

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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QYFM

APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,  
MIGRANT SERVICES AND MULTICULTURAL  
AFFAIRS & ANOR

RESPONDENTS

*QYFM v Minister for Immigration, Citizenship, Migrant Services and  
Multicultural Affairs*

[2023] HCA 15

*Date of Hearing: 13 December 2022*

*Date of Judgment: 17 May 2023*

M53/2022

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 15 September 2021.*
3. *Remit the matter to the Federal Court of Australia to be heard and determined by a differently constituted Full Court.*
4. *The first respondent pay the appellant's costs of the appeal and of the hearing to date of the appeal to the Full Court of the Federal Court of Australia.*

On appeal from the Federal Court of Australia



**Representation**

E M Nekvapil SC with N Boyd-Caine and C J Fitzgerald for the appellant (instructed by Zarifi Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with A F Solomon-Bridge and A N Regan for the first respondent (instructed by Clayton Utz)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

Courts and judges – Bias – Reasonable apprehension of bias – Where appellant appealed to Full Court of Federal Court of Australia from decision dismissing application for judicial review of non-revocation of decision to cancel his visa on character grounds – Where appellant sought recusal of judge sitting as member of Full Court constituted to hear appeal – Where reasonable apprehension of bias on the part of challenged judge said to arise from judge's appearance, in former capacity as Commonwealth Director of Public Prosecutions, as counsel for Crown in opposition to appellant's appeal against conviction – Where appellant's conviction causally related to cancellation of visa and non-revocation decision subject to challenge in Full Court – Whether fair-minded lay observer might reasonably apprehend that judge might not be impartial – Whether reasonable apprehension of bias on the part of challenged judge vitiated Full Court's jurisdiction.

Courts and judges – Practice and procedure – Whether application to disqualify judge for bias should be determined in the first instance by challenged judge alone or by all members of court as constituted.

Words and phrases – "absence of bias", "actual bias", "apprehended bias", "character test", "disqualification", "fair-minded lay observer", "impartiality", "impartial mind", "independence", "judicial power", "judicial practice", "jurisdiction", "logical connection", "multi-member bench", "multi-member court", "objection to jurisdiction", "reasonable apprehension of bias", "recusal", "substantial criminal record".

*Administrative Appeals Tribunal Act 1975* (Cth), ss 25, 43.

*Federal Court of Australia Act 1976* (Cth), ss 11, 14, 15, 16, 25.

*Migration Act 1958* (Cth), ss 476A, 500, 501, 501CA.



1 KIEFEL CJ AND GAGELER J. This appeal from a decision of the Full Court of the Federal Court of Australia turns not on the merits of that decision but on whether the Full Court as constituted had jurisdiction to make it in circumstances where a prior conviction of the appellant formed part of the factual matrix which gave rise to the matter before the Full Court and in circumstances where one of the three judges who constituted the Full Court, when Director of Public Prosecutions of the Commonwealth, had appeared in opposition to an appeal by the appellant against that conviction.

2 Two issues arise. One is whether those circumstances were sufficient to have given rise to apprehended bias on the part of the individual judge. There being no dispute between the parties that an apprehension of bias on the part of one judge must have deprived the Full Court constituted by three judges of jurisdiction to make the decision, the determination of that issue is dispositive.

3 The other issue is whether, objection having been taken during the hearing of the appeal to the jurisdiction of the Full Court as then constituted on the ground of apprehended bias on the part of the individual judge, the objection ought to have been considered and determined by the Full Court or by that judge alone. That issue, although not dispositive, is one of principle, is of general practical importance, has been squarely raised and fully argued, and for those reasons is appropriate now to be determined by this Court.

4 For the reasons which follow, the objection to jurisdiction on the ground of apprehension of bias ought to have been considered and determined by the Full Court rather than by the individual judge alone, ought to have led the Full Court to find apprehended bias, and ought therefore to have been upheld. In the result, the appeal must be allowed. The decision of the Full Court must be set aside, and the matter must be remitted to the Federal Court to be heard and determined by a differently constituted Full Court.

### **Background to the appeal**

5 The matter before the Full Court was an appeal by the present appellant, who is a citizen of Burkina Faso. The respondents to the appeal were the present respondents, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the Minister") and the Administrative Appeals Tribunal ("the AAT"). The appeal was from a decision of a single judge of the Federal Court<sup>1</sup> dismissing an application by the appellant for judicial review of a decision

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1 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810.

of the AAT. The decision of the AAT had affirmed a decision of a delegate of the Minister not to revoke the cancellation of the appellant's visa.

6 Under the *Migration Act 1958* (Cth) ("the Act"), the Minister is obliged to cancel a person's visa if the Minister is satisfied that the person does not pass the "character test" and if the person is serving a full-time sentence of imprisonment<sup>2</sup>. The Act provides that a person does not pass the "character test" if the person has "a substantial criminal record"<sup>3</sup>, which exists if the person has been sentenced to a term of imprisonment of 12 months or more<sup>4</sup>. Upon notice to the person and upon representations being made by the person<sup>5</sup>, the Minister has a discretion to revoke the cancellation decision if, relevantly, satisfied that there is "another reason" (apart from the person passing the character test) why that decision should be revoked<sup>6</sup>. A decision of a delegate of the Minister made in the exercise of that discretion is reviewable on its merits by the AAT<sup>7</sup>.

7 Following a trial on indictment in the County Court of Victoria in 2013, the appellant was convicted of a drug importation offence under the *Criminal Code* (Cth). He was sentenced to a term of imprisonment of ten years with a non-parole period of seven years. He appealed against his conviction to the Victorian Court of Appeal, which in 2014 dismissed the appeal.

8 In 2017, while the appellant was serving the sentence of imprisonment, a delegate of the Minister made the decision to cancel his visa on the basis that he did not pass the "character test" by reason of the sentence of imprisonment. In 2019, another delegate of the Minister decided not to revoke that cancellation decision. The decision not to revoke the cancellation of the appellant's visa was affirmed by the AAT in 2020. The appellant applied for judicial review of that decision of the AAT and was unsuccessful before the primary judge, leading to the appeal to the Full Court.

9 The appellant was unrepresented before the primary judge and at the time of filing the original notice of appeal from the decision of the primary judge to the

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2 Section 501(3A) of the Act.

3 Section 501(6)(a) of the Act.

4 Section 501(7)(c) of the Act.

5 Section 501CA(3) and (4)(a) of the Act.

6 Section 501CA(4)(b)(ii) of the Act.

7 Section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 500(1)(ba) of the Act.



3.

Full Court. The appellant subsequently obtained legal representation, resulting in a written application to the Full Court for leave to amend the notice of appeal to raise grounds which had not been advanced before the primary judge. The proposed grounds were to the effect that the decision of the AAT was legally unreasonable and that certain findings of the AAT were not supported by probative evidence. The application for leave to amend was listed for hearing at the time scheduled for hearing of the appeal.

10           The appeal was scheduled to be heard on the morning of 17 August 2021 before a Full Court constituted by McKerracher, Griffiths and Bromwich JJ. It is a matter of public record that, from 2012 until his appointment to the Federal Court in 2016, Bromwich J held the office of Director of Public Prosecutions under the *Director of Public Prosecutions Act 1983* (Cth).

11           Minutes before the commencement of the hearing on that day, the associate to Bromwich J sent an email to the legal representatives of the parties. The email stated that his Honour had asked the associate to advise the parties that he had appeared for "the Crown" in the appellant's unsuccessful conviction appeal in the Victorian Court of Appeal in 2014. The fact that his Honour had appeared as senior counsel for the respondent in that appeal was apparent from the record of the decision of the Victorian Court of Appeal, which was included in the appeal book for the Full Court proceedings. The email said that his Honour did not consider that circumstance to give rise to an apprehension of bias as the appeal "related to a pure legal question" but nonetheless wished to draw it to the attention of the parties "in order that any application for his Honour to recuse himself" could be made.

12           At the commencement of the hearing of the appeal before the Full Court, counsel for the appellant announced that he had instructions to apply for Bromwich J "to recuse himself". Counsel for the appellant proceeded to make that application orally, relying solely on the circumstances disclosed in the email. At the conclusion of the oral submissions of counsel for the appellant there was a short adjournment, following which the Full Court reconvened.

13           Upon the Full Court reconvening, McKerracher J invited Bromwich J to "deal with the application". Bromwich J explained that he declined to recuse himself from sitting on the appeal for reasons he proceeded to elaborate. McKerracher J then invited counsel for the appellant to continue and the hearing resumed. At the conclusion of the hearing, the Full Court reserved its decision.

14 The decision of the Full Court was delivered on 15 September 2021<sup>8</sup>. By that decision, the Full Court granted the appellant leave to rely on the ground that the decision of the AAT was legally unreasonable, refused the appellant leave to rely on the proposed ground that findings of the AAT were not supported by probative evidence, and dismissed the appeal.

15 Joint reasons for judgment then published by McKerracher and Griffiths JJ comprehensively addressed the merits of the application for leave to amend the notice of appeal and the appeal<sup>9</sup>. Those reasons said nothing about the application which had been made orally at the hearing.

16 In separate reasons for judgment, Bromwich J agreed with McKerracher and Griffiths JJ as to the merits<sup>10</sup> and went on to recapitulate the reasons he had given during the hearing for considering that the circumstances outlined in the email from his associate did not give rise to an apprehension of bias<sup>11</sup>. Those reasons, in essence, were that: as Director of Public Prosecutions his practice was to appear only in appeals which raised issues of principle; the appellant's appeal against conviction to the Victorian Court of Appeal was an appeal of that character, turning wholly on a legal question as to the admissibility of evidence; by virtue of his appearance in that appeal, he had acquired no knowledge of the criminal history of the appellant beyond that which was apparent to all members of the Full Court from the record of the decision of the Victorian Court of Appeal contained in the appeal book for the Full Court proceedings; the fact of the conviction was not in issue in the appeal before the Full Court, it being common ground that the appellant failed the "character test"; and the contents of the decision of the Victorian Court of Appeal did not feature in the appeal before the Full Court in any way, the record of that decision having been included in the appeal book only because it had been part of the material which had been before the AAT.

17 His Honour also made clear what was in any event to be inferred from the timing of his associate's email: that he had only noticed that he had appeared in the conviction appeal during the course of his final preparation on the morning of the

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8 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328.

9 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 330-344 [1]-[50].

10 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 344 [51].

11 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 344-346 [52]-[61].

hearing before the Full Court on 17 August 2021<sup>12</sup>. His Honour acted prudently in accordance with standard judicial practice by promptly notifying the parties of circumstances properly recognised by him to have the potential to be seen to give rise to an apprehension of bias<sup>13</sup>.

### **The Full Court should have decided the objection**

18        The application made to the Full Court by counsel for the appellant at the commencement of the hearing, although framed as an application that Bromwich J "recuse himself", was in substance an objection to the Full Court as then constituted hearing and determining the appeal. Was the application appropriately left by McKerracher and Griffiths JJ to be considered and determined by Bromwich J alone? Or should it have been considered and determined by the Full Court constituted by all three of them?

19        Existing authority provides no direct answer. And a survey of the practices of multi-member courts in Australia and in comparable jurisdictions reveals no consistent approach to questions of this kind.

20        Issues as to apprehension of bias on the part of individual Justices sitting as members of Full Courts of this Court have arisen on two occasions in the past 25 years. On neither occasion, however, was an objection pressed to the Full Court as constituted hearing or determining the matter before it.

21        The first occasion arose in relation to *Kartinyeri v The Commonwealth*<sup>14</sup>. There, an issue of apprehended bias on the part of Callinan J was raised by the plaintiffs informally before his Honour alone in advance of the hearing of the substantive proceeding before the Full Court. His Honour took the view that an apprehension of bias did not arise for reasons which he then published<sup>15</sup>. His Honour went on to sit as a member of the Full Court on the hearing of the substantive proceeding. After the hearing, the plaintiffs filed a notice of motion seeking from the Full Court an order that Callinan J "not further participate in the deliberations of the Court". The notice of motion was the subject of a directions hearing before Brennan CJ, who listed it for hearing before the Full Court and

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12    *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 344 [56].

13    Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (2017) at [3.5]. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 360 [69].

14    (1998) 195 CLR 337.

15    *Kartinyeri v The Commonwealth [No 2]* (1998) 72 ALJR 1334; 156 ALR 300.

informed the parties that Callinan J did not propose to sit on its return<sup>16</sup>. Brennan CJ also informed the parties that the issue of whether Callinan J should sit on the hearing of the substantive proceeding before the Full Court had been raised with him by Callinan J in advance of that hearing and that "[a]lthough the Judge would have welcomed consultation with other members of the Court, the view was taken by me and by the other Justices that, at least at first instance, the decision was one for the Judge alone"<sup>17</sup>. In the events which subsequently occurred, the hearing of the notice of motion did not proceed and Callinan J did not participate in the determination of the proceeding.

22       The second occasion arose in relation to *Unions NSW v New South Wales*<sup>18</sup>. There, senior counsel for an intervenor stated at the commencement of the hearing before the Full Court that he needed to draw to the Full Court's attention that "a member of the Court in a previous capacity" had given advice which "touched on" an issue in the proceeding<sup>19</sup>. No application was made, and no objection was raised. The Full Court adjourned. Upon resuming, Gageler J announced that he proposed to recuse himself from the hearing for the reasons he then gave<sup>20</sup>. The hearing continued in his absence.

23       In neither of the foregoing instances was it necessary for the Full Court of this Court to consider any objection to the Justice in question hearing or determining the matter because each recused himself before any such occasion could arise. The most that can be generalised from those sequences of events is the existence of a practice whereby individual Justices of this Court have been accepted by their colleagues to have the capacity to recuse themselves from the hearing or determination of a matter upon becoming satisfied of an apprehension of bias on their part, whether before or after the commencement of a hearing. To note this institutional practice of collective acquiescence in unilateral recusal, however, is not to answer the question at hand.

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16   *Kartinyeri v The Commonwealth* [1998] HCATrans 43 (18 February 1998) at lines 30-33.

17   *Kartinyeri v The Commonwealth* [1998] HCATrans 43 (18 February 1998) at lines 28-30.

18   (2013) 252 CLR 530.

19   *Unions NSW v New South Wales* [2013] HCATrans 263 (5 November 2013) at lines 23-26.

20   *Unions NSW v New South Wales* [2013] HCATrans 263 (5 November 2013) at lines 53-77.

24 Procedures adopted by intermediate courts of appeal in Australia when dealing with objections to one or more of their members hearing or determining or continuing to hear or determine a matter on the basis of apprehension of bias have varied between and even within those courts. In the events which led to the decision of this Court in *Livesey v New South Wales Bar Association*<sup>21</sup>, for example, objections to two out of three members of the Court of Appeal of New South Wales hearing and determining a matter were raised at the commencement of a scheduled hearing and renewed during that hearing. Each of those objections was considered and rejected by all three members of that Court<sup>22</sup>. In *Bainton v Rajski*<sup>23</sup>, in contrast, discrete objections to two out of three members of the Court of Appeal of New South Wales hearing and determining a matter were determined discretely by each of the two members concerned, with the third expressing no opinion. The approach adopted by the Full Court of the Federal Court in the decision under appeal can similarly be contrasted with that adopted by a differently constituted Full Court of that Court several months earlier in *CPJ16 v Minister for Home Affairs*<sup>24</sup>, where reasons given by S C Derrington J for refusing to recuse herself were specifically agreed to by Jagot and Griffiths JJ.

25 Internationally, a diversity of approaches has also been evident<sup>25</sup>. At one extreme has been the view famously expressed by Jackson J (with the concurrence of Frankfurter J) that a complaint about the participation of an individual Justice of the Supreme Court of the United States "is one which cannot properly be addressed to the Court as a whole"<sup>26</sup>. Conformably with that view, the federal statute, first enacted in 1948, which now provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"<sup>27</sup> has been interpreted to

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21 (1983) 151 CLR 288.

22 Transcript of Proceedings, *Bar Association of New South Wales v Livesey* (Court of Appeal of the Supreme Court of New South Wales, Moffitt P, Hope and Reynolds JJA, 22 March 1982) at 1; Transcript of Proceedings, *Bar Association of New South Wales v Livesey* (Court of Appeal of the Supreme Court of New South Wales, Moffitt P, Hope and Reynolds JJA, 25 May 1982) at 243-244.

23 (1992) 29 NSWLR 539.

24 [2020] FCAFC 212 at [50] (Jagot and Griffiths JJ), [76]-[84] (S C Derrington J).

25 See Olowofoyeku, "Bias in Collegiate Courts" (2016) 65 *International and Comparative Law Quarterly* 895.

26 *Jewell Ridge Coal Corp v Local No 6167* (1945) 325 US 897 at 897.

27 28 USC §455.

require any disqualification decision to be made by the individual judge concerned and none other<sup>28</sup>. The Supreme Court of Canada has taken the approach that an application for recusal, although raised and argued before the Court as a whole<sup>29</sup>, was appropriately determined solely by the individual Justice whose recusal was sought<sup>30</sup>. At the other extreme has been the view expressed by the Lord Chancellor of England (Lord Irvine) in an open letter to the Senior Law Lord (Lord Browne-Wilkinson), in the wake of *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]*<sup>31</sup>, "that [Lord Browne-Wilkinson], or the law lord in the chair, [should] ensure at the time when any committee is being composed to hear an appeal, that its proposed members consider together whether any of their number might appear to be subject to a conflict of interest; and in order to ensure the impartiality, and the appearance of impartiality, of the committee, require any law lord to disclose any such circumstances to the parties, and not sit if any party objects and the committee so determines"<sup>32</sup>. Each of the Court of Appeal of England and Wales<sup>33</sup>, the Constitutional Court of South Africa<sup>34</sup>, the Court of Appeal of Singapore<sup>35</sup>, and the Court of Appeal in Northern Ireland<sup>36</sup> has acted on the view that an objection to one of its members sitting was appropriately determined by the entirety of the court as constituted. Varying approaches are adopted in recusal guidelines published pursuant to statute in New Zealand<sup>37</sup>. The

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28 See *Schurz Communications Inc v Federal Communications Commission* (1992) 982 F 2d 1057 at 1059; *In re Bernard* (1994) 31 F 3d 842 at 843; *Baker & Hostetler LLP v United States Department of Commerce* (2006) 471 F 3d 1355 at 1357.

29 Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 *Advocates' Quarterly* 326 at 340.

30 See *Arsenault-Cameron v Prince Edward Island* [1999] 3 SCR 851.

31 [2000] 1 AC 119.

32 *The Guardian*, 18 December 1998 at 7. See also Malleon, "Judicial Bias and Disqualification After *Pinochet (No 2)*" (2000) 63 *Modern Law Review* 119 at 126.

33 *Dwr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97; *Baker v Quantum Clothing Group* [2009] EWCA Civ 566.

34 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147.

35 *Yong Vui Kong v Attorney General* [2012] 2 LRC 439.

36 *TF v Northern Ireland Public Services Ombudsman* [2021] NICA 39.

37 Section 171 of the *Senior Courts Act 2016* (NZ).

guidelines published by the Supreme Court of New Zealand require an objection to be determined by all available judges other than the judge who is the subject of the objection<sup>38</sup>. The guidelines published by the Court of Appeal of New Zealand provide for an objection to be determined by the panel of judges allocated to the hearing of an appeal including the impugned judge unless the President otherwise directs<sup>39</sup>. Ultimately, differences in constitutional structure, legislative instruction, and institutional experience render comparative analysis of limited utility.

26 The question arising in the circumstances of the present case falls to be resolved at the level of principle within the framework established in *Ebner v Official Trustee in Bankruptcy*<sup>40</sup>. Foundational to that framework are two propositions. One is that impartiality is an indispensable aspect of the exercise of judicial power<sup>41</sup>. The other is that "[b]ias, whether actual or apprehended, connotes the absence of impartiality"<sup>42</sup>. Leaving to one side exceptional circumstances of waiver or necessity<sup>43</sup>, an actuality or apprehension of bias is accordingly inherently jurisdictional in that it negates judicial power.

