



HIGH COURT OF AUSTRALIA

17 May 2023

QYFM v MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR [2023] HCA 15

Today, the High Court allowed an appeal from a judgment of the Full Court of the Federal Court of Australia ("the Full Court") dismissing the appellant's appeal from a decision of a single judge of the Federal Court. At first instance, the Federal Court dismissed the appellant's application for judicial review of a decision of the Administrative Appeals Tribunal affirming a decision made by a delegate of the Minister exercising powers under the *Migration Act 1958* (Cth) not to revoke the cancellation of the appellant's visa. The cancellation decision was based on the appellant's sentence to a term of imprisonment for his conviction of a drug importation offence in 2013.

The issue before the High Court was whether a judge sitting as part of the Full Court constituted to hear the appellant's appeal should have recused himself from the hearing of the appeal by reason of a reasonable apprehension of bias said to arise from the judge's appearance as senior counsel for the Crown, in his former capacity as the Commonwealth Director of Public Prosecutions, in opposition to an appeal by the appellant against his conviction for the drug importation offence that resulted in the cancellation of the appellant's visa ("the conviction appeal").

On the morning of the hearing of the appeal before the Full Court, the judge's associate informed the parties' legal representatives by email of the judge's involvement in the conviction appeal. At the commencement of the hearing, the appellant's counsel made an oral application for the judge to recuse himself. Following a short adjournment, the challenged judge delivered reasons for declining to recuse himself and the hearing of the appeal proceeded. The judge recapitulated those reasons in his written reasons for judgment. The other members of the Full Court did not address the recusal application either during the hearing or in their separate joint reasons for judgment.

The High Court, by majority, held that the judge should have recused himself from the Full Court appeal. The majority held that the judge's appearance as counsel against the appellant in the conviction appeal gave rise to a reasonable apprehension on the part of a fair-minded lay observer that the judge might not bring an impartial mind to the adjudication of the issues presented in the Full Court appeal. The reasonableness of that apprehension was reinforced by the causal connection between the appellant's conviction and the visa cancellation decision, the legality of the non-revocation of the visa cancellation being in issue before the Full Court. As a result of the reasonable apprehension of bias on the part of the challenged judge, the Full Court as constituted had no jurisdiction to hear and determine the appellant's appeal.

Although not necessary for the disposition of the appeal, a majority of the High Court also considered whether an application to disqualify a judge from the hearing and determination of a matter before a multi-member court should be determined by the challenged judge alone, by all members of the court as constituted, or by both, as well as (if the latter) whether the challenged judge should have the opportunity to consider the application in the first instance.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*