FEDERAL CIRCUIT COURT OF AUSTRALIA

AMA16 v Minister for Immigration and Border Protection and Ors

[2016] FCCA 1966

Judge Riley

9 June, 2 August 2016

Practice and Procedure — Notice to produce — Application to set aside — Relevance — Public Interest Immunity — Where proceedings were for judicial review — Where issue not raised in application — Where issue raised in affidavit — Whether Court should inspect document.

Evidence — Public Interest Immunity — Notice to produce — Application to set aside — Whether competing public interests favour disclosure — Relevance of obligations under international treaties — Whether legislative scheme abrogated immunity — Migration Act 1958 (Cth), Part 7AA, 473EA, 473GA, 473GB, 473GD.

The Immigration Assessment Authority (the IAA) made a decision not to grant the applicant a protection visa. The applicant commenced judicial review proceedings. In those proceedings, the applicant served on the Minister a notice to produce certain documents including an "identity assessment form" made in respect of him. The Minister filed an application resisting production on the basis of relevance and public interest immunity (PII).

The applicant submitted that the identity assessment form was relevant to a potential *sur place* claim. That issue was not raised in the judicial review application. The Minister submitted this was fatal. The applicant argued that the *sur place* claim was put in issue by affidavit evidence of the applicant's lawyer. Her evidence was to the effect that the determination of the identity of protection visa applicants by the Department had at times involved "in country" inquiries that could give rise to *sur place* claim.

The Minister further argued that the identity assessment form was subject to PII. The applicant disputed this claim. Further, the applicant argued that Part 7AA - Division 3 of the *Migration Act 1958* (Cth) (the Migration Act), which provided for the discretionary disclosure of certain PII documents provided to the IAA by the Secretary, had the effect of abrogating PII for any document which the Secretary had provided to the IAA (including the identity assessment form).

Held: (1) In judicial review proceeding, the Court may look to affidavits to determine the issues in dispute between the parties. Because the possibility of a *sur place* claim was squarely raised in the affidavit sworn by the applicant's lawyer, the identity assessment process is in issue and the identity assessment form that deals with that process is relevant to the proceedings. [29]-[31]

Creswick Resources NL [2000] VSC 134; *Ross v Blakes Motors* [1951] WN 478, considered.

WA Pines Pty Ltd v Bannerman (1980) 41 FLR 175, distinguished.

(2) The competing public interests in this case favour the disclosure of the identity assessment form. [88]-[90]

Alister v The Queen (1984) 154 CLR 404, applied.

Zarro v Australian Securities Commission (1992) 36 FCR 40; *Parkin v O'Sullivan* (2009) 260 ALR 503, distinguished.

Somerville v Australian Securities Commission (1995) 60 FCR 319; *Fernando v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 975; *R v Melasecca* (1994) 74 A Crim R 210, considered.

Per curium: In considering the competing public interests, there is a very strong public interest in Australia fulfilling its obligations under international treaties and Australia giving protection to those who meet the criteria for a protection visa. Those considerations should also go into the balance. [90]

(3) Parliament may abrogate public interest immunity by express words or necessary intendment. The legislative scheme created by Part 7AA - Division 3 of the Migration Act does not do this. [51]

Baker v Campbell (1983) 153 CLR 52, applied.

Per curium: It is proper and desirable for the Court to inspect the identity assessment form before it is released to the applicant. If there is no possible *sur place* claim deriving from the identity assessment form, it would not need to be disclosed. [94]

Alister v The Queen (1984) 154 CLR 404; *Ahmet v Chief Commissioner of Police* [2014] VSCA 265, considered.

Cases Cited

Ahmet v Chief Commissioner of Police [2014] VSCA 265.

Air Canada v Secretary of State for Trade [1983] 2 AC 394.

Alister v The Queen (1984) 154 CLR 404.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd (2011) 277 ALR 388.

Baker v Campbell (1983) 153 CLR 52.

Burmah Oil Co Ltd v Bank of England [1980] AC 1090.

Cheung Kong Infrastructure Holdings Ltd v BlueScope Steel Ltd [2010] FCA 739.

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3) (2012) 228 IR 195.

Creswick Resources NL [2000] VSC 134.

Diddams v Commonwealth Bank of Australia [1998] FCA 497.

Fernando v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 975.

Maloney v NSW National Coursing Assn Ltd (No 1) [1978] 1 NSWLR 60.

Millar v Harper (1888) LR 38 Ch D 110.

National Companies and Securities Commission v News Corp Ltd (1984) 156 CLR 296.

Parkin v O'Sullivan (2009) 260 ALR 503.

R v Melasecca (1994) 74 A Crim R 210.

Railways, Commissioner for v Small (1938) 38 SR (NSW) 564.

Ross v Blakes Motors [1951] WN 478.

Sankey v Whitlam (1978) 142 CLR 1.

Seven Network Ltd v News Ltd (No 11) [2006] FCA 174.

Somerville v Australian Securities Commission (1995) 60 FCR 319.

Spargos Mining NL v Standard Chartered Australia Ltd (No 1) (1989) 1 ACSR 311.

WA Pines Pty Ltd v Bannerman (1980) 41 FLR 175.

Zarro v Australian Securities Commission (1992) 36 FCR 40.

Application

L De Ferrari, for the applicant.

N Wood, for the first respondent.

Cur adv vult

2 August 2016

Judge Riley.