27 Once the jurisdictional significance of bias is appreciated, it becomes apparent that responsibility for ensuring an absence of bias – whether actual or apprehended – lies with a court as an institution and not merely with a member of that court whose impartiality might be called into question. The duty, indeed the "first duty"<sup>44</sup>, of any court is to be satisfied of its own jurisdiction. The upshot of

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38 Courts of New Zealand, Supreme Court Recusal Guidelines at [7].

39 Courts of New Zealand, Court of Appeal Recusal Guidelines at [10].

40 (2000) 205 CLR 337.

41 (2000) 205 CLR 337 at 348 [22], 362-363 [79]-[81]. See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64], 77 [66]-[67]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 300 [32], 331 [139].

42 (2000) 205 CLR 337 at 348 [23].

43 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [146].

44 *Re Nash [No 2]* (2017) 263 CLR 443 at 450 [16], quoting *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415.

that duty, as elaborated by Gibbs J in *The Queen v Federal Court of Australia; Ex parte WA National Football League*<sup>45</sup>, is that:

"When the question is raised before a court of limited jurisdiction whether a condition of its jurisdiction has been satisfied, that court is not obliged immediately to refrain from proceeding further. It can and should decide whether the condition is satisfied and whether it has jurisdiction to proceed, but its decision is not conclusive."

28 Thus, an objection to a multi-member court as constituted hearing and determining a matter based on an allegation of bias on the part of one or more of its members (including an objection brought by way of an application for recusal or disqualification) raises a question of jurisdictional fact which that court can and must determine for itself in order to be satisfied of its own jurisdiction. The determination of that question of jurisdictional fact is not antecedent to the performance of the curial function, but part of that function. The determination ought to be reflected in a curial order which embodies the court's formal resolution of the objection, subject to applicable procedures for appeal<sup>46</sup> or review for jurisdictional error<sup>47</sup>.

29 In the case of the Full Court of the Federal Court, precisely who constitutes "the court" for the purposes of hearing and determining an appeal is spelt out in the *Federal Court of Australia Act 1976* (Cth). Subject to presently immaterial exceptions, the appellate jurisdiction of the Federal Court is required to be exercised by a Full Court<sup>48</sup> consisting of three or more judges sitting together<sup>49</sup>. The making of arrangements about which judges are to constitute the Full Court in a particular matter or class of matters lies within the responsibility of the Chief Justice<sup>50</sup>. The process by which the Chief Justice makes arrangements can be expected to be tailored to minimise the risk of any issue of bias arising on the hearing of a matter, including by allowing a legitimate concern about bias on the part of a judge to be raised and addressed administratively as an aspect of that

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45 (1979) 143 CLR 190 at 215.

46 See *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 450 [81]; *Bienstein v Bienstein* (2003) 195 ALR 225.

47 See *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.

48 Section 25(1) of the *Federal Court of Australia Act 1976* (Cth).

49 Section 14(2) of the *Federal Court of Australia Act 1976* (Cth).

50 Section 15(1) and (1AA)(a)(i) of the *Federal Court of Australia Act 1976* (Cth).



process. But once a Full Court consisting of three or more judges is constituted and is seized of the hearing of an appeal, responsibility for the discharge of the judicial power involved in hearing and determining the appeal devolves to those three or more judges acting institutionally as the Full Court. The institutional responsibility of the Full Court as so constituted includes the consideration and determination of an objection to its jurisdiction. The Full Court as so constituted has a duty to hear and determine the appeal unless the court as so constituted determines that the objection to jurisdiction is well-founded<sup>51</sup>.

30 The view that an allegation of bias on the part of a member of an appellate or collegiate court can and should be considered and determined by the court as distinct from the impugned member alone was cogently developed by Sir Anthony Mason, writing soon after *Kartinyeri*<sup>52</sup>. Sir Anthony concluded that the court has an institutional responsibility to ensure that it is constituted "in accordance with the provisions of the law governing the judicial process, the exercise of judicial power and natural justice"<sup>53</sup>. He pointed out that that institutional responsibility of the court as constituted was entirely congruent with what then was, and remains, the common practice in Australian courts according to which judges at first instance hear and determine allegations of bias raised against themselves. The rationale for that practice he explained to be that "[a]t first instance, the judge who is the target of the objection determines the objection because [that judge] constitutes the court"<sup>54</sup>.

31 To require an allegation of bias on the part of a member of a multi-member court to be considered and determined by the court as constituted should not be thought to place an undue strain on judicial collegiality. In the context of explaining the appropriateness of appellate review of non-recusal decisions, it was emphasised in *Livesey*<sup>55</sup> that the determination of questions of apprehended bias can involve evaluations of degree on which reasonable minds might differ and that

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51 Compare *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [19]; *Bienstein v Bienstein* (2003) 195 ALR 225 at 233 [35].

52 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21.

53 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 26.

54 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 24.

55 (1983) 151 CLR 288 at 294.

a conclusion of apprehended bias on the part of an individual judge implies no criticism of that judge. As for sensitivities between judges at different levels of the judicial hierarchy, so for sensitivities between judges within a multi-member court.

32 If, upon objection being taken, a procedure is followed according to which the judge in question places his or her knowledge of all relevant facts on the record at the outset, there is no reason why the requisite evaluative judgment ought not be formed by each judge of a multi-member court on the totality of the evidentiary material before that court. The judge's state of mind itself being a question of fact, there is also no reason why the same procedure should not be adopted in the unusual (and ordinarily unnecessary and inappropriate) event of an objection being made on the ground of actual bias. In such an event, the determination of the objection would remain for the court even though the disclosure by the judge in question of his or her state of mind would in practice resolve the question of jurisdictional fact as to whether or not actual bias existed.

33 Nor is there any reason why the judgment of the majority of the multi-member court should not prevail in the event of disagreement on an issue of apprehended bias as it would in the determination of any other issue before the court. The potential for a judge persuaded of apprehended bias on their own part to find themselves in the minority, and so to find themselves duty-bound by the decision of the majority to hear and determine a matter contrary to their own judgment, cannot be gainsaid. But a potential of that kind will arise in relation to any jurisdictional objection. Moreover, the predicament of a judge persuaded of apprehended bias on their own part finding themselves bound by the decision of the majority is little different from the predicament of a judge persuaded of apprehended bias on their own part finding themselves reversed on appeal or compelled to exercise jurisdiction by a writ of mandamus.

34 Bearing reiteration in this context is that the systemic function served by providing curial mechanisms to ensure an absence of bias is the maintenance of public confidence in the judiciary. That function is better served by an allegation of bias on the part of a member of a multi-member court being, and being seen to be, considered and determined by the court as an institution, according to the same procedure and in the application of the same decision-making rule as would any other objection to jurisdiction.

35 The application that Bromwich J "recuse himself" ought therefore to have been considered and determined by the Full Court.

### **Apprehended bias should have been found**

36 The basis on which apprehended bias should have been found remains to be explained.

37 The criterion for the determination of an apprehension of bias on the part of a judge was definitively stated in *Ebner* by reference to previous authority<sup>56</sup> and has often been repeated<sup>57</sup>. The criterion is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide"<sup>58</sup>. The "double might"<sup>59</sup> serves to emphasise that the criterion is concerned with "possibility (real and not remote), not probability"<sup>60</sup>.

38 Application of the criterion was identified in *Ebner*<sup>61</sup>, and has been reiterated<sup>62</sup>, logically to entail: (1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.

39 *Ebner*<sup>63</sup> specifically rejected the notion that there exists a category of case, involving some "interest" or "association" on the part of a judge, in respect of which an apprehension of bias will be presumed without needing to undertake such an analysis in order to determine that the criterion is satisfied. The submission by the appellant that this Court should now recognise "incompatibility" between the judicial role and another role previously performed by a judge as a category of "interest" in respect of which an apprehension of bias will be presumed is irreconcilable with *Ebner* and must be rejected.

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56 (2000) 205 CLR 337 at 344 [6], footnote 41.

57 See *Charisteas v Charisteas* (2021) 273 CLR 289 at 296-297 [11] and the authorities cited in footnote 6.

58 *Charisteas v Charisteas* (2021) 273 CLR 289 at 296 [11].

59 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 87 [18], quoting *Islam v Minister for Immigration and Citizenship* (2009) 51 AAR 147 at 154-155 [32].

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

61 (2000) 205 CLR 337 at 345 [8].

62 *Charisteas v Charisteas* (2021) 273 CLR 289 at 296-297 [11].

63 (2000) 205 CLR 337 at 348-351 [24]-[37].

40 The reasoning of the plurality in *Isbester v Knox City Council*<sup>64</sup>, upon which the appellant sought to rely for the proposition that an apprehension of bias should be presumed in a case of "incompatibility of roles", is not to be understood as having departed from the analysis in *Ebner*. That reasoning is rather to be understood as demonstrating that the outcome of the *Ebner* analysis in some cases may be so obvious as to warrant little or no elaboration. *Isbester*, where a person who laid charges which resulted in a criminal conviction went on to participate in impugned decision-making concerning a civil consequence of that conviction, was such a case<sup>65</sup>. *Dickason v Edwards*<sup>66</sup> and *Stollery v Greyhound Racing Control Board*<sup>67</sup> can be similarly regarded.

41 In the present case, close adherence to the logic of the *Ebner* analysis has greater utility.

42 Although the appellant placed some emphasis on the fact of Bromwich J having held the statutory office of Director of Public Prosecutions at the time of the appellant's conviction appeal, and by inference at the time of his indictment, trial and conviction, the appellant failed to articulate how that factor alone might logically be said to lead to an apprehension that his Honour might not resolve the questions in the appeal to the Full Court on their legal and factual merits. None is apparent<sup>68</sup>.

43 The appellant is on firmer ground in relying on the fact that Bromwich J had appeared as counsel against him in his conviction appeal. It will be recalled that becoming aware of that fact had prompted Bromwich J correctly to cause the parties to be notified of the potential for an apprehension of bias to have arisen.

44 In articulating the logical connection between that factor and an apprehension that Bromwich J might not bring an impartial mind to the resolution of the legal questions before the Full Court on their merits, the appellant relied on the observation of Gageler J in *Isbester* that "a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual

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64 (2015) 255 CLR 135.

65 See (2015) 255 CLR 135 at 152 [46], 153 [49].

66 (1910) 10 CLR 243.

67 (1972) 128 CLR 509. See *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262-263.

68 Compare *Dickason v Edwards* (1910) 10 CLR 243 at 260.

and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person"<sup>69</sup>.

45       The pivotal stage in the analysis on this strand of the appellant's argument lies in the assessment of the reasonableness, in the circumstances of the case, of an apprehension of that kind from the perspective of a fair-minded lay observer. In undertaking that assessment, "it is the court's view of the public's view, not the court's own view, which is determinative"<sup>70</sup>. The hypothetical fair-minded lay observer is a deliberate and necessary construct which tethers the court's analysis to the ultimate purpose of maintaining public confidence in the impartiality of the judicial system. The construct provides the "standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system"<sup>71</sup>.

46       Here, as the parties properly recognised in argument, much depends on the characteristics to be attributed to the hypothetical fair-minded lay observer in applying that standard. The observer is to be placed in a contemporary setting. Uncritical attitudes of the past cannot be assumed to be those of the present.

47       Being "fair-minded", the observer "is neither complacent nor unduly sensitive or suspicious"<sup>72</sup>. Yet the observer is cognisant of "human frailty"<sup>73</sup> and is all too aware of the reality that the judge is human. The observer understands that "information [as well as attitudes] consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-making"<sup>74</sup>.

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69   (2015) 255 CLR 135 at 157 [63].

70   *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 88 [21], quoting *Webb v The Queen* (1994) 181 CLR 41 at 52.

71   *Charisteas v Charisteas* (2021) 273 CLR 289 at 299 [21].

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

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

74   *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 90 [28].

48 Being "lay", the observer "is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge"<sup>75</sup>. Though the observer may be taken to understand that the judge, by reason of professional training and experience and fidelity to the judicial oath or affirmation, will have a greater capacity than most to discard "the irrelevant, the immaterial and the prejudicial"<sup>76</sup> and to discharge the judicial function uninfluenced by past professional relationships<sup>77</sup>, "the public perception of the judiciary is not advanced by attributing to the ... observer a knowledge of the law and an awareness of the judicial process that ordinary experience suggests not to be the case"<sup>78</sup>. This indicates that the observer will see the person who is currently a judge as the person who was formerly an advocate and may be less inclined to dissociate the advocate from the cause advocated than would someone steeped in the adversary process with a cultivated sense of the ethics of the legal profession and the profundity of the judicial oath.

49 Nor is the observer so abstracted and dispassionate as to be insensitive to the impression that the circumstances in issue might reasonably create in the mind of the actual party who is asserting an apprehension of bias<sup>79</sup>. The observer can be taken to appreciate that a party – especially an individual, and especially a non-citizen facing deportation on the basis of his conviction – might understandably experience a justifiable sense of disquiet in seeing his former prosecutor turn up as one of his judges.

50 Though the lesson of *Ebner* is that each case must be considered by reference to the totality of its own circumstances, the combination of such considerations makes likely the conclusion that a fair-minded lay observer might reasonably apprehend that a judge who has been involved as an advocate in the prosecution of an individual in the past might have developed in that role, and might be unable completely to discard, a mind-set that is unfavourable to the

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75 *Charisteas v Charisteas* (2021) 273 CLR 289 at 297 [12], quoting *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

76 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 90 [28]; *GetSwift Ltd v Webb* (2021) 283 FCR 328 at 338 [35].

77 *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 87-88.

78 *Vakauta v Kelly* (1989) 167 CLR 568 at 585.

79 See *Johnson v Johnson* (2000) 201 CLR 488 at 508 [52]. See also *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 260; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351, 368.

individual to a degree incompatible with the dispassionate resolution of such question as the judge may be called on to decide in a subsequent case to which that individual is a party. The conclusion is even more likely where the earlier prosecution is in some way connected with the case before the court.

51       The Minister drew attention to two cases in which courts of criminal appeal in Australia have declined to set aside convictions in circumstances where the trial judge had acted as counsel for the prosecution in earlier proceedings against the accused for unrelated offences.

52       In one of those cases, *R v Garrett*<sup>80</sup>, the judge when Solicitor-General for South Australia had acted against the accused only as counsel for the respondent in an appeal against conviction and in an application for special leave to appeal. King CJ, with the concurrence of the other members of the Full Court of the Supreme Court of South Australia, opined that the transcript of the earlier appeal and application for special leave contained "nothing to suggest that the then Solicitor-General had formed any personal view of the case and was doing other than making submissions on behalf of the Crown in the ordinary way of advocacy"<sup>81</sup>. For present purposes, it is unnecessary and would be inappropriate to canvass the correctness of the outcome in that case at the time it was decided. It is enough to record that the fact that the judge had acted unexceptionally in performing the role of advocate would not now be accepted as sufficient to assuage a reasonable apprehension on the part of a lay observer that the judge might have carried over a perception of the accused formed during the performance of that role.

53       In the other case, *McCreed v The Queen*<sup>82</sup>, the judge had acted as counsel for the prosecution in the trial of the accused for murder. In concluding that circumstance not to have given rise to an apprehension of bias, it was emphasised in the Full Court of the Supreme Court of Western Australia sitting as the Court of Criminal Appeal that the prosecution had been more than a decade earlier, that "nothing unusual or untoward" occurred in the course of it, that the judge had said that he had no independent recollection of it, and that the case against the accused before the judge was for unrelated sexual offences<sup>83</sup>. Again, without canvassing the correctness of the outcome at the time that case was decided, it would be difficult now to accept those factors as sufficient to assuage a reasonable

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80   (1988) 50 SASR 392.

81   (1988) 50 SASR 392 at 400. See also at 404.

82   (2003) 27 WAR 554.

83   (2003) 27 WAR 554 at 561 [18].

apprehension on the part of a lay observer that the judge might have formed as a prosecutor and retained as a judge an adverse perception of the accused.

54 The reasoning of Bromwich J in the present case understandably reflected the approach taken in those earlier cases. For the reasons stated, however, that approach cannot be accepted as a correct contemporary application of the criterion for the determination of apprehended bias in circumstances where a judge has acted as counsel against a party in or in relation to an earlier criminal prosecution.

55 His Honour's appearance as counsel against the appellant in his earlier conviction appeal was sufficient to give rise to a reasonable apprehension on the part of a fair-minded lay observer of the possibility that his Honour had formed and retained an attitude to the appellant incompatible with the degree of neutrality required dispassionately to resolve issues in a subsequent proceeding to which the appellant was a party. The circumstance that the conviction led to the cancellation of the appellant's visa so as to be causally related to the subject-matter of the appeal concerning the non-revocation of the cancellation decision reinforced the reasonableness of that apprehension in the circumstances of the case. The facts that his Honour had been concerned as counsel only to argue a question of law and had acquired no knowledge of the criminal history of the appellant not apparent from the record of the decision of the Victorian Court of Appeal were not to the point. Neither that nor any other of the considerations referred to by his Honour was sufficient to allay the apprehension of bias which reasonably arose.

### **The effect of apprehended bias**

56 The Solicitor-General of the Commonwealth, who appeared for the Minister, conceded that it followed from a conclusion of apprehended bias on the part of Bromwich J that the Full Court was deprived of jurisdiction to hear and determine the appeal even though the decision was in fact unanimous. Despite being prepared to concede that bias on the part of one out of three members of a multi-member court was sufficient to deprive the court of jurisdiction, the Solicitor-General sought to reserve to a future case whether bias on the part of one out of, say, five or seven members of a multi-member court would have that effect. The attempted reservation indicates that something needs to be said about the basis on which the concession is correct.

57 Once it is accepted that absence of bias is inherent in the exercise of judicial power and that the jurisdiction of a multi-member court is to be exercised by all of the judges who constitute the court for the hearing and determination of a matter, it becomes apparent that bias on the part of any one of those judges deprives the court as so constituted of jurisdiction to proceed with the hearing and determination of that matter. Where bias on the part of an individual judge is established, that is the end of the jurisdictional inquiry. No numerical exercise is



involved. It is not a question of counting apples in a barrel<sup>84</sup>. Nor is it to the point to inquire into whether the outcome of the exercise of jurisdiction by the court as so constituted would or could have been different if the judge was not biased or if the biased judge did not participate.

58 That jurisdictional consequence of bias on the part of any of its members has an important practical dimension for a multi-member court. Each member of the court has an individual duty to give effect to his or her own true view of the facts and applicable law<sup>85</sup>. In the discharge of that duty, however, members of the court can properly be expected to confer together in private in order to obtain the benefit of each other's views and to agree where they can<sup>86</sup>. For the public to be able to have confidence in the outcome of such a closed deliberative process, the public must be confident that each participant in the process is free from bias. The process and the outcome would be tainted were a biased judge "in the room"<sup>87</sup>.

## Orders

59 The appeal should be allowed. The decision of the Full Court should be set aside. The matter should be remitted to the Federal Court to be heard and determined by a differently constituted Full Court. The Minister should pay the appellant's costs of the appeal and of the hearing to date of the appeal to the Full Court.

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84 Compare *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 510 [31], 511 [37].

85 *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at 622 [73], citing Mason, "Reflections on the High Court: Its Judges and Judgments" (2013) 37 *Australian Bar Review* 102 at 110.

86 Kiefel, "An Australian Perspective on Collective Judging", in Häcker and Ernst (eds), *Collective Judging in Comparative Perspective: Counting Votes and Weighing Opinions* (2020) 47 at 50-51, 55.

87 Compare *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 520.

60 GORDON J. This appeal from the Full Court of the Federal Court of Australia deals solely with the law and procedure of apprehended bias of a judge.

