters' which the concept of procedural fairness covers.[18] It is established that the doctrine of procedural fairness only relates to the process leading up to a decision and whether unfairness in that process produces a practical injustice that deprives a litigant of a chance at a successful outcome in their case.[19] Therefore, the way in which reasons for a decision are delivered after a hearing — that is, after the close of final submissions — is irrelevant.[20]

Here, the delivery of *ex tempore* reasons occurred after the close of final submissions in the FCCA. It followed that the first respondent could not argue that the delivery of the *ex tempore* reasons deprived him of his chance at a successful outcome in the preceding FCCA hearing.[21] Rather, to argue procedural unfairness, he had to demonstrate that he was deprived of the chance to succeed *in his subsequent appeal* to the FCA.[22] This was an important point of contrast, given the HCA only focused on this appeal rights question, yet Mortimer J allowed the appeal in the FCA on the basis of a much broader range of general procedural fairness principles.[23] Notably, the first respondent did not advance, as appeal grounds, Mortimer J's general finding that procedural fairness would have required Street J to publish translated written reasons as soon as practicable after he gave judgement and not just, presumably, in response to the filing of a notice of appeal.[24]

In view of the fact written reasons were belatedly published by Street J, the first respondent began by contending that the *ex tempore* reasons delivered immediately following the hearing were in fact the main or 'operative' reasons of the court,[25] positing that, because the *ex tempore* reasons were delivered directly following the hearing and contemporaneously with the court's orders, they were the only true account of Street J's reasoning process at the time of decision-making.[26] This allowed him to claim that his full rights of appeal were undermined because those 'operative' *ex tempore* reasons could not possibly be understood by him, nor could he be expected, as a self-represented non-English speaking litigant, to know that he could obtain a transcript containing those reasons. In any event, he argued, he was unable to decipher between the written and *ex tempore* reasons in preparing his appeal, this inability to decipher being sufficient proof *in itself* that Mortimer J was also therefore not in a position to determine which set of reasons were the true reasons of the court.[27]

18 Ibid 14 [22].
19 Ibid.
20 Ibid, citing *Public Service Board of New South Whales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ).
21 Ibid 14 [22].
22 Ibid 12 [18] cf 10 [14]−[15]. See also AAM17, 'First Respondent's Submissions', Submissions in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, P23/2020,13 August 2020 [15]−[17], [25] ('First Respondent's Submissions').
23 Ibid 12 [17], 15 [22].
24 Ibid 12 [17].
25 Ibid 12 [19].
26 First Respondent's Submissions, above n 22, [13]−[15].
27 See especially [2021] HCA 6, 12−13 [20].

Resultantly, the FCA had no choice but to set aside Street J's orders and remit the matter for re-hearing.[28]

His Honour rejected the first respondent's above submissions in their conceptual entirety. He held that, because written reasons were provided and certified by Streets J's associate,[29] they must be regarded as being the *prima facie* authentic reasons for judgement. There is a sole exception to this presumption, but it is only enlivened if a litigant discharges the onus of proving that there is a 'material deviation' between the *ex tempore* reasons and later written reasons. The litigant's inability to decipher alone is not enough. In this vein, his Honour endorsed the principle espoused by Willmer LJ in *Bromley v Bromley*, where his Lordship said that the court would be reluctant to go 'behind the official transcript' to explore any discrepancy between *ex tempore* and subsequent written reasons, unless it could be demonstrated by a litigant that the judge had 'in substance rewritten his judgment'.[30]

Even though the first respondent was not given a transcript of proceedings in the FCCA hearing, it remained that he had sufficient material before him at the time to demonstrate a 'material deviation' in the sense described above. Accordingly, he could have done this by calling for the transcript in the FCA (which he did not do when lodging his appeal)[31] or by making reference to other recordings or materials like counsel's notes or by obtaining evidence from counsel present at the hearing in lieu of such notes.[32] It was also fatal that he did not amend his appeal after the publication of written reasons.[33]

His Honour was persuaded by the fact there is nothing in the FCCA statute or rules[34] which require the Court to translate *ex tempore* reasons for litigants who cannot speak English or publish written reasons.[35] His Honour's conclusion in this respect was supported by the imperative for justice to be done in an efficient manner, as set out in the various parts of the Court's statutes and rules.[36] It was also supported by the nature of the FCCA's jurisdiction as an inferior federal court; hence, in efficaciously exercising that jurisdiction, it is not only appropriate but also in the interests of justice that *ex tempore* reasons are immediately provided and then more carefully written reasons subsequently provided, if appropriate. It was also noted that English is Australia's official language.[37] As explained above, there is only an issue when there is a discrepancy in substance between the two sets of reasons.[38]

In turn, his Honour exposed the first respondent's failure to take full advantage of the FCA rules on appeal, which would have assisted him as both a self-represented and a non-English speaking litigant and also helped him avoid any practical injustice which arose.

28 Ibid 12−13 [19]−[20] cf 20−21 [21].
29 Ibid 7 [10].
30 [2021] HCA 6, 18−19 [32]−[34].
31 Ibid 7 [10].
32 Ibid 17 [31]−[32], 19 [34].
33 Ibid 11 [15].
34 *Federal Circuit Court of Australia Act 1999* (Cth) ss 5, 42, 57, 74, 75; *Federal Circuit Court Rules 2001* (Cth) rr 15.27, 16.01, 16.02.
35 [2021] HCA 6, 15 [26], 17 [29].
36 Ibid.
37 Ibid 16 [27].
38 Ibid 17 [30].

Case law was cited in support of this expectation.[39] Accordingly, he could have extended the time to file his notice of appeal or sought amendment of his appeal before it was heard.[40]

Finally, his Honour was led to conclude that Mortimer J did not need to set aside Streets J's orders and remit the matter, for she could have remedied any practical injustice occasioned by directing the respondent to amend his appeal grounds based on the written reasons or, alternatively, by adjourning the hearing to obtain the transcript of proceedings within which a record of the *ex tempore* reasons would be found.[41]

Conclusion

The HCA has clearly demonstrated its commitment to the doctrinal limits of natural justice. It has also indicated that it is for the courts and the Parliament of Australia to determine whether or not special procedures should be adopted to ensure non-English speaking litigants are given a fairer hearing in the federal court system. There also seems to be support for the principle that appeal courts should cure practical injustices where possible.

39 Ibid 19 [35].
40 Ibid, citing *Federal Court Rules 2011* (Cth) rr 36.05, 36.11(2)(b).
41 Ibid 21 [40]−[41].