Introduction

1 The matter before the court is an application in a case that seeks orders setting aside one paragraph of a notice to produce. The substantive proceeding is an application for review of a "fast-track" decision made by the Immigration Assessment Authority (the IAA). That decision was made under s 473CC(2)(a) of the *Migration Act 1958* (Cth) (the Act). In its decision, the IAA affirmed a decision of a delegate of the Minister to refuse the applicant a protection visa.

2 The applicant served on the Minister a notice to produce dated 19 May 2016. On or about 6 June 2016, the Minister filed and served an application in a case seeking orders setting aside paragraph 1 of the notice to produce. The Minister provided some documents sought in the notice to produce, namely, legal advice in respect of which the Minister had previously claimed legal professional privilege.

3 Ultimately, the only document about which there was a dispute before the court was a document that was listed as item 5 in the index to the court book and marked as "not reproduced". It will be referred to in these reasons as the identity assessment form. It was described in the index to the court book as:

> Completed "IMA PV - Identity Assessment Form" [subject to a Notification Regarding the Disclosure of Certain Information covered by s 473GB of the *Migration Act 1958*] 28 August 2015

Background

4 The applicant is a citizen of Iran. He claimed that:

a) he had been a member of the Basij but had fallen out with his commander because of the way the Basij treated people;
b) he told his commander that a good Imam, religion or god would not require such actions;
c) a few days later, the commander warned the applicant to stop making such remarks and slapped him;
d) the applicant replied with derogatory statements about the Basij, the Imam, Islam, the commander and Iran;

e) the following day, some men on a motor bike told the applicant's mother they would kill the applicant;
f) the applicant fled Iran;
g) his mother moved to Qeshm Island because of what had happened; and
h) the applicant was at risk of being imprisoned, tortured or killed by the Iranian authorities.

5 The delegate found that the applicant's claims lacked credibility. The delegate did not accept that the applicant had been a member of the Basij, or had insulted Islam or had been threatened by the authorities or would in the future express any dissident beliefs that would attract persecution.

6 The IAA accepted some of the applicant's claims, including that he had been an ordinary member of the Basij, and had made derogatory comments to his commander about the commander, the Basij, the Imam, Islam, and Ayatollah Khomeni. The IAA accepted that the commander and other members of the Basij may continue to bear a grudge against the applicant. However, the IAA found that the applicant was of no ongoing interest to the Basij or other Iranian authorities. The IAA concluded that the applicant did not face a real chance of persecution or significant harm in Iran.

Discovery as an alternative to the notice to produce

7 In resisting the production of the identity assessment form, the Minister initially argued that the applicant should have sought the document using the discovery procedure rather than the notice to produce procedure, as that would have meant that the final hearing could have proceeded with all interlocutory issues resolved and all evidence in the proceeding already established.

8 As the matter stood, if the court compelled the production of the identity assessment form, the Minister signalled that he might wish to appeal that ruling, before the identity assessment form was disclosed. Consequently, there was a possibility that the final hearing of the substantive matters would be delayed because the applicant used the notice to produce procedure rather than the discovery procedure. The Minister relied on *Railways, Commissioner for v Small* (1938) 38 SR (NSW) 564 at 574, *Diddams v Commonwealth Bank of Australia* [1998] FCA 497 and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at paragraph 7.

9 The considerations raised by the Minister are obviously significant where there is a long trial that might have to be adjourned because the notice to produce procedure was adopted rather than the discovery procedure. However, migration matters usually take only a half day, which is how long the argument about the notice to produce took. It would have taken that amount of time, and it would have needed to be accommodated somewhere in the list, whether it was listed as an interlocutory hearing or as part of the final hearing of the substantive matter.

10 As a matter of practicality, it seems to me that the procedure adopted in this case should not be fatal to the applicant's attempts to have access to the identity assessment form. It is likely that the substantive matter could be listed in the near future, assuming that another migration matter is resolved prior to final hearing, as they sometimes are. Consequently, the inconvenience to the court, and the Minister, of the applicant using the notice to produce procedure is marginal. The Minister conceded as much in his post-hearing written submissions dated 23 June 2016, when he formally stated that he did not press the point.

Relevance

11 The second basis on which the Minister resisted the production of the identity assessment form was that it was said to be irrelevant.

12 The Minister filed an affidavit sworn on 6 June 2016 by Sally Babbage, the Acting First Assistant Secretary, Refugee, Humanitarian and Visa Management Division of the Department of Immigration and Border Protection. Ms Babbage, whose evidence was unchallenged, said that:

> In assessing an application for a protection visa, the case officer is required to assess the identity as well as the protection claims of the applicant. As part of this process the Department collects information in respect to the visa applicant's identity. This information is collected from a variety of the Department's systems and external sources and recorded in an Identity Assessment Form along with a preliminary assessment of the applicant's identity based on this information. The identity assessment form is provided to the Department officer who conducts the protection visa assessment. Information in the Identity Assessment Form may inform the protection interview or other information requests and further investigations required in relation to the applicant's identity. The applicant's identity is a critical part of the protection visa assessment process.

13 The applicant filed an affidavit in reply affirmed on 7 June 2016 by Chelsea Clark, a solicitor with Victoria Legal Aid, whose evidence was unchallenged. She said that she had many years experience in refugee matters and had reviewed many Department of Immigration files obtained under freedom of information legislation. She said that:

> Based on my experience, determination of the identity of protection visa applicants by the Department has at times involved "in country" inquiries that could give rise to a sur place claim.

14 The IAA in the present case apparently accepted that the applicant was basically who he claimed to be, that is, an Iranian Shia Muslim who had been an ordinary member of the Basij.