61 The appellant, a citizen of Burkina Faso, was convicted in 2013 of one count of importing a border controlled drug and sentenced to more than 12 months' imprisonment. His appeal to the Court of Appeal of the Supreme Court of Victoria against conviction was dismissed on 21 November 2014. As a consequence of his conviction and sentence of imprisonment, the appellant's visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) on 8 November 2017. The appellant unsuccessfully sought revocation of the cancellation decision under s 501CA(4) of the *Migration Act*, merits review of that decision in the Administrative Appeals Tribunal ("the Tribunal"), and judicial review of the Tribunal's decision in the Federal Court of Australia.

62 On appeal, the Full Court of the Federal Court was constituted by McKerracher, Griffiths and Bromwich JJ. On the morning of the hearing on 17 August 2021, Bromwich J's associate emailed the parties to advise that Bromwich J had "appeared for the Crown in the appellant's unsuccessful conviction appeal before the Victorian Court of Appeal on 12 August 2014". The email further stated that "Justice Bromwich does not consider that this is a cause for apprehended bias because that appeal related to a pure legal question, but nonetheless his Honour wishes to raise it with the parties in order that any application for his Honour to recuse himself can be made".

63 At the commencement of the hearing, counsel for the appellant sought the recusal of Bromwich J. The presiding judge, McKerracher J, invited counsel to make submissions, and following those submissions announced that the Court would adjourn to consider what steps to take next. After a brief adjournment, McKerracher J invited Bromwich J to "deal with the application". Bromwich J gave ex tempore reasons for declining to recuse himself. The Court then proceeded to hear the substantive matter and handed down judgment on 15 September 2021, unanimously dismissing the appeal.

64 The question is whether the Full Court erred in hearing and determining the matter with Bromwich J as a member of the Court. The answer is "Yes", because his Honour's involvement in the appeal gave rise to a reasonable apprehension of bias and lack of judicial independence, due to the incompatibility between his earlier role as the Commonwealth Director of Public Prosecutions ("the Commonwealth Director") appearing personally in the conviction appeal, and his later role as a judge of the Full Court of the Federal Court hearing the appellant's migration appeal.

65 Where a judge sits as a member of a Full Court in circumstances that give rise to a reasonable apprehension of bias, the jurisdiction of the Court as constituted is vitiated. For that reason, the appeal should be allowed, the orders of the Full Court of the Federal Court should be set aside, and the matter should be

remitted to the Full Court of the Federal Court before a differently constituted bench for rehearing and determination of the appeal according to law.

66 This appeal also raises the question of whether the Full Court erred by adopting a procedure for deciding the recusal application whereby Bromwich J alone determined the question of apprehended bias raised by the appellant. As will be explained, there is not, nor should there be, a single set of universally applicable procedures for dealing with recusal applications in multi-member courts. However, if an objection is raised or there are matters giving rise to a real potential for apprehended bias, *and* the judge in question decides not to recuse themselves (as occurred here), the Full Court as constituted must be satisfied it has jurisdiction before proceeding to hear the matter. In most, if not all, cases, the judge in question should have the opportunity initially to decide to recuse themselves, without that matter needing to be decided by the Full Court. If the judge decides not to recuse themselves and the objection is maintained, or the other judges consider that there are matters giving rise to a real potential for apprehended bias, a procedure that might be followed is set out below.

### **Did Bromwich J's involvement in the appeal give rise to a reasonable apprehension of bias?**

#### *Test for apprehended bias*

67 As this Court held in *Ebner v Official Trustee in Bankruptcy*, a judge is disqualified, subject to qualifications relating to waiver or necessity, "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide"<sup>88</sup>. The *Ebner* test has two steps<sup>89</sup>: first, it requires the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and second, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed<sup>90</sup>.

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88 (2000) 205 CLR 337 at 344 [6]. See also *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 98 [56]; *Charisteas v Charisteas* (2021) 273 CLR 289 at 296-297 [11].

89 *Ebner* (2000) 205 CLR 336 at 345 [8]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [21]; *CNY17* (2019) 268 CLR 76 at 88 [21], 98-99 [57]; *Charisteas* (2021) 273 CLR 289 at 296 [11].

90 *Charisteas* (2021) 273 CLR 289 at 296-297 [11], citing *Ebner* (2000) 205 CLR 337 at 345 [8], 350 [30], *Concrete Pty Ltd v Parramatta Design & Developments Pty*

68 Four aspects of the test are critical to observe. First, it is an objective test: it does not require a conclusion about the judge's *actual* state of mind or an assertion of *actual* bias. The principle gives effect to the requirement that justice should both be done and be seen to be done<sup>91</sup>.

69 Second, it is a test of possibility, not probability<sup>92</sup> – whether the fair-minded lay observer *might* reasonably think that the judge *might* be biased. It has even been said that the fair-minded lay observer is generally taken to be mistaken because decision-makers will rarely be biased in the ways attributed to them, as the observer might have appreciated if fully apprised of the operation of a particular decision-maker<sup>93</sup>. That said, a finding of apprehended bias is "not to be reached lightly"<sup>94</sup>. In determining whether an apprehension of bias arises, relevant considerations include "the legal, statutory and factual contexts in which the decision is made" and "the nature of the decision ..., what is involved in making the decision and the identity of the decision-maker"<sup>95</sup>.

70 Third, the test is not prescriptive about the ways in which a reasonable apprehension might arise. "The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty"<sup>96</sup>. Indeed, the apprehension may not even be of a consciously impartial mind. The test encompasses apprehension of unconscious bias: "the hypothetical

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*Ltd* (2006) 229 CLR 577 at 609-610 [110]-[111] and *CNY17* (2019) 268 CLR 76 at 88 [21], 98-99 [57].

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

92 *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [28]; 179 ALR 425 at 435.

93 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 519 [79], referring to *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411 at 440.

94 *CNY17* (2019) 268 CLR 76 at 98 [56], citing *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 371.

95 *Isbester* (2015) 255 CLR 135 at 146 [20], [23]. See also *CNY17* (2019) 268 CLR 76 at 99 [58].

96 *Ebner* (2000) 205 CLR 337 at 345 [8]. See also *CNY17* (2019) 268 CLR 76 at 118 [132].

observer would recognise that judges are human, not a 'passionless thinking machine' or robot just assessing information"<sup>97</sup>.

- 71 Fourth, the adjective "lay" in relation to the fair-minded observer is critical – "[i]t would defy logic and render nugatory the principle to imbue the hypothetical observer" with the knowledge and professional self-appreciation of a lawyer<sup>98</sup>, let alone that of an experienced judge<sup>99</sup>. The fair-minded lay observer is a member of the public because the principle is concerned with maintenance of public confidence in the justice system. "[I]t is the court's view of the public's view, not the court's own view, which is determinative"<sup>100</sup>.

*Knowledge of the fair-minded lay observer*

- 72 The fair-minded lay observer is taken to be aware of the nature of the decision and the context in which it was made<sup>101</sup>, and the circumstances leading to the decision<sup>102</sup>. The fair-minded lay observer is taken to have "a broad knowledge of the material objective facts", as distinct from a detailed knowledge of the law or of the character and ability of the decision-maker<sup>103</sup>. In considering whether an allegation of apprehended bias on the part of a judge is made out, "the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case"<sup>104</sup>.

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97 *GetSwift Ltd v Webb* (2021) 283 FCR 328 at 341 [46] (citations omitted). See also *CNY17* (2019) 268 CLR 76 at 89-90 [27]-[28], 97 [51], 107 [92], 108 [97], 118-119 [133].

98 *Charisteas* (2021) 273 CLR 289 at 299-300 [21].

99 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

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

101 *Isbester* (2015) 255 CLR 135 at 146 [23], citing *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68]. See also Young, "The Evolution of Bias: Spectrums, Species and the Weary Lay Observer" (2017) 41 *Melbourne University Law Review* 928 at 945-949.

102 *Isbester* (2015) 255 CLR 135 at 146 [23]; *CNY17* (2019) 268 CLR 76 at 99 [58].

103 *Webb* (1994) 181 CLR 41 at 73, quoted in *CNY17* (2019) 268 CLR 76 at 99 [58].

104 *Webb* (1994) 181 CLR 41 at 52.

73 As the test is objective, the state of mind of the judge in question is irrelevant<sup>105</sup>. So too are the reasons for judgment given by the judge ex tempore or published by the judge after the trial<sup>106</sup>. The test turns on the facts and circumstances that might give rise to the apprehension of bias at the time of the hearing and determination<sup>107</sup>. For that reason, Bromwich J's reasons are not within the knowledge of the fair-minded lay observer. The material facts stated by his Honour in his ex tempore reasons should have been provided to the parties in the associate's email or stated in open court during the hearing. That would have allowed the parties to address those facts in their submissions to the Court. It would also have allowed any facts known only to Bromwich J – for example, his level of conscious recollection – to form part of the knowledge of the fair-minded lay observer, to the extent relevant.

74 In this case, the fair-minded lay observer would have known and understood that his Honour was the Commonwealth Director at the time of the appellant's conviction appeal, and may have inferred that was also the case when the appellant was tried on indictment, convicted and sentenced to more than 12 months' imprisonment. The fair-minded lay observer would understand that the Commonwealth Director had a formal role in the prosecution. In this case, there is no evidence and no basis to infer that the Commonwealth Director had any actual role in the institution or carrying on of the prosecution against the appellant. However, the fair-minded lay observer would see the Commonwealth Director embodied in the official name in which the appellant was prosecuted and the conviction appeal defended.

75 Next, as the Commonwealth Director, his Honour had personally appeared as senior counsel to oppose the conviction appeal, which was dismissed. Although the observer would understand that the appeal was about a legal point of general principle, they would see his Honour as the person who stood at the bar table in the Court of Appeal on 12 August 2014 and persuaded the Court to dismiss the appeal. They would observe that in that capacity his Honour had stepped in and successfully defended the appellant's conviction on behalf of the Commonwealth Executive.

76 Third, the criminal conviction led to the mandatory cancellation of the appellant's visa by a delegate of the Minister (also of the Commonwealth Executive) under s 501(3A) of the *Migration Act* on the basis that he failed the "character test" because he had been sentenced to a term of imprisonment

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**105** *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 446 [67]; *Isbester* (2015) 255 CLR 135 at 156 [61].

**106** *Michael Wilson* (2011) 244 CLR 427 at 447 [68].

**107** See *Michael Wilson* (2011) 244 CLR 427 at 447 [68], 448 [73].

exceeding 12 months, and was serving that sentence on a full-time basis in a custodial institution. The appellant applied for the cancellation to be revoked under s 501CA(4) of that Act, and then applied for merits review of the refusal to revoke the cancellation of the visa in the Tribunal. The fair-minded lay observer would know that the question for the Tribunal under s 501CA(4) was, because the appellant failed the character test, whether it was satisfied that there was "another reason" why the cancellation decision should be revoked.

77 Finally, the fair-minded lay observer would understand that the Federal Court, and on appeal the Full Court of the Federal Court, were not deciding the merits of the Tribunal's decision not to revoke the cancellation or considering the correctness of the appellant's criminal conviction. Rather, the Court's role was to determine whether the Tribunal, in deciding not to revoke the cancellation of the appellant's visa, had stayed within the legal limits of its power.

### *Apprehension of bias*

What might lead a judge to decide a case other than on its legal and factual merits

78 As the plurality observed in *Ebner*, "the fundamental principle to which effect is given by disqualification of a judge is the necessity for an independent and impartial tribunal. Concepts of independence and impartiality overlap, but they are not co-extensive"<sup>108</sup>. This case is usefully considered through the lens of independence, as well as impartiality. There are three aspects. His Honour appeared as the Commonwealth Director against a party to the migration appeal – the appellant – in or in relation to an earlier criminal prosecution of the appellant. That criminal proceeding and the migration appeal were related. Finally, and no less significantly, the other party in both the criminal proceeding and the migration appeal was the same – the Commonwealth Executive. That is, Bromwich J had represented the Commonwealth Executive against the appellant – now embodied by the Minister in the migration appeal – in the criminal proceeding.

79 Using Deane J's typology set out in *Webb v The Queen*<sup>109</sup>, the matter might usefully be framed as an issue of *incompatibility* of roles, or of *association* between his Honour and the respondent to the migration appeal, or past *conduct* by his Honour in relation to the appellant. The *incompatibility* is between the role of an adversary speaking against the appellant and his interests, and the role of sitting in judgment on him in related proceedings. The *association* is his Honour's association with the Commonwealth Executive in a past case involving the appellant which is connected to the present appeal. The *conduct* is advocating on behalf of the Commonwealth Executive against the appellant in the earlier

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**108** (2000) 205 CLR 337 at 358 [60].

**109** (1994) 181 CLR 41 at 74.

proceeding, and now deciding on a related dispute between the Executive and the appellant.

80 This case might also be considered through the concept of *interest*. That concept is most salient in prosecutor/defendant cases where the decision-maker was the person who decided to institute, or who carried on, the prosecution. As the plurality held in *Isbester v Knox City Council*, "a person bringing charges, whether as a prosecutor or other accuser, might be expected to have [an interest] in the outcome of the hearing of those charges"<sup>110</sup>. The interest of a prosecutor or other moving party "may be in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment"<sup>111</sup>. As the decision in *Isbester* demonstrated, that interest does not necessarily end with the prosecution, and may create an apprehension of bias in later decision-making processes in relation to the same person<sup>112</sup>. But in this case, there is no evidence that his Honour instituted or had any actual involvement in the prosecution (as opposed to the conviction appeal).

The logical connection between the matter and the feared deviation from the course of deciding the case on its merits

81 It must be explained how the existence of the incompatibility, association, conduct or interest (or other identified matter) might be thought by the fair-minded lay observer possibly to divert the judge from deciding the case on its merits.

82 In this case, the logical connection is clear – as encapsulated by Gageler J in *Isbester*, "a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person"<sup>113</sup>. The incompatibility is between the adversarial frame of mind or attitude in the earlier proceeding, and the need for a deliberative or adjudicative frame of mind and attitude in the later proceeding.

83 This does not mandate that a judge who was formerly the prosecutor of a party now before the court is *per se* disqualified. The *Ebner* test must still be applied. However, in such cases, particularly where there is a connection between

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**110** (2015) 255 CLR 135 at 149 [34].

**111** *Isbester* (2015) 255 CLR 135 at 152 [46].

**112** (2015) 255 CLR 135 at 151 [42]-[43], 158-159 [68]-[69].

**113** (2015) 255 CLR 135 at 157 [63].



the proceedings, it will generally be easy to establish the second limb of *Ebner*. That connection need not be causal, nor does it require that the proceedings deal with the same subject matter, issues or evidence. The observer does not take an overly technical legalistic approach – the observer is a fair-minded lay person. The intermediate appellate court authorities of *R v Garrett*<sup>114</sup>, *McCreed v The Queen*<sup>115</sup> and *Muldoon v The Queen*<sup>116</sup> should be considered wrong by modern standards – where the later proceeding is also a criminal prosecution, the fact that the judge was formerly the prosecutor of the same defendant in an earlier criminal prosecution will nearly always give rise to a reasonable apprehension of bias. That is because both proceedings are criminal in nature – that is the connection.

84 Here, the Minister submitted that the conviction appeal and the Full Federal Court appeal were not sufficiently connected to give rise to a reasonable apprehension of bias because the subject matters of the two proceedings were "completely different". One was a decision relating to the appellant's migration status; the other a conviction appeal. That submission has an air of unreality – the fair-minded lay observer would clearly see the two proceedings as connected. The second proceeding would never have arisen if not for the Crown's successful defence of the conviction at the conviction appeal. The subject matter of the conviction appeal was the appellant's conviction and the subject matter of the Full Federal Court appeal was the cancellation of the appellant's visa because of that conviction. The observer would understand that the appellant's appeal to the Full Court was the last check on the power and obligation of the Commonwealth Executive under the *Migration Act* to remove him from Australia as a consequence of his visa cancellation. An apprehension of bias might be more readily made by the fair-minded lay observer where the decision relates to a person's right to be at liberty in Australia.

85 Ultimately, in cases raising a question of apprehended bias, what must be involved is "an assessment (through the construct of the fair-minded observer) of the behaviour of a person or persons in a position to exercise power over another, and whether that other person was treated in a way that gave rise to the appearance of unfairness being present in the exercise of state power"<sup>117</sup>. The fair-minded observer will be sensitive to how the circumstances might reasonably appear to the actual party who is asserting the apprehension of bias,

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<sup>114</sup> (1988) 50 SASR 392.

<sup>115</sup> (2003) 27 WAR 554.

<sup>116</sup> (2008) 192 A Crim R 105.

<sup>117</sup> *Isbester* (2015) 255 CLR 135 at 155 [58], quoting *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [3].

in this case the appellant<sup>118</sup>. Here, the performance by his Honour of the two incompatible roles in the exercise of public power in relation to the appellant gave rise to the appearance of unfairness, impartiality and a lack of independence being present in the exercise of power to dismiss the migration appeal. The appeal should be allowed.

### Procedure for deciding recusal application

86 The appellant's first appeal ground was that the Full Court erred by proceeding to hear the appeal after Bromwich J alone, instead of the Full Court, determined the question of apprehended bias raised by the appellant. This ground does not need to be decided. As there was a reasonable apprehension of bias, the Full Court's orders must be set aside. If there had not been a reasonable apprehension of bias, it would have followed that the Full Court would have been properly constituted when it decided the appeal and ground one would not have provided a basis to set aside the Full Court's orders. The procedure for deciding a recusal application might therefore never need to be decided on an appeal to this Court. However, as the Minister accepted, while the matter may not need to be decided, this Court may well decide to address it.

87 It is appropriate to address this appeal ground because the procedure for deciding objections for apprehended bias raises issues that go to the heart of judicial duty, process and, indeed, the protection of impartiality, independence and procedural fairness, all essential characteristics of Ch III courts under the *Constitution*<sup>119</sup>.

88 The practice and procedure for raising apprehended bias and determining objections has historically been informal<sup>120</sup>. The conventional, although not universal, practice in Australia has been that the judge who is alleged to be affected

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118 See reasons of Kiefel CJ and Gageler J at [49].

119 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487; *Ebner* (2000) 205 CLR 337 at 362-363 [79]-[82]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]; *South Australia v Totani* (2010) 242 CLR 1 at 157 [428]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71-72 [67]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 426 [44]; *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at 1019 [50], 1030 [106], 1041 [172]; 405 ALR 209 at 221, 236, 251-252. See also *R v Watson*; *Ex parte Armstrong* (1976) 136 CLR 248 at 263; *Ebner* (2000) 205 CLR 337 at 343 [3].

120 *Barton v Walker* [1979] 2 NSWLR 740 at 749.

by apprehended bias determines whether they are disqualified irrespective of whether they are sitting as a single judge or on a multi-member court<sup>121</sup>.

89 A plurality of this Court in *Ebner* confirmed that the decision on disqualification being made by the challenged judge is "the ordinary, and the correct, practice"<sup>122</sup>. However, the plurality was there referring to a single trial judge matter. Rightly, their Honours queried, if another judge was to decide the matter, what would be "the power of that other judge to determine the question" and how would "that other judge's conclusion ... find its expression"<sup>123</sup>.

90 Sir Anthony Mason said, extra-curially: "[i]n principle there is no compelling reason why the practice followed at first instance should be followed by appellate and collegiate courts. At first instance, the judge who is the target of the objection determines the objection because he constitutes the court. Correspondingly, it can be said that an appellate or collegiate court should determine an objection taken to one of its number sitting"<sup>124</sup>.

91 The Australian Law Reform Commission report "Without Fear or Favour: Judicial Impartiality and the Law on Bias" (the "ALRC Bias Report") recommended in December 2021 that objections on bias grounds to one or more judges sitting on a multi-member court be determined by the court as constituted, observing that<sup>125</sup>:

"Consultations suggested that this is already informally the practice in some appellate courts, and has been explicitly adopted on some occasions<sup>126</sup>, and therefore should be formalised. It is also a process that has been adopted by courts in other comparable jurisdictions, including England and

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121 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law On Bias*, Report No 138 (2021) at 100 [3.54], 231 [7.1], 263 [7.102]. See Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89 at 90.

