HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **QYFM**

Appellant

AND:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 2 – No apprehended bias

2. The recusal application made to Bromwich J (which did not assert incompatibility based on his prior role as CDPP) was weak. Confronted with that application, his Honour had a duty to sit unless there was a substantial ground for concluding that he was disqualified. Such a finding is not reached lightly, and could not properly have been reached simply on an impressionistic basis: **CAB 157-158 [56]-[60]; ABFM 47-49**.

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No incompatibility of roles (**RS [31]-[39]**)

3. An allegation of apprehended bias based on incompatibility of roles must spell out the "interest" the judge is said to have, and must articulate the logical connection between that interest and the feared deviation from deciding a case on its merits. The Appellant cannot discharge that burden by asserting or assuming that this case is analogous to *Isbester*, which it is not: *Isbester* (2015) 255 CLR 135 (**Vol 3, Tab 16**) at [3]-[10], [20], [21], [24], [33], [34], [39]-[43], [46], [49], [63], [68].

4. Justice Bromwich did not have an "interest" that was incompatible with his Honour's duty to act impartially in the Federal Court appeal on either of the bases asserted.

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(1) Formal responsibility for carrying on prosecution: **(RS [9]-[10], [17]; cf AS [7]-[8])**

5. To the extent that there is a factual foundation to entertain an argument based on Bromwich J's formal responsibility for carrying on the prosecution (*Mickelberg* (1989) 167 CLR 259 (**Vol 3, Tab 20**)), that role did not give rise to any relevant "interest" (**RS [35]**).

   (a) Absent actual involvement, there is no basis to infer that Bromwich J might have had a frame of mind about the Appellant's guilt or punishment, or any interest in vindicating the decisions relating to his prosecution.

   (b) In any case, a decision in the Full Court as to whether there was jurisdictional

30 error in the Tribunal's decision not to revoke the cancellation of the Appellant's visa was so far removed from the prosecution that it was inherently incapable of "vindicating" any such decisions.

(2) Counsel in conviction appeal

6. Justice Bromwich did not have an "interest" by reason of his appearance as counsel in the appeal. By then, a jury had found the Appellant guilty **(CAB 156 [55]**), confirming that Bromwich J was not the "accuser" or "moving force" for the conviction. Further:

   (a) The appeal did not require consideration of "any aspect of the appellant's conduct or conviction that did not directly relate to the admissibility of the evidence", "nor anything else to do with him as an individual" (**CAB 156-157 [56]**), and therefore provided no occasion to form a "frame of mind" about the Appellant; and

   (b) Bromwich J appeared to argue a point of legal principle (**CAB 158 [61(1)]**).

7. There is not necessarily any incompatibility between a person having played a prosecutorial role and then subsequently, after being made a judge, hearing proceedings involving the person who was prosecuted. That is so even when the subject-matter of the proceedings overlaps more closely than the present proceedings: *R v Garrett* (1988) 50 SASR 392 **(Vol 5, Tab 39)** at 400, 404. See also *McCreed* (2003) 27 WAR 554 **(Vol 5, Tab 32)** at [8], [16]-[18], [45]; *Muldoon* (2008) 192 A Crim R 105 **(Vol 5, Tab 34)** at [26], [28]; *R v Goodpipe* (2018) SKQB 189 **(Vol 5, Tab 40)** at [12]-[16].

8. Whether subsequent proceedings are relevantly "related" or "consequential" to an earlier proceeding, such that incompatibility might arise if the judge was a prosecutor in that earlier proceeding, depends, inter alia, on the degree of commonality of facts, evidence and/or remedies between the two proceedings, and their temporal proximity: eg *Isbester* (2015) 255 CLR 135 (**Vol 3, Tab 16**) at [34], [63]. Incompatibility is not established – in effect automatically (cf **AS [45])** – merely by establishing a "but for" relationship between the two proceedings (cf **ASR [9]-[12]**).

*Fair-minded lay observer would not reasonably have apprehended bias (**RS [37]-[38]**)*

9. A fair-minded lay observer would not reasonably have apprehended that Bromwich J might not bring an impartial mind to the resolution of the Federal Court appeal, given: (i) the absence of overlap in the subject-matter of the Federal Court appeal and the earlier criminal proceedings; (ii) his limited involvement as appellate counsel, and the passage of seven years since that appeal; and (iii) Bromwich J's judicial training and experience: *Johnson* (2000) 201 CLR 488 **(Vol 3, Tab 18)** at [12]. However, if that conclusion is rejected, it is not in issue that the appeal must be allowed.

Ground 1 – No error in Bromwich J deciding apprehended bias application alone

10. If the Appellant fails to establish a reasonable apprehension of bias, Ground 1 does not provide any independent basis upon which the appeal could be allowed. Even if the Full Court should have decided the recusal application, the rejection of Ground 2 would establish that the Full Court was in fact properly constituted: *Ebner* (2000) 205 CLR 337 **(Vol 3, Tab 15)** at [71]; *Webb* (1994) 181 CLR 41 **(Vol 4, Tab 23)** at 88; also 54 and 56. **(RS [45]-[46])**

*The orthodox practice is for impugned judge to determine the application (**RS [47]-[48]**)*

11. Justice Bromwich followed the orthodox practice in Australia in deciding the recusal application himself.

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(a) With respect to primary judges, the plurality in *Ebner* described this as "both the ordinary, and the correct practice": (2000) 205 CLR 337 (**Vol 3, Tab 15**) at [74].

(b) That practice has been followed many times by judges on multi-member courts, including this Court, Federal Courts and State and Territory Supreme Courts. All Justices apparently endorsed that course in *Kartinyeri* [1998] HCATrans 43.

(c) It is likewise endorsed by the AIJAI's *Guide to Judicial Conduct* (**Vol 7, Tab 50**) at [3.5].

12. There are both practical advantages to this practice (**RS [49]**) and serious doubts as to how a majority could give effect to a decision that another judge is disqualified (**RS [50]-**

20 **[53]**). If the orthodox practice is to change, that should follow a considered law reform process: ALRC, *Without Fear or Favour* (December 2021) (**Vol 7, Tab 51**) at [7.103].

*Decision on qualification to sit does not involve exercise of appellate jurisdiction (**RS [54]**)*

13. A decision as to the constitution of a Full Court does not involve the exercise of judicial power, let alone appellate jurisdiction: FCA Act, s 15(1AA); ADJR Act, Sch 1 item (ze). Consistently with that submission, a recusal decision does not resolve a controversy between the parties, and no order is required to give effect to it: *Ebner* (2000) 205 CLR 337 (**Vol 3, Tab 15**) at [74], [185]; *Michael Wilson* (2011) 244 CLR 427 **(Vol 3, Tab 19)** at [81].

30 Dated: 13 December 2022

Stephen Donaghue Alexander Solomon-Bridge Arlette Regan