15 The Minister relied on *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at paragraph 6 where it was said that:

> In my view the following principles are relevant to setting aside a Notice to Produce, and to consideration of the interlocutory application before me:
>
> (1) The party which has issued a Notice to Produce bears the onus of establishing that the documents the subject of the Notice are sufficiently relevant to justify production (*Seven Network Ltd v News Ltd (No 11)* [2006] FCA 174 at [6], *Cheung* at [55]).
>
> (2) …
>
> (3) …
>
> (4) It is necessary that the material sought has an apparent relevance to the issues in the principal proceedings. The test of apparent relevance in this context is whether the documents are reasonably likely to add, in the end, in some way or other, to the relevant evidence in the case. (*Seven Network (No 11)* at [6], *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* at [14]).
>
> (5) A Notice to Produce cannot be used for the purposes of "fishing" or for the purpose of determining a preliminary question as to whether a party has a supportable case.
>
> (6) …

16 The Minister argued that the identity assessment form was not relevant to any of the issues raised in the further amended application dated 7 June 2016, which was the most recent version of the application for review. The Minister argued that, in a judicial review proceeding such as this, where there are no pleadings, relevance is ascertained by reference to the grounds of review. The Minister relied for that proposition on *Creswick Resources NL* [2000] VSC 134 at paragraph 39 where Gillard J said that:

> In proceedings where there are no pleadings and discovery is demanded in the interests of justice sometimes the only source to determine the issues is the affidavits filed by the parties but if this is the only source, discovery should be confined to identified issues. Here the originating process must set out the grounds and the issues can to some extent be defined by them. In my opinion it is unnecessary to go to the affidavits to define the issues, but again the court should identify the issues which are the subject of discovery based on the originating motion.

17 Clearly, that passage from *Creswick* also contemplates the issues being determined by reference to affidavits. When pressed, the Minister argued that an earlier passage from *Creswick* made the position more clear. That was at paragraph 37, which stated:

> The difficulty with the present matter is that because there are no pleadings it is difficult to determine what the issues are and these must be identified primarily by reference to the originating motion and to a lesser extent the affidavits filed in the proceeding.

18 The Minister also relied, by analogy, on *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 as authority for the proposition that the applicant needed to have a "good case" that the IAA made a jurisdictional error by not determining a *sur place* claim that arose in the identity assessment process and was documented in the identity assessment form "proof of which is likely to be aided by" the production of the identity assessment form. The relevant passage from *Bannerman* states (per Brennan J):

> Though the power to require discovery be acknowledged, how should it be exercised? It depends upon *the nature of the case and the stage of the proceedings* at which the discovery is sought. *In the present case, discovery is sought before there is a tittle of evidence* to suggest that the Chairman did not have the requisite cause to believe which par. 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v Blake's Motors* (1951) 2 All E.R.689, but in cases of that kind *there is either an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery*. This is not such a case. This is a case where a bare allegation is made by par. 6 of the Statement of Claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing. …

(Emphasis added.)

19 The applicant argued that a registrar of this court ordered on 26 March 2016 that the Minister file a court book in this matter. The applicant argued that

meant that the Minister was ordered to file a court book containing all documents that were before the IAA, including the identity assessment form that was included in the index to the court book but not reproduced.

20 The Minister argued that an order to produce a court book was simply a requirement for informal discovery and did not override claims of privilege or claims relating to relevance.

21 Neither party provided to the court any practice direction or other ruling on what a court book ordered by the court must contain.

22 In my view, a general order made by a registrar for the Minister to file a court book does not override any claims that may be made by the Minister about privilege or relevance. If an issue arises about whether a specific document or specific types of documents should be included in a court book, obviously an appropriate application could be made to a judge. If the judge makes an order for the inclusion in a court book of a specific document or specific types of documents, the Minister would have to comply with that order, or file an appeal and obtain a stay of the order.

23 However, this is not an application about what documents should be included in the court book. It is an application resisting a notice to produce. It should be considered on that basis.

24 The applicant also said that he had sought his file, presumably including the identity assessment form, under the *Freedom of Information Act 1982* (Cth) from both the IAA and the Department. Counsel said, though it was not a matter of evidence, that the IAA responded that it had no documents, because it had returned them all to the Department and the Department did not respond within the time allowed. That apparently constituted a deemed refusal, which is surprising, because there would have been no issue with the applicant being given the vast bulk of the documents on his file. The Minister's counsel denied all knowledge of the FOI claim. In any event, this court is not seized of the FOI issues because the application before the court is not a review of a decision on an FOI claim.

25 The applicant did not argue that the identity assessment form related to an existing ground in the further amended application. Rather, the applicant more or less frankly conceded that the identity assessment form might disclose something that could become a ground of review. When asked by the court whether that was not classic fishing, the applicant said that the identity assessment form might disclose that the Department had done in-country checks in Iran that could lead to a *sur place* claim, as mentioned in the affidavit of Ms Clark.

26 The applicant said further that he was in a Kafkaesque position. Because he was not given the identity assessment form he did not know with certainty whether he had a claim that related to it, and because he had not raised a relevant ground in his application he was not given the identity assessment form. The applicant's position might also be described as a Catch-22.

27 The applicant said further, correctly, that professional obligations prevented his legal representatives from including a *sur place* ground in the further amended application when there was no specific evidence in this case in support of it.

28 It was not disputed that the identity assessment form was relevant to the IAA's decision. It clearly was. However, there is a significant distinction between the documents that are relevant in the IAA process and the documents

that are relevant in this court's process. While it may be customary for the court book to contain all the documents that were before the decision-maker, there is no need for this court to have, in the court book, documents that do not relate in any way to the issues in dispute in this court. In other words, the test of what is relevant in the present proceeding before the court is not necessarily the same as the test of what was relevant in the IAA proceeding.

