HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

CNY17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

CNY17 v Minister for Immigration and Border Protection
[2019] HCA 50
Date of Hearing: 16 October 2019
Date of Judgment: 13 December 2019
M72/2019

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 21 September 2018 and order 1 made by the Full Court of the Federal Court of Australia on 12 October 2018 and, in their place, order that:*

    (a) the appeal be allowed with costs; and

    (b) orders 1 and 2 of the Federal Circuit Court of Australia dated 8 November 2017 be set aside and, in their place, order that:

        (i) the decision of the Immigration Assessment Authority dated 12 May 2017 be quashed;

        (ii) the matter be remitted to the Immigration Assessment Authority differently constituted; and

        (iii) the first respondent pay the applicant's costs.

On appeal from the Federal Court of Australia

Representation

L G De Ferrari SC with M W Guo for the appellant (instructed by Estrin Saul Lawyers)

G R Kennett SC with A P Yuile for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

CNY17 v Minister for Immigration and Border Protection

Immigration – Refugees – Application for protection visa – Where Pt 7AA of *Migration Act 1958* (Cth) requires Immigration Assessment Authority ("IAA") to review certain decisions to refuse applications for protection visas – Where s 473CB(1)(a), (b) and (d) requires Secretary of Department to give certain material to IAA to conduct review – Where s 473CB(1)(c) requires Secretary to give to IAA any other material Secretary considers relevant to review – Where s 473DB requires IAA to review decision by considering material given by Secretary – Where Secretary gave material to IAA pursuant to s 473CB(1)(c) – Where material irrelevant to task of IAA – Where material prejudicial to applicant – Where applicant unaware of material – Whether jurisdictional error by Secretary – Whether jurisdictional error invalidated decision of IAA – Whether apprehended bias.

Administrative law – Judicial review – Procedural fairness – Where s 473FA requires IAA to operate free of bias – Whether apprehended bias.

Words and phrases – "apprehended bias", "bias", "fair-minded lay observer", "fast track reviewable decision", "Immigration Assessment Authority", "impartial", "irrelevant", "irrelevant and prejudicial material", "jurisdictional error", "material", "materiality", "prejudicial", "prejudicial but inadmissible", "procedural fairness", "professional decision maker", "reasonable apprehension of bias", "relevant", "relevant to the review", "required to consider", "review material", "rule against bias", "subconscious bias".

Constitution, s 75(v).
Migration Act 1958 (Cth), Pt 7AA.

1 KIEFEL CJ AND GAGELER J. This appeal from a decision of the Full Court of the Federal Court[1] concerns a problem that has arisen in the administration of Pt 7AA of the *Migration Act 1958* (Cth).

The statutory scheme

2 Part 7AA of the *Migration Act*, the scheme of which has been noted in this Court on previous occasions[2], imposes a requirement for automatic merits review by the Immigration Assessment Authority of decisions of the Minister for Immigration and Border Protection referred to as "fast track reviewable decisions". Fast track reviewable decisions include certain decisions to refuse protection visas on the basis that the Minister is not satisfied that the applicants meet the main statutory criterion for the grant of protection visas, that they are persons in respect of whom Australia owes protection obligations[3].

3 The Part establishes the Authority within the Migration and Refugee Division of the Administrative Appeals Tribunal[4]. The Authority as so established is to consist of the President of the Tribunal and the Division head[5], each of whom must hold appointment for a fixed term under the *Administrative Appeals Tribunal Act 1975* (Cth)[6], together with a Senior Reviewer and other Reviewers[7], each of whom are to be persons engaged under the *Public Service Act 1999* (Cth)[8].

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1 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87.

2 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 225-232 [13]-[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1094-1096 [3]-[17]; 373 ALR 196 at 198-201.

3 Sections 5(1) (definition of "fast track decision"), 36, 65 and 473BB (definition of "fast track reviewable decision") of the *Migration Act*.

4 Section 473JA(1) of the *Migration Act*.

5 Section 473JA(2)(a) and (aa) of the *Migration Act*.

6 Section 8, read with ss 6 and 17K.

7 Section 473JA(2)(b) of the *Migration Act*.

8 Section 473JE(1) of the *Migration Act*.

4 The requirement which the Part imposes for automatic review by the Authority of a fast track reviewable decision is achieved through the imposition of three cumulative and consecutive statutory duties. The Minister has a duty to refer a fast track reviewable decision to the Authority as soon as reasonably practicable after the decision is made[9]. The Secretary of the Department of Immigration and Border Protection then has a duty to give specified "review material" to the Authority at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority[10]. The Authority then has a duty to "review" the referred decision[11] and to do so "by considering the review material" provided to it by the Secretary without accepting or requesting new information and without interviewing the referred applicant[12]. That requirement for the Authority to conduct the review by considering the review material provided to it by the Secretary is expressly made subject to other provisions within the Part which confer power on the Authority to get[13] and in specified circumstances to consider[14] "new information", being information which was not before the Minister when making the referred decision and which the Authority considers may be relevant.

5 The review material which the Secretary has a duty to give to the Authority is specified to include a statement that sets out the findings of fact made by the person who made the fast track reviewable decision, that refers to the evidence on which those findings were based, and that gives the reasons for the decision[15], together with all material provided by the referred applicant to the Minister before the fast track reviewable decision was made[16].

6 By operation of s 473CB(1)(c), the review material which it is the duty of the Secretary to give to the Authority also includes "any other material that is in

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9 Section 473CA of the *Migration Act*.

10 Section 473CB of the *Migration Act*.

11 Section 473CC(1) of the *Migration Act*.

12 Section 473DB(1) of the *Migration Act*.

13 Section 473DC of the *Migration Act*.

14 Section 473DD of the *Migration Act*.

15 Section 473CB(1)(a) of the *Migration Act*.

16 Section 473CB(1)(b) of the *Migration Act*.

the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review". To consider material that is in the Secretary's possession or control to be relevant to the review within the meaning of the provision, the Secretary (who can be expected ordinarily to act through a delegate[17]) obviously needs to form the opinion that the material is capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding in the conduct of its review of the referred decision. Compliance with the duty to provide such material to the Authority accordingly necessitates that the Secretary or delegate of the Secretary turn his or her mind to the range of material that is in the Secretary's possession or control which pertains to the referred applicant in order to determine whether or not to form that opinion in relation to the whole or some part of that material. The opinion of the Secretary that material is relevant to the review (so as to be required to be given to the Authority) or is not relevant to the review (so as not to be required to be given to the Authority) must be formed reasonably and on a correct understanding of the law[18].

7 The requirement for the Authority then to consider the review material that is given to it by the Secretary is not a requirement for the Authority to adopt the Secretary's opinion of the relevance of the review material to the review of the merits of the referred decision that it is the duty of the Authority to conduct. The requirement is no more than that the Authority examine the review material provided to it by the Secretary in order for the Authority to form and act on its own assessment of the relevance of that material to the review of the referred decision. Within the bounds of reasonableness, it is open to the Authority to assess review material as probative of an issue of fact arising in the review, and give that material such weight as it thinks the material deserves in making the decision on the review. Alternatively, it is open to the Authority to assess review material as wholly irrelevant to the review and place no reliance at all on that material in making its decision on the review. What the Authority cannot do is to fail or refuse to turn its attention to any of the review material that is given to it by the Secretary.

8 To the extent that the Authority treats review material as a basis for making a finding of fact that forms part of the reason for the decision that it

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17 Section 496(2) of the *Migration Act* and s 34AB of the *Acts Interpretation Act 1901* (Cth).

18 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57].

makes on the review, the Authority is obliged to identify that material in the written statement of reasons that it is required to give for the decision[19] as evidence on which that finding is based[20].

The nature of the problem

9 The problem with which the appeal is concerned arises in the following apparently not-uncommon scenario.

10 In purported compliance with s 473CB(1)(c), a delegate of the Secretary gives to the Authority a large amount of material contained on a departmental file relating to the referred applicant. Some of the material which the Secretary gives to the Authority is not capable of rationally affecting assessment of the probability of the existence of any fact about which the Authority needs to make a finding in reviewing the referred decision. That material is nevertheless prejudicial to the referred applicant in the sense that the material might be argued to be capable of founding an inference that the referred applicant is a person of bad character or might be interpreted as indicating that the referred applicant is a person who, in the view of the Secretary or of one or more officers of the Department, has been shown by his or her conduct or associations to be a person unworthy of being granted permission to remain in Australia.

11 Without requesting new information and without interviewing the referred applicant, the Authority conducts a review which results in the Authority making a decision affirming the decision to refuse the referred applicant a protection visa. Unsurprisingly, given the irrelevance of that material to the review, the Authority's written statement of reasons makes no reference to the irrelevant but prejudicial material given to it by the Secretary.

The consequences of the problem for the decision of the Authority

12 The absence of reference to material in the Authority's written statement of reasons will ordinarily support the inference that the material was not intentionally relied on by the Authority in reaching its decision on the review[21]. Where that inference is appropriate to be drawn in relation to irrelevant but prejudicial material given to the Authority by the Secretary, the decision of the

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19 Section 473EA(1)(b) of the *Migration Act*.

20 Section 25D of the *Acts Interpretation Act*.

21 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [47].

Authority will not be open to challenge on the basis that the Authority has reached the decision taking into account an irrelevant consideration.

13 The Secretary's giving of the irrelevant but prejudicial material to the Authority nevertheless has potential to result in the decision-making of the Authority having transgressed either or both of two distinct limitations which Pt 7AA imposes on its jurisdiction. One is failure of a precondition to the exercise of the jurisdiction of the Authority to conduct a review. The other is non-compliance with the need for the Authority to avoid any appearance of bias.

14 The first of those potentially operative procedural limitations on the jurisdiction of the Authority is inherent in the structure of Pt 7AA. That structure makes compliance by the Secretary with the duty to give the specified review material to the Authority, including the review material specified in s 473CB(1)(c), a precondition to the Authority exercising jurisdiction to review the fast track reviewable decision that has been referred to it by the Minister. To the extent that material given by the Secretary to the Authority in purported compliance with that duty is material which the Secretary at the time of referral could not reasonably have considered capable of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding in reviewing the referred decision, the giving of that material to the Authority by the Secretary is not compliant with that duty[22].