122 (2000) 205 CLR 337 at 361 [74].

123 *Ebner* (2000) 205 CLR 337 at 361 [74].

124 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 24.

125 ALRC Bias Report at 263, 265 [7.110]-[7.111].

126 See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 292; *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 at [50]. See also *R v Nicholas* (2000) 1 VR 356 at 370 [47]-[48]. [Balance of footnote omitted.]

Wales<sup>127</sup>, New Zealand<sup>128</sup>, Northern Ireland<sup>129</sup>, Singapore<sup>130</sup>, and South Africa<sup>131</sup>."

However, the processes adopted by courts in other jurisdictions are not consistent<sup>132</sup>, or even consistent between courts in the same country<sup>133</sup>. And that inevitably raises the next question – are there to be uniform rules and procedures?

92 As this case has demonstrated, a reasonable apprehension of bias in respect of one judge on a Full Court means its jurisdiction – the authority of the whole of the Court to decide – is vitiated<sup>134</sup>. The Court as constituted is required to be and to appear to be independent and impartial: "[i]t is for the court itself to be satisfied that it is so constituted that it will exercise its judicial function impartially and with

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127 *Sengupta v Holmes* [2002] EWCA Civ 1104; *Baker v Quantum Clothing Group* [2009] EWCA Civ 566; *Dwr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97.

128 See the judicial recusal guidelines in Appendix G [of the ALRC Bias Report].

129 *TF v Northern Ireland Public Services Ombudsman* [2021] NICA 39.

130 *Yong Vui Kong v Attorney General* [2012] 2 LRC 439.

131 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147.

132 See Olowofoyeku, "Bias in Collegiate Courts" (2016) 65 *International and Comparative Law Quarterly* 895 at 905-912.

133 See ALRC Bias Report at 575-585 (Appendix G – Recusal Guidelines of New Zealand Courts).

134 Subject to limited exceptions which do not arise here, including where the party allegedly injured by bias waives their right to object and such waiver is fully informed and clear (see, eg, *Michael Wilson* (2011) 244 CLR 427 at 449 [76]) or the doctrine of necessity. See also Groves, "Waiver of Natural Justice" (2019) 40 *Adelaide Law Review* 641 at 650-653; ALRC Bias Report at 101-102 [3.56]-[3.60].

the appearance of impartiality"<sup>135</sup>. The Court must be satisfied that it has jurisdiction to hear the matter<sup>136</sup>. That is the "first duty" of any court<sup>137</sup>.

93        Given the differences in the practices, jurisdiction, level in the judicial hierarchy, composition and work of the various courts, as well as the variety of circumstances and the various stages of a proceeding (from prior to or at the initial allocation of a judge to the matter, all the way through until after the judgment has been handed down) in which the question of an apprehension of bias may arise, there can be no universally applicable rules or procedures.

94        The preferable, if not the proper, course is for the judge in question to be given the opportunity initially to decide for themselves whether they will recuse. This may happen informally at or around the time of allocation of the matter, or it may occur later – for example, after hearing an objection from one of the parties. Only if the judge does not recuse themselves, and an objection is maintained or there are matters that the other judges consider may give rise to a potential for apprehended bias, does the Full Court as a whole need to determine the issue.

95        There are at least three basic reasons why it is appropriate for the judge in question to have the opportunity to initially decide to recuse themselves, without that matter needing to be decided first by the Full Court.

96        First, there are a judge's professional and ethical obligations. A recusal application raises *both* a matter of professional and ethical obligations for the individual judge and a matter that goes to the Court's jurisdiction as constituted. A judge has a professional obligation to sit on any case allocated to them unless there are grounds for recusal<sup>138</sup>. As the plurality explained in *Ebner*<sup>139</sup>:

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135 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 26.

136 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446; *The Queen v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 215; *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 492 [64]-[65]; 400 ALR 1 at 17-18.

137 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415, quoted in *Re Nash [No 2]* (2017) 263 CLR 443 at 450 [16].

138 See *Re JRL* (1986) 161 CLR 342 at 352; *Bienstein v Bienstein* (2003) 195 ALR 225 at 233 [35].

139 (2000) 205 CLR 337 at 348 [19]; see also 394 [175].

"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges."

A judge, equally, has a duty not to sit where there is a reasonable apprehension of bias<sup>140</sup>. "[I]n the end the decision to sit or not to sit must rest comfortably with the judicial conscience"<sup>141</sup>.

97        Second, there are prudential reasons. It is not improper for a judge to decline to sit without having affirmatively concluded that they are disqualified – in a case of "real doubt", a judge may take the prudent course of deciding not to sit<sup>142</sup>. The procedure adopted should not prevent a judge from taking that prudential (and practical) approach and deciding to recuse themselves in a case of real doubt, even if they and their colleagues on the Court were to ultimately conclude that the judge is not disqualified.

98        Third, there are institutional reasons. A procedure whereby the judge in question deliberates on the matter of their own recusal *together with* the other judges constituting the Court may appear to lack impartiality and transparency. That may undermine the fundamental principle that the process is directed to preserving – "the necessity for an independent and impartial tribunal"<sup>143</sup>, both real and apparent.

99        Institutions – courts – are not uniform. That lack of uniformity – in relation to jurisdiction, level within the judicial hierarchy, composition and method of listings to name just a few matters – may well explain the differences that presently exist in the practices adopted by courts, including courts within a country<sup>144</sup>.

100        Adopting and adapting what was outlined and discussed in the ALRC Bias Report, the following are steps that might be taken by a Full Court to identify and

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**140** See *Watson* (1976) 136 CLR 248 at 262.

**141** Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 18.

**142** *Ebner* (2000) 205 CLR 337 at 348 [20].

**143** *Ebner* (2000) 205 CLR 337 at 358 [60].

**144** See ALRC Bias Report at 575-585 (Appendix G – Recusal Guidelines of New Zealand Courts). See also, eg, Supreme Court of the United States, *Chief Justice's Year-End Report on the Federal Judiciary* (2011) at 7-10.

address issues of apprehended bias. At the outset, administratively the court might circulate a list of cases among judges before cases are allocated to give the judges an opportunity to raise any concerns<sup>145</sup>. Then when a judge is allocated to a matter, the judge should consider whether there are any facts or circumstances which may give rise to an appearance or concern from litigants or observers that the judge might not be impartial or independent in hearing the matter. The judge may recuse themselves if the judge is of the opinion that they are disqualified, without necessarily involving the other members of the Court allocated to the matter or informing the parties<sup>146</sup>. The judge is free, of course, to consult with the head of jurisdiction and their colleagues<sup>147</sup>.

101 If there are facts or circumstances which might give rise to a concern and the judge has not initially decided to recuse, the judge should give notice to the parties to the litigation, even if the judge has formed the view that there is no basis for recusal<sup>148</sup>. That notice should also be provided to the other judges who will constitute the Full Court. The notice should set out the material facts or circumstances and inform the parties that they may wish to object to the judge sitting on the case (and may respond to any objection, if made). Disclosure should generally be made as early as possible before the hearing.

102 If an objection is received, in the first instance the judge in question should consider it and decide whether to recuse themselves. If the judge does not recuse themselves, the case should not proceed to be heard by the Court as constituted unless the other judges are satisfied that they will be able to discharge their judicial oath as a member of the Court as constituted, and the Court is satisfied that it has jurisdiction to hear the matter<sup>149</sup>. The way in which the other members of the Court address the questions of judicial ethics and jurisdiction will necessarily vary from case to case and from court to court<sup>150</sup>. However, consistent with principle<sup>151</sup>, in a case of real doubt, it may be prudent for the Court to reconstitute in order to avoid

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145 ALRC Bias Report at 201 [6.37]-[6.38].

146 ALRC Bias Report at 201 [6.38], 205 [6.51], [6.53].

147 ALRC Bias Report at 214 [6.86]-[6.87]. See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 17.

148 ALRC Bias Report at 206 [6.56]. See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 17-18.

149 See [92] above.

150 See [93] above.

151 *Ebner* (2000) 205 CLR 337 at 348 [19]-[21].

the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification.

103 If the other judges – individually or collectively – consider that they could not discharge their own judicial oath, or for prudential reasons decide not to proceed to hear the substantive matter, the Court should reconstitute. If the Court, of its own motion, raises a question or concern about its jurisdiction or if an application for recusal is renewed in the Court as constituted and the Court proceeds to hear the substantive matter, the Court should make an order formally recording its determination on jurisdiction, and reasons should be given *ex tempore* and, if necessary, further addressed in any later substantive judgment.

104 As occurred in this case, it may be that the facts or circumstances giving rise to the apprehension of bias do not become apparent until just prior to or during the hearing. As Bromwich J properly did in this case, the parties should be notified promptly of those facts or circumstances. The following procedure may be appropriate, and would have been an appropriate procedure in this case. The judge in question should state the facts and circumstances in open court. If a party makes an objection to a judge sitting, the parties should be given an opportunity to make submissions before the Court as constituted. Unless stated only to be an application to the judge in question, the application should be treated as one that is directed in the first instance to the judge in question and, if the judge in question decides not to recuse themselves, as an application that is renewed to the Court as a whole. In the first instance, the Court should adjourn to let the judge in question decide whether they wish to recuse themselves. The judge should inform the other members of the Court and the parties of their decision. If the judge in question decides not to recuse themselves, that judge should make a formal order dismissing the application. At that stage, the other judges – individually and collectively – should consider the matter in the manner outlined in the previous paragraph.

105 Ultimately, the adoption of preventative administrative processes for identifying potential issues of bias before cases are allocated, and processes for early identification and resolution of potential issues of bias after allocation but in advance of the hearing, will minimise the likelihood of late disclosure and the need for recusal applications to be made and determined at the outset of the hearing.

### **Relief**

106 For those reasons, I agree with the orders proposed by Kiefel CJ and Gageler J.



EDELMAN J.

**This appeal and the ethical responsibility of a judge**

107 Justice should appear to be done. But, more importantly, it should be done. Indeed, in the long run, the appearance of justice is something "which courts can attain only by seriously pursuing the reality of justice"<sup>152</sup>. The issue of fundamental principle that arises on this appeal is whether the reality of justice should give way to the appearance of justice by replacing a judge's ethical (and personal) duty to ensure that justice is done with an institutional (and collective) duty to ensure that justice is seen to be done. It should not. Ethics are a lonely affair because they cannot be delegated to a committee.

108 In these reasons, a reference to bias issues is a general reference to both actual bias and apprehended bias, and the judge who is the subject of bias issues is described as the subject judge. The issue of fundamental principle raised by this appeal is as follows: should a subject judge sitting on a multi-member court have the first opportunity — prior to consideration by the court as a whole — to determine whether to recuse themselves for bias issues, consistently with their ethical duties? That question should be answered, "yes". In this respect I agree with Gordon J and Steward J, as well as Jagot J (who would confine this opportunity only to the subject judge). That affirmative answer accords with a central rationale, recognised over thousands of years of judicial recusal, from early Jewish<sup>153</sup> and Roman law<sup>154</sup> through the English common law, by which "recusal has been viewed almost exclusively as an issue of judicial ethics"<sup>155</sup>.

109 There is an important reason for the qualification, "almost". If the subject judge decides, or continues, to sit as a member of a multi-member court in the face of bias issues, then the court is capable of determining whether it lacks jurisdiction due to the bias issue. When the issue is considered by the court, the ethical question

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152 Leubsdorf, "Theories of Judging and Judge Disqualification" (1987) 62 *New York University Law Review* 237 at 279.

153 Elon (ed), *The Principles of Jewish Law* (2007) at 564.

154 G 4.52; J 4.5.pr; D 5.1.15 (Ulpian, *Edict*, bk 21): *The Digest of Justinian*, tr ed Watson, rev ed (1998), vol 1 at 166; D 44.7.5.4 (Gaius, *Golden Words*, bk 3): *The Digest of Justinian*, tr ed Watson, rev ed (1998), vol 4 at 156; D 50.13.6 (Gaius, *Common Matters or Golden Words*, bk 3): *The Digest of Justinian*, tr ed Watson, rev ed (1998), vol 4 at 444. See especially Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (2009) at 82.

155 Virelli, *Disqualifying the High Court: Supreme Court Recusal and the Constitution* (2016) at xii.

by which the subject judge focuses centrally on whether justice will be done becomes a collective, institutional question that will usually be focused on whether justice will be seen to be done. But basic ethics require that the subject judge have the first opportunity, and a continuing ability, to recuse themselves. In this respect, an appropriate court procedure is set out by Gordon J in her Honour's reasons<sup>156</sup>.

110 This case concerned an application made in the Full Court of the Federal Court of Australia for one of the three judges sitting on the appeal, Bromwich J, to recuse himself on the ground of apprehended bias. A majority of this Court concludes that the application should properly have been directed, at least initially, to Bromwich J alone rather than to the Full Court as a whole. This conclusion of the majority of this Court is seriously considered obiter dicta. Questions concerning the appropriate court procedure to determine issues of bias are not, and could never be, part of the ratio decidendi of an appeal to this Court. It is only a decision of this Court as to whether actual bias or apprehended bias was present that can resolve the dispute between the parties.

111 It has sometimes been suggested that a large question that need not be decided by an ultimate appellate court is one that should not be decided<sup>157</sup>. Such statements cannot be taken literally. This Court has never confined itself to the resolution only of the issues in dispute between the parties. An assessment of whether issues should be addressed beyond those that are strictly necessary to resolve a dispute between the parties involves a consideration of numerous factors, sometimes pointing in different directions<sup>158</sup>. On this appeal, the decisive factors in favour of addressing the issue are the institutional importance of the issue coupled with the fact that on an appeal to this Court it will never be an issue that is necessary to resolve any dispute between parties.

112 The issue upon which this appeal must be resolved concerns whether a fair-minded lay observer might have had a reasonable apprehension that Bromwich J might not bring an impartial mind to the resolution of QYFM's appeal. QYFM's appeal was brought from the dismissal of his application for judicial review of the refusal of a delegate of the Minister to revoke the cancellation of his visa. The cancellation of QYFM's visa had been based on a conviction of QYFM, an earlier appeal from which had been dismissed. Bromwich J, who was the Commonwealth

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156 At [102]-[104].

157 See, for instance, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [7].

158 See, eg, *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 852-854 [100]-[107]; 393 ALR 551 at 574-576.

Director of Public Prosecutions at the time of QYFM's conviction appeal, appeared as counsel in that appeal.

113 The decision by Bromwich J not to recuse himself may reflect a conscientious and robust approach to recusal that avoids increasing the burden upon one's judicial colleagues. It must have been a finely balanced decision. The decision may have been influenced by, and is consistent with, the approach taken by three intermediate appellate courts to which the Minister referred<sup>159</sup>. But, with respect to all involved in those decisions, they are wrong now and they were wrong when they were decided. Ultimately, in the circumstances of this case, a fair-minded observer, who is a lay person and not a lawyer, might have had a reasonable apprehension that Bromwich J might not bring an impartial mind to the issues raised by QYFM's appeal.

### **In a multi-member court, who should first decide issues of bias?**

*Two bias issues: actual bias and apprehended bias*

114 Issues of bias are commonly divided into actual and apprehended bias. The proper starting point, however, is what is meant by "bias". For the purposes of this appeal, it is convenient to separate bias issues involving a sufficient lack of impartiality from bias issues concerning a lack of independence. The two concepts, partiality and dependence, are commonly treated together, and can overlap. An example is the lack of independence in the roles of the council officer in *Isbester v Knox City Council*<sup>160</sup> — being responsible for laying charges against a dog owner in connection with an attack by the dog, and also forming part of the panel that recommended that the dog be killed — which gave rise to an apprehension of partiality in her latter role because she "might be expected to have [an interest] in the outcome of the hearing of those charges"<sup>161</sup>. Nevertheless, bias "may not be an adequate term to cover all cases of the absence of independence"<sup>162</sup>. Although some aspects of QYFM's submissions appeared to allege an absence of independence, the proper focus of this appeal is upon QYFM's submissions concerning bias in its core sense of a sufficient lack of impartiality.

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<sup>159</sup> *R v Garrett* (1988) 50 SASR 392; *McCreed v The Queen* (2003) 27 WAR 554; *Muldoon v The Queen* (2008) 192 A Crim R 105.

<sup>160</sup> (2015) 255 CLR 135.

<sup>161</sup> (2015) 255 CLR 135 at 149 [34].

<sup>162</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [23].

115 Actual bias, involving compromised impartiality, presents a threat to actual justice. It requires an "assessment of the state of mind of the judge in question"<sup>163</sup>. If the subject judge's state of mind is sufficiently partial, then justice will not be done. But the only person truly capable of knowing whether actual bias is present in a person's mind is the subject judge: "the devil himself knoweth not the thought of man"<sup>164</sup>.

116 There are, however, two reasons why the rules of a legal system concerning bias cannot stop with the subject judge's own assessment of whether they are impartial. First, a judge who is impartial might nevertheless have the appearance of partiality. That appearance of bias might arise even from circumstances independent of the judge such as the bias of, or the appearance of bias in respect of, a person assisting the judge<sup>165</sup>. Even if the judge is not biased, the appearance of bias damages the appearance of justice. And justice is undermined when confidence in justice is undermined<sup>166</sup>.

117 Secondly, the subject judge may have unconscious biases which are apparent from their conduct, or the subject judge may have wrongly convinced themselves of their own impartiality<sup>167</sup>. As Professor Leubsdorf has said<sup>168</sup>:

"The judge hearing a case knows better than anyone else what she really feels about the parties and issues. She can therefore tell better than others whether she should sit. Yet even honest judges — and disqualification law is not primarily directed at conscious fraud — may be swayed by unacknowledged motives. The most biased judges may be the most persuaded that their acts are just ... [N]o sensible judicial system would leave disqualification entirely to the discretion of the judge in question."

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163 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 438 [33].

164 Ames, "Law and Morals" (1908) 22 *Harvard Law Review* 97 at 97, citing YB 7 Ed IV f 2 pl 2.

165 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at 58-59 [79], citing *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

166 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599.

167 See *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 108 [97], 111-112 [111].

168 Leubsdorf, "Theories of Judging and Judge Disqualification" (1987) 62 *New York University Law Review* 237 at 277.

118 Every sensible legal system therefore requires more than a subject judge's own assessment of whether they are actually biased. Issues of actual and apprehended bias can be, and are, objectively assessed by both the subject judge and others. That objective assessment might concern the mere possibility that actual bias would exist in the judge's mind. Or it might be further abstracted from actual bias so that it ceases to be an enquiry centrally focused upon whether justice is done and becomes an enquiry centrally focused upon whether justice is seen to be done.

119 In Australia, the test for an apprehension of bias involves an abstraction upon an abstraction: "it is the court's view of the public's view, not the court's own view, which is determinative"<sup>169</sup>. The person considering the issue does not ask whether they reasonably apprehend that the subject judge might not bring an impartial mind to the issue to be decided. The person asks whether a fair-minded lay observer might have that reasonable apprehension<sup>170</sup>.

120 Ultimately, and whether or not the assessment is undertaken by the subject judge or others, the root concern of actual bias and apprehended bias is the same: justice. But each approaches the question of justice from a different perspective. The focus of an enquiry into actual bias is upon whether the judge is sufficiently impartial to permit justice to be done. The focus of an enquiry into apprehended bias is upon whether the judge is seen to be sufficiently impartial so that justice is seen to be done.

*Bias issues arising before a single judge in Australia*

121 A bias issue (whether actual or apprehended bias) concerns the jurisdiction of the court. Impartiality and independence are so fundamental to the exercise of judicial power that the institutional integrity of a court will, subject to countervailing interests such as waiver or necessity<sup>171</sup>, be impaired by a decision

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

**170** *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]. See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 609 [110]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 302 [37], 331 [139]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 87 [17], 96-97 [50]; *Charistead v Charistead* (2021) 273 CLR 289 at 296 [11]; *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at 59 [80].