29 However, in my view, the identity assessment form is sufficiently relevant to require that it be produced to the applicant, subject to the claim of public interest immunity, which is considered below. *Creswick* makes it clear that, in a judicial review proceeding, the court can look to the affidavits to determine the issues in dispute, and thus what documents are relevant. In the present case, Ms Clark squarely raised an issue in her affidavit concerning the possibility of a *sur place* claim arising by virtue of the identity assessment process. That makes the identity assessment process, and the identity assessment form that deals with that process, an issue in the present proceeding, at least for the purposes of a notice to produce.

30 Obviously, whether the applicant does in fact have a *sur place* claim in the present case could only be determined by an examination of the identity assessment form. Before the identity assessment form is examined, it would be improper for the applicant's legal representatives to include in the application to this court a ground of review based on the IAA failing to deal with a *sur place* claim.

31 The present case is distinguishable from *Bannerman* in that, in the present case, there is more than a "tittle" of evidence supporting the applicant's claim for access to the identity assessment form. The evidence in the present case consists of Ms Clark's unchallenged evidence that "at times" identity assessments include in-country enquiries that "could" give rise to *sur place* claims. Clearly, the IAA did not deal with any such claim.

32 In addition, in *Bannerman*, the court referred to the following two circumstances which made discovery available (per Brennan J, (1980) 41 FLR 175 at 181):

> … there is either an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery. …

33 That statement was based on cases such as *Ross v Blake's Motors*. That case determined that it was open to the court to order discovery before particulars in cases where there was an anterior relationship. It was said that the relationship did not need to be a fiduciary relation. In *Ross v Blake's Motors*, the anterior relationship was a contract to buy a car.

34 In *Ross v Blake's Motors*, the court cited with approval an earlier decision of Bowen LJ in *Millar v Harper* (1888) LR 38 Ch D 110 at 112, where his Honour said:

> It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars.

35 In the present case, Ms Clark's affidavit is sufficient to show there is at least a suspicion that the applicant has "a good case proof of which is likely to be aided by discovery": *WA Pines v Bannerman*. This is also a case where, clearly,

the Minister knows the facts and the applicant does not: *Millar v Harper*. Moreover, by seeking protection from Australia, the applicant entered into the type of anterior relationship with Australia that would entitle the applicant to discovery, subject to public interest immunity and any other similar considerations: *Ross v Blake's Motors*. Seeking protection is obviously a much more substantial anterior relationship than entering into a contract to buy a car.

Public interest immunity

36 The third basis on which the Minister resisted production of the identity assessment form was that he said it was subject to public interest immunity. The evidence in support of this claim was contained in the affidavit of Ms Babbage as follows:

> 10. In my opinion, the protection visa assessment process will be jeopardised if the Exempt Document is disclosed. It will reveal aspects of the Department's investigative methods in relation to determining the identity of protection visa applicants. It is important that this information, and these methods, are confidential. In my opinion, if the Identity Assessment Form was disclosed, visa applicants would be able to anticipate the types of checks undertaken in order to satisfy the Department of their identity. This would undermine the integrity of the protection visa process and the reliability of applicants' responses to protection visa interview and other forms of inquiry.
> 11. Having regard to the matters outlined above, I am of the opinion that if the Applicant was permitted access to the Exempt Document, that would undermine and impair the Department's ability to conduct its investigations in respect of protection visa applicants.
> 12. Accordingly, I am of the opinion that the Exempt Document exhibits the characteristics of information which the Department would treat as non-disclosable and immune from disclosure on public interest grounds because its disclosure:
>
> (a) would be contrary to the public interest because the Exempt Document reveals the types of checks undertaken by the Department to determine the identity of protection visa applicants;
> (b) would compromise the Department's investigative / intelligence methods;
> (c) would prejudice the proper functioning of the government of the Commonwealth; and
> (d) as a result of paragraphs (a) and (b), [would] hinder or inhibit the ability of the Department to administer the *Migration Act* insofar as the Department conducts investigations in assessing protection visa applications.

37 The affidavit of Ms Babbage explained that, on 3 December 2015, the Secretary of the Department:

> a) issued a certificate under s 473GB of the Act in respect of the identity assessment form; and
> b) provided the identity assessment form to the IAA under cover of the certificate.

38 Section 473GB of the Act provided that:

> Immigration Assessment Authority's discretion in relation to disclosure of certain information etc.
>
> (1) This section applies to a document or information if:

(a) the Minister has certified, under subs (5), that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 473GA(1)(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or

(b) the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

(2) If, in compliance with a requirement of or under this Act, the Secretary gives to the Immigration Assessment Authority a document or information to which this section applies, the Secretary:

(a) must notify the Authority in writing that this section applies in relation to the document or information; and

(b) may give the Authority any written advice that the Secretary thinks relevant about the significance of the document or information.

(3) If the Immigration Assessment Authority is given a document or information and is notified that this section applies in relation to it, the Authority:

(a) may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and

(b) may, if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under subs (2), disclose any matter contained in the document, or the information, to the referred applicant.

(4) If the Immigration Assessment Authority discloses any matter to the referred applicant under subs (3), the Authority must give a direction under s 473GD in relation to the information.

(5) The Minister may issue a written certificate for the purposes of subs (1).

