HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA **M53/2022**

MELBOURNE REGISTRY

BETWEEN:

QYFM

Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Respondent

Administrative Appeals Tribunal

Second Respondent

APPELLANT'S REPLY

PART I – CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ARGUMENT

Material facts in contention (cf. RS [8] and [11]–[14])

2. The Appellant agrees with the corrections set out in the First Respondent's submissions (**RS**) at [8] and [11]–[14].

Ground 1 is anterior to Ground 2 (cf. RS [15], [45] and [46])

3. A ground of apprehended bias — striking, as it does, at the validity and acceptability of the substantive hearing and determination[1] — must be dealt with before grounds concerning the substantive hearing and determination. Ground 1 is not of that kind. The question of the proper constitution of the Full Court for the purpose of determining apprehended bias is logically anterior to the question of apprehended bias, for much the same reason that the question of apprehended bias is logically anterior to questions affecting the substantive determination.

[1] *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 611 [117] (Kirby and Crennan JJ, Gummow A-CJ agreeing at 581-582 [3]); **RS [15]**.

Evidence of appointment as CDPP (cf. RS [9])

4. If it was correct for Bromwich J to determine the objection alone, then the appointment date, being known to his Honour, formed "part of the evidential foundation upon which the [application] was determined": **RS [9]**.

5. If the Full Court was required to determine the apprehended bias objection, then the appeal should be allowed on ground 1. Had the Full Court determined the objection, it would have been open to their Honours to adopt a procedure that involved Bromwich J setting out the relevant facts for the consideration of the Full Court,[2] including the appointment date.

10 **The role of the CDPP (cf. RS [10], [17], [24] and [26]–[27])**

6. The Appellant accepts that "distinguishing the actual from the formal is important" (**RS [17]**) and that it is critical to consider the factual context of each case (**RS [27]**). This appeal does not require determination of whether apprehended bias would arise had Bromwich J not appeared in the conviction appeal, but solely by virtue of his having held the office of CDPP at the time of conviction, sentence or conviction appeal (see the Appellant's submissions dated 30 September 2022 (**AS**), [58]).

The *Webb* categories (cf. RS [21])

7. While the categories identified by Deane J in *Webb v The Queen*[3] provide a "convenient frame of reference",[4] they were not intended, and have not subsequently
20 been treated, as providing four exhaustive subsets[5] (cf. **RS [21]**).

8. While categories may be useful, they should not be used to complicate the test, or to invite overly elaborate analysis, lest the court be drawn back into its own view, rather than its view of the public's view.[6]

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2 See, Australian Law Reform Commission, *Final Report – Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021) (**ALRC Bias Report**), 254–255 (In Focus: Obtaining information from judges on underlying facts); Supreme Court of New Zealand (Te Kōti Mana Nui o Aotearoa) Recusal Guidelines, [6] (ALRC Bias Report, 576); Court of Appeal of New Zealand (Te Kōti Pīra o Aotearoa) Recusal Guidelines, [10] (ALRC Bias Report, 578).

3 (1994) 181 CLR 41, 74.

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 349 [24] (Gleeson CJ. McHugh, Gummow and Hayne JJ).

5 In *Ebner*, it was "not necessary to decide upon the comprehensiveness of such categorisation" and "its utility may depend upon the context in which it is employed": *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348–349 [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ). In *CNY17 v Minister for Immigration* (2019) 268 CLR 76, Nettle and Gordon JJ recognised that "[p]artiality can take many forms, *including*" those categories identified by Deane J: at 98–99 [57] (but see 119 [134] per Edelman J).

6 *Webb v The Queen* (1994) 181 CLR 41, 52 (Mason CJ and McHugh J).

Related proceedings (cf. RS [17], [25] [28], [30], [32]–[34] and [36]–[39])

9. The First Respondent seeks to draw a line. On one side of the line, disqualification is not required if the relationship between the instant proceeding and one in which the judge previously appeared can be characterised by the adjective "unconnected" (**RS [17] (fn 9)**), or "unrelated" or "peripheral" (**RS [36]**). That is the side of the line on which the present case is said to fall. *Isbester v Knox City Council*[7] is said to fall on the other side of the line, by characterising the two proceedings in that case as "closely related" (**RS [30]**).

10. This use of adjectives invites attention to their function. The issue would never arise if the two proceedings are truly unconnected. At a minimum, the judge and the party were both involved in each; "unconnected" means, presumably, that there is no connecting factor beyond that commonality of players. That is not the present case. Here, the two proceedings were related in that the outcome of the first gave rise to the second.