**171** See *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at 1054-1055 [231]; 405 ALR 209 at 268.

maker who is the subject of bias or apprehended bias<sup>172</sup>. As an issue that concerns the jurisdiction of the court, bias must be capable of being addressed by the court.

122 If a bias issue were only an objective question concerned with the jurisdiction of the court, then, like other interlocutory or preliminary issues, including a privilege application or a trial of a separate issue concerning the court's jurisdiction, a different judge from the subject judge could determine that jurisdictional issue. Indeed, if the bias issue were only an objective matter related to jurisdiction it would be very difficult to justify it being determined by the subject judge. When the subject judge is asked to determine that issue they are put in "an invidious position"<sup>173</sup> and made a "judge[] in their own cause"<sup>174</sup>. In the Court of Appeal of England and Wales it has been said that a preferable course may sometimes be for the interlocutory issue of bias to be decided by another judge because it can be "invidious for a judge to sit in judgment on [their] own conduct"<sup>175</sup>. As Sir Stephen Sedley has argued, the paradox of "a judge who is unbiased but might reasonably be thought not to be" should not be replaced with a further paradox of "a judge who, in order to decide whether [they] will be sitting as judge in [their] own cause, has to sit as judge in [their] own cause"<sup>176</sup>.

123 Yet, for many years interlocutory issues of bias that arise in a proceeding before a single judge have been assessed, subject to any available appeal or judicial review, by that judge alone<sup>177</sup>. In the United States, subject to regulation or legislation, it has been said to have been the case "for centuries" that only that

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172 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 300 [32].

173 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 397 [185].

174 *Visy Board Pty Ltd v Attorney-General (Cth)* (1984) 2 FCR 113 at 174.

175 *El Farargy v El Farargy* [2007] 3 FCR 711 at 725 [32].

176 Sedley, "When Should a Judge Not be a Judge?" (2011) 33(1) *London Review of Books* (online edition).

177 Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) at 42, 61, 63-64; Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89 at 89; Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 232 [7.7].

single judge could decide the issue, a practice said to be "largely unreviewable"<sup>178</sup>. In Australia, the practice of having the issue decided by the subject judge has been held to be the "ordinary, and the correct, practice"<sup>179</sup>. Why?

124 The fundamental reason is the ethical dimension of bias. Issues of bias are not merely concerned with a dimension concerning the jurisdiction of the court or questions of whether justice will be seen to be done. Issues of bias also involve a dimension of ethics concerning whether justice will actually be done. From this perspective, the single judge is the only person who can scrutinise their own knowledge and beliefs: "it is the fundamental ethical duty of every judge to police [their] own disqualification status"<sup>180</sup>. That is a question of "conscience"<sup>181</sup>.

125 A judge's consideration of whether they are actually biased should not be independent of their consideration of any apprehension of bias. We sometimes understand ourselves by considering how others see us. Hence, consideration of apprehended bias might well reveal matters concerning actual bias. It has been suggested that a personal assessment of whether we might be the subject of an apprehension of bias assists to overcome the phenomenon described in psychological research as a "bias blind spot" that makes it difficult for us to see actual bias in ourselves<sup>182</sup>.

126 The converse is also true. When the subject judge considers the doubly abstracted question of whether they are the subject of apprehended bias, they should also consider whether they are actually biased. It would be a nonsense for a judge to refuse an application for recusal based on apprehended bias if, after examining all the circumstances, they were satisfied that they were not actually impartial although there was no apprehension of bias. For instance, Frankfurter J famously recused himself from sitting on a case concerning the installation and use of radios in public vehicles where he could not have been disqualified on grounds

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**178** Virelli, *Disqualifying the High Court: Supreme Court Recusal and the Constitution* (2016) at 5-6, 78. See also *Jewell Ridge Coal Corp v Local No 6167* (1945) 325 US 897 at 897; *State of Vermont v Hunt* (1987) 527 A 2d 223 at 224; *In re Bernard* (1994) 31 F 3d 842 at 843; *Adair v State of Michigan, Department of Education* (2006) 709 NW 2d 567 at 581, 588, 589.

**179** *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 361 [74].

**180** *Southwestern Bell Telephone Company v Federal Communications Commission* (1998) 153 F 3d 520 at 521.

**181** See *United States v Snyder* (2000) 235 F 3d 42 at 45.

**182** See Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89 at 96.

of apprehended bias, but he considered himself to be partial because his "feelings [were] so strongly engaged as a victim of the practice in controversy"<sup>183</sup>.

127 Another important reason for the practice of having the judge hearing the substantive dispute also decide the issues of bias is that that judge is usually in the best position to determine the relevant circumstances and to assess prudential and pragmatic reasons for recusal.

128 As to the determination of the relevant circumstances, it is very common for a judge to disclose to the parties and to the court matters relevant to any issue of bias without a full recollection of the detail of those matters or a full description of all of the circumstances. As will be seen below, that is what happened in this case. During a subsequent oral hearing concerning recusal the judge might recall and enunciate further facts or circumstances. And reasons given by the judge on the application might provide even further facts and circumstances. Indeed, the judge might recall further relevant facts or circumstances at any time before the substantive matter is determined. Memory is imperfect and elastic. It cannot be objectified and recorded for the application of apparently mechanical justice. The ethical duty of the subject judge to recuse themselves where they consider bias (actual or apprehended) to be present continues throughout the hearing and applies to their developed memory.

129 As to the prudential and pragmatic reasons for the subject judge to make the determination concerning bias, this Court recognised in *Ebner v Official Trustee in Bankruptcy* that there may be circumstances in which a judge will decline to sit even if the judge has not affirmatively concluded that they are disqualified<sup>184</sup>. This is sometimes described as a prudential principle. Prudence is a loose term which encompasses a value judgment based upon a combination of factors: the misnomer "duty to sit", which is really a principle that a judge should not too readily disqualify themselves, particularly where there is not a large pool of available alternative judges; and case management concerns including delays, and other issues including the inconvenience that might result if, after a lengthy trial, a finely balanced decision not to recuse were found on appeal to be incorrect<sup>185</sup>.

130 The principle that the single judge who is to hear a matter is also the person who should first decide any issue concerning their own bias does not gainsay the possibility of any appeal or application for judicial review. It has been said that a decision by a single judge not to recuse themselves is not reviewable because it

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**183** *Public Utilities Commission v Pollak* (1952) 343 US 451 at 467.

**184** (2000) 205 CLR 337 at 348 [20].

**185** See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [20].



involves no order of the court commanding any party to do anything<sup>186</sup>. Whether or not this is correct, the judge might be asked to make a declaration for the purposes of an appeal and, in any event, any orders made by the judge are, in principle, capable of appeal or judicial review on the ground of bias or apprehended bias<sup>187</sup>.

*Bias issues before judgment in a multi-member court in Australia*

131 The same ethical reasons that require a single judge who is the subject of a bias issue to determine issues of bias concerning themselves also require a judge sitting in a multi-member court to determine issues concerning their bias, with any recusal application to be directed first to that judge. Justice does not become a dehumanised, automated process that is devoid of ethics merely because the subject judge is sitting with other judges. The subject judge's enunciation of their memory is not required to be treated as eidetic and a perfect documentary record. The subject judge does not suddenly cease to be the only person capable of examining their own conscience to determine whether their mind is partial. The judge's conscience is not melded like a Borg with the conscience of the other members of the court. Rather, the subject judge remains throughout the proceedings under the same ethical duty to recuse themselves if they consider that they are biased or are the subject of an apprehension of bias.

132 As with the approach taken where a judge sits alone, where bias issues arise before a multi-member court the "orthodox practice"<sup>188</sup> over many years has been for any application before judgment to be directed to the subject judge and to be decided in the first instance by that judge alone<sup>189</sup>. This approach is consistent with the primacy of the ethical duty.

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186 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 22.

187 See also *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 450-451 [81]-[83].

188 Tarrant, *Disqualification for Bias* (2012) at 310.

189 *Mann v Northern Territory News* (1988) 88 FLR 194 at 194; *Bainton v Rajski* (1992) 29 NSWLR 539 at 540; *Duke Group Ltd (In liq) v Pilmer [No 3]* [2001] SASC 215 at [71]; *Setka v Gregor* [2011] FCAFC 64 at [2]-[4]; *Slaveski v Attorney-General (Vic)* [2013] VSCA 165 at [6]; *Valdez v Frazier [No 3]* [2015] FamCAFC 205 at [8]; *Bisciani v Piscioneri [No 1]* [2016] ACTCA 30 at [1]; *Bisciani v Piscioneri [No 2]* [2016] ACTCA 24 at [4]; *Bisciani v Piscioneri [No 3]* [2016] ACTCA 31 at [1]; *Amos v Wiltshire* [2016] QCA 70 at [1]-[4], [18]; *SZVBN v Minister for Immigration and Border Protection [No 2]* [2017] FCA 123 at [1]-[2]; *SZVBN v*

133 In Australia, after a judge on a multi-member court has assessed issues of bias, if the judge has decided not to recuse themselves or if the judge continues to sit then an application based on apprehended bias can be renewed to the court<sup>190</sup>. Even if an application is not renewed, the court might consider the reasons of the subject judge when assessing its jurisdiction<sup>191</sup>. Since issues of bias have a jurisdictional dimension as well as an ethical dimension, the court must also have the ability to make such a collective decision concerning the recusal of one of its own members. If a majority of the court concludes that the member should be recused then that court, as constituted, has no jurisdiction to make orders.

134 The determination by the court as a whole should include the subject judge unless that judge considers that they cannot, or cannot be perceived to, determine the renewed application impartially. Once again, the decision as to whether the judge should sit as a member of the court on a renewed application, or upon a decision following the issue being raised of the court's own motion, is a matter in the first instance for that judge alone.

135 Even if the subject judge has decided to sit, or continues to sit, and a renewed application to the court has been dismissed, the judge retains the ability to recuse themselves. The judge does not lose their conscience, and their ethical obligations do not cease until the case has been finally decided. Hence, even after an application is determined the judge is, and must be, capable of recusing themselves if their conscience so demands or, as has previously occurred<sup>192</sup>, for strong prudential or pragmatic reasons.

136 Sir Anthony Mason has argued in favour of a different approach. His argument is that "there is no compelling reason why the practice followed at first

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*Minister for Immigration and Border Protection [No 3]* [2017] FCA 126 at [1]-[2]; *Jackson v The Queen* [2019] VSCA 65 at [5], [34]; *Rayney v Western Australia* [2020] WASCA 206 at [13]; *Rayney v Western Australia [No 2]* [2020] WASCA 207 at [1]; *Rayney v Western Australia [No 3]* [2020] WASCA 209 at [1]; *Frugtniet v Secretary, Department of Social Services* (2021) 285 FCR 159 at 160 [2]; *Wark v Western Australia [No 2]* [2023] WASCA 67 at [6]; *Wark v Western Australia [No 3]* [2023] WASCA 68 at [1]; *Masi-Haini v Minister for Home Affairs* [2023] FCA 430 at [3]-[7]. See also *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 16 PRNZ 1014 at 1019 [22].

**190** See, eg, *R v Nicholas* (2000) 1 VR 356 at 370 [47]-[48].

**191** *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 at [50].

**192** See Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89 at 93, discussing *Perry v Lean* (unreported, Supreme Court of South Australia, 30 September 1985).

instance should be followed by appellate and collegiate courts", with "much to be said for the view" that the subject judge should be excluded from the decision on a multi-member court<sup>193</sup>. Sir Anthony posits three reasons for excluding the subject judge from any ability to consider any application for recusal by themselves: (i) consistency with the approach taken by a single judge hearing requires that only the court as constituted should determine any objection; (ii) the difficulty of securing a review by the court of one of its members; and (iii) the better position occupied by other members of the court to determine an objection based on apprehended bias than the subject judge.

137       None of these arguments withstands scrutiny. As for the reason concerning consistency, an approach that excluded the subject judge from the initial consideration of any recusal application would be positively inconsistent with the approach to single judge hearings, which permits, and usually requires, the first consideration to be made by the subject judge. The ethical obligations of a judge, which require any application to be directed to them at first instance, do not evaporate when the judge moves from sitting alone to sitting as a member of a multi-member court.

138       As for the reason concerning difficulties of review, a renewed application before the entire court is not an application for review of the decision of one of its members. Rather, it is an application to the whole of the court concerning the jurisdiction of the court. Neither the court, nor the subject judge, can shirk its "first duty" to satisfy itself of its jurisdiction<sup>194</sup>.

139       Finally, as for the better position of the other members of the court to determine an objection based on apprehended bias, that better position is preserved by the ability of an applicant to renew an application to the entire court or that of the court to assess the issue of its own motion. That enhances the process of ensuring the appearance of justice. But to deny the ability of the subject judge to adjudicate upon the associated question of actual bias would undermine the process of ensuring the actuality of justice. Although the other members of the court remain capable — even duty-bound in some circumstances — to make that assessment, they are not required to make it prior to the subject judge first making the determination. Indeed, on issues of actual bias, even if the subject judge were to commit their assessment of their state of mind to some form of "record", and

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**193** Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 24, 26.

**194** *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415; *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; *Re Nash [No 2]* (2017) 263 CLR 443 at 450 [16]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 477 [132].

even if that record could somehow be treated as a counsel of perfection guiding everything that happens thereafter, it would be absurd to suggest that the other members of the court are in the same position to assess the state of mind of the subject judge based upon that "record". As Lester has observed, "[t]hat material cannot really be said to be 'evidence'", with the effect, as he concludes, that another "objection to Sir Anthony Mason's view turns on the difficulty that arises where members of the panel take a different view of the 'evidence' and what has been established"<sup>195</sup>.

140 The focus of Sir Anthony's argument was, however, upon the particular position of the High Court of Australia. It might be thought that two considerations, arguably pointing in opposite directions, may put the High Court in a different position from an intermediate appellate court. The first is the lack of any appeal from a decision of the Full Court of the High Court in its appellate jurisdiction and the lack of any judicial review of the decisions of its members<sup>196</sup>. The second is the longstanding convention that every judge of this Court is entitled to sit on any matter<sup>197</sup>.

141 The first consideration provides no support for any different rule. The High Court, as constituted, retains its ability to determine jurisdictional issues of bias or apprehended bias by renewed application to the Court or by the Court's own motion. Further, at least arguably, the Court has power, with leave, to hear an appeal from any declaration or interlocutory order (including for costs) made by the judge declining to recuse<sup>198</sup>. The Court's ability to determine bias issues need not compromise the ethical position of each of its individual members. Rather,

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195 Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 *Advocates' Quarterly* 326 at 340.

196 *Re Toohey; Ex parte Gunter* (1996) 70 ALJR 644 at 645; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 603-604, 610, 636; *Re Carmody; Ex parte Glennan* (2003) 77 ALJR 1202 at 1203 [6]; 198 ALR 259 at 260.

197 See Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 *University of New South Wales Law Journal* 731 at 741; Arden and Edelman, "Mutual Borrowing and Judicial Dialogue Between the Apex Courts of Australia and the United Kingdom" (2022) 138 *Law Quarterly Review* 217 at 229. See also Brennan, "Bench, Composition of", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 60 at 61.

198 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 450 [81]; *Bezer v Bassan* [2017] NSWCA 333 at [16].

with practice following principle, the Court's ability to determine issues of bias arises after the subject judge has declined to recuse themselves.

142 The second consideration likewise provides no support for any rule that would confine decisions on recusal in this Court to be the province only of the subject judge. The convention that every judge of this Court has a power to sit on any appeal has never qualified, and could not qualify, the jurisdiction of the Court. In other words, a decision by a judge of this Court to sit on any matter has never been a restriction on the ability of this Court to determine its jurisdiction.

143 Consistently with this approach, when issues of bias have been raised in this Court, or by this Court or the subject judge themselves, the approach taken has always been for the matter to be considered first by the subject judge, irrespective of whether others might take a different view<sup>199</sup>. Again, consistently with the approach described above, in one case in this Court where an application based on apprehended bias was renewed to the Full Court after the subject judge (Callinan J) had decided not to recuse himself, the application was listed to be heard before the Full Court. In that case, Brennan CJ said of the ethical duty of the judge in the first instance<sup>200</sup>:

"Although the Judge would have welcomed consultation with other members of the Court, the view was taken by me and by the other Justices that, at least at first instance, the decision was one for the Judge alone."

In relation to the listing of the renewed application before the Full Court, and again consistently with it being the personal decision of each judge in the first instance whether to sit, Brennan CJ explained that Callinan J had himself decided that he did "not propose to sit on the return of the notice of motion"<sup>201</sup>.

*Bias issues before judgment on multi-member courts overseas*

144 Even in jurisdictions overseas which often recognise issues of bias as being a matter for the entire court to determine, there is no authority to support a practice that would remove the ethical duty of the subject judge, in the first instance, to consider and determine these issues before the issues are considered by the court

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**199** See, eg, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; *Unions NSW v New South Wales* (2013) 252 CLR 530; *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* (2015) 90 ALJR 270; 327 ALR 192; *Northern Territory v Griffiths* (2019) 269 CLR 1.

**200** *Kartinyeri v The Commonwealth* [1998] HCATrans 43.

**201** *Kartinyeri v The Commonwealth* [1998] HCATrans 43. See also *Wewaykum Indian Band v Canada* [2003] 2 SCR 259.

as a whole. Nor is there any authority that rejects the continuing nature of the ethical duty of that judge. This is unsurprising. Other jurisdictions outside Australia similarly recognise the primacy of ethical duties in assessing bias issues. A survey of other jurisdictions reveals that whilst the jurisdictional dimension of bias is now commonly recognised, no jurisdiction has abandoned the ethical dimension of bias issues, leaving only the jurisdictional dimension. Indeed, where an approach is taken that is different from Australia, such as in general practice in the United States, there has sometimes been a tendency to abandon the jurisdictional dimension, leaving only the ethical dimension<sup>202</sup>.

145 In England, in 1998 the Lord Chancellor wrote to Lord Browne-Wilkinson, as senior Law Lord, suggesting that Lord Browne-Wilkinson should ensure that the proposed members of the Appellate Committee of the House of Lords might "consider together whether any of their number might appear to be subject to a conflict of interest; and ... require any Law Lord to disclose any such circumstances [of partiality or the appearance of partiality] to the parties, and not sit if any party objects and the Committee so determines"<sup>203</sup>. The Lord Chancellor did not deny the duty of such a Law Lord to comply first with their ethical responsibility to make such a determination for themselves. Nor did the Lord Chancellor deny the continuing nature of this ethical responsibility even if the Committee determined that the judge should sit on the appeal.

146 Consistently with this reasoning, in a subsequent decision of the Court of Appeal of England and Wales, in which the entire Court decided the issue of whether Richards LJ should recuse himself, Clarke MR acknowledged that an anterior decision not to recuse had been made by Richards LJ<sup>204</sup>. There was also no suggestion that Richards LJ was precluded from changing his mind and recusing himself at any time prior to judgment. And in another case before the Court of Appeal, where an applicant sought orders that the entire Court recuse itself due to alleged apprehended bias by Sedley LJ, the application was first decided by Sedley LJ, and when the application was renewed it was decided by the remainder of the Court<sup>205</sup>.

147 In the Supreme Court of Canada, when an application prior to hearing was brought before the Court as a whole for the recusal of Bastarache J in a language rights case based on his past expressions in writing of support of French language

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**202** *Jewell Ridge Coal Corp v Local No 6167* (1945) 325 US 897 at 897-898.

**203** See Sullivan, "Pinochet Chronology" (2004) 14 *Indiana International and Comparative Law Review* 415 at 432-433, fn 128.