15 For the purpose of determining whether or not that precondition to the exercising of the Authority's jurisdiction to review a referred decision is met, no meaningful distinction can be drawn between under-compliance and over-compliance with the Secretary's duty. The legislative contemplation is that the Authority is to receive from the Secretary the totality of the statutorily specified review material and that the Authority is not to receive any other information about the referred applicant from the Secretary unless and until the Authority chooses to exercise its specific power to get new information. Consistently with repeatedly articulated interpretative principle[23], however, the precondition to the Authority exercising jurisdiction is not to be interpreted so rigidly as to result in the invalidity of the Authority's decision where the non-compliance that occurred

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22 cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

23 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32 [23], 33-34 [26]-[28]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133-134 [27]-[29]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 444-445 [44]-[45], 452-453 [72].

is immaterial to the decision of the Authority in the sense that the non-compliance could not realistically have made any difference to the decision.

16 The second of the potentially operative procedural limitations on the jurisdiction of the Authority is implied into the scheme of Pt 7AA by the common law. The operative common law principle of statutory interpretation is that observance of procedural fairness is an implied condition of the exercise of jurisdiction by "every one who decides anything"[24] pursuant to statute to affect the interests of an individual by force of the statute, unless and to the extent that procedural fairness is clearly excluded by the statutory scheme[25]. One aspect of procedural fairness – the hearing rule – must be taken to be exhausted by those provisions within Pt 7AA that are expressed to make exhaustive provision as to the natural justice hearing rule in the conduct of the review[26]. The other aspect of procedural fairness – the bias rule – is unconfined by any provision of Pt 7AA. The fullness of its common law vigour is acknowledged in the terms of the express statutory exhortation[27] that in carrying out its functions the Authority "is to pursue the objective of providing a mechanism of limited review" that is, amongst other things, "free of bias"[28].

17 What the bias rule requires of the Authority is that its conduct and that of the Minister and the Secretary is never such that a fair-minded lay observer properly informed as to the nature of the procedure for which Pt 7AA provides might reasonably apprehend that the Authority might not bring an impartial and unprejudiced mind to the resolution of the factual and legal questions that arise for its decision in the conduct of a review. That adaptation to the scheme of

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24 *Board of Education v Rice* [1911] AC 179 at 182, quoted in *Kioa v West* (1985) 159 CLR 550 at 584.

25 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658-659 [66], 666-668 [97]-[100].

26 Section 473DA(1) of the *Migration Act*. See *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1098-1099 [29]-[34]; 373 ALR 196 at 203-205.

27 cf *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 342 [12], 373 [98].

28 Section 473FA(1) of the *Migration Act*.

Pt 7AA of the standard formulation of the bias rule[29] has a number of elements which warrant further exposition.

18 The purpose of combining the "double might"[30] with the construct of the hypothetical "fair-minded lay observer" is to stress that the bias rule is concerned as much to preserve the public appearance of "independence and impartiality"[31] on the part of the Authority as it is to preserve the actuality. The requisite independence is decisional independence, most importantly from influence by the Secretary or the Minister. The requisite impartiality is objectivity in the finding of facts, in the exercise of procedural discretions, and in the application of the applicable legislated criteria for the grant or refusal of a protection visa.

19 The purpose of combining the "fair-mindedness" of the hypothetical lay observer with the "reasonableness" of that observer's apprehension is to stress that the appearance or non-appearance of independence and impartiality on the part of the Authority falls to be determined from the perspective of a member of the public who is "neither complacent nor unduly sensitive or suspicious"[32]. Together they emphasise that "the confidence with which the [Authority] and its decisions ought to be regarded and received may be undermined, as much as may confidence in the courts of law, by a suspicion of bias reasonably – and not fancifully – entertained by responsible minds"[33].

20 The question whether conduct has resulted in a breach of the bias rule falls to be determined in light of the totality of the circumstances that exist at the time when that question arises[34]. Where the question arises for determination after the Authority has made a decision on a review, the totality of the circumstances

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29 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]; *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 989-990 [27]-[28]; 179 ALR 425 at 434-435.

30 *Islam v Minister for Immigration and Citizenship* (2009) 51 AAR 147 at 154-155 [32].

31 cf *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7].

32 *Johnson v Johnson* (2000) 201 CLR 488 at 509 [53].

33 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553.

34 *Webb v The Queen* (1994) 181 CLR 41 at 55, 73-74.

includes the decision and the reasons that the Authority has given for the decision.

21 Establishment of an apprehension of bias on the part of the Authority then requires the taking of two essential steps: first, identification of the factor which it is postulated might have led the Authority to have decided the review otherwise than on an independent and impartial evaluation of the merits; and, second, articulation of how that factor might have led the Authority to have decided the review otherwise than on an independent and impartial evaluation of the merits[35]. Taking those two steps is necessary to provide the foundation for the third and critical step in the application of the bias rule. That is the step of assessing whether the fair-minded lay observer might reasonably apprehend in the totality of the circumstances that the articulated departure might have occurred[36]. In taking that third step, "it is the court's view of the public's view, not the court's own view, which is determinative"[37].

22 Stepping through that analysis in respect of the conduct of the Secretary in having given irrelevant but prejudicial material to the Authority allows for the recognition of two quite distinct ways in which the material might conceivably be apprehended by the fair-minded lay observer to have compromised the independence or impartiality of the Authority in the conduct of the review.

23 To the extent that the fair-minded lay observer might interpret the material as a communication to the Authority of the opinion of the Secretary about the character of the referred applicant or about the worthiness of the referred applicant to be granted a visa or about the merits of the decision of the Minister to refuse to grant the referred applicant a protection visa, the hypothetical fair-minded lay observer can be expected to be reluctant to discount as unrealistic the possibility that the Authority might have been influenced by that communication. The fair-minded lay observer would expect the Authority and the Secretary to adhere scrupulously to the standard expected of a court and court officer[38] of

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35 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8]; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 445 [63]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [21].

36 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 155-156 [59].

37 *Webb v The Queen* (1994) 181 CLR 41 at 52.

38 cf *Re JRL; Ex parte CJL* (1986) 161 CLR 342.

avoiding any private communication of opinion pertaining to the review and would view any departure from that standard with justifiable suspicion.

24 The general concern about private communications to decision-making bodies was expressed some thirty years ago[39]:

> "Citizens are generally aware that it is the accepted practice that no party or representative of a party should have a private communication with a judge or a member of a tribunal who is to hear a case. The mere knowledge that there had been an undisclosed departure from that proper practice would have tended to produce doubts and reduce confidence in the member of the tribunal who presided at the hearing. People would be inclined to wonder why the breach of practice had occurred and how far it had gone."

25 Within the cloistered and non-adversarial context of Pt 7AA, there is a structural consideration which makes that general concern more acute. It is the marked discrepancy in hierarchical position between the Secretary, on the one hand, and a Reviewer engaged under the *Public Service Act*, on the other. That discrepancy would make any communication from the Secretary to the Authority that might smack of instruction, advice or opinion concerning the conduct or outcome of a review a matter of grave concern.

26 To the extent that the fair-minded lay observer might interpret material given to the Authority by the Secretary not as instruction, advice or opinion concerning the conduct or outcome of a review but merely as material capable of founding an inference on the part of the reader that the referred applicant is a person of bad character or a person who is in some way (unrelated to the applicable criteria for the grant of a protection visa) unworthy of being granted permission to remain in Australia, the hypothetical fair-minded lay observer can be expected to be more circumspect.

27 The fair-minded lay observer would again here recognise that an understanding of the role of the judge within the judicial process has some analogical application to the role of the Reviewer within the review process. In relation to the role of the judge within the judicial process, she would recognise the wisdom of the following observation[40]:

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39 *The City of St Kilda v Evindon Pty Ltd* [1990] VR 771 at 777.

40 *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451 at 466-467.

> "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

28 The fair-minded lay observer would recognise that although the Authority is not a court and although a Reviewer is not necessarily a lawyer, the Authority as constituted by a Reviewer is a professional decision-making body that can ordinarily be expected to be capable of discarding "the irrelevant, the immaterial and the prejudicial"[41]. But, the fair-minded lay observer must also be taken to recognise that even a professional decision-maker is not "a passionless thinking machine"[42] and that information consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-making[43].

29 That last proposition can be illustrated in respect of material given to the Authority by the Secretary in purported compliance with s 473CB(1)(c) by an earlier judgment of the Full Court of the Federal Court, the correctness of which is not challenged in this appeal[44]. The Full Court there concluded that information contained in material given to the Authority by the Secretary, which was irrelevant to the review and to which the Authority made no reference in its

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41 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], quoting *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527. See also *Re The Queen and Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155 at 158; 18 ALR 93 at 99.

42 *In re J P Linahan Inc* (1943) 138 F 2d 650 at 653.

43 eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 299-300.

44 *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534.

reasons for affirming the decision of a delegate of the Minister to refuse the referred applicant a protection visa, was so "highly prejudicial" to the referred applicant that "the fair-minded lay observer, acting reasonably, would not dismiss the possibility that the [Authority] may have been affected by [the information] *albeit* subconsciously"[45]. The highly prejudicial information with which the Full Court was concerned was information that the referred applicant had been charged with the commission of a serious sexual assault while in immigration detention. Although not spelt out in the Full Court's reasoning, the information was evidently regarded by the Full Court as so appalling as to give rise to the reasonable perception that it might play on the subconscious of the Authority to the detriment of the referred applicant as the Authority conscientiously sought to evaluate the merits of the referred applicant's claims to have met the statutory criteria to be recognised as a person in respect of whom Australia has protection obligations.

The problem instantiated in the present appeal

30 The problem arises in the present appeal in the context of the Minister's referral to the Authority of a decision of a delegate of the Minister which refused to grant a protection visa to the appellant, who arrived in Australia by boat in August 2013. The appellant was detained in immigration detention on Christmas Island from the time of his arrival until November 2015 when he was transferred to a correctional facility in Albany in Western Australia. He applied in September 2016 for a protection visa, which a delegate of the Minister refused in March 2017 on the basis that the delegate was not satisfied that the appellant was a person in respect of whom Australia has protection obligations.

31 Material which the Secretary indisputably had a duty to give to the Authority as review material in consequence of the referral, and which the Secretary in fact gave to the Authority, included the prescribed form of application for a protection visa which the appellant signed in August 2016 as well as the statement of reasons which the delegate gave for refusing that application in March 2017. The appellant's answers to standard questions in the prescribed form revealed that he had in February 2016 been placed on a six month good behaviour bond for an offence involving the breaking of a window. His answers also revealed that he had been charged with, and was awaiting trial for, offences involving spitting at a guard and breaking a window when still in immigration detention on Christmas Island in November 2015 following the death of a friend there.

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45 *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at 552 [75] (original emphasis).

32 The delegate's reasons for decision also referred to the February 2016 good behaviour bond, being for the offence of intentionally destroying or damaging property belonging to the Commonwealth. The reasons did so in the context of noting that the appellant's conviction for the offence might have been relevant for the delegate to consider in relation to another criterion for the grant of a protection visa had the delegate been satisfied that the appellant was a person in respect of whom Australia has protection obligations. The reasons made clear that the delegate properly did not take the conviction into account in coming to the decision that he was not so satisfied.

33 The source of the problem is some 48 pages of accompanying documents which the Secretary gave to the Authority in purported compliance with s 473CB(1)(c). Those 48 pages comprised formal letters from officers of the Department to the appellant concerning the provision to him of assistance in the preparation of his application for protection, the formal record of the conviction and the order and recognisance in the Magistrates Court of Western Australia in February 2016 for the offence of intentionally destroying or damaging Commonwealth property, a prosecution report to the Department by the Commonwealth Director of Public Prosecutions referring to that conviction, copies of emails passing between officers of the Department as well as between the Department and "WA Compliance Courts Prisons" concerning the custody and management of the appellant during the period from November 2015 to March 2016, and a departmental "Case Review" in relation to the appellant dated March 2016.

34 Nothing in those 48 pages was capable of rationally affecting assessment of the probability of the existence of any fact about which the Authority needed to make a finding in reviewing the delegate's decision. Within the email correspondence could be found numerous statements which referred to the appellant having been transferred from Christmas Island to the Albany correctional facility following his participation in events on Christmas Island in November 2015 which were described sometimes as an "incident" and sometimes as a "riot".

35 One of the emails, sent from one departmental officer to another in January 2016 soon after the transfer of the appellant from Christmas Island to the Albany correctional facility, offered a "brief background" to the appellant. Under the heading "Immigration History", the email set out a chronology which made reference to numerous events including references (not otherwise explained in the evidence) to the appellant having taken part in a peaceful protest in May 2014, to advice in February 2015 that the appellant was "no longer of interest to Det Intel", and to the appellant in March 2015 having participated in an "interview with National Security Monitoring Section". Under the heading "Mental Health", it referred to then recent "Case Management observations" of "possible mental health issues". Under the heading "Behaviour", it referred to the

appellant having a history of "aggressive and/or challenging behaviour" when "engaging with the department" possibly attributable to frustration from being held in detention or to mental health issues.

36 Within the departmental "Case Review", under the heading "Immigration history", was a similar chronology as had been recorded under that heading in the January 2016 email. Under the heading "Barriers to case resolution and actions taken or being taken to resolve those barriers", were statements to the effect that the appellant had been considered on several occasions for release from detention as the holder of a bridging visa and had been "involved in many incidents while in detention". Under the heading "Justification of ongoing detention", was a statement that a recommendation had been made to the effect that the appellant remain in the Albany correctional facility until the Australian Federal Police had finalised "their [Christmas Island] riot investigation".

37 Why the departmental case officer responsible for selecting the review material to be given to the Authority on behalf of the Secretary might have thought it appropriate to include the 48 pages does not appear from the record on the appeal. In a standard form referral document completed by the case officer, the pages are listed without explanation simply by document numbers under the residual category of "[a]ny other relevant documents that should be included".

38 After writing to the appellant informing him that the Minister had referred the delegate's decision to refuse him a protection visa to it for review and that the Department "has provided us with all documents they consider relevant to your case", the Authority went on to make a decision affirming the decision of the delegate without requesting new information and without interviewing the appellant. The statement of the Authority's reasons for affirming the decision of the delegate expressly states that the Authority "had regard to the material referred by the Secretary". The Authority's reasons make no reference to the February 2016 conviction or to any events on Christmas Island or to anything else contained only in the 48 pages.

Is there a reasonable apprehension of bias on the part of the Authority?

39 Plainly, the 48 pages had nothing to do with the merits of the decision of the Minister to refuse to grant the referred applicant a protection visa. And plainly, the 48 pages were looked at and were consciously discarded as irrelevant by the Authority in the course of undertaking its review.

40 Differing from the majority in this Court and agreeing with the majority in the Full Court of the Federal Court in the judgment under appeal[46], we are unable to conclude that a hypothetical fair-minded lay observer, acting reasonably, would entertain as realistic the possibility that looking at anything contained in the 48 pages might in any way have diverted the Authority from its statutory function of undertaking an independent and impartial evaluation on the merits of whether or not the appellant was a person in respect of whom Australia has protection obligations.

41 The hypothetical fair-minded lay observer might well wonder why the 48 pages were included in the material provided to the Authority, but would recognise that most of the information contained in all of the pages was information which fleshed out the references to the conviction and pending charges arising from events on Christmas Island in March and November 2015 to which the appellant had referred in his application for a protection visa which was quite properly given to the Authority. The hypothetical fair-minded lay observer would understand that, whatever relevance those events and the information which pertained to them might possibly have had for the processing of the appellant's application for the protection visa had he been found to be a person in respect of whom Australia has protection obligations, the events and information could have no legitimate bearing on whether the appellant met the statutory definition of a person in respect of whom Australia has protection obligations and therefore could have no legitimate bearing on the review to be conducted by the Authority.

42 Whilst the hypothetical fair-minded lay observer would therefore be led to question the judgment of the departmental case officer who included the 48 pages within the review material given to the Authority on behalf of the Secretary, she would not, without undue suspicion, find reason to question the case officer's motive. The characterisation of the events of November 2015 in which the appellant was involved sometimes as a "riot", the reference to him as having a history of "aggressive" and "challenging" behaviour in his dealings with the Department, the references to his mental health, and the obscure security-related references within his "immigration history", would be recognised by the hypothetical fair-minded lay observer as expressions of opinion and records of events that were all explicable in the context of the communications in which they were originally made. Neither in form nor in substance would she see the provision to the Authority of the documents containing those expressions of opinion as an attempt to communicate to the Authority an opinion of the

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46 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 at 116-117 [135], 126 [177].

Secretary or of any officer within the Department to the effect that the appellant was a person of bad character or otherwise unworthy to be granted a visa.

43 Finally, the hypothetical fair-minded lay observer would not regard the revelations and opinions contained in the 48 pages as so shocking as to give rise to the realistic possibility that knowing of them would play on the subconscious of the Authority to the detriment of the appellant. Just as the Authority could be expected to engage in an impartial evaluation of the merits of whether or not the appellant met the applicable criteria for the grant of a protection visa untainted by the information about the conviction and pending charges which the appellant had included in his form of application properly given to the Authority by the Secretary, so the Authority could be expected to engage in that evaluation untainted by the dashes of colour added by the contents of those pages.

Was there a material failure of a condition precedent to the Authority's conducting the review?

44 Not only was the impugned information contained in the 48 pages objectively incapable of rationally affecting assessment of the probability of the existence of any fact which the Authority needed to find in reviewing the delegate's decision; that information was not reasonably capable of being regarded by the Secretary at the time of referral as capable of rationally affecting assessment of the probability of the existence of any fact which the Authority might need to find in reviewing the delegate's decision.

45 That conclusion of fact appears to have been seen by the Full Court either to have lain beyond the scope of the case presented by the appellant or to have been inappropriate to be drawn[47]. However, the appropriateness of the conclusion was raised without objection by a ground of appeal to this Court and was effectively conceded by the Minister in argument on the appeal.

46 The conclusion of fact carries with it the conclusion of law that the inclusion of the information contained in the 48 pages did not comply with the duty imposed on the Secretary by s 473CB(1)(c). Whether that non-compliance would have led to the failure of a condition precedent to the conduct of the review by the Authority turns on whether the further conclusion is properly to be reached that non-compliance could realistically have made any difference to the decision that the Authority in fact went on to make.

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47 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 at 90 [3], 118-119 [149], 119 [152].

47 The question so framed as of the materiality of the information contained in the 48 pages to the decision of the Authority differs in concept and in nature from the question of whether the provision of the information gave rise to a reasonable apprehension of bias. The difference is that materiality is a question of counter-factual analysis to be determined by the court as a matter of objective possibility as an aspect of determining whether an identified failure to comply with a statutory condition has resulted in a decision that has in fact been made being a decision that is wanting in statutory authorisation. The question is not one of perception to be determined by the court by reference to the reasonable apprehension of a hypothetical fair-minded lay observer, which apprehension if established is of itself sufficient to result in a want of statutory authorisation.

48 Nevertheless, the question of whether the information contained in the 48 pages could realistically have made any difference to the decision of the Authority falls to be answered by reference to the same considerations as inform the answer already given to the question of whether a hypothetical fair-minded lay observer, acting reasonably, would entertain as realistic the possibility that the information might have diverted the Authority from its statutory function of undertaking an independent and impartial evaluation on the merits. The material had no objective relevance to the review, can be inferred not in fact to have been consciously taken into account by the Authority in making the decision, and could at most be conjectured to have had a subconscious effect on the Authority in making the decision. In those circumstances, the negative answer already given to the latter question leads inexorably to a negative answer to the former.

Disposition of the appeal

49 For these reasons, we would dismiss the appeal.

50 NETTLE AND GORDON JJ. A decision by a delegate of the first respondent to refuse the appellant's application for a protection visa was referred to the Immigration Assessment Authority ("the IAA") for review under Pt 7AA of the *Migration Act 1958* (Cth)[48]. The Secretary of the Department was required to give to the IAA, among other things, "any other material that [was] in the Secretary's possession or control and [was] considered by the Secretary (at the time the decision [was] referred to the [IAA]) to be relevant to the review"[49]. The IAA had to review the decision "by considering the review material provided to [it]" by the Secretary, without accepting or requesting new information, and without interviewing the appellant[50]. Unbeknown to the appellant, the Secretary gave the IAA material which was not only irrelevant but prejudicial to him. The question in this appeal is whether a hypothetical fair-minded lay observer with knowledge of the material objective facts *might* reasonably apprehend that the IAA *might* not bring an impartial mind to the decision before it as a result of that information being given to it[51].

51 The answer to that question is "yes". A fair-minded lay observer, cognisant of the way Pt 7AA works[52], including the role of the Secretary, might have apprehended that the IAA might not have brought an impartial mind to the review, by reason of the irrelevant and prejudicial material which the IAA was mandated to consider. The source of the apprehended bias is the irrelevant and prejudicial material. That material might have led the decision-maker to make a decision otherwise than on the legal and factual merits of the case[53] because it might have led the decision-maker to the view that the appellant was not the sort of person who should be granted a visa or that the appellant was not a person who should be believed. A fair-minded lay observer might have apprehended that this might have had an effect on the decision-maker, even if that effect was subconscious.

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48 *Migration Act*, s 473CA.

49 *Migration Act*, s 473CB(1)(c).

50 *Migration Act*, s 473DB(1).

51 *Webb v The Queen* (1994) 181 CLR 41 at 73; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20].

52 *Isbester* (2015) 255 CLR 135 at 146 [20], [23].

53 *Isbester* (2015) 255 CLR 135 at 146 [21].

52 The other grounds of appeal concerning an opportunity for the appellant to be heard, the lawfulness of the actions of the Secretary of the Department, and jurisdictional error do not arise once this conclusion is reached.

Apprehended bias

53 The rule against bias for judicial and administrative decision-makers is long standing[54]. The public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias[55]. Bias, although incapable of precise definition, "connotes the absence of impartiality"[56].

54 The rule against bias is one aspect of the requirements of procedural fairness[57]. Breach of the rules of procedural fairness, including where apprehended bias is demonstrated, constitutes jurisdictional error[58], attracting relief under s 75(v) of the *Constitution*[59].

55 As the rule applies to any decision which is subject to the principles of procedural fairness[60], it applies "not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers"[61].

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54 See *Ebner* (2000) 205 CLR 337 at 343 [3]; *Dr Bonham's Case* (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

55 *Webb* (1994) 181 CLR 41 at 53.

56 *Ebner* (2000) 205 CLR 337 at 348 [23], 396 [182].

57 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 490 [25].

58 *Plaintiff S157/2002* (2003) 211 CLR 476 at 490 [25].

59 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 101 [41], 106 [51]-[52], 135 [142], 136 [145], 143 [170], 144 [172]; *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [33]; 179 ALR 425 at 435-436.

60 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 643 [9.10].

61 *Isbester* (2015) 255 CLR 135 at 146 [22]. This includes tribunals (*Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128), judges (*Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427), jurors (*Webb* (1994) 181 CLR 41), government ministers (*Minister for*

Footnote continues

The rule is concerned with public confidence in the administration of justice[62]. It is important to the quality of decisions being made and to the confidence and cooperativeness of individuals affected by those decisions[63]. By enhancing the appearance and actuality of impartial decision-making, it fosters public confidence in decision-makers and their institutions.

56 The test for apprehended bias is whether "a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide"[64]. A finding of apprehended bias is not to be reached lightly[65]. The determination of whether an apprehension of bias is "reasonable" is not assisted by philosophical conceptions of the varieties of seriousness or materiality.

57 The test has two steps. First, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits[66]. What is said to affect a decision-maker's impartiality? Partiality can take many forms, including disqualification by direct or indirect interest in the proceedings, pecuniary or otherwise; disqualification by conduct; disqualification by association; and disqualification by extraneous information[67]. As Deane J said in *Webb v The Queen*, in relation to disqualification by extraneous information, "knowledge of some prejudicial but inadmissible fact or circumstance [may give] rise to [an] apprehension of bias"[68]. Second, a logical connection must be

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Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507 at 529 [64]) and local councils (*Isbester* (2015) 255 CLR 135). It is a rule of "almost universal application": Groves, "The Rule Against Bias" (2009) 39 *Hong Kong Law Journal* 485 at 485.

62 *Webb* (1994) 181 CLR 41 at 68.

63 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 107 [186].

64 *Ebner* (2000) 205 CLR 337 at 344 [6]; see also *Isbester* (2015) 255 CLR 135 at 146 [20].

65 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 371.

66 *Isbester* (2015) 255 CLR 135 at 146 [21].

67 *Webb* (1994) 181 CLR 41 at 74.

68 *Webb* (1994) 181 CLR 41 at 74.

articulated between the identified thing and the feared deviation from deciding the case on its merits[69]. How will the claimed interest, influence or extraneous information have the suggested effect?

58 In applying the test, "it is necessary to consider ... the legal, statutory and factual contexts in which the decision is made"[70]. It is also necessary to consider "what is involved in making the decision and the identity of the decision-maker"[71]. This draws attention to the fact that the test must recognise "differences between court proceedings and other kinds of decision-making"[72]. The fair-minded lay observer knows the nature of the decision, the circumstances which led to the decision and the context in which it was made[73]. The fair-minded lay observer has "a broad knowledge of the material objective facts ... as distinct from a detailed knowledge of the law or knowledge of the character or ability of the [decision-maker]"[74].

59 Where, however, as here, the statutory context is complex, the fair-minded lay observer at least must have knowledge of the key elements of that scheme. In this case, those key elements, summarised below[75], are not themselves overly complex. It is necessary to consider the statutory regime.

Statutory context

60 Part 7AA of the *Migration Act* provides the process for review by the IAA of decisions made by delegates of the Minister. The IAA is to "pursue the objective of providing a mechanism of limited review that is efficient, quick, *free of bias* and consistent with Division 3 (conduct of review)"[76] (emphasis added).

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69 *Ebner* (2000) 205 CLR 337 at 345 [8]; *Isbester* (2015) 255 CLR 135 at 146 [21].

70 *Isbester* (2015) 255 CLR 135 at 146 [20].

71 *Isbester* (2015) 255 CLR 135 at 146 [23].

72 *Isbester* (2015) 255 CLR 135 at 146 [22]; see also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 90.

73 *Isbester* (2015) 255 CLR 135 at 146 [23].

74 *Webb* (1994) 181 CLR 41 at 73.

75 See [94] below.

76 *Migration Act*, s 473FA(1). See also s 473DA(1).

Part 7AA furthers that objective by creating a "fast track reviewable decision"[77] which the Minister administering the *Migration Act* (or his or her delegate) is obliged to refer to the IAA as soon as reasonably practicable after that decision is made[78].

61 Part 7AA applies only to a "fast track applicant"[79] and a decision to refuse the applicant's visa application must not have been made because of the character test in s 501 of the *Migration Act*, or on the basis of s 5H(2), 36(1C), or 36(2C)(a) or (b) of the *Migration Act*[80]. Those latter provisions are concerned primarily with excluding people who the Minister has serious reasons for considering have committed certain international crimes, a "serious non-political crime"[81] before entering Australia, or acts contrary to the purposes and principles of the United Nations or who the Minister considers, on reasonable grounds, would be a danger to Australia's security, or a danger to the Australian community having been convicted of a "particularly serious crime"[82]. Where those provisions are relied upon in making a decision to refuse a visa, the decision will be reviewed by the Administrative Appeals Tribunal, rather than by the IAA[83]. Those provisions were not relied upon in refusing the appellant's protection visa.

62 A number of other aspects of the Part should be emphasised.

63 First, s 473CB(1) requires the Secretary of the Department to give the following review material to the IAA: (a) a statement setting out the facts found by the decision-maker, the evidence on which those findings were based and the reasons for the decision; (b) material provided by the applicant to the decision-maker before the decision was made; (c) "any other material that is in the Secretary's possession or control and is considered by the Secretary (at the

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77 *Migration Act*, ss 5(1), 473BB definition of "fast track reviewable decision".

78 *Migration Act*, s 473CA.

79 *Migration Act*, s 5(1) definition of "fast track applicant".

80 *Migration Act*, s 500(1)(c).

81 The term "non-political crime" is further defined by the *Migration Act*, s 5(1).

82 The term "particularly serious crime" is further defined by the *Migration Act*, s 5M.

83 *Migration Act*, s 500(1)(c).

time the decision is referred to the [IAA]) to be relevant to the review"; and (d) certain contact details for the applicant. This appeal concerns para (c).

64 Second, s 473DA(2) provides that nothing in Pt 7AA "requires the [IAA] to give to a referred applicant any material that was before the Minister when the Minister made the [original] decision". Indeed, subject to the rest of Pt 7AA, the IAA must review the decision "by considering the review material provided to [it] under section 473CB", without accepting or requesting new information, and without interviewing the applicant[84].

65 The IAA does not have a duty to accept new information in any circumstances[85]. Nevertheless, the IAA may "get" any documents or information which were not before the Minister which the IAA considers to be relevant, and may invite a person to give new information[86]. Such "new information" gained under s 473DC must not be considered by the IAA unless it is satisfied that there are exceptional circumstances which justify its consideration, and the applicant satisfies the IAA that the new information could not have been provided to the Minister before the original decision was made, or is credible personal information which was not previously known but which may have affected consideration of the applicant's claims[87].

66 If the new information is considered by the IAA under s 473DD and would be the reason, or part of the reason, for affirming a decision, the IAA must give the applicant particulars of the new information[88]. The IAA must also explain to the applicant why that new information is relevant to the review and invite the applicant to give comments on the new information, either in writing or at an interview[89]. This obligation does not apply to "non-disclosable

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84 *Migration Act*, s 473DB(1).

85 *Migration Act*, s 473DC(2).

86 *Migration Act*, s 473DC(1) and (3).

87 *Migration Act*, s 473DD.

88 *Migration Act*, s 473DE(1)(a).

89 *Migration Act*, s 473DE(1)(b) and (c).

information"[90], information which is about a class of persons rather than the applicant themselves, or information which is prescribed by regulations[91].

67 It will be necessary to return to the application of the test for apprehended bias in the context of Pt 7AA of the *Migration Act* and the facts of this appeal. However, before doing so, it is both appropriate and necessary to consider why the question of apprehended bias should be considered *before* the other appeal grounds and, indeed, makes the consideration of those grounds unnecessary.

Order of consideration

68 The rule against bias is a principle of procedural fairness, and "principles of procedural fairness focus upon procedures rather than outcomes"[92]. The rule against bias is designed to ensure that the process is, and appears to a fair-minded lay observer to be, a fair process. As four members of this Court said in *Michael Wilson & Partners Ltd v Nicholls*[93]:

> "An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue. To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension). Inquiring whether there has been 'the crystallisation of that apprehension in a demonstration of actual prejudgment'[94] impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made." (emphasis in original)

69 The test for apprehended bias requires the court to consider what it is which *might* lead a decision-maker to stray from the merits of the case, and then to articulate a logical connection between that thing and the feared deviation

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90 *Migration Act*, s 5(1) definition of "non-disclosable information".

91 *Migration Act*, s 473DE(3).

92 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 96 [16].

93 (2011) 244 CLR 427 at 446 [67].

94 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177 at 200 [91].

from the merits[95]. These points can be, and often are, considered *before* the decision is made. Here, they could have been considered as soon as the IAA was given the material by the Secretary. The test does not depend on anything which happens at the time of decision, or later.

70 Next, the test for apprehended bias does not rest on a finding of actual bias[96] or depend on the final decision actually made. One does not need to find that the irrelevant material affected the decision[97]. One needs only to find that the fair-minded lay observer might have reached the conclusion that the irrelevant material might lead to a deviation from the merits[98].

71 Finally, the remedies for apprehended bias reinforce the need to consider apprehended bias upfront. In cases of apprehended bias, recusal of the decision-maker is a possible remedy and is available before a decision is made. Indeed, in *Michael Wilson* it was said[99]:

> "If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification [of a decision-maker] but acquiesces in the proceedings by not taking objection, it will likely be held that the party has waived the objection."

72 Put in different terms, a remedy for apprehended bias should be sought (and, if appropriate, made) at the earliest possible time. There is no utility in allowing a flawed process to run to its conclusion.

73 Here, the provision of irrelevant and prejudicial material to the IAA immediately raised an issue of whether a fair-minded lay observer might apprehend that the IAA might, as a result of the provision of that information, not bring an impartial mind to the resolution of the review. As will be seen, that question of bias having arisen and been considered, it is not necessary in the circumstances of this appeal to go on to consider issues of jurisdictional error which may have otherwise affected the IAA's final decision.

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95 *Ebner* (2000) 205 CLR 337 at 345 [8]; *Isbester* (2015) 255 CLR 135 at 146 [21].

96 *Ebner* (2000) 205 CLR 337 at 345 [7].

97 *Ebner* (2000) 205 CLR 337 at 345 [7].

98 *Ebner* (2000) 205 CLR 337 at 344 [6].

99 (2011) 244 CLR 427 at 449 [76] (footnote omitted).

Factual context

74 The appellant arrived in Australia on 13 August 2013. He was detained on Christmas Island and was unable to apply for a visa because of the bar in s 46A of the *Migration Act*. He broke a window on 20 March 2015 while in detention and was charged with damaging Commonwealth property ("the March 2015 incident"). He pleaded guilty, was convicted and was released without sentence, on condition of good behaviour for six months and the payment of $820.60 in reparation.

75 The Minister lifted the s 46A visa application bar for the appellant on 29 September 2015.

76 In November 2015, there were protests on Christmas Island. The appellant was charged, he said in his visa application, with "spitting at a guard & breaking a window" during the protests ("the November 2015 incident"). The appellant was transferred to a correctional facility on 12 November 2015.

77 The appellant lodged an application for a safe haven enterprise visa on 16 September 2016. He disclosed his conviction from the March 2015 incident, and the pending charges from the November 2015 incident. In relation to the March 2015 incident, the appellant's form also said "[t]here may be further updates on the cases".

78 The visa application was refused on 14 March 2017. By letter of that date, the Department advised that the decision had been referred to the IAA. The Department said it had provided the IAA with the decision record, material given by the appellant to the Department, and "any other material the Department considers to be relevant to the review". That material was not identified.

79 The appellant then received a letter from the IAA dated 23 March 2017. It stated that the Department had provided "all documents they consider relevant to your case", though these were not identified. The IAA stated that a decision would be made on that material, "unless we decide to consider new information", but this could only happen "in limited circumstances".

80 The IAA affirmed the decision on 12 May 2017, stating that it "had regard to the material referred by the Secretary under s 473CB of the *Migration Act 1958*". The material was not particularised.

81 The Minister identified the material provided to the IAA only when the appellant sought judicial review of the IAA's decision. The material included departmental documents with the following assertions. First, that the appellant had a "history of aggressive and/or challenging behaviour when engaging with the [D]epartment", and had been "involved in many incidents while in detention" (without identifying the history or the incidents). Second, that he had been

recommended for detention in a correctional facility while there was a police investigation into a "riot". Third, that Australian Border Force had advised the Department "to not engage" with the appellant (or other detainees) while in prison. Fourth, that the appellant was "no longer of interest to Det Intel" and was the subject of unspecified "on-going investigations". There was no identification of what, exactly, "Det Intel" referred to. Fifth, that he had been considered for release from detention on a Bridging E visa "on several occasions", which the appellant characterises as an implicit representation that his behaviour resulted in him not being granted those bridging visas.

82 The appellant never had these documents. The information in the documents went beyond what was provided by the appellant and, in many cases, it was information of which the appellant was not even aware. It is not known whether the delegate had the documents. The information outlined above was irrelevant to the task of the IAA. That information could only plausibly have gone to questions of whether the appellant was a danger to the Australian community, or had been convicted of a particularly serious crime. A decision on that basis could not have been made by the IAA[100].

The decisions below

83 In the Federal Circuit Court of Australia, Judge Street dismissed the appellant's application for judicial review of the IAA's decision. His Honour held that the information identified by the appellant was not such that a fair-minded lay observer might reasonably apprehend that the IAA might not bring an impartial mind to the determination of the matter on its merits.

84 The appellant appealed to the Full Court of the Federal Court of Australia. The appeal was dismissed by majority. Each judge gave separate reasons. Moshinsky and Thawley JJ both found that much of the information which the appellant claimed to be prejudicial was already contained in the original visa application and the delegate's reasons for decision. This included the conviction for the March 2015 incident and the charges for the November 2015 incident. The information which was not otherwise provided by the visa application or the delegate's reasons was irrelevant to the IAA's task, but not prejudicial enough to meet the test for apprehended bias.

85 Mortimer J would have allowed the appeal. Her Honour held that the material was "plainly adverse to the appellant's interest" in having matters concerning his credibility, the reliability of his narrative, his motives for seeking

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100 See [61] above.

asylum and whether he should be granted a visa determined in his favour. Having considered the effect of individual pieces of information contained in the review material, her Honour came to the view that the material overall gave:

> "a strong impression that the appellant was not trustworthy, that he was aggressive towards authority, that he challenged authority, that he was a person of interest to officers within the Commonwealth Government who were dealing with issues of sensitivity and of national security, that he had a disregard for Australian law and that overall, there were considerable, sustained concerns at an official level ... that the appellant posed a risk to the safety of the ... Australian community".

Submissions in this Court

86 The appellant, after noting that Pt 7AA preserved the bias rule, submitted that a fair-minded lay observer would be aware of how Pt 7AA of the *Migration Act* worked. The appellant submitted that the material provided to the IAA was "objectively irrelevant" and that the Secretary's error in providing it resulted in the IAA exceeding its jurisdiction, because the legislative scheme contemplates the IAA undertaking its review only on the basis of certain materials (which it needs to properly exercise its powers), not including the material impugned in this case.

87 The information in the review material was characterised by the appellant as being a character assessment at best, and a "character assassination" at worst. The appellant submitted that the material was capable of having a subconscious effect on the IAA, and that this gave rise to a reasonable apprehension of bias. The appellant further submitted that this apprehension was strengthened by the fact that the information was provided by the Secretary of the Department, who considered the material "relevant" to the review. The appellant accepted that the risk of bias could have been "neutralised" by affording the appellant an opportunity to comment on the material, but that was not done in this case.

88 The Minister said that if Pt 7AA required a decision-maker to consider information, that information could not logically cause the decision-maker to depart from the statutory task. The information in this case was initially said to constitute "background" to the IAA's decision. But during oral argument, the Minister accepted that describing the material as "relevant" to assessment of the appellant's credibility or claims to protection would be to draw "a very long bow".

89 The Minister further submitted that the information provided by the Secretary was not prejudicial. The reference to the appellant no longer being of interest to "Det Intel" was characterised as being "positive in character". A reference to the appellant being interviewed by the National Security

Monitoring Section did not say anything about why that interview was held, and so could not lead to any inference on the part of a reasonable observer. The references to investigations into a "riot" on Christmas Island did not say that the appellant himself was under investigation. The reference to the appellant's history of aggressive or challenging behaviour was explained by reference to the appellant's mental health, evidence of which was otherwise before the IAA in any event. Although the Minister accepted that it may be possible for information to be put before the IAA which is so prejudicial as to raise an apprehension of bias, he submitted that the material in this case did not reach that level of prejudice.

90 The Minister also pointed out that some of the information said to be prejudicial had already been disclosed by the appellant himself, such as the existence of the pending criminal charges; that even if the material was irrelevant, the IAA was capable of putting that material aside for the purposes of making a decision; and that it would not lead a fair-minded lay observer to conclude that the IAA might not decide the case on its merits. The fact that the Secretary had provided the information, according to the Minister, conveyed no "official view" about its significance, and the over-provision of information by the Secretary would rarely, if ever, constitute an error. The Minister said that there was no prohibition on the Secretary providing additional material which was not strictly required by s 473CB. The Minister further submitted that there was no obligation on the IAA to seek any comment from the appellant on the material in light of s 473DA of the *Migration Act*[101].

91 As will be explained, the provision of irrelevant and prejudicial material to the IAA immediately raised an issue whether a fair-minded lay observer might apprehend that the IAA might, as a result of the provision of that information, not bring an impartial mind to the resolution of the review.

Apprehended bias here?

92 What might lead the IAA to decide the appellant's case otherwise than on its merits? The presence of prejudicial material which was irrelevant to the question before the IAA and which the IAA was mandated to consider. As Deane J said in *Webb*, "knowledge of some prejudicial but inadmissible fact or circumstance [may give] rise to [an] apprehension of bias"[102]. Is there a logical connection between this and the feared deviation from deciding the case on its merits? Yes. The material was not relevant to the IAA's task. If it influenced the

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101 See [102] below.

102 *Webb* (1994) 181 CLR 41 at 74.

IAA, whether consciously or subconsciously, then the IAA would deviate from deciding the case on its merits.

93 In light of this, might the fair-minded lay observer apprehend a lack of impartiality? Yes. This conclusion is largely a factual one[103]. It is therefore necessary to consider the facts of the case in light of the statutory context[104].

94 The fair-minded lay observer knows the key aspects of the statutory scheme, which are as follows. First, the Secretary must give the IAA any material which he or she considers to be "relevant" to the review[105]. Second, the IAA must conduct its review "by considering the review material" provided under s 473CB[106]. Third, it must do so "without accepting or requesting new information" and "without interviewing the referred applicant", except as provided by Pt 7AA[107]. Fourth, the IAA has no duty to accept or request new information[108] and must not consider it except in exceptional circumstances[109]. Fifth, the IAA is under no obligation to give the applicant any material which was before the Minister[110].

95 The appellant was not aware of the information provided by the Secretary. The Secretary had decided that the information was "relevant". The IAA then *had* to consider that information[111], without the appellant knowing about that information or having any ability to comment on it.

96 The material was prejudicial to the appellant. The material included assertions that the appellant had a history of aggressive or challenging behaviour,

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103 *Isbester* (2015) 255 CLR 135 at 146 [20].

104 *Isbester* (2015) 255 CLR 135 at 146 [20].

105 *Migration Act*, s 473CB(1)(c).

106 *Migration Act*, s 473DB(1).

107 *Migration Act*, s 473DB(1).

108 *Migration Act*, s 473DC(2).

109 *Migration Act*, s 473DD(a).

110 *Migration Act*, s 473DA(2).

111 *Migration Act*, s 473DB(1).

had some link to investigations of a "riot" and was himself the subject of investigations for unspecified matters, had been of interest to "Det Intel", and had been refused bridging visas in the past. These matters had not been disclosed by the appellant in his visa application, and, in many cases, were information of which the appellant was not even aware. Nor were they disclosed in the reasons for the delegate's decision. There is a risk that such information would lead a decision-maker in the place of the IAA to have a bias against the appellant, possibly by thinking that the appellant is not a fit person to hold a visa or that the appellant would be a danger to the community.

97 Of course, it does not matter whether the IAA *actually* had such a bias[112], or whether the IAA in fact put the prejudicial information aside. There is a risk of subconscious bias here[113], and that risk cannot be cured by putting the information aside.

98 The idea that the information could or would be put aside is also difficult to reconcile with the statutory scheme. As noted above[114], the Secretary endorses the information which he or she gives to the IAA as "relevant" to the IAA's task. The IAA then *has* to consider that information.

99 The Minister submitted that administrative decision-makers routinely set aside irrelevant material. But that is not the point. The material was not only irrelevant, but also *prejudicial*. Putting the material aside does not overcome the subconscious bias which might result from seeing that material. Nor did the IAA expressly state that the material had been put to one side[115].

100 Returning to the test, a fair-minded lay observer might apprehend a lack of impartiality on the part of the IAA where: (i) material has been designated as "relevant" by the Secretary; (ii) the IAA *must* have regard to that material; (iii) the information is prejudicial to the applicant; and (iv) that information is hidden from the applicant. A fair-minded lay observer may well ask why prejudicial information is provided and hidden from the applicant, if that information was not to be taken into account. In those circumstances,

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112 *Ebner* (2000) 205 CLR 337 at 345 [7].

113 *Kioa v West* (1985) 159 CLR 550 at 629; *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at 552 [75].

114 See [94] above.

115 cf *AMA16* (2017) 254 FCR 534 at 552 [77].

the fair-minded lay observer might apprehend that the decision-maker might decide the case other than on its merits.

101 This conclusion depends on the facts of this case. There may be other cases in which the material given to the IAA was *somewhat* prejudicial to an applicant, but not such as might lead a fair-minded lay observer to apprehend a lack of impartiality. The *particular* point at which prejudicial information will lead to apprehended bias cannot be identified in the abstract. Here, the information was such that a fair-minded lay observer might think it would bias the decision-maker against the grant of a visa to the appellant.

102 If circumstances like this arise, a decision-maker may need to invite an applicant to comment on adverse information to counteract the apprehension of bias. Is this consistent with the statutory scheme? Yes. Section 473DA(2) says that "nothing in this Part requires the [IAA] to give to a referred applicant any material that was before the Minister" when the Minister made the original decision. But this says nothing about "what might be required of the [IAA] in particular circumstances in order to exercise [its] power [under s 473DC(3)] reasonably"[116]. The power in s 473DC(3) allows the IAA to get new information. While the IAA "does not have a duty to get, request or accept, any new information" in any circumstances[117], it may still invite an applicant to comment on information under s 473DC(3) if that would be the best way of avoiding an apprehension of bias.

103 That conclusion is reinforced by the statutory scheme. The IAA is statutorily obliged to "pursue the objective of providing a mechanism of limited review that is efficient, quick, *free of bias* and consistent with Division 3 (conduct of review)"[118] (emphasis added). The provisions concerning the giving and receipt of new information did not override the requirement that the IAA act free from bias.

Other appeal grounds

104 The Minister accepted that where apprehended bias is shown, it would be appropriate to grant relief under s 75(v) of the *Constitution*, subject to relief

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116 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 229 [26].

117 *Migration Act*, s 473DC(2).

118 *Migration Act*, s 473FA(1).

under s 75(v) being discretionary[119]. In the circumstances of this appeal, where the Minister accepted that if apprehended bias was demonstrated, relief would be granted, the role (if any) of materiality in questions of jurisdictional error, and its precise metes and bounds, does not arise.

105 Moreover, given the conclusions reached on the question of apprehended bias in this appeal, it is unnecessary to address the other appeal grounds concerning an opportunity for the appellant to be heard, the lawfulness of the actions of the Secretary of the Department, and jurisdictional error on the part of the IAA resulting from the Secretary's allegedly unlawful actions. Indeed, given the conclusions on the question of apprehended bias, the *process* of the IAA in making the decision was not, and might not have appeared to a fair-minded lay observer to be, a fair process. It is, for that reason alone, inappropriate and unnecessary to consider and address the legality of an *outcome* of that flawed process.

106 The Minister contended that quashing the decision of the IAA and remitting the matter back to it would put the IAA in an "impossible bind", because the IAA would once again be exposed to the prejudicial material. Any further decision it made would, therefore, be infected by the same apprehended bias found in this appeal. That submission should not be accepted. Section 473EA(4) of the *Migration Act* requires the IAA to return to the Secretary those documents provided by the Secretary, after the IAA's review is complete. Moreover, the matter would be remitted to a differently constituted IAA. As a result, the "impossible bind" spoken of by the Minister would not arise. The relief would not be futile.

Conclusion

107 For those reasons, the appeal should be allowed with costs. Orders 1 and 2 made by the Full Court of the Federal Court of Australia on 21 September 2018 and order 1 made by the Full Court of the Federal Court of Australia on 12 October 2018 should be set aside and, in their place, order that:

1. The appeal be allowed with costs.

2. Orders 1 and 2 of the Federal Circuit Court of Australia dated 8 November 2017 be set aside and, in their place, order that:

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119 *Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 106 [51]-[52], 136 [145], 144 [172]; *Ex parte H* (2001) 75 ALJR 982 at 990 [33]; 179 ALR 425 at 435-436.

(a) the decision of the Immigration Assessment Authority dated 12 May 2017 be quashed;

(b) the matter be remitted to the Immigration Assessment Authority differently constituted; and

(c) the first respondent pay the applicant's costs.

EDELMAN J.

Introduction

108 A deduction from the world around us, usually as a natural implication if it is not expressed, is that in exercising powers to adjudicate upon the rights of others an adjudicator will be, and will be seen to be, impartial and independent. This appeal concerns whether that requirement of a lack of apprehended bias was violated in a hearing by the Immigration Assessment Authority ("the Authority"). The hearing was a review, under Pt 7AA of the *Migration Act 1958* (Cth), of a decision of a delegate of the Minister for Immigration and Border Protection to refuse the appellant's application for a protection visa. The apprehension of bias was said to arise from the existence of irrelevant but prejudicial material provided to the Authority by the Secretary of the Department of Immigration and Border Protection.

109 Before the Federal Circuit Court of Australia, and before the Full Court of the Federal Court of Australia, the issue of apprehended bias was raised by the appellant as a direct reason for impugning the decision of the Authority. However, during the course of submissions in this Court, an anterior issue was raised by the Court upon which the parties made oral submissions and provided further written submissions after the hearing of the appeal. The anterior issue is that s 473CB(1)(c) of the *Migration Act* requires, as a prima facie precondition for the exercise of any jurisdiction by the Authority, the formation of an opinion, on reasonable grounds, by the Secretary that the material provided to the Authority was relevant to the review. No reasonable grounds existed for such an opinion to have been formed by the Secretary. However, s 473CB does not contemplate that jurisdictional error will exist, invalidating the decision of the Authority, unless the failure by the Secretary is material. The Minister accepted that if the appellant established a reasonable apprehension of bias then materiality would be satisfied. For this reason, despite the anterior issue being resolved in favour of the appellant, the issue of apprehended bias still arises on this appeal, although in an indirect way.

110 As Nettle and Gordon JJ explain, the Federal Circuit Court and a majority of the Full Court concluded that there was no apprehension of bias. I agree with Nettle and Gordon JJ that this conclusion was in error. The Secretary had provided the Authority with 48 pages of irrelevant and prejudicial material involving prejudicial opinion, innuendo and tacit suggestion, on the basis that the Secretary considered that the material was relevant to the review. A fair-minded lay observer would consider that the prejudice arising from any consideration of this irrelevant material could be substantial. Importantly, the Authority said, in a letter to the appellant, that it would make a decision on the basis of the information provided by the Secretary. The Authority acknowledged in its reasons that it had considered all of the material provided to it.

111 It appears from the index of the court book before the Federal Circuit Court that the 48 pages of irrelevant material comprised a very large part of the material provided to the Authority. And yet, the Authority, a professional decision maker, did not suggest that any of that irrelevant and prejudicial material that it had considered had been disregarded or had been given no weight. In these circumstances, a fair-minded lay observer would apprehend, at the very least, that the Authority might have taken the material into account, either consciously or subconsciously. The apprehension might be that the Authority might have formed adverse views of the appellant's character and, consciously or subconsciously, might have acted upon those adverse views when reaching conclusions on the issues in dispute either directly, or indirectly by the effect on its assessment of the credibility of the appellant.

112 The appeal must be allowed.

The manner in which the apprehended bias issue arises

A decision of the Secretary as a prima facie pre-requisite for the Authority's jurisdiction

113 The appellant arrived in Australia on 16 August 2013. On 16 September 2016 the appellant applied for a protection visa, namely a Safe Haven Enterprise (subclass 790) visa. The application was refused on 14 March 2017 by a delegate of the Minister on the ground that the appellant was not a person in respect of whom Australia has protection obligations. The appellant was a fast track applicant[120], requiring the Authority to review the decision of the delegate of the Minister[121]. On 23 March 2017, a delegate of the Minister referred the matter to the Authority as required by s 473CA.

114 The Authority is required to perform its function of reviewing a decision and either affirming it or remitting it for reconsideration[122] by "considering the review material provided to the Authority"[123]. The Authority does not have jurisdiction to review a decision to refuse a visa in various categories concerning

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120 *Migration Act 1958* (Cth), s 5(1) definition of "fast track applicant".

121 *Migration Act 1958* (Cth), s 473CC read with s 473BB definition of "fast track reviewable decision" and s 5(1) definitions of "fast track decision" and "fast track review applicant".

122 *Migration Act 1958* (Cth), s 473CC.

123 *Migration Act 1958* (Cth), s 473DB(1).

the character of an applicant[124]: under s 501 (the character test), s 36(1C) (danger to Australia's security; danger to the Australian community, having been convicted of "a particularly serious crime"), or ss 5H(2) and 36(2C) (serious reasons for considering that various crimes have been committed).

115 Section 473CB placed the Secretary under a duty to provide the Authority with various categories of review material including the following:

> "**Material to be provided to Immigration Assessment Authority**
>
> (1) The Secretary must give to the Immigration Assessment Authority the following material (***review material***) in respect of each fast track reviewable decision referred to the Authority under section 473CA:
>
> (a) a statement that:
>
> (i) sets out the findings of fact made by the person who made the decision; and
>
> (ii) refers to the evidence on which those findings were based; and
>
> (iii) gives the reasons for the decision;
>
> (b) material provided by the referred applicant to the person making the decision before the decision was made;
>
> (c) any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;
>
> ..."

116 A prima facie precondition for the Authority's jurisdiction to conduct a review of a fast track reviewable decision was compliance by the Secretary with the duty under s 473CB(1). Although s 473CB(1)(c) is expressed in positive terms, concerning the material that the Secretary must provide, contrary to the submission of the Minister on this appeal it also carries an implied prohibition against the provision of any other material which the Secretary could not

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124 *Migration Act 1958* (Cth), s 473BB definition of "fast track reviewable decision", s 5(1) definition of "fast track decision".

reasonably consider to be relevant to the review. The duty of the Secretary to assess relevance might involve difficult or nuanced decisions, particularly since the Secretary, or their delegate, might not be aware of the issues that could be considered by the Authority. However, subject to judicial restraint in any review of a decision of this nature[125], the decision of the Secretary that material is considered relevant must be formed reasonably on the material before the Secretary[126].

The Authority was provided with material by the Secretary that could not reasonably be considered to be relevant

117 The Authority concluded that the appellant was not a person in respect of whom Australia has protection obligations[127]: he was not a refugee[128], nor was he a person entitled to complementary protection[129]. In the course of its reasons, the Authority rejected the appellant's claims including: (i) that he was stateless, with no right to return to Iraq, and had travelled to Australia using an Iraqi passport that was not genuine; (ii) that there was a real chance of harm to him in Basra, including as a result of discrimination, by the Iraqi government on the basis of his Faili Kurd ethnicity; and (iii) that he would be killed or persecuted in Iraq by various extremist insurgent groups because of his Shia religion, his Faili Kurd ethnicity, his imputed political views including links to Iran, and his imputed statelessness.

118 The material provided by the Secretary to the Authority for the purposes of the review included considerable information, innuendo and opinions about the appellant's character over 48 pages. It is unclear whether any of this material had even been before the delegate of the Minister[130]. If not, and there are

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125 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 [137]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30].

126 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 136 [34].

127 See *Migration Act 1958* (Cth), s 36(2)(a)-(aa); *Migration Regulations 1994* (Cth), Sch 2 cll 790.211, 790.221.

128 *Migration Act 1958* (Cth), ss 5H, 36(2)(a).

129 *Migration Act 1958* (Cth), s 36(2)(aa).

130 *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 at 108 [103], 112-113 [112]-[116].

indications that it was not before the delegate, the material would have been specifically chosen by the Secretary for provision to the Authority as new information. In either event, however, the material was not relevant to any issue which the Authority had to decide.

119 The irrelevant material can be divided into three overlapping categories of information about the appellant's character.

120 One category of the irrelevant material provided by the Secretary to the Authority concerned periods of detention of the appellant and offences or alleged offences committed by the appellant. The underlying facts concerning the appellant's commission of an offence, his detention, and his charges were not controversial and were disclosed by the appellant himself in his application. One offence, in March 2015, to which he had pleaded guilty, involved breaking a window whilst he was in detention. The appellant was convicted of damage to Commonwealth property and was released without sentence, with conditions of a reparation payment and good behaviour for six months. The other offence for which he had been charged, as he described it in his application, was "spitting at a guard & breaking a window" during protests in November 2015.

121 However, the material in this first category was not merely factual statements about the appellant's criminal record. It included descriptive language and suggestions of grave concerns when describing the appellant's criminal charges in November 2015. The material referred to his transfer to different prisons in Western Australia, to his alleged "participation" in a "riot" on Christmas Island in November 2015, and to him facing criminal charges in relation to that riot. It also included an internal departmental email chain with an update from the office of the Commonwealth Director of Public Prosecutions concerning the appellant's "criminal matters" and statements by departmental officers that the appellant's criminal matters were in relation to rioting on Christmas Island and that these criminal matters were still under investigation by the Australian Federal Police. References were also made to "multiple incidents" involving the appellant and there were assertions that a Superintendent of the Australian Border Force had recommended that the appellant remain in detention pending the finalisation of an Australian Federal Police investigation into the "riot" on Christmas Island.

122 A second category was material that, by vague suggestions and opinions, had the potential to raise concerns about permitting the appellant to become a member of the Australian community. Putting to one side a reference in the materials to the appellant's "possible mental health issues", which a fair-minded lay observer with knowledge of the appellant's broad circumstances would not today treat as prejudicial, the appellant was described as displaying "a history of aggressive and/or challenging behaviour when engaging with the department". He was twice described as having been "involved in many incidents while in detention", in the context of statements that he had been "considered on several

occasions for release from detention" on a bridging visa, such that he was to "be considered as a Cat 2 BVE consideration", from which it might be inferred that the visa had been denied.

123 A third category was material that might have tacitly suggested that the appellant might be a national security risk. There was a reference to the appellant no longer being "of interest to Det Intel" and having been "[e]scalated" to another departmental team. There were two references to the appellant having an "interview with National Security Monitoring Section" and two references to him having been "Esc [escalated] to NSSCRT [which was accepted in oral submissions to be a national security body]".

124 There is no basis upon which, on any reasonable view, this material could be considered relevant to the issues before the Authority. It had no legal relevance to the issues before the Authority, including any assessment of the appellant's credibility. Yet the expressions of opinion, the innuendo, and the tacit suggestions in the material could be seen by a fair-minded lay observer as painting a picture of the appellant as a man of poor or doubtful character.

Non-compliance with s 473CB of the Migration Act is a jurisdictional error if it is material

125 Although the provision of material that could not reasonably be seen to be relevant to the determination of any issue before the Authority establishes a prima facie case of jurisdictional error, s 473CB of the *Migration Act* does not contemplate that jurisdictional error will exist, and that the decision of the Authority will be invalidated, unless the failure by the Secretary is "material". As Professor Daly has perceptively noted, the concept of materiality has sometimes been used in three different senses[131].

126 In one sense, it might be used to describe a threshold of sufficient seriousness before an act or omission could be treated as an "error", or perhaps more accurately a recognised category of administrative injustice[132], capable of being jurisdictional in the sense of being a condition for the exercise of authority by the decision maker. For instance, just as a violation of the hearing rule requires real, or practical, injustice[133], so too does a violation of the rule against

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131 See Daly, "A Typology of Materiality" (2019) 26 *Australian Journal of Administrative Law* 134.

132 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

133 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]-[38]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 433 [38]; *BVD17 v Minister for*

Footnote continues

bias require an apprehension of bias to be reasonable. Contrary to the submissions of the appellant, the receipt of prejudicial information, no matter how trivial, will not necessarily give rise to a reasonable apprehension of bias.

127 The second sense of materiality is the sense in which it has been used in recent decisions of this Court[134]. Materiality in this sense concerns any required connection between the administrative injustice and the decision. An administrative injustice will commonly be intended by Parliament to be immaterial, and not capable of invalidating a decision, if it did not involve a fundamental departure from the proper process of decision making and if there was no possibility that the decision would have been different. Assuming that there is no difference in onus of proof[135], this involves an approach that mirrors the long-standing approach to whether a miscarriage of justice in a criminal appeal is "substantial"[136], or whether an appellate court should order a new civil trial following a denial of procedural fairness[137].

128 The third sense in which materiality has been used, but which might better be avoided, concerns the residual discretion to refuse relief despite the presence of jurisdictional error. This third sense can overlap with the second sense, but it is distinct. It might also apply in cases such as delay or bad faith[138] or in a case

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Immigration and Border Protection (2019) 93 ALJR 1091 at 1104-1105 [66]; 373 ALR 196 at 212.

134 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 136 [34]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 441 [30], 452-453 [72].

135 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 459 [93]. See also *Lindsay v The Queen* (2015) 255 CLR 272 at 294 [64]. But compare (2019) 264 CLR 421 at 445 [46].

136 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1105 [67]; 373 ALR 196 at 212-213.

137 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; *Nobarani v Mariconte* (2018) 92 ALJR 806 at 812-813 [38]; 359 ALR 31 at 38-39.

138 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56]; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1197-1198 [28]; 235 ALR 609 at 618.

where there would be no utility in a new trial[139] such as where "the illegality at issue had subsequently been legitimised"[140].

129 It is unnecessary on this appeal to consider any of these different dimensions of "materiality" other than the first. The Minister accepted that if the appellant established a reasonable apprehension of bias then the Secretary's non-compliance with s 473CB of the *Migration Act* would be material. However, relying upon the first sense of materiality, the Minister submitted that any apprehension of bias did not reach a threshold of reasonableness.

The principles concerning apprehended bias

130 The principles of apprehended bias are derived by implication and expression from the terms of the particular statutory framework. They are commonly an implication from the terms of the statute in the context of the natural foundations of our legal system. As an implication, however, their content must accommodate the particular statutory framework[141].

131 Section 473FA(1), in Pt 7AA, provides that in carrying out its functions under the *Migration Act*, the Authority is required to act in a manner that is "free of bias". Although Subdiv A of Div 3 of Pt 7AA is headed "[n]atural justice requirements" and relates to the conduct of reviews by the Authority, s 473DA provides that Div 3, together with ss 473GA and 437GB, is an "exhaustive statement" only of the natural justice hearing rule. It is not concerned with the rule against bias (whether actual or apprehended). With the long-standing approach to the natural components of justice, the express reference to bias in s 473FA(1) is not limited to actual subjective bias but extends also to circumstances where the bias might reasonably be apprehended by a fair-minded lay observer.

132 The test for a reasonable apprehension of bias is a test of a "double might": whether a fair-minded lay observer *might* reasonably apprehend that the adjudicator *might* not bring an impartial and independent mind to the fair

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139 *Nobarani v Mariconte* (2018) 92 ALJR 806 at 813 [39]; 359 ALR 31 at 39.

140 Daly, "A Typology of Materiality" (2019) 26 *Australian Journal of Administrative Law* 134 at 141, referring to *R (Nadarajah) v Home Secretary* [2002] EWHC 2595 (Admin) at [30] and *GXL Royalties Ltd v Minister of Energy for New Zealand* [2010] NZCA 185.

141 *Isbester v Knox City Council* (2015) 255 CLR 135 at 154 [55].

resolution of the issue to be decided[142]. The notion of independence and impartiality is not limited to prejudgment of the issue. It is a "recognition of human nature"[143] and "human frailty"[144]. It can include any other "preponderating disposition or tendency" and can arise by matters that create emotions of sufficient strength to sway opinion: "affection or enmity"[145], "fear, hatred or love"[146].

133 The prism through which a reasonable apprehension of bias is tested, a fair-minded lay observer, is a familiar legal construct used for objective assessment. The construct assumes that the person is "intelligent"[147]. The person will be aware of the phenomenon that in adjudication, as in life generally, the mental plasticity of human decision making is subject to the unconscious[148]

> "stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. ... Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person]".

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142 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[7]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 322 [104]; see also at 331 [139]. See also *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20]-[21], 149 [33], 154 [57].

143 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 331 [139].

144 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8].

145 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 563 [183].

146 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 300 [34], quoting Bracton, *On the Laws and Customs of England*, Woodbine ed, Thorne trans (1977), vol 4, f 411 at 280.

147 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 267.

148 Cardozo, *The Nature of the Judicial Process* (1921) at 12, 167 (footnote omitted). See *R v S (RD)* [1997] 3 SCR 484 at 508-509 [47].

134 In *Webb v The Queen*[149], Deane J, who was not dissenting on this point, described four overlapping categories of apprehended bias. The submissions on this appeal focussed upon the fourth category: "cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias". But some of the matters mentioned in the second category were also submitted to be relevant: "conduct, either in the course of, or outside, the proceedings", including the published reasons of the Authority.

135 Apprehended bias must be assessed by reference to all the circumstances existing at the relevant time of enquiry. If apprehended bias is assessed at the conclusion of a hearing, as the appeal in this case requires, then the reasons for decision might reveal matters relevant to the consideration of whether a reasonable apprehension exists. It would be absurd if, on the one hand, remarks made by the decision maker during the course of a hearing could be considered as part of an assessment of the presence of reasonable apprehension of bias but, on the other hand, remarks at the conclusion of the proceeding could not[150]. However, remarks at the conclusion of a proceeding or in reasons for decision are only one of the circumstances to take into account. In *Michael Wilson & Partners Ltd v Nicholls*[151], a joint judgment of four members of this Court cautioned against the error of assuming a reasonable apprehension of a decision maker's bias and using comments in the reasons for judgment by the decision maker to "confirm, enhance or diminish the existence of a reasonable apprehension of bias".

136 In assessing whether a reasonable apprehension of bias arose through the construct of the fair-minded lay observer, the nature of the decision maker is a relevant consideration[152]. When assessing whether the presence of the irrelevant material could have given rise to a reasonable apprehension of bias, the Authority should not be equated with a judicial officer, whose "independence and security of tenure"[153] might permit a more robust approach to be taken to any possibility of influence from material provided by senior officers of the Executive

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149 (1994) 181 CLR 41 at 74. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348-349 [24].

150 See *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 316 [83].

151 (2011) 244 CLR 427 at 446 [67].

152 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343-344 [4]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [22].

153 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [4].

Government and whose "training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial"[154]. On the other hand, a professional decision maker in a specialised area, such as the Authority, should not be equated with a purely lay body such as a jury[155].

The effect of the irrelevant material in this case

137 There are three matters which combine to compel the conclusion that a fair-minded lay observer might reasonably apprehend that the Authority might not have brought an impartial and independent mind to the issue to be decided at the hearing.

138 First, the material provided by the Secretary to the Authority was qualitatively and quantitatively significantly prejudicial to an assessment of the appellant's character on grounds other than legal grounds. The three categories of material, over nearly 50 pages, provided opinion, suggestion, and innuendo in relation to the appellant's criminal charges concerning "rioting" in November 2015, unspecified "multiple incidents" involving the appellant, alleged but unspecified aggressive behaviour, "[e]scalation" of consideration of the appellant including by national security bodies, and interviews of him by the National Security Monitoring Section.

139 The Minister submitted that some of the prejudicial information provided by the Secretary should, in effect, be disregarded because the appellant had himself provided that information in response to questions in his visa application. But the information provided by the appellant was factual statements of relatively minor, although irrelevant, content. The appellant said that he was "awaiting trial on charges of spitting at a guard & breaking a window", that he had been convicted of "[b]reaking window - in prison and has 6 month good behaviour bond", that his occupation was "Prisoner (formerly self-employed)", and that his previous addresses included prisons in Western Australia. None of the information provided by the appellant involved any of the opinion, suggestion or innuendo described above.

140 Secondly, the fair-minded lay observer would expect the Authority to have been aware that, by s 473CB(1) of the *Migration Act*, material was provided by the Secretary on the basis that the Secretary considered that it was relevant to the review, and that by s 473DB(1) the Authority was required to consider that

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154 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], quoting *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585.

155 *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at 536 [3].

material. Although the Authority, as a professional decision maker in a specialised area, would be expected to make its own assessment of relevance and weight, the fair-minded lay observer would be aware that the Authority remains part of the Executive Government. The apparent assessment of the material, and the opinions and innuendos contained therein, as relevant by the Secretary or a delegate of the Secretary, and the provision of 48 pages of materials to the Authority concerning issues in the three broad categories described above, is a matter that, at least subconsciously, might be expected to have an influence upon the Authority that considers it.

141 Thirdly, although the material was irrelevant, the fair-minded lay observer might reasonably have expected from statements made by the Authority, together with a deafening silence in the reasons of the Authority, that the Authority might have been influenced by the information within the material. On 23 March 2017, prior to reaching its decision, the Authority wrote to the appellant and said that the Department had "provided us with all documents they consider relevant to your case" and that the Authority would "make a decision on your case on the basis of the information sent to us by the department, unless we decide to consider new information". At the outset of its reasons for decision, in the second paragraph, the Authority said that it had "had regard to the material referred by the Secretary under s 473CB of the *Migration Act 1958*". Nowhere in its reasons did the Authority suggest that any of the material provided by the Secretary was not relevant or that weight had not been placed on any of the material provided by the Secretary.

142 In these circumstances, a fair-minded lay observer would apprehend that the material, together with the basis upon which it was apparently provided, might cause the Authority to form adverse views of the appellant's character and, consciously or subconsciously, the Authority might be influenced by those adverse views either directly in the course of dismissing each of the appellant's claims to be a person in respect of whom Australia has protection obligations or indirectly when reaching conclusions based upon the credibility of the appellant.

Conclusion

143 The appeal should be allowed and orders made as proposed by Nettle and Gordon JJ. The matter should be remitted to a differently constituted Authority for a new hearing. Since the Authority will have returned all materials to the Secretary[156], the new hearing will require the Secretary to re-exercise the task of considering which of the material that is in the Secretary's possession or control is relevant to the review.

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156 *Migration Act 1985* (Cth), s 473EA(4).