11. In *Williams v Pennsylvania*, the proceedings were connected because the Chief Justice of the Supreme Court of Pennsylvania had, when district attorney, given approval to seek the death penalty against the appellant in a criminal proceeding. The execution was ordered, but subsequently stayed on a civil application. The Chief Justice sat on a court which upheld the further civil application by the Commonwealth of Pennsylvania to vacate the stay, brought some 30 years after the Chief Justice had, as district attorney, approved the seeking of the death penalty.[8] The original prosecution and the later stay proceeding were related because the outcome of the first gave rise to the second. Similarly, in *Isbester*,[9] the outcome of the Magistrates' Court proceeding (the finding of guilt) gave rise to the panel process (**AS [50]**).

12. Here, the matter adjudicated by the Full Court arose only because the Appellant had been convicted and sentenced, his appeal against conviction had been dismissed, and his visa was cancelled as a statutory consequence. It does not matter that the precise issues to be determined in each proceeding did not overlap (cf. **RS [25.6(d)]**, **[32]–[34]**). The two were related because the second proceeding was the fruit of the first.

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7 (2015) 255 CLR 135.
8 136 S.Ct. 1899 (2016), 1903–1904.
9 (2015) 255 CLR 135.

13. At **RS [25.6(d)]**, the First Respondent submits that the appeal to the Full Court "concerned whether Kerr J had erred in holding that the Tribunal had not made a jurisdictional error in upholding the non-revocation decision" (see also **RS [32]**). The Appellant was unrepresented before Kerr J. After obtaining legal representation in his appeal, the Appellant sought to rely on new grounds and was given leave to rely on one new ground concerning the reasonableness of the Tribunal's decision.[10] The task of the Full Court included, in effect, judicial review of the Tribunal's decision on grounds that had not been considered or determined by the primary judge.

Knowledge of the hypothetical observer (cf. RS [25])

14. At **RS [25.5]** the First Respondent refers to the "subsequent enactment of s 501(3A)" following the conviction appeal. If the hypothetical observer is to be imputed awareness of this legislative sequencing issue, then they must also be taken to be aware that before s 501(3A) was enacted, and at the time the conviction appeal was dismissed, the power under s 501(3) was enlivened by reason of the conviction and sentence.

15. At **RS [25.6(b)]** the First Respondent imputes knowledge to the hypothetical observer of the Appellant's evidence before the Tribunal that he "accepted he had committed the offence of which he was convicted". The observer would also appreciate that the Appellant's criminal conviction could not have been put in issue in the Tribunal.[11]

Bromwich J deciding the recusal application alone (cf. RS [45]-[47])

16. It is incongruous to maintain that: (1) the unanimous decision of a multi-member court is affected by the presence of a judge disqualified by reason of apprehended bias (**RS [44]**), but (2) it is a matter for that judge alone, not the Full Court, to decide whether the Court is precluded by the judge's presence from hearing the proceeding.

17. As to the "orthodoxy" of practice, and as is recognised by the First Respondent, it has not been the universal practice for such applications to be determined by the challenged judge alone where the judge sits on a panel (**RS [47] (fn 93)**).[12]

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10 **CAB 138, [2]–[3]**.

11 *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121, 139–140 [78]–[79] and 163 [179] (McKerracher and Colvin JJ) (from which special leave to appeal was refused on 15 October 2021: [2021] HCATrans 168).

12 See also ALRC Bias Report, 232 [7.7] fn 3, 265 [7.110] fn 172, and 266 [7.112] fn 183.

Scenarios about individual judges in a multi-member bench (cf. RS [51]–[53])

18. The practical difficulties posited by the scenarios identified at **RS [51]–[53]** do not arise to be considered on this appeal. In any event, each starts by incorrectly assuming the validity of the premise that each judge is a locus of authority when sitting as a member of a Full Court.

19. If the jurisdiction of a Full Court were challenged on some other basis, the Full Court would be required to determine that issue at the outset; that issue could not be delegated to one judge to decide alone.

20. In any event, the first duty of the Full Court on objection being taken for apprehended bias is to ask whether its authority to hear and determine the appeal is affected (**AS [27]**). If it answers in the affirmative, it can then move to consider whether the situation can be remedied, including by reconstitution. But difficulties that may arise from that subsequent consideration do not logically bear on how the Full Court should be constituted to decide the initial question.

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