



FEDERAL COURT OF AUSTRALIA



Migration Practice Note (MIG-1) ACLHR National Practice Area NPA Sub-Area Practice Note

PART A: INTRODUCTION

1. Purpose

1.1 The purpose of this Practice Note is to inform parties and the profession of the Court's practice and procedure for the case management of its migration caseload so that they can better prepare and assist the Court.

1.2 This Practice Note deals with:

- [Commencing proceedings](#)
- [Urgent applications and requests for expedition](#)
- [Parties in immigration detention](#)
- [Non-removal of detainees with litigation before the Court](#)
- [Early submissions](#)
- [Challenging Full Court decisions](#)
- [Initial triage of original jurisdiction matters](#)
- [Application books](#)
- [Initial triage of appellate matters](#)
- [Substantive allocation and case management of appellate matters](#)
- [Full Court listings](#)

2. Scope

2.1 This Practice Note applies to:

- (a) matters in the Court's original jurisdiction brought under ss 476A and 477A of the *Migration Act 1958* (Cth) (**Part B**); and
- (b) appeals brought under s 24 of the *Federal Court of Australia Act 1976* from a decision of
 - a single Judge of this Court, or
 - a Judge of the Federal Circuit and Family Court (Division 2) sitting in that Court's jurisdiction under s 476 of the *Migration Act* (**Part C**).

[The Administrative and Constitutional Law and Human Rights Practice Note \(ACLHR-1\)](#) covers matters:

- relating to the *Australian Citizenship Act 2007* (Cth);
- commenced under s 39B of the *Judiciary Act 1903* (Cth);
- commenced under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and
- commenced under the *Administrative Appeals Tribunal Act 1975* (Cth).

3. Commencing Proceedings

- 3.1 The [Federal Court Rules 2011 \(Rules\)](#) and [forms](#) apply to the commencement of migration proceedings.
- 3.2 When commencing a migration proceeding, save where a rule in Chapter 3 of the *Federal Court Rules* permits that no supporting material be filed with an application, an originating document should be accompanied by appropriate supporting material.

Title of Proceedings and Naming Parties

- 3.3 The Court will assign a pseudonym to litigants whose proceedings are referred to in s 91X of the *Migration Act*.
- 3.4 Where a pseudonym has previously been assigned by a Court or Tribunal that is the source of the proceedings, this Court will adopt the same pseudonym. Where a pseudonym has not previously been assigned, the Migration Team should be contacted before lodgement of the application so that the Court can assign a new pseudonym:
migrationteam@fedcourt.gov.au.
- 3.5 In judicial review matters brought under the *Migration Act* (whether in the Court's first instance or appellate jurisdiction – see 2.1 above):
- (a) each party bringing the application should be named as the first applicant/ appellant, second applicant/ appellant and so on respectively;
 - (b) each of the other parties to the proceeding before the relevant Tribunal or authority should be named as the first respondent, second respondent and so on respectively;
 - (c) The relevant Tribunal or authority should be named as the last respondent.
 - (d) The individual names of the President, Senior Members, Members or Registrars of the relevant Tribunal or authority should not appear in the title of the proceeding and do not need to be named as parties to the proceeding.

4. Urgent Applications and Requests for Expedition

- 4.1 Any urgent originating applications should be brought promptly to the attention of the duty judge in accordance with the [Court's guidance on urgent \(Duty\) matters](#).
- 4.2 Any interlocutory applications should be brought to the attention of the docket Judge who has the responsibility for hearing and case managing the proceeding at the time of filing of the interlocutory application. If no docket Judge has been assigned, or after approaching the chambers of the docket judge it is clear that the docket judge is uncontactable or otherwise unavailable to hear the interlocutory application, then urgent interlocutory applications should be brought to the immediate attention of the duty Judge in the same manner as set out in 4.1 above.
- 4.3 Any request for expedition should be communicated promptly to the National Operations Registrar (NOR) Team at NORTeam@fedcourt.gov.au. Any interlocutory applications that may not be sufficiently urgent for the duty system, but still require consideration within a month of filing, should also be brought promptly to the attention of the NOR Team.

- 4.4 A request for expedition should clearly explain the reason(s) for the request and indicate when parties expect to be ready for hearing. To the extent possible, the views of all parties in relation to the expedition request should be sought and communicated to the Court. All parties should be included in correspondence sent to the Court.
- 4.5 It is the Court's policy that requests for expedition are considered by the Chief Justice, who may consult the NOR and/or seek the views of another Judge as to whether expedition is appropriate or may request evidence on affidavit.