39 In other words:

a) the Secretary may give a certificate about a document that the Secretary gives to the IAA where the contents of the document could form the basis of a claim for public interest immunity (other than a s 473GA claim); and

b) the IAA may disclose the contents of the document (but not the document itself) to an applicant, provided that the IAA gives the applicant a direction under s 473GD of the Act.

40 Section 473GD of the Act provided that:

Immigration Assessment Authority may restrict publication or disclosure of certain matters

(1) If the President is satisfied, in relation to a review, that it is in the public interest that:

(a) any information given to the Immigration Assessment Authority; or

(b) the contents of any document produced to the Authority;

should not be published or otherwise disclosed, or should not be published or otherwise disclosed except in a particular manner and to particular persons, the President may give a written direction accordingly.

(2) A direction under subs (1):

(a) must be in writing; and

(b) must be notified in a way that the President considers appropriate.

(3) If the President has given a direction under subs (1) in relation to the publication of any information or of the contents of a document, the direction does not:

(a) excuse the Immigration Assessment Authority from its obligations under s 473EA; or

(b) prevent a person from communicating to another person a matter contained in the evidence, information or document, if the first-mentioned person has knowledge of the matter otherwise than because of the evidence or the information having been given or the document having been produced to the Authority.

(4) A person must not contravene a direction given under subs (1) that is applicable to the personPenalty: Imprisonment for 2 years.

41 In other words, if the IAA considers that the contents of any document in its possession should not be disclosed, or should not be disclosed except in a particular manner or to particular persons, the IAA may direct accordingly.

42 Section 473EA of the Act requires the IAA to give a written statement setting out the reasons for its decision.

43 In the present case, it seems that the Secretary gave the IAA a certificate under s 473GB in relation to the identity assessment form. It also seems that the IAA did not tell the applicant the contents of the identity assessment form, and, consequently, did not give the applicant a written direction under s 473GD of the Act.

44 Ms Babbage explained in her affidavit that:

> The Certificate provided notification regarding the disclosure of certain information covered by s 473GB of the *Migration Act* and advised that the Exempt Document should not be disclosed to the Applicant or his representative because the disclosure of the document would be contrary to the public interest.

45 The certificate itself was not provided to the court. However, based on Ms Babbage's description of the certificate, it seems that it does not accord with s 473GB of the Act. Section 473GB of the Act does not empower the Secretary to issue a certificate saying that a document should not be disclosed. It empowers the Secretary to issue a certificate saying that disclosure of the contents of a document would be contrary to the public interest for reasons of public interest immunity.

46 Additionally, regardless of the s 473GB certificate, s 473GD of the Act permits the IAA, in its own discretion, to disclose the contents of a document to an applicant, provided that the IAA gives the appropriate written statement to the applicant.

47 The applicant argued that this legislative scheme meant that the Parliament had abrogated public interest immunity for any document that the Secretary had provided to the IAA.

48 Under s 473GA of the Act, the Secretary cannot give to the IAA any document, the disclosure of which the Secretary certifies would be contrary to the public interest:

(a) because it would prejudice the security, defence or international relations of Australia; or

(b) because it would involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

49 Such documents may be regarded as the core, or higher level, documents to which public interest immunity applies. Other documents giving rise to claims of public interest immunity are subject to the s 473GB regime, under which the Secretary may give the documents to the IAA and the IAA may give them to the applicant, together with a written direction.

50 The applicant argued that the point concerning abrogation of public interest immunity was not based on the waiver of privilege flowing from the Secretary giving the document to an independent third party, namely, the IAA. The applicant acknowledged that the rules relating to waiver of privilege do not apply to claims of public interest immunity. Rather, the applicant argued that the Parliament had abrogated the common law entitlement to claim public interest immunity in the circumstances of this case by creating the scheme that allowed the IAA to disclose to an applicant information that would normally be subject to public interest immunity.

51 Obviously, the Parliament could abrogate public interest immunity by appropriate legislation. However, it could only do so by "express words or necessary intendment": *Baker v Campbell* (1983) 153 CLR 52 at 116. The legislative scheme in this case has not done so. The rules relating to public interest immunity relate to whether a court or other body can compel the production of a particular document for the purposes of judicial or other proceedings. Sections 473GB and 473GD of the Act say nothing about that.

52 The applicant also argued that the question of public interest immunity in this case was governed by s 130 of the *Evidence Act 1995* (Cth). The Minister argued that that provision only concerned whether particular documents could be put into evidence, not whether particular documents should be produced pursuant to a notice to produce.

53 I accept the Minister's submissions on this point. Section 130 of the *Evidence Act* would apply to the identity assessment form if the applicant tried to put it into evidence, after somehow managing to get possession of it.

54 In any event, s 130 of the *Evidence Act* does not limit the types of documents to which public interest immunity might attach, although it does list a number of types of documents to which it clearly does attach. Moreover, s 130 of the *Evidence Act* simply reflects the balancing exercise required by the common law. Subsection 130(1) of the *Evidence Act* provides:

> If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

55 The applicant also argued that, pursuant to the notice to produce, the Minister was required to have brought the identity assessment form to court for the hearing of the matter, and if he had done so, the document would have been adduced into evidence. That submission takes no account of the fact that the matter before the court was the Minister's application to set aside the notice to produce. That had to be determined before the Minister was under any obligation to produce any documents. Whether the Minister has to produce the identity assessment form is the subject of these reasons.

56 In assessing a claim of public interest immunity, there are three steps, as described by Gibbs CJ in *Alister v The Queen* (1984) 154 CLR 404:

> 4. *Sankey v Whitlam* [(1978) 142 CLR 1] establishes that when one party to

> litigation seeks the production of documents, and objection is taken that it would be against the public interest to produce them, the court is required to consider two conflicting aspects of the public interest, namely whether harm would be done by the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld, and to decide which of those aspects predominates. The final step in this process - the balancing exercise - can only be taken when it appears that both aspects of the public interest do require consideration - i.e., when it appears, on the one hand, that damage would be done to the public interest by producing the documents sought or documents of that class, and, on the other hand, that there are or are likely to be documents which contain material evidence. The court can then consider the nature of the injury which the nation or the public service would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation. …

57 That is, firstly, the court needs to form the view that harm would be done to the public interest by the disclosure of the document in question. Secondly, the court needs to form the view that the administration of justice would be impaired by the document being withheld. Thirdly, the court needs to balance the two aspects of the public interest.

58 It is clear that the possible immunity from production of the identity assessment form falls to be considered as a contents claim rather than a class claim. That seems to follow from the statements of Lockhart J in *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 46: format

> Documents within the possession of the ASC (an investigative and law enforcement agency) of a confidential nature, which record information received by it concerning possible offences or irregularities and recording the possible course of investigations or information with respect to evidence concerning proceedings to which the ASC is a party, plainly may fall within the scope of public interest immunity; but as at present advised I cannot conceive of a case where they would fall within the class doctrine and thus be immune from disclosure irrespective of the contents of any particular document.
>
> That the doctrine of public interest immunity can apply to documents in the possession of a law enforcement agency such as the ASC cannot be doubted: see *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 60; *Spargos* (supra). The ASC has various roles under the Corporations Law; it is investigator, prosecutor and intervener in proceedings, both civil and criminal, and is generally responsible for the enforcement of the Corporations Law. The range of activities which it may investigate and the variety of documents which may come into its possession for the purposes of fulfilling its statutory obligation are numerous and diverse. In some cases the ASC's investigations will be conducted over long periods of time and involve large numbers of documents. Those matters all point to the conclusion that, although the doctrine of public interest immunity may apply to documents of this kind, they cannot be immune from disclosure within the class doctrine; that would be an unwarranted extension of the doctrine which has hitherto been confined to rare cases of documents involving high government policy and decision-making.

59 It is clear that, in considering the immunity of documents such as the identity assessment form, the Department of Immigration would be in an analogous position to the Australian Securities Commission. The Department is similar to the ASC in that it administers legislation and is involved in a great deal of

public litigation, though very little of it is criminal. It may be arguable that the Department's law enforcement function is not nearly as great as the ASC's was, but probably nothing turns on that.

60 In the present case, the Minister argued that the public interest would be damaged by the disclosure of the identity assessment form because disclosure would permit visa applicants to anticipate the types of identity checks that the Department undertakes. The Minister further argued that this would compromise the Department's investigative methods, prejudice the proper functioning of the Commonwealth Government and inhibit the administration of the Act insofar as the Department conducts investigations.

61 It is clear that the claim of public interest immunity in the present case, unlike many of the reported decisions, did not concern a continuing investigation. The identity of the present applicant has been established. It was not suggested that there is any further investigation of the applicant's identity to be undertaken, or that disclosure of the identity assessment form could in any way prejudice the assessment of the applicant's claims by the IAA or by any court on review.

62 Rather, the claim for immunity was based on the concern that disclosing the identity assessment form to the applicant would permit the identity assessment form to become public knowledge, and that would permit other applicants to somehow defeat the Department's identity assessment process. The Minister did not provide any evidence about how the release of the identity assessment form would compromise the Department's investigative methods, other than by saying that it would reveal the types of identity checks undertaken by the Department.

63 It is not self-evident that knowledge of the types of identity checks undertaken by the Department would mean that applicants could circumvent the Department's identity checks more easily than they can now. For example, obvious types of identity checks are examinations of passports and driver's licences. They can be faked now. Disclosing the identity assessment form will not change that. Another type of identity check would be making enquiries of the authorities in an applicant's home country about historical records. It is not obvious that applicants could change those records, even if they knew that enquiries were going to be made about them.

64 In the present case, "more detail" from the Minister, as Lindgren J observed in *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 354, would have been helpful. As his Honour said, it is not necessarily enough to provide an "incantation of expressions which have been used in decided cases".

65 It is axiomatic that public interest immunity claims are not established simply on the say so of a public servant. The court must be satisfied that there is a genuine public interest in non-disclosure.

66 The Minister was not able to point to any other case where the stated need to conceal the investigative methods of the Department of Immigration was found to have been sufficient to establish public interest immunity. The Minister did refer to *Fernando v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 975 at [35]. That case concerned "non-disclosable information" contained in a document, namely, the source of certain confidential information. It was held that the source of the confidential information was subject to public interest immunity, or its statutory equivalent under s 130 of the *Evidence Act*. However, it was also held in *Fernando* that the Minister should

have provided to the applicant a summary of the other information in the document containing the identity of the source. The Minister's failure to do so meant that there was a denial of procedural fairness.

67 It may be that the procedure permitted by s 473GD of the Act was a statutorily ordained method of meeting the procedural fairness obligations of the IAA, as required by cases such as *Fernando*, while not unduly damaging the public interest through a wholesale release of sensitive material. However, for one reason or another, the IAA did not follow that procedure.

68 In any event, the Minister pointed to *Parkin v O'Sullivan* (2009) 260 ALR 503, which concerned security assessments conducted by the Australian Security and Intelligence Organisation and related documents. In that case, Sundberg J said at [33]:

> I have referred in connection with the respondent's affidavit to the great importance that is attached to the respondent's opinion as to the damage to national security incident upon disclosure. Obviously that is also the case in relation to the disclosure of the documents over which privilege is claimed. I have summarised the respondent's reasons for his opinion about the possible effects of disclosure of the documents in question. This is all derived from the open parts of his affidavit. The Final Appreciations and related briefing notes set out the reasoning process that underlies the making of security assessments, which are the key mechanism by which ASIO advises government that particular individuals pose a threat to national security. If documents falling within this class were required to be produced, ASIO would be giving information about its knowledge, assessments and methodology to the very people to whom it is most important that national security information is not disclosed: cf *Alister* 154 CLR 404 at 454-455 per Brennan J. As the respondent has deposed, the relevant class is "one of the classes of documents held by ASIO that require the greatest level of protection" first, because of the inherent sensitivity of the information that is routinely contained in such documents, and second, because of the detrimental consequences in terms of the quality of decision-making that would be likely to follow if ASIO officers were forced to omit particular kinds of information from Final Appreciations and related briefing notes due to the risk that those documents will become available to persons the subject of security assessments.

69 It is clear from that paragraph that the public interest immunity claim was not based so much on the investigative methods of ASIO, as on the security risk that would be involved in disclosure of security assessments and related documents. In the present case, the risk to the public interest was not put on the basis of security concerns.

70 Moreover, it can be inferred that there was no appreciable security risk in the present case because, if there had been, the Minister would have certified to that effect and the Secretary would then have been prohibited by s 473GA of the Act from giving the identity assessment form to the IAA. It does not seem to me that *Parkin v O'Sullivan* is particularly apposite.

71 The case of *Zarro v Australian Securities Commission* (1992) 36 FCR 40 upheld public interest immunity in documents concerned in an investigation by a public authority. However, the documents in that case appeared to concern ongoing investigations and informers. There are numerous cases that have upheld public interest immunity claims where there were ongoing investigations and informers.

72 In relation to ongoing investigations, the public interest could obviously be prejudiced by the early release of information about the point at which the

investigation had reached and how the investigation was being carried out. As the High Court said in *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at [13], 323-324 per Mason, Wilson and Dawson JJ:

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.

73 However, in cases of ongoing investigations, public interest immunity will not necessarily subsist beyond the conclusion of the investigation. In *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 8 ACLC 87 at 88, McLelland J said:

> It is, of course, necessary to appreciate that material for which immunity from disclosure may properly be claimed during the course of an investigation does not necessarily retain its immunity after the conclusion of the proceedings, although some of it may well do so.

74 In relation to informers, the public interest could obviously be damaged by the disclosure of the identity of informers because people may not be as willing to give information to the authorities about the transgressions of others if the informers identity was liable to be divulged.

75 In the present case, there was no suggestion that there was an informer involved, or any ongoing investigation.

76 The case of *Somerville* also upheld a claim of public interest immunity in respect of documents involved in an ongoing investigation and information given by members of the public in confidence. As stated, those factors do not apply in the present case. However, there was also a claim in *Somerville* that disclosure of some of the documents would be likely to:

> reveal investigatory methods used by the Commission which may hinder future investigations.

77 However, the Full Court of the Federal Court did not address that claim specifically. It may have been that claim that prompted Lindgren J to say that "more detail" should have been provided. It is not clear from the reasons for judgment that the investigative methods claim, by itself, would have been successful. In the present case, the investigative methods claim is the only claim for public interest immunity.

78 In *R v Melasecca* (1994) 74 A Crim R 210, Ryan J upheld a claim of public interest immunity in relation to an application to review the issuing of three search warrants obtained by the National Crime Authority and the Australian Federal Police. The claim of immunity was based on three grounds, namely, the informer rule, an ongoing investigation and investigative techniques.

79 In that case, Ryan J said at 225-226:

> I am prepared to accept the assertion sworn to by Mr Keehn, the NCA Regional Manager, that in part of the suppressed paragraphs of the information there are "matters which would disclose lawful methods by which investigations are undertaken into breaches or possible breaches of the law". Mr Keehn is a duly qualified legal practitioner and has deposed that he has inspected the information for himself. It has not been suggested that he had any motive for misleading the Court about the contents of the suppressed paragraphs. Nor has it been suggested

> that he had been mistaken about the effect which he has attributed to those paragraphs. The conclusion which I have quoted from his affidavit is one which the nature of the information and the purpose which it was intended to serve suggest is a natural inference to be drawn in respect of the contents of the suppressed paragraphs. In these circumstances, I do not think, on balance, that it is appropriate to myself inspect those paragraphs merely to reassure the applicants of Mr Keehn's veracity. In the words used in *Alister* (at 414), I am not persuaded that inspection would be likely to satisfy me that I ought to order production.
>
> On behalf of the applicants it was contended that, in so far as the suppressed paragraphs revealed investigative techniques which were well-known to the public, like the use of telephone interceptions and listening devices, no public interest could be served by their non-disclosure. I do not accept this submission. The fact that one of several well-known investigative techniques has been used in a particular context may be an important piece of information, the disclosure of which could alert persons the subjects of the investigation to the course which it was taking or might take in the future, and to the information which had been amassed in the course of it and the sources of that information. In that sense, disclosure would run counter to the policy applied by Lockhart J in *Zarro v Australian Securities Commission* (at 50) when his Honour upheld the non-disclosure of "documents that showed the extent of information gathered and the direction the investigation is or may be taking".

80 As can be seen, in *Melasecca & Zayler*, his Honour elided the concepts of ongoing investigations and investigative techniques. In addition, Ryan J said that he was reinforced in his decision to uphold the claim of public interest immunity by the fact that the applicants in that case would have an unrestricted opportunity to challenge the issuing of the search warrants and object to production of documents at any future committal hearing and trial. By contrast, there will be no other hearing in the present case that will give the opportunity to raise anything connected with the identity assessment form.

81 All in all, it is not clear that investigative methods, alone, have ever been held to be sufficient to make out a claim of public interest immunity. As stated above, that is the only ground that the Minister relies on in the present case, although that ground forms the basis of more general claims such as the proper functioning of the Commonwealth Government.

82 As also stated above, the evidence in support of exactly how disclosure of the identity assessment form would undermine the Department's system of identity checks is not detailed. The consequence is that the evidence in that regard is weak.

83 Overall, I accept that the Minister has provided some basis for the claim that there may be damage to the public interest if the identity assessment form were disclosed to the applicant. However, it is a weak case.

84 In relation to the second step, it is obvious that harm would be done to the administration of justice if there were material in the identity assessment form that could arguably give rise to a *sur place* claim. The IAA did not consider any such claim. If the identity assessment form did give rise to a *sur place* claim, the IAA would clearly have committed a jurisdictional error in not considering that claim. It would undoubtedly be a travesty of justice if the applicant were deprived of the opportunity to present such a case, if there were a proper basis for it.

85 However, the applicant's argument is merely that the identity assessment form may contain material that could found a *sur place* claim. That is based on

Ms Clark's evidence that "at times" identity checks by the Department involve in-country inquiries that "could" give rise to a *sur place* claim. Consequently, the applicant's case is not particularly strong either.

86 However, regarding the strength of the applicant's claim for production of the identity assessment form, Gibbs CJ said in *Alister v R* at 414:

> Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam*), so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence.

(Footnote omitted.)

87 In the present case, as discussed above, the applicant is not able to say with certainty that the identity assessment form would give rise to a *sur place* claim. However, the evidence is, in the words of Gibbs CJ, sufficient to show that it is "on the cards" that a *sur place* claim could be established. All in all, the present applicant's case for disclosure can be described as fairly weak.

88 Having found that there is a case, albeit a weak one, in favour of upholding public interest immunity in the identity assessment form, and a case, albeit a fairly weak one, in favour of the identity assessment form being disclosed, the third step is to balance the competing interests.

89 In *Alister v R*, Gibbs CJ emphasised in the passage quoted above the additional weighting, so to speak, which should be given to the needs of an accused person whose liberty may be at stake. In the present case, the applicant claimed that not only his liberty but his life is at stake. If his claims are true that he has offended members of the Basij in Iran, as the IAA accepted, it is not beyond the realms of possibility that his life really is at stake. Consequently, that adds to the weight in favour of disclosure.

90 Additionally, in considering the competing public interests, there is a very strong public interest in Australia fulfilling its obligations under international treaties and Australia giving protection to those who meet the criteria for a protection visa. Those considerations should also go into the balance. Whether the applicant does meet the criteria for a protection visa is a matter for the IAA. However, the question whether the IAA assessed that question lawfully is the substantive matter now before this court.

91 In my view, the competing public interests in this case favour the disclosure of the identity assessment form. Before ordering disclosure, however, I consider that it would be preferable for the court to inspect the form for itself. That is in accordance with authority. For example, in *Ahmet v Chief Commissioner of Police* [2014] VSCA 265 (24 October 2014), Nettle JA and Sloss AJA (in the Victorian Court of Appeal) said at paragraph 32:

> In the absence of knowing what information is contained in the complaint files, it is difficult to see how his Honour could have undertaken any real balancing of the competing public interests. In our view, where the claim for immunity is a "contents" claim, that exercise will normally require the judge to inspect the documents for the purpose of making a decision on whether or not the claim is made out.

(Footnote omitted.)

92 In *Alister v R*, Gibbs J noted that:

> *Both Burmah Oil Co. Ltd. v Bank of England* [1979] UKHL 4; (1980) AC 1090 and *Air Canada v Secretary of State for Trade* (1983) 2 AC 394 support the view that where the Crown objects to the production of a class of documents on the ground of public immunity, the judge should not look at the documents unless he is persuaded that inspection would be likely to satisfy him that he ought to order production …

(Footnotes omitted.)

93 However, Gibbs CJ went on to depart somewhat from those cases, saying:

> Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam*), so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence.

94 In all the circumstances of this case, I consider that it would be proper and desirable for the court to inspect the identity assessment form. Firstly, that course is in keeping with *Alister v R* and *Ahmet*. Secondly, inspection by the court has the practical benefit that, if there were no possible *sur place* claim deriving from the identity assessment form, it would not have to be disclosed. Thirdly, the document the subject of this proceeding is a single document. As such, and unlike cases involving suitcases full of documents, it would be very easy for the court to inspect the identity assessment form and reach a conclusion about whether it could possibly assist the applicant.

95 If there were a *sur place* claim arising on the identity assessment form, there may be ways of releasing the necessary information to the applicant without disclosing the entire document. It will be recalled that, in *Fernando*, the court said that the applicant should have been given a summary of the relevant information, without disclosing a confidential source of information. As a matter of practicality, however, it would seem that, if there were sufficient material in the identity assessment form to found a *sur place* claim, the IAA's decision could not stand.

Conclusion

96 There will be an order for the court to inspect the identity assessment form.

Orders accordingly

Solicitors for the applicant: *Victoria Legal Aid*.

Solicitors for the first and second respondent: *Clayton Utz*.

TRISTAN LOCKWOOD