**204** *Dwr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97 at [3].

**205** *Baker v Quantum Clothing Group* [2009] EWCA Civ 566 at [2].

rights, the application was considered in the first instance by Bastarache J "as if it was addressed to [him]"<sup>206</sup>. It does not appear that the application was renewed to the Court. Nor does it appear that the Court, whose decision was ultimately delivered by Bastarache J jointly with Major J, had any doubts about its jurisdiction arising from the presence of Bastarache J on the case<sup>207</sup>. Nevertheless, the jurisdictional dimension of bias was recognised by the Supreme Court of Canada in a later case<sup>208</sup>, where Binnie J had been the subject of a motion, after judgment in the appeal had been handed down by the Court, seeking directions in respect of information concerning his Honour's previous role in the proceeding many years prior. Binnie J recused himself from any further proceedings concerning the matter. In dismissing a subsequent motion to vacate the Court's judgment, the remaining members of the Court (absent Binnie J) determined that Binnie J was not disqualified from hearing the appeals or participating in the judgment.

148 The ethical duty of the individual judge was also preserved in the decisions of the Court of Appeal of Singapore in *Yong Vui Kong v Attorney General*<sup>209</sup> and the Court of Appeal in Northern Ireland in *TF v Northern Ireland Public Services Ombudsman*<sup>210</sup>. In the first of those cases, the application that Chan CJ recuse himself was considered by Chan CJ. His Honour's reasons, with which the other members of the Court agreed, formed the basis for dismissal of the application by the Court<sup>211</sup>. If Chan CJ had chosen to recuse himself then the issue would not have been dealt with by the other members of the Court as reconstituted. In the second case, the reasons of the Court of Appeal in Northern Ireland were given by the subject judge, McCloskey LJ. Those reasons described the issue as concerning the "impartiality of the author" of the judgment<sup>212</sup>, indicating that they were initially formulated by McCloskey LJ.

149 One exceptional case, in South Africa, involved a circumstance in which it was convenient for multiple individual judges on the multi-member appellate Constitutional Court, who were the subject of issues of bias, to consider the ethical dimension of recusal at the same time as the institutional, jurisdictional

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206 *Arsenault-Cameron v Prince Edward Island* [1999] 3 SCR 851 at 852 [1].

207 *Arsenault-Cameron v Prince Edward Island* [2000] 1 SCR 3.

208 *Wewaykum Indian Band v Canada* [2003] 2 SCR 259.

209 [2012] 2 LRC 439.

210 [2021] NICA 39.

211 [2012] 2 LRC 439 at 458-460 [16]-[22], 504 [149].

212 [2021] NICA 39 at [26]. See also *Sengupta v Holmes* [2002] EWCA Civ 1104.

dimension<sup>213</sup>. In that case, all ten judges delivered a judgment concerning allegations of apprehended bias against individual judges as well as "allegations made collectively with regard to all ten members of the Court"<sup>214</sup>. Even then, however, the procedure adopted by the Constitutional Court involved individual members of the Court commenting first on the separate applications that had been made against them personally<sup>215</sup>. The determination involved the judges considering the applications "individually and collectively"<sup>216</sup>. Each judge looked "to their conscience, considered their own positions individually, and also considered the application as a whole, collectively"<sup>217</sup>.

150 Finally, in New Zealand, where a protocol has been developed following legislative requirements, the ethical dimension of the determination by the judge has been preserved. The protocol for recusal procedure in the Supreme Court of New Zealand provides for an application for recusal to be determined by all available judges of the Court absent the subject judge<sup>218</sup>. But it also provides for an anterior step by which, after discussion of the circumstances with all other judges, the judge concerned makes their own decision as to whether to recuse<sup>219</sup>. Similarly, in the Court of Appeal of New Zealand, the first decision as to whether to recuse is made by the subject judge, with express opportunities to recuse provided in the protocol both before and after the listing of the recusal application<sup>220</sup>. The protocols also appear impliedly to permit a continuing power for the subject judge to recuse themselves after an application has been made to the

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**213** *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147.

**214** *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 157 [15].

**215** *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 165-167 [23].

**216** *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 170 [34].

**217** *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 170 [34].

**218** Courts of New Zealand, *Supreme Court Recusal Guidelines* (9 July 2020) at [7].

**219** Courts of New Zealand, *Supreme Court Recusal Guidelines* (9 July 2020) at [5].

**220** Courts of New Zealand, *Court of Appeal Recusal Guidelines* (22 November 2021) at [5], [7].



Court in circumstances where the objection is no longer maintained<sup>221</sup>. Indeed, the very purpose of the statutory duty imposed on the Court of Appeal and the Supreme Court to develop the protocols focuses upon the decision by the judge themselves: to assist judges "to decide if they should recuse themselves from a proceeding"<sup>222</sup>.

151 The Australian Law Reform Commission has recommended that federal courts should develop guidelines for recusal for multi-member courts, citing the New Zealand protocols as an example of how this might be achieved<sup>223</sup>. The Commission rightly observed that efficient guidelines "should require the challenged judge or judges to first consider the issue, and to recuse themselves if they determine they are disqualified, or otherwise to involve the other members of the court"<sup>224</sup>.

### *Conclusion*

152 For these reasons, although the application for recusal was made to the Full Court, with counsel referring throughout his oral submissions on the application to the Court as a whole, the application was properly first addressed by Bromwich J personally. His Honour was correct to address it, personally, prior to any renewed application to the Court or prior to any consideration of the application of the Court's own motion. The ethical issues of bias and apprehended bias that arose were properly, and best, first assessed by Bromwich J himself before any jurisdictional issues were addressed by the Full Court. Ultimately, the application was not renewed to the Full Court and the Full Court did not express any doubts about its jurisdiction based upon any apprehension of bias on the part of Bromwich J.

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**221** Courts of New Zealand, *Court of Appeal Recusal Guidelines* (22 November 2021) at [10]. See also Courts of New Zealand, *Supreme Court Recusal Guidelines* (9 July 2020) at [6], "drawing the judge's attention to any additional matters thought relevant".

**222** *Senior Courts Act 2016* (NZ), s 171.

**223** Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 263-264 [7.103]-[7.104].

**224** Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 264 [7.104].

**Whether an apprehension of bias existed***Background and facts that can be considered on this appeal*

153 The decision of the Full Court of the Federal Court, from which the appeal to this Court is brought, concerned QYFM's unsuccessful application at first instance in the Federal Court for judicial review of a decision of the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal had affirmed a decision of a delegate of the Minister not to revoke the mandatory cancellation of QYFM's visa under s 501CA(4) of the *Migration Act 1958* (Cth).

154 The Tribunal had power to revoke the original decision cancelling QYFM's visa if QYFM passed the character test in s 501 of the *Migration Act* or if "there [was] another reason why the original decision should be revoked". QYFM had failed the character test in s 501 of the *Migration Act* because in 2013 he was convicted of one count of importing a marketable quantity of a border controlled drug and was sentenced to more than one year of imprisonment. His appeal against conviction had been dismissed in 2014 by the Court of Appeal of the Supreme Court of Victoria. The record before the Full Court contained the reasons of the Court of Appeal, which show that Mr Bromwich SC appeared as the Commonwealth Director of Public Prosecutions to oppose QYFM's appeal against his conviction.

155 Before the Full Court, QYFM sought leave to amend his grounds of appeal in order to allege that the primary judge should have quashed the Tribunal's decision on the basis that the Tribunal had made jurisdictional errors in determining that there was not "another reason" (apart from his failure of the character test) to revoke the cancellation of QYFM's visa. The jurisdictional errors alleged by QYFM were that the Tribunal's decision was, in various ways, irrational or legally unreasonable, as well as that the Tribunal made findings for which there was no probative evidence. The Full Court granted leave to appeal on the irrationality and legal unreasonableness ground only and unanimously dismissed QYFM's appeal.

156 The appeal to this Court is not an appeal from the decision of Bromwich J not to recuse himself from the Full Court appeal. The recusal decision by Bromwich J was not a decision of the Full Court. The reasons given by Bromwich J for his decision are not reasons that support the orders made by the Full Court. Instead, the appeal that QYFM brings to this Court is from the orders of the Full Court, in particular the order dismissing QYFM's appeal.

157 Therefore, a preliminary issue that arises on this appeal is the status of Bromwich J's reasons for refusing to recuse himself. In some respects, Bromwich J's oral reasons (later transcribed) and subsequent written reasons on the recusal application go further than the matters that had been disclosed to counsel prior to, or during, the recusal application to the Full Court. The increased

detail provided by Bromwich J in his oral reasons was both usual and entirely proper. As explained above, the prospect of such increased detail is one of the reasons that the ethical duty of a judge should first be discharged by that judge alone. However, there may be consequences for an appeal to this Court where the reasons for recusal extend beyond those matters which were part of the record before the Full Court.

158 Bromwich J said in his oral reasons that he had only "a faint memory of this case in terms of its factual detail [but had] quite a reasonably clear memory of the case because of the legal principle". Further, his Honour said that he "had no knowledge whatsoever of the appellant's criminal history". The fact of Bromwich J's state of mind might have been relevant to any renewed application to the Full Court seeking his recusal based on actual bias, although not based on an apprehension of bias<sup>225</sup>. Arguably, however, evidence of facts about Bromwich J's memory and knowledge would be necessary before they could be taken into account by the Full Court on a consideration of the bias issues. That might have occurred, for instance, by a consensual tender of the transcript as evidence of the facts contained in it. But evidence of those facts (if necessary) could not be introduced on an appeal to this Court without them being evidence in the Full Court<sup>226</sup>.

159 These issues need not be further considered on this appeal. QYFM did not rely upon any claim of actual bias in this Court to which the description of Bromwich J's state of mind would have been relevant. It is therefore unnecessary to consider further whether this Court can take into account matters that were not raised in QYFM's recusal application before the Full Court but were referred to in Bromwich J's reasons. It suffices to proceed below on the basis of the record of the recusal application and materials in the Full Court of the Federal Court.

*The approach to apprehended bias in the United States*

160 During the oral hearing of this appeal, questions were asked of the parties, and a direction for further submissions was made by the Chief Justice, concerning authorities in the United States addressing the principles to be applied in cases where a former prosecutor has been sought to be disqualified from adjudicating a case that raised issues relating to that prosecution. The parties complied with that request. Unfortunately, their labours were entirely in vain. The test for apprehended bias, as well as the institutional and substantive context in which issues of bias arise in the United States, is so far divorced from the Australian context that the decisions and reasoning of the United States courts can provide no

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<sup>225</sup> *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437-438 [33].

<sup>226</sup> See *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

assistance in drawing factual analogies when applying the Australian test for apprehended bias. As has already been explained in these reasons, even on a matter as fundamental as whether bias has a jurisdictional dimension as well as an ethical dimension, in the absence of a legislative rule some United States courts deny the existence of any jurisdictional dimension.

161 Ultimately the Minister properly acknowledged that in this context the United States legal system draws upon "legal tests and provisions not applicable in Australia". In the United States, the different test for the apprehension of, or "potential" for, bias is shaped or bounded by constitutional considerations<sup>227</sup>. For instance, the Due Process Clause of the Fourteenth Amendment to the *Constitution of the United States* was central to the Supreme Court of the United States answering the question: was there "an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case"<sup>228</sup>?

*The approach to apprehended bias in Australia*

162 It is well established that two steps of reasoning must take place before asking whether a fair-minded lay observer might have had a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the case in question<sup>229</sup>. The first step is to identify the subject matter that could give rise to the apprehension of bias: what it is that might lead the judge to decide a case other than upon its legal and factual merits. The second step is to articulate the logical connection between that subject matter and the feared deviation from the course of deciding the case on its merits.

*The first step: identify the subject matter of the apprehension*

163 The first essential step is to identify the subject matter that could give rise to the apprehension of bias. The central subject matter of an apprehension that Bromwich J might decide the appeal other than upon its legal and factual merits was described by counsel for QYFM in his application to the Full Court as Bromwich J's role as "senior counsel who supported defending [QYFM's] conviction" in QYFM's criminal appeal. In that role, Bromwich J appeared in his

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**227** See *Caperton v A T Massey Coal Co Inc* (2009) 556 US 868 at 877; *Rippo v Baker* (2017) 137 S Ct 905 at 907; *Isom v Arkansas* (2019) 140 S Ct 342 at 343.

**228** *Williams v Pennsylvania* (2016) 136 S Ct 1899 at 1905.

**229** *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 609 [110]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 98-99 [57]; *Charisteas v Charisteas* (2021) 273 CLR 289 at 296-297 [11].

capacity as Commonwealth Director of Public Prosecutions pursuant to s 15(1)(c) of the *Director of Public Prosecutions Act 1983* (Cth).

164 The offence for which QYFM was convicted was very serious. It involved the importation of cocaine into Australia with a potential wholesale value of \$330,000 and a potential street value of \$724,250. Although QYFM was not the principal importer, the offence involved a considerable degree of planning in which he was involved. It was undertaken for financial gain. It involved his callous exploitation of his mother-in-law as an innocent agent, by a calculated decision to have her carry drugs from the United Arab Emirates, causing a frightening ordeal for her when she was found by customs agents to be carrying cocaine. He was sentenced to ten years' imprisonment with a non-parole period of seven years.

*The second step: identify the connection between the subject matter and the feared deviation*

165 The second essential step is to identify the connection between the subject matter of the alleged apprehension of bias and the feared deviation from the course of deciding the case on its merits. In cases where the subject judge has previously been involved in a prosecution of, or an appeal by, the person presently before the court, the connection is generally a loose one involving the potential for negative emotion and antipathy to be felt in respect of that person. In some cases, that emotion and antipathy could arise despite the dispassionate presentation of a purely legal case and despite the training, technique, and oath or affirmation of a judge.

166 In this case, the connection was more than a loose one. The appeal before the Full Court concerned QYFM's application for judicial review of the Minister's refusal to revoke the cancellation of QYFM's visa on character grounds which included his criminal conviction. The connection between QYFM's criminal conviction and the refusal to revoke the cancellation of his visa was not merely that the latter involved issues related to his character. There was a causal connection between the conviction and the refusal to revoke the visa cancellation. The conviction of QYFM was the first step in a process that might ultimately lead to deportation. The second step was the appeal by QYFM to the Court of Appeal. The third step, following the enactment of s 501(3A) of the *Migration Act* and the Minister's mandatory cancellation of QYFM's visa based on the conviction, was QYFM's application for revocation of that cancellation of his visa. And the final step was QYFM's application for judicial review, and his appeal from that judicial review decision.

*Application: a fair-minded lay observer's reasonable apprehension of bias*

167 It does not require a resort to legal realism to accept that "[i]f ... 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will ... Interests,

points of view, preferences, are the essence of living."<sup>230</sup> Indeed, both the common law and principles of statutory interpretation have often developed by reference to preconceptions concerning very broadly expressed embedded values and recognised principles<sup>231</sup>.

168 The presence of bias, or an apprehension of bias, is defined in a narrower way so as to exclude the possibility of underlying general preconceptions, such as having an antipathy to drug importation, or beliefs regarding the effect of drugs on society and the importance of prosecuting drug offences. Those underlying preconceptions reflect generally held, and embedded, values which will not rise to the level of an apprehension of bias unless it is concluded that they are so strongly held by the judge that there is a possibility that the preconceptions might affect a proper application by the judge of the law to the person before the court. The focus is upon how the preconceptions might affect, or be seen to affect, the person before the court.

169 The issue on this appeal concerning apprehension of bias is concerned with the possible application of potential beliefs about QYFM himself, particularly in a context in which there is a causal connection between QYFM's conviction and the subject of the appeal before the Full Court, being the judicial review application concerning the cancellation of QYFM's visa.

170 It can be immediately accepted that, as Steward J carefully sets out in his reasons, the fair-minded lay observer can be taken to know that a judge is a professional whose training and tradition and loyalty to oath or affirmation require discarding of matters that are irrelevant, immaterial, or prejudicial<sup>232</sup>. It can also be accepted that a fair-minded lay observer would be aware that prosecutors are trained and ethically obliged not to strive for a conviction at all costs nor to seek a penalty outside an accepted range. These matters establish that there is no absolute rule that a person who has previously prosecuted an individual for an offence, or has previously sought to defend the individual's conviction as a matter of law, cannot sit on a later proceeding concerning that person merely because an ordinary person might assess that proceeding in light of the previous prosecution or defence.

171 On the other hand, a fair-minded lay observer would also know that prosecutors and judges are not (presently) robots. There is no inconsistency in accepting that a prosecutor can objectively perform their responsibilities in a fair

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**230** *In re J P Linahan Inc* (1943) 138 F 2d 650 at 651-652.

**231** *Jaensch v Coffey* (1984) 155 CLR 549 at 607; *Stephens v The Queen* (2022) 96 ALJR 871 at 879-880 [33]; 404 ALR 367 at 376.

**232** See reasons of Steward J at [196]-[200]; *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], quoting *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585.

and proper manner and may strive to do so yet nevertheless may develop a natural emotional antipathy towards the person they prosecuted which could have subtle but potentially important effects. The extent of that possible antipathy, and the ability of the judge (who was the former prosecutor) to suppress it, will depend upon all the circumstances: the extent to which the character of the accused was in issue at trial or on appeal; the force with which it was necessary to cross-examine the accused; the seriousness of the offence involved; and the impact of the offence upon others, especially those called as witnesses at trial.

172 The likelihood and strength of any emotional response will vary from prosecutor to prosecutor and from judge to judge. Many prosecutors and judges are able to achieve high degrees of dispassionate detachment from the facts and the accused person. Others have less success, occasionally notoriously so. But the fair-minded lay observer is not attributed with knowledge of the likely degree of success that a particular prosecutor or judge will have in achieving that detachment. In the words of Laws LJ, the fair-minded lay observer cannot be attributed with the knowledge of practising lawyers, since "[t]o a greater or lesser extent [practising lawyers], or some of them, will know the judges personally. Crudely put, they may be said to belong to the same club."<sup>233</sup> The fair-minded lay observer is not a member of that "club".

173 The application of these principles is not simple in this case. On the one hand, there is a strong argument that a fair-minded lay observer would expect that Bromwich J would, as I have no doubt he did, strive to bring an impartial mind to the adjudication of QYFM's appeal of the decision in respect of the judicial review application. That judicial review application concerned a pure question of law, six years after his appeal from conviction. That appeal itself involved only a question of law, without cross-examination or any obvious direct involvement by QYFM.

174 On the other hand, the legal issue in QYFM's conviction appeal, in respect of which Bromwich J appeared in his capacity as Commonwealth Director of Public Prosecutions, was one of considerable legal importance. The underlying offence that was the subject of that appeal was very serious. And the conviction appeal was one connected step in a process which concluded with the cancellation of QYFM's visa and the judicial review application and appeal.

175 Ultimately, I conclude that a fair-minded lay observer might have had a reasonable apprehension that Bromwich J might not bring an impartial mind to the adjudication of the issues on the appeal of the decision in respect of the judicial review application. The "double might" test in the application of the construct of the fair-minded lay observer is relatively undemanding once sufficient facts exist to raise the possibility of actual bias or apprehended bias. It does not matter if the possible apprehension of a fair-minded lay observer involved only the possibility

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<sup>233</sup> *Sengupta v Holmes* [2002] EWCA Civ 1104 at [10].

of a mind affected in a small degree by bias. A perception of only a little bias will invalidate a decision. Once the line of bias is crossed, there are no degrees of permissible judicial bias.

*Three incorrect decisions*

176 On this appeal, the Minister relied upon three decisions of intermediate appellate courts which demonstrate a similar approach to that taken by Bromwich J on appeal as to when a trial judge should recuse himself from a trial. All of those decisions involve basic errors in reasoning. And in all those cases the result was, and is, wrong.

177 The first of those cases is *R v Garrett*<sup>234</sup>. In that case, Mr Garrett was convicted after a trial before a judge and jury of rape and false imprisonment. Nearly 12 years earlier, Mr Garrett had been convicted of counts of forceable abduction, rape and assault occasioning actual bodily harm. Mr Garrett appealed from those earlier convictions, principally on grounds of law. His appeal to the Court of Criminal Appeal was dismissed, as was his later application for special leave to appeal to this Court. Counsel for the Crown on the earlier appeal and on the special leave application was the trial judge in the later trial.