5. Parties in immigration detention

- 5.1 Matters involving a party who is in immigration detention ('detainee') will be allocated for hearing as expeditiously as possible to avoid undue delay.
- 5.2 It is the Court's policy that detainees who are unrepresented will be referred for pro bono legal assistance. The Court may seek the appointment of pro bono counsel in accordance with r. 4.12 or an amicus curiae in accordance with r. 9.12 of the *Rules*.
- 5.3 Where legal representation is not available, hearings involving detainees maybe conducted by remote access technology by link to the relevant detention facility, or in person if the Judge hearing the matter or the Court otherwise considers it is in the interests of the administration of justice to do so. In such a case, a judge may order the attendance of the detainee in Court.

6. Non-Removal from Australia of Detainees with Litigation Before the Court

- 6.1 The **Migration Practice Note - Removal from Australia of Immigration Detainees who have Proceedings before the Court (MIG-2)** applies to detainees with litigation before the Court. To facilitate the efficient administration of justice, a detainee with proceedings currently before the Court should advise the Court of any arrangements being contemplated or made for their removal from Australia, irrespective of whether the proposed removal is voluntary or involuntary.
- 6.2 Detainees to whom the Removal from Australia Practice Note (MIG-2) applies should not be removed from Australia, whether voluntarily or involuntarily, unless the Commonwealth and its officers, whether through the respondents Minister in a particular proceeding or otherwise, are able to demonstrate that the detainee has been
- properly informed of the contents of the Removal from Australia Practice Note (MIG-2) and
 - given a reasonable, and practicable, opportunity to communicate with the Court, whether the docket Judge, the Duty Judge, the National Migration Registrar or the Court's Migration Team, about their proposed removal and what they wish to occur in relation to the proceedings before the Court.
- 6.3 The Court will not consider that such an opportunity has been given unless the detainee has been informed that the communication should be made to one or more of such persons. Communication should NOT be made to a generic Court or Registry address.

7. Early Submissions

- 7.1 In some matters, early outlines of submissions may assist the Court to consider how the matter can be appropriately case managed. In such cases, a Registrar will contact parties about the early filing of submissions and timetabling orders will be made accordingly.

8. Challenging a Previous Full Court Decision

- 8.1 A party intending to challenge the correctness of a previous Full Court decision should write to the Court at the time of filing, or as soon as reasonably practicable after filing:
- (a) identifying the previous Full Court decision that is, or that may be, the subject of a challenge; and
 - (b) briefly explaining the reason(s) why a Full Court should be convinced or persuaded of an error in the previous Full Court decision which would be perpetuated if that decision were followed.
- 8.2 In matters where a party communicates its intention to challenge the correctness of a previous Full Court decision in accordance with paragraph 8.1 above:
- (a) the Court may require early submissions;
 - (b) a Judge will consider what, if any, recommendation should be made to the Chief Justice about the manner in which the Court may be constituted in accordance with s 14 of the *Federal Court of Australia Act 1976* (Cth); and
 - (c) the Chief Justice will consider and determine the appropriate constitution of the bench, including the number and selection of Judges to sit as the Full Court.

PART B: ORIGINAL JURISDICTION MATTERS

9. Initial Triage of Original Jurisdiction Matters

- 9.1 Upon filing, original jurisdiction matters are placed in the NOR docket for initial triage before being allocated to judges' dockets by the Chief Justice. Matters are generally allocated on a weekly basis.
- 9.2 The initial triage process will typically consider:
- (a) what originating documents have been filed;
 - (b) whether there have been any interlocutory applications;
 - (c) whether the applicant is in immigration detention;
 - (d) whether a party is represented;
 - (e) any requests for expedition or adjournment, etc. made by parties;
 - (f) whether there are any other matters before the Court, or in other courts, that may be relevant to how the matter should be case managed;
 - (g) other matters involving parties that are potentially relevant to proceedings;
 - (h) whether the matter must be heard by a Full Court, and, if not, whether a Full Court hearing may in any event be appropriate;
 - (i) whether any party seeks to challenge any Full Court authority, such that it may be appropriate for the Court to consider constituting a Full Court;
 - (j) whether the matter is suitable for case management by a Registrar;

- (k) any other issues that may be of relevance to case management, including the Court's workload, availability of facilities and Judges, etc.

10. Application Books

- 10.1 For every matter brought under the Court's original jurisdiction, an application book must be prepared by the lawyer for the applicant; or by the lawyer representing the Minister if the applicant:
- (a) is not represented by a lawyer; or
 - (b) is represented by a lawyer who is acting on a pro bono basis, and who informs the Migration Team they do not have the resources, or are not permitted, to produce and file a court book.
- 10.2 Unless otherwise directed by the Court, the application book must be provided to the Court in electronic searchable format and must contain:
- (a) all material that was before the decision-maker who made the substantive decision that is the subject of the proceedings;
 - (b) the substantive decision and all documents relating to the applicant being notified of the decision;
 - (c) if relevant, all material that went to the decision-maker for an indication as to whether they wished to consider the exercise of a personal power;
 - (d) where the application relates to tribunal proceedings, any part of the transcript of those proceedings relied upon as relevant to the hearing and determination of the application.
- 10.3 Unless the Court directs otherwise, the party responsible for preparing the application book is to file and serve the application book no later than (20) business days prior to the hearing date.

PART C: APPELLATE MATTERS

11. Initial Triage of Appellate Matters

- 11.1 Upon filing, migration appeals are placed in the NOR Full Court & Appellate docket for initial triage. Shortly after filing, a Registrar will issue directions and seek information to assist with the triage process.
- 11.2 The time from filing to initial triage varies from case to case and will typically depend on:
- (a) what documents have been filed;
 - (b) whether there have been any interlocutory applications;
 - (c) any requests made by the parties, such as for expedition or adjournment;
 - (d) whether a party is in immigration detention;
 - (e) whether there are any other matters before the Court, or in other courts, that may be relevant to how the matter should be case managed;
 - (f) any past matters involving parties that are relevant to proceedings;
 - (g) whether the matter must be heard by a Full Court, and, if not, whether a Full Court hearing may in any event be appropriate;

- (h) whether further consultation as to the appropriate constitution of the bench is required or appropriate, for example, matters to which s 44(3)(b)(ii) of the *Administrative Appeals Tribunal Act 1975* (Cth) apply;
- (i) whether any party seeks to challenge any Full Court authority, such that it may be appropriate for the Court to consider constituting a Full Court;
- (j) whether the matter is suitable for case management by a Registrar;
- (k) any other issues that may be of relevance to case management, including the Court's workload, availability of facilities and Judges, etc.

12. Substantive Allocation and Case Management

12.1 Following the initial triage process, appeals will be allocated to either a Full Court or single Judge by the Chief Justice, following consultation with the Migration Liaison Judges and NOR.

12.2 Pending formal allocation for substantive hearing, an appeal may remain in the NOR docket for case management by a Registrar, for example where the parties are represented and no case management issues that require the attention of a judge arise. Some appeals may be allocated to a judge's docket for case management, for example if an interlocutory application has been filed that is required to be determined prior to the final hearing.

12.3 A Judge conducting case management may:

- (a) consider whether it may be appropriate for certain applications or objections to competency to be heard and determined immediately prior to, or concurrently with, the hearing of any appeal;
- (b) hear and determine certain applications or objections to competency;
- (c) make recommendations to the Chief Justice about matters such as expedition, adjournment and appropriate constitution of the bench;
- (d) review the grounds of appeal, for example, where the appellant is a self-represented litigant and the grounds of appeal are extensive;
- (e) make timetabling orders for the case management of the matter; and
- (f) ascertain relevant information, for example, the estimated duration of the hearing and deal with any other case management issues that may arise.

12.4 Where it is determined by the Chief Justice that a matter which has previously been referred to a Judge for case management may appropriately be heard and determined by a single judge, it is likely that the Chief Justice will allocate the matter to that same Judge for hearing, subject to their availability.

13. Full Court Listings

13.1 During each of the Court's Full Court and appellate sitting periods, a Registrar reviews all Full Court and appellate matters in the Court with a view to determining which matters may be appropriate for inclusion in the list of matters to be heard by a Full Court during the next available Full Court and appellate sitting period.

- 13.2 Where the Registrar considers that a particular matter may be appropriate for inclusion in the list of matters to be heard by a Full Court during the next available Full Court and appellate sitting period, the Registrar may email the parties regarding case management issues and availability.
- 13.3 Parties' replies to such emails are collated with other relevant information relating to availability and case management. This is then provided to the Chief Justice for consideration.
- 13.4 All decisions in relation to listing matters before a Full Court, whether within the Full Court and appellate sitting periods or by special fixture, are made by the Chief Justice.

J L B ALLSOP
Chief Justice
7 March 2022