178 In the Full Court of the Supreme Court of South Australia, King CJ (with whom Jacobs and von Doussa JJ agreed) held that there was no apprehension of bias for two reasons: (i) there was nothing in the transcript of argument to indicate that the trial judge, as counsel on the earlier appeal and special leave application, "had formed any personal view of the case"; and (ii) disqualification at the late stage of the trial when the issue arose would have caused significant delay and inconvenience<sup>235</sup>. The first of these reasons has little weight, although it might be significant if the trial judge had expressed personal views about the case. The absence of any such expression says little more than that, in a formal court environment and in a case principally concerned with matters of law, counsel did not enunciate any subjective views about Mr Garrett that he might have formed in the course of the appeal or special leave application. The second reason, namely delay and inconvenience, is irrelevant to an assessment of apprehended bias.

179 The second case relied upon by the Minister is *McCreed v The Queen*<sup>236</sup>. In that case, Mr McCreed was convicted in 1996 of aggravated sexual assault. Nearly 12 years earlier he had been prosecuted for wilful murder. The prosecutor at Mr McCreed's murder trial was the trial judge at Mr McCreed's trial for aggravated

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<sup>234</sup> (1988) 50 SASR 392.

<sup>235</sup> (1988) 50 SASR 392 at 400-401.

<sup>236</sup> (2003) 27 WAR 554.



sexual assault. In the reasons of Steytler J (with which Malcolm CJ agreed) on appeal to the Full Court of the Supreme Court of Western Australia, his Honour correctly observed that<sup>237</sup>:

"the fact that a defendant in criminal proceedings has previously been prosecuted for a serious criminal offence by the judge who is to preside over his trial on unrelated charges will often be sufficient to result in the judge's disqualification".

180 Steytler J reasoned, however, that the appeal should be dismissed for two reasons<sup>238</sup>: (i) when the application was made to the trial judge seeking that he disqualify himself, the trial judge said that he had no independent recollection of the circumstances of the prosecution or of the facts giving rise to it, which was unsurprising given the lapse of time (although the application had itself been prompted by the trial judge informing the parties of his role after he had looked at the file concerning the earlier prosecution<sup>239</sup>); and (ii) the sexual offences which were the subject of the appeal bore no relationship to the offence of murder for which Mr McCreed had been prosecuted in the earlier trial.

181 As to the first matter, even assuming that statement to have been in evidence before the Full Court, a fair-minded lay observer would surmise that, by the time of the trial, the trial judge had restored his memory at least to some extent. That memory would be restored at least in part, even if that restored memory might have been limited due to the long delay and might have been dependent on the court file of the murder prosecution, which the trial judge, for some unexplained reason, had taken the time to retrieve from the court records and to examine. The fair-minded lay observer would also apprehend that it is possible that the trial judge's memory of the earlier prosecution might further develop during the trial. Importantly, the relevant matter is not the apprehended state of the trial judge's memory before the bias issues are raised. It is the apprehended state of the judge's possible memory during the trial itself. As to that, the restored memory might have given rise to negative emotions and antipathy towards Mr McCreed, resulting from the trial judge's recollection of his pivotal role as prosecutor, and the extremely serious nature of the offence.

182 As to the second matter, the difference between the earlier and later offences, this distracted from the question that should have been asked by the appellate court, which concerned whether a fair-minded lay observer might conclude that the trial judge might possibly be distracted from an impartial

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**237** (2003) 27 WAR 554 at 560 [16].

**238** (2003) 27 WAR 554 at 561 [18].

**239** (2003) 27 WAR 554 at 564 [35].

performance of his duties. The recognition by Steytler J that recusal will often be required where a trial judge had previously prosecuted an accused for a serious criminal offence was correctly not qualified by any requirement that the serious criminal offence be of the same nature as the offence being tried. Indeed, a prior prosecution of the same person for a different, but more serious, offence may be more likely to give rise to an apprehension of bias than if both trials are for the same identical, but trivial, offence.

183 The final case relied upon by the Minister is *Muldoon v The Queen*<sup>240</sup>. Mr Muldoon was tried before the trial judge and a jury on counts of breaking and entering, and stealing property in circumstances of aggravation. More than eight years earlier the trial judge had been the Crown prosecutor of Mr Muldoon for an offence of robbery in company, for which Mr Muldoon had been convicted. In the Court of Criminal Appeal of New South Wales, Hodgson JA (with whom James and Price JJ agreed) said that the trial judge had not been required to recuse himself<sup>241</sup>. His Honour relied upon the decision in *McCreed* and referred to matters including the professional obligations of prosecutors and judges, the need not to encourage parties to seek disqualification without justification, and the inability of the trial judge to recall the trial given the lapse of time of more than eight years since Mr Muldoon's earlier trial<sup>242</sup>.

184 The factor concerning the trial judge's memory was, again, focused upon an apprehension of the state of the trial judge's memory at the time the matter was first raised, rather than such an apprehension at the time of the trial, albeit correctly taking into account the lapse of time. The factor concerning a need not to encourage other parties to seek disqualification in other cases is irrelevant to whether an apprehension of bias existed in the particular case before the court.

185 The error in the results in all of these cases can also be seen in the approach taken in the separate reasons of Miller J in *McCreed*. His Honour said that the judge who prosecuted the wilful murder case "was not 'trying to put (a) man in prison for life' but was performing fairly and impartially the responsibility cast upon him of Crown Prosecutor in those proceedings". He then conceded that "[o]bviously [Mr McCreed] would not see it that way"<sup>243</sup>. But the proposition that a judge, by training, technique, and oath or affirmation, will aim to put aside

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**240** (2008) 192 A Crim R 105.

**241** (2008) 192 A Crim R 105 at 110 [28], 119 [49], [50].

**242** (2008) 192 A Crim R 105 at 110 [26].

**243** (2003) 27 WAR 554 at 566 [40].

emotion and antipathy does not deny the possibility that some emotion and antipathy will remain.

186 The very humanity of prosecutors and judges might, despite their best efforts, consciously or subconsciously affect their decision making by evoking an emotional response. Whether or not it is possible that such an emotional response might be characterised as "trying to put a man in prison for life", the possibility of an emotional response that could affect decision making is one that cannot always be ignored simply due to the training, technique, and oath or affirmation. That possibility will depend upon an objective assessment of the individual circumstances of each case without regard to the temperament of the particular prosecutor and judge. In circumstances where it becomes known that a judge had previously prosecuted the present accused for a very serious offence it will usually be hard to escape from the conclusion that there would be an apprehension of bias if the judge were to preside over a trial of that person for an offence.

*The consequence of the apprehension of bias*

187 The Minister conceded in this Court that any apprehension that Bromwich J was affected by bias would deprive the Full Court of jurisdiction, despite the unanimity of the decision of the Full Court. That concession was properly made.

188 An apprehension of bias in respect of one member of a multi-member bench necessarily results in that court, as constituted, lacking the appearance of justice. A lack of an appearance of justice denies authority — jurisdiction — to any court in one of the most fundamental ways. This applies to every court and every tribunal, irrespective of whether that court or tribunal is constituted by three members or thirty. Because an apprehension of bias negates jurisdiction for a fundamental reason, it is irrelevant that the decision might not have been any different due to the presence of additional judges, such that the decision might remain the same<sup>244</sup>.

**Conclusion**

189 A court cannot have jurisdiction if it is affected by any degree of bias. The possibility that a fair-minded lay observer might have perceived that Bromwich J might not bring an impartial mind to the issues on the appeal was sufficient to deny

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<sup>244</sup> *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 136-137 [39]-[40], 147-148 [72]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 462-463 [85], 478 [164]; 390 ALR 590 at 610-611, 631-632; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at 755-756 [76]-[77], 760-761 [98]-[102]; 403 ALR 398 at 420-421, 426-427.

jurisdiction to the Full Court. I agree with the orders proposed by Kiefel CJ and Gageler J.

190 Part of the first recommendation of the Australian Law Reform Commission in its report on judicial impartiality was that each Commonwealth court should develop and publish guidelines on the process and principles of judicial disqualification<sup>245</sup>. There are a wide variety of possible and proper procedures that each court could develop. But those procedures must be governed by fundamental matters of basic principle. Those matters of basic principle require the preservation of the ethical duty of a judge who is, or might be, the subject of any bias issues. Only once that judge has decided not to recuse themselves, or has proceeded on that basis, should a multi-member court, on application or of its own motion, assess the issues of bias as a matter of jurisdiction, consistently with the procedure outlined by Gordon J in her reasons<sup>246</sup>.

191 For these reasons, the Full Court was capable of deciding whether a fair-minded lay observer might have had a reasonable apprehension that Bromwich J might not bring a sufficiently impartial mind to the issues raised by QYFM's appeal. The possibility of such an apprehension is a matter affecting the jurisdiction of the Court. As a matter of jurisdiction, it was the duty of all members of the Court to consider the issue, if an application was subsequently brought to the Court or if they had any doubt about their jurisdiction. This jurisdictional issue is usually concerned with apprehended bias and, therefore, the appearance of justice. But I agree with Gordon J, Steward J, and Jagot J that it was both proper and essential that Bromwich J first consider those issues, personally and independently of the other members of the Court. As he did. That consideration reflects a continuing ethical duty that enhances the likelihood of actual justice.

192 The appearance of justice is good. Actual justice is better. Both is the best of all.

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**245** Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 13.

**246** At [102]-[104].

193 STEWARD J. For the reasons that follow, Bromwich J was correct in deciding not to recuse himself from sitting as a judge of the Full Court of the Federal Court of Australia in this matter. No fair-minded and reasonable lay observer could possibly have apprehended that his Honour might not bring an impartial and unprejudiced mind to the resolution of QYFM's appeal from a single judge of the Federal Court<sup>247</sup>. I otherwise respectfully agree with Gordon J in relation to her Honour's explanation of the procedure for determining a recusal application. The responsibility of deciding whether a judge should recuse himself or herself lies initially, in accordance with the orthodox practice in Australia, in the hands of that judge.

194 The relevant legal test is well settled and was recently and aptly articulated by Nettle and Gordon JJ in *CNY17 v Minister for Immigration and Border Protection* as follows<sup>248</sup>:

"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. 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. 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'. Second, a *logical connection* must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?"

195 In this case the matter said to give rise to the risk of partiality was Bromwich J's prior role as Director of Public Prosecutions for the Commonwealth ("the DPP") and, specifically, his appearance seven years earlier as senior counsel for the Crown in QYFM's appeal against conviction for the importation of cocaine. QYFM has since accepted that he committed that offence, when giving evidence before the Administrative Appeals Tribunal ("the Tribunal") in relation to his application for review of a decision by a delegate of the Minister not to revoke the mandatory cancellation of his visa<sup>249</sup>. The "logical connection", to use the language

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247 *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

248 (2019) 268 CLR 76 at 98-99 [57] (footnotes omitted; emphasis added).

249 *QYFM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 2161 at [68]-[69] per Senior Member Nikolic.

of *CNY17*, said to exist between this matter and the risk of partiality was identified as being the relationship between the earlier conviction appeal and the appeal below in the Full Court. Whether that connection existed depended upon the links, if any, between those proceedings and the role Bromwich J played in each. As Gageler J said in *Isbester v Knox City Council*<sup>250</sup>:

"Rarely could a fair-minded observer not think it appropriate to say of a person: '[i]f he is an accuser he must not be a judge'. That is because a person who has been the adversary of another person in the *same or related proceedings* can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person."

196 Obviously, it is not the case here that Bromwich J sought to be an accuser and a judge in the "same" proceeding. Rather, the issue is whether the two proceedings were "related" in a way or ways that revealed the "logical connection" referred to above. In this case, that turns upon a correct identification of the attributes of the fair-minded lay observer. How much would that observer know and understand about the two roles that Bromwich J performed?

197 In *Johnson v Johnson*, Kirby J described many of the necessary attributes of the fair-minded lay observer in the following way<sup>251</sup>:

"The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. ... The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and

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**250** (2015) 255 CLR 135 at 157 [63] (footnote omitted; emphasis added).

**251** (2000) 201 CLR 488 at 508-509 [53] (footnotes omitted).

impartiality. ... Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

198 In *CNY17*, Nettle and Gordon JJ said<sup>252</sup>:

"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. 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]'."

199 Whilst the hypothetical lay observer is not a lawyer, he or she is taken to have a basic knowledge of the issues to be decided and the nature of the proceedings or process. Even where the applicable statutory scheme is complex, and here the *Migration Act 1958* (Cth) might fairly be so described, the lay observer will be taken to "have knowledge of the key elements of that scheme"<sup>253</sup>.

200 The lay observer will also have an understanding of the role played by the judge and by counsel. As to the function of the judge, the plurality observed in *Johnson v Johnson*<sup>254</sup>:

"[T]he person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'."

201 As for the role played by counsel, and in particular by Crown prosecutors, I agree with the observation of Refshauge J in *Eastman v Chief Executive Officer of the Department of Justice and Community Safety [No 2]* that a lay observer "would understand that prosecutors do not strive for a conviction and do not submit for the most severe sentence"<sup>255</sup>. That is because, consistently with the observations of Kirby J above, a fair-minded lay person "would ordinarily be taken to have sought to be informed" about the role of prosecuting counsel in this country. Here, that would include very general knowledge of the ethical duties

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252 (2019) 268 CLR 76 at 99 [58] (footnotes omitted).

253 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 99 [59] per Nettle and Gordon JJ.

254 (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (footnote omitted), quoting *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527 per McHugh JA and *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585 per Toohey J.

255 [2010] ACTSC 13 at [64].

attending to the role of prosecuting counsel and the special responsibilities of the DPP, who holds a statutory function as an Agency Head<sup>256</sup>.

202 Here, senior counsel for QYFM clothed the hypothetical lay observer with knowledge of the following features in relation to the earlier criminal proceeding: that the prosecution had been instituted by the Office of the DPP (whether Bromwich J was the DPP at this time was not a necessary part of QYFM's case); that it had been commenced in accordance with s 6(1)(a) of the *Director of Public Prosecutions Act 1983* (Cth); that the trial of QYFM had been undertaken by junior counsel for the DPP; that the trial was held between 7 October 2013, when QYFM pleaded not guilty, and 27 October 2013, when the jury delivered a guilty verdict; that during that trial, Bromwich J held the statutory office of the DPP; that in December 2013, QYFM was sentenced to ten years' imprisonment with a non-parole period of seven years; that upon sentencing QYFM, a power in the *Migration Act* for the applicable Minister to cancel QYFM's partner visa<sup>257</sup> was thereby enlivened, but, as that Act then stood, the Minister was not compelled to exercise that power (and did not then do so)<sup>258</sup>; that QYFM applied for leave to appeal his conviction to the Court of Appeal of the Supreme Court of Victoria; that the ground of appeal broadly concerned the use at trial against QYFM of statements, said to be implied admissions, made by him to a Customs officer at Melbourne Airport; that this issue turned upon whether QYFM was at that time a "suspect"<sup>259</sup>, and that if the Court so concluded, the appeal would be successful; that QYFM was only given leave to appeal because, at least initially, Priest JA thought this was a "good ground"; that junior counsel for the DPP was led in the appeal by Bromwich J as senior counsel; that Bromwich J presented oral submissions both in his capacity as a senior barrister and as the holder of the statutory office of the DPP; that Bromwich J had "stepped in" to advocate for the dismissal of QYFM's appeal; and that the appeal was dismissed on 21 November 2014.

203 The foregoing does not, but should, include that the lay observer would also have known that the conviction appeal turned upon a question of law only, specifically concerning the interpretation of statutory provisions.

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256 *Director of Public Prosecutions Act 1983* (Cth), s 27(2)(b); *Public Service Act 1999* (Cth), ss 10, 10A, 12, 13 and 14.

257 QYFM had held a Class BC Subclass 100 (Partner) visa.

258 *Migration Act*, s 501(2).

259 For the purposes of s 23V of the *Crimes Act 1914* (Cth), although, it was said, the lay observer's knowledge would not be so detailed as to know the precise provision that was engaged.



204 In relation to the proceeding before the Full Court, senior counsel for QYFM in this Court contended that the lay observer should be fixed with the following knowledge: that soon after the dismissal of the conviction appeal, s 501 of the *Migration Act* was amended to require the applicable Minister to cancel QYFM's visa by reason of his conviction and sentence<sup>260</sup>; that QYFM's visa was accordingly cancelled ("the visa cancellation decision"); that consequently QYFM was liable to be removed from Australia unless the Minister exercised his or her power to revoke the visa cancellation decision<sup>261</sup>; that the Minister decided not to exercise that power in favour of QYFM; that, in general terms, merits review of that decision was available in the Tribunal; that QYFM sought merits review but the Tribunal decided not to revoke the visa cancellation decision; that the Tribunal's decision had to be made within the bounds of the law; that QYFM was entitled to seek, and did seek (without being legally represented), judicial review of the Tribunal's decision before a judge of the Federal Court; that QYFM's application was dismissed by Kerr J<sup>262</sup>; that QYFM was entitled to appeal this decision to the Full Court of the Federal Court; that QYFM exercised that right with legal representation and a new set of judicial review grounds, so that, practically, the Full Court was required to review the legality of the Tribunal's decision afresh; that on the day of the hearing of the appeal, the parties received an email from the chambers of Bromwich J disclosing that his Honour had appeared as counsel for the Crown in QYFM's unsuccessful conviction appeal; and finally that, later that day, Bromwich J sat with two other judges of the Full Court to hear QYFM's appeal, albeit by the medium of Microsoft Teams.

205 Based on the foregoing, QYFM submitted that there was a causal connection between the conviction appeal and the judicial review appeal which revealed the required "logical connection". Without his conviction, QYFM's visa could not have been cancelled; without that cancellation, there would have been no merits review in the Tribunal; without the merits review, there would have been no judicial review proceedings in the Federal Court; and without the judicial review proceedings, there would have been no appeal to the Full Court. The predicate of this submission was that Bromwich J bookended each proceeding by appearing in the first as QYFM's "accuser", both as the DPP and as senior counsel, and in the last as one of the judges to hear QYFM's appeal.

206 With respect, the force of QYFM's submission is lost when the matter is looked at in rather more detail. In that respect, senior counsel for QYFM clothed the hypothetical fair-minded lay observer with a reasonable degree of knowledge

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260 *Migration Act*, s 501(3A).

261 *Migration Act*, s 501CA.

262 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810.

about the nature of each proceeding and about the legal issues raised in each matter. It included basic knowledge of the ground of the conviction appeal. But it excluded from consideration important and equivalent information about the issues before the Tribunal and the Full Court. That information must also be taken to have been known to the hypothetical lay observer. When that information is taken into account, the link between the conviction appeal and the appeal to the Full Court becomes, at best, tenuous.

207 The issue the Tribunal was required to determine was whether there was another reason to revoke the visa cancellation decision<sup>263</sup>. In answering that question, the Tribunal was obliged to apply a ministerial direction<sup>264</sup> ("the Direction") to the evidence and material before it. The Direction required the Tribunal to apply a number of primary and other considerations which were directed at the impact of QYFM's removal from Australia in the future. The "primary considerations" were protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia, and the expectations of the Australian community. Before the Tribunal, QYFM led evidence and made submissions and claims about these matters.

208 In considering the risk that QYFM might reoffend, the Tribunal considered the serious nature of the offence for which he was convicted and the trial judge's sentencing remarks. It did so for the purpose of making a prediction concerning the likelihood that QYFM would endanger the Australian community if he remained here. No part of that analysis required the Tribunal to consider the conviction appeal in any way. Indeed, and critically, QYFM accepted before the Tribunal that he had committed the offence for which he had been convicted. Rather, the Tribunal was required to consider, amongst other things, QYFM's claims of rehabilitation following his conviction. The Tribunal found that there was a real and unacceptable risk that QYFM would reoffend if released. That finding followed largely from the Tribunal's rejection of his evidence and claims. The Tribunal found that key features of QYFM's evidence were false, inconsistent, exaggerated, implausible or incomplete. Just as the reasonable lay observer is taken here to have had knowledge of the ground of QYFM's conviction appeal, so too there is no reason to doubt that this hypothetical person must also be taken to have known, in a general way, about the foregoing.

209 The Tribunal then considered what was in the best interests of QYFM's children and decided, on balance, that this factor favoured revocation of the visa cancellation decision. It also considered the expectations of the Australian

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**263** Pursuant to the power conferred by s 501CA(4)(b)(ii) of the *Migration Act*.

**264** *Migration Act*, s 499; *Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of visa under s 501CA*.

community. Having regard to, amongst other things, "the very serious nature of [QYFM's] offending" and the "presentation of bogus evidence" by him, this factor weighed very substantially in favour of non-revocation of the visa cancellation decision. Again, there is no reason not to attribute knowledge, in a general way, of these findings to the fair-minded lay observer.

210 The Tribunal went on to consider a number of "other considerations" mandated by the Direction. For example, it considered whether QYFM's claim of fear of harm if returned to Burkina Faso (he is a citizen of that country) gave rise to any non-refoulement obligations and observed that none arose on the evidence before it. It considered the strength, nature and duration of QYFM's ties to Australia, and found that this favoured, slightly, revocation of the visa cancellation decision. It also considered the impact on Australian business interests and on any victims if QYFM were to be removed, as well as the impediments he might face in Burkina Faso. It found that there were many such impediments and that this matter favoured revocation of the visa cancellation decision. The Tribunal ultimately decided that there was not "another reason" to revoke the visa cancellation decision, largely because the primary considerations, described above, outweighed the considerations in favour of revocation. Again, the hypothetical lay observer should be taken to have known about all of these matters.

211 As already mentioned, QYFM sought judicial review of the Tribunal's decision in the Federal Court. His three written grounds of review alleged that the Tribunal had denied him procedural fairness, that it had asked him a series of "closed questions", and that it had failed to inquire into why he had left Burkina Faso. Before Kerr J, it appears that these grounds were not pursued, but that instead new proposed claims were proffered, one of which, by way of example, was that QYFM did not have a substantial criminal record within the meaning of s 501(7) of the *Migration Act*. Kerr J considered that the prospects of success in relation to the new grounds were "so derisively small" as to not warrant an amendment<sup>265</sup>. QYFM's original grounds were also dismissed as being "without merit"<sup>266</sup>. Again, the lay observer should be taken to have been aware of these claims and their dismissal by Kerr J.

212 The decision of Kerr J was appealed to the Full Court. Again, the reasonable lay observer can be taken to have a general appreciation of the grounds of appeal. The first new ground contended that the decision of the Tribunal was "illogical, irrational and/or legally unreasonable". It was particularised with five "strands". It is unnecessary to describe any of these other than to observe that none of them in

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265 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810 at [51].

266 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810 at [57].

any way challenged or concerned his conviction, his conviction appeal, or the finding that there was a risk that QYFM might reoffend, save in one instance. That instance was an assertion, as part of strand five, that QYFM's criminal history and his risk of reoffending (presumably as found by the Tribunal) could, amongst other factors, "logically and rationally impact [QYFM's] prospects of living in a third country". The Notice of Appeal did not say how these matters might affect QYFM's ability to live in Burkina Faso, and no such reasons have ever been suggested. The second new ground of appeal was that the Tribunal made findings for which there was no probative evidence. This ground had two strands. They were directed to findings made by the Tribunal about how QYFM might live in Burkina Faso. Once again, these are all matters that the lay observer should be taken to have known about.

213 The hypothetical lay observer would also have basic knowledge of the grounds relied upon by QYFM to seek Bromwich J's recusal. Those grounds differed from those presented to this Court. In particular, they alleged that Bromwich J had personal knowledge of QYFM's criminality as a result of his prior prosecutorial role, and that this knowledge would be relevant to the issue of materiality were the Full Court to decide that the Tribunal had erred in law<sup>267</sup>. No such allegation was maintained before this Court, and no challenge was made to Bromwich J's conclusion that any knowledge of QYFM's criminal history could have nothing to do with the topic of materiality<sup>268</sup>.

214 It follows from the foregoing that the reasonable lay observer would have known that no part of the proceeding before the Full Court involved in any way the previous criminal proceeding or conviction appeal, save in two instances. First, those criminal proceedings were an historical fact; QYFM's conviction was a necessary condition to be satisfied in order for his visa to be cancelled. But the satisfaction of that condition was not, and was never going to be, a matter for consideration by the Full Court. It was no more than an unchallenged background fact. Secondly, in the one instance in which the grounds of appeal did deploy QYFM's criminal history and his risk of reoffending as the foundation for a claim about his future in Burkina Faso, it was an unparticularised assertion. In circumstances in which QYFM accepted his guilt, it was no more than what was described in this Court in *Ebner v Official Trustee in Bankruptcy* as an "insubstantial objection"<sup>269</sup> about which the lay observer might only have a "vague

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**267** *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 345-346 [59(2), (5)] per Bromwich J.

**268** *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 346 [61(4)].

**269** (2000) 205 CLR 337 at 348 [20] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

sense of unease or disquiet"<sup>270</sup>. But that is not enough to establish the required "logical connection" between the earlier conviction appeal and any fear that Bromwich J might deviate from deciding the Full Court appeal on its merits. A different conclusion may have been justified if QYFM had maintained his earlier contention that Bromwich J knew or might have known something relevant to the Full Court appeal that was not contained in the material before the Full Court – for example, knowledge about QYFM's criminal past that might have been relevant to his future in Burkina Faso in some particular way. But no such specific allegation was ever made in this Court. In these circumstances, and in short, the two proceedings were fundamentally different in nature and content; they were not sufficiently "related" to justify recusal.

215 The fact alone that Bromwich J held the statutory office of the DPP at the time of the conviction appeal requires no different conclusion. The reasonable lay observer can be taken to have a practical understanding of the different roles that a prosecutor, and indeed any barrister, might have had in a past life, as distinct from his or her present duty of impartiality as a judge. Once again, more than this would be needed to demonstrate the required "logical connection".

216 Whilst a judge must exercise prudence in deciding whether or not to sit in a given case, he or she also has a duty to decide cases allocated to him or her. That duty should not be displaced without good cause; it cannot be set aside because of merely superficial appearances<sup>271</sup>. As Gleeson CJ, McHugh, Gummow and Hayne JJ observed in *Ebner*<sup>272</sup>:

"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case."

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**270** *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 549 [135] per Kirby J.

**271** See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294 per Mason, Murphy, Brennan, Deane and Dawson JJ; *Re JRL*; *Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J.

**272** (2000) 205 CLR 337 at 348 [19].

217           Nothing has occurred since the foregoing was written in 2000 that has in any way diminished the judge's duty to decide cases allocated to him or her. In that respect, it might have been an easy solution for Bromwich J to have recused himself simply because in the past he had once been involved in QYFM's criminal prosecution. But a judge's duty trumps such a facile observation. If that had ever been a sufficient basis for recusal, it would mean that Bromwich J would necessarily be obliged to recuse himself in respect of any matter involving a party whom his Honour had previously prosecuted, regardless of the nature of the proceeding, and regardless of the circumstances of the previous prosecution. But that is not the law. The issue of recusal relevantly turns upon the particular circumstances of each matter and each previous criminal proceeding, and the need for there to be the "logical connection" described above. Here, for the reasons given, there is no such connection. The two proceedings are entirely distinct.

218           I would dismiss the appeal with costs.

219 GLEESON J. The proper administration of justice requires that a judge be, and be seen to be, an independent and impartial decision maker, able and willing to decide the case before them on its legal and factual merits<sup>273</sup>. Consequently, a judge is disqualified from sitting on any case where they are unable to decide the case on its merits because of actual bias, or where there is a "reasonable apprehension of bias" in relation to that judge<sup>274</sup>.

220 QYFM's case is that Bromwich J ("the judge") was affected by a reasonable apprehension of bias that disqualified him from sitting on QYFM's appeal concerning the cancellation of his visa ("visa appeal"). QYFM argued that the reasonable apprehension of bias arose because the public could not see the judge to be an independent decision maker. In this context, "independent" means free from the influence of others. Most prominently, judicial independence is concerned with independence from the Executive arm of government<sup>275</sup>, but it also extends to independence from the range of possible influences that might affect a judge's capacity to perform the judicial role in an impartial manner.

221 How is a decision to be made about whether justice will be seen to be done in a particular case? Since the question is concerned with public perceptions, the decision is not made by reference to a judge's own view of the matter<sup>276</sup>. Instead, this Court has developed the principle that a judge will be disqualified from hearing a case where a "fair-minded lay observer" might reasonably apprehend that the judge whose independence or impartiality is challenged might not bring an impartial mind to the resolution of the question that the court is required to decide<sup>277</sup> ("the apprehension of bias principle"). The perspective of this fair-minded lay observer is supposed to avoid a difficulty on the part of some judges to recognise that they might reasonably be perceived to be affected by bias in a particular case. I say more about the fair-minded lay observer below.

222 QYFM's visa appeal, heard by a Full Court of the Federal Court of Australia, concerned the cancellation of his visa<sup>278</sup> following his criminal

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273 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[7]; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

274 *Ebner* (2000) 205 CLR 337 at 344 [5]-[6].

275 *Ebner* (2000) 205 CLR 337 at 382-383 [145].

276 *Webb v The Queen* (1994) 181 CLR 41 at 51-52.

277 *Charistead v Charistead* (2021) 273 CLR 289 at 296 [11], citing *Ebner* (2000) 205 CLR 337 at 344 [6] and *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 609 [110].

278 Pursuant to s 501(3A) of the *Migration Act 1958* (Cth).

conviction for importation of a marketable quantity of a border-controlled drug<sup>279</sup>. QYFM argued that the judge was disqualified from hearing the visa appeal because, in his former role as Commonwealth Director of Public Prosecutions ("CDPP"), the judge had appeared before the Victorian Court of Appeal some seven years earlier in opposition to QYFM in QYFM's appeal against conviction ("conviction appeal"). As CDPP, the judge was successful in this opposition, and QYFM's conviction was upheld. By the time of the visa appeal, QYFM had admitted the underlying offence.

223 QYFM argued that the Full Court as constituted, including the judge, could not be seen by the public to be independent because of the causal connection between the conviction appeal and the visa appeal. The causal connection involved the following several steps. The sentence imposed in respect of QYFM's conviction required the cancellation of his visa following amendments to the *Migration Act 1958* (Cth) in December 2014<sup>280</sup>, unless the cancellation was revoked<sup>281</sup>. A delegate of the Minister refused to revoke the cancellation of QYFM's visa. The delegate's decision was affirmed by the Administrative Appeals Tribunal, following a review of the decision on the merits. A judge of the Federal Court of Australia dismissed QYFM's application for judicial review of the Tribunal's decision. QYFM appealed from that decision to the Full Court. In this Court, senior counsel for QYFM invoked the metaphor of a track from the conviction towards deportation from Australia, along which QYFM had legal claims that might secure the preservation of his visa and prevent his deportation. Along the track, one junction was the conviction appeal; the visa appeal was a further junction along the same track.

224 For the following reasons, the apprehension of bias principle did not apply to disqualify the judge. Accordingly, the appeal should be dismissed with costs.

### **The *Ebner* framework for identifying a reasonable apprehension of bias**

225 In *Ebner v Official Trustee in Bankruptcy*<sup>282</sup>, this Court established a framework for the application of the apprehension of bias principle in any case.

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**279** Contrary to s 307.2(1) of the *Criminal Code* (Cth).

**280** Section 501(3A) was inserted by s 2 and Sch 1, item 8 of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). QYFM was taken not to pass the "character test" in s 501(3A) on the basis that he had a "substantial criminal record" (s 501(6)(a)), having been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)).

**281** Relevantly under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth).

**282** (2000) 205 CLR 337.



That framework requires: (1) the identification of "what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and (2) an articulation, and not mere assertion, of a "logical connection between the matter [identified at (1)] and the feared deviation from the course of deciding the case on its merits"<sup>283</sup>. The articulation of the asserted logical connection is necessary to assess the reasonableness of the asserted apprehension of bias from the perspective of the fair-minded lay observer<sup>284</sup>.

226 *Ebner* concerned two cases in which the trial judge had a small shareholding in a bank which either was one of the parties to the litigation or had a financial interest in the litigation<sup>285</sup>. Noting that cases of "interest" and "association" with a party or some other person concerned with the case often overlap<sup>286</sup>, the plurality stated that "the question must be how it is said that the existence of the 'association' or 'interest' might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits"<sup>287</sup>. "[T]he bare identification of an 'association' will not suffice to answer the relevant question."<sup>288</sup> Later in their reasons, the plurality reiterated that "[t]he apprehension of bias principle requires articulation of the connection between the asserted interest and the disposition of the cause which is alleged"<sup>289</sup>.

227 The framework was applied in *Ebner* to conclude that the judges' respective shareholdings did not give rise to a reasonable apprehension of bias in either case. The question was approached on the basis that the only factual issue to be explored was whether there was a realistic possibility that the outcome of the litigation would affect the value of the relevant judge's shareholding<sup>290</sup>. In each case, the answer was no. The plurality noted the absence of any suggestion that either judge

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283 *Ebner* (2000) 205 CLR 337 at 345 [8].

284 *Ebner* (2000) 205 CLR 337 at 345 [8].

285 (2000) 205 CLR 337 at 342-343 [1].

286 *Ebner* (2000) 205 CLR 337 at 349 [28].

287 *Ebner* (2000) 205 CLR 337 at 350 [30].

288 *Ebner* (2000) 205 CLR 337 at 350 [30].

289 *Ebner* (2000) 205 CLR 337 at 357 [55].

290 *Ebner* (2000) 205 CLR 337 at 351 [36].

had any interest in the outcome of the case other than its possible effect on the value of their shares<sup>291</sup>.

228 Acknowledging that the question of whether the judge had any interest in the outcome of the visa appeal is not the ultimate question, and that the meaning of "interest" is protean<sup>292</sup>, it is nonetheless notable that QYFM did not suggest that the fair-minded lay observer might think that the judge had any specific interest – financial, ideological or otherwise – in the outcome of the visa appeal.

229 Finally, in *Ebner*, the plurality reaffirmed the prohibition upon a judge sitting in a case to which they are a party as a rule which may have significance apart from the apprehension of bias principle<sup>293</sup>. Although QYFM sought to compare the position of the judge in this case to that of a judge who is sitting on their own cause, the comparison is wrong. The judge was not a party to the visa appeal; the respondent Minister was not the judge's alter ego; the judge was not a necessary or proper party to the visa appeal; the judge was not the moving party to the refusal to revoke the cancellation of QYFM's visa; and the judge's apparent lack of interest in the outcome of the visa appeal reinforces the inaptness of the comparison.

**QYFM's principal case: automatic disqualification or presumption of disqualification for apparent want of judicial independence**

230 Despite *Ebner*, QYFM's principal argument was that his case did not require articulation of a logical connection in accordance with the second step of the established framework. Instead, he argued that his case fell into a category of cases preserved by *Ebner*, to which he referred as "incompatibility of roles", that could be decided by reference to a rule or, at least, a presumption of apprehended bias.

231 The rule proposed by QYFM was that where the prosecutor and accused in one proceeding are judge and party in a second proceeding, and the second proceeding has arisen or resulted in any way from the outcome of the first, the judge must be disqualified for an apparent lack of independence. QYFM proposed that the *Ebner* framework must be modified in such a case because "the public would just expect independence". In those cases, there was no "need to ... articulate something like the logical connection in the second limb of *Ebner*". Alternatively, QYFM contended that *Isbester v Knox City Council*<sup>294</sup> was authority for a

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291 *Ebner* (2000) 205 CLR 337 at 351 [36].

292 *Ebner* (2000) 205 CLR 337 at 349 [25].

293 (2000) 205 CLR 337 at 358 [59]-[60].

294 (2015) 255 CLR 135.

presumption that the second step of the *Ebner* framework is satisfied in those circumstances.

### *Judicial independence*

232 Given the way QYFM put his principal case, it is appropriate to say something about judicial independence. The expectation of litigants and the community that a judge will be independent of the parties before the court is axiomatic<sup>295</sup>. Writing extra-curially, Sir Gerard Brennan explained that judicial independence "must be predicated of *any* influence that might tend, or be thought reasonably to tend, to a want of impartiality in decision-making"<sup>296</sup>. He acknowledged the possibility of subconscious influences, saying:

"Perhaps the independence that is most difficult for a judge to achieve is independence from those influences which unconsciously affect our attitudes to particular classes of people. Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination. Such gremlins are not extirpated by mere declaration. Indeed, too vocal a judicial protest of impartiality may bespeak an overreaction to prejudice in one direction by forming a prejudice in the other. Or it may indicate a failure to employ that worldly wisdom which permissibly takes account of differences that are relevant for some purposes but irrelevant for others."

233 Judicial independence does not demand a mindset of impeccable neutrality<sup>297</sup>. Thus, bias has been described as a "favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ... or because it is excessive in degree"<sup>298</sup>; and as a "predisposition or

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295 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 360.

296 Brennan, "Judicial Independence", remarks delivered at the Australian Judicial Conference, Canberra, 2 November 1996 (emphasis in original).

297 See Groves, "Clarity and Complexity in the Bias Rule" (2020) 44 *Melbourne University Law Review* 565 at 572-579.

298 *Liteky v United States* (1994) 510 US 540 at 550 (emphasis in original).

prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue"<sup>299</sup>.

234 In some circumstances, independence is distinguished from impartiality as a "structural or institutional framework which secures ... impartiality"<sup>300</sup>. A similar distinction was adopted by Kiefel CJ and Gageler J in the context of an administrative decision maker in *CNY17 v Minister for Immigration and Border Protection* in the following terms<sup>301</sup>:

"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."

#### *Incompatibility of roles*

235 This case is far removed from previous cases about incompatible roles, a concept that was first explained by Isaacs J in *Dickason v Edwards*<sup>302</sup>. In that case, Isaacs J derived a principle from "sets" of cases involving instances of incompatibility whereby<sup>303</sup>:

"if the person whose presence [at deliberations of a judicial tribunal] is challenged can fairly be said to be biassed, either by reason of his necessary interest or by reason of some pre-determination he has arrived at in the course of the case, then he ought not to act unless there is something to relieve him from these disqualifications".

236 The instances referred to by Isaacs J concerned the simultaneous occupation of roles<sup>304</sup>, that is, where a member of a judicial tribunal was disqualified for incompatibility because they also occupied "some other position which he really

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**299** *Flaherty v National Greyhound Racing Club Ltd* [2005] LLR 571 at 579 [28].

**300** *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 at 793 [38]; [2006] 1 All ER 731 at 744.

**301** (2019) 268 CLR 76 at 87 [18].

**302** (1910) 10 CLR 243.

**303** *Dickason* (1910) 10 CLR 243 at 260.

**304** *Dickason* (1910) 10 CLR 243 at 259-260, citing *R v Milledge* (1879) 4 QBD 332, *R v Gaisford* [1892] 1 QB 381 and *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

[had] in the case"<sup>305</sup>. Related principles are that the same person cannot be accuser and judge in judicial proceedings<sup>306</sup> and that a judge is disqualified from deciding a case to which that judge is a party<sup>307</sup>. A more distantly related principle is that a decision will be affected by apprehended bias where it is made in the presence of a person disqualified from participating in the decision, even though that person did not participate in the deliberations or decision<sup>308</sup>.

237 In *Dickason*, the plaintiff, a member of a friendly society regulated by statute, was accused of insulting the District Chief Ranger of the society<sup>309</sup>. The District Chief Ranger then presided as chairman of the committee which heard the charge brought against the plaintiff, as a result of which the plaintiff was expelled from membership of the society<sup>310</sup>. As the District Chief Ranger was the person "complaining of a grievance", Griffith CJ concluded that the Ranger's membership of the committee that tried the case vitiated the committee's proceedings, even though he did not take any substantive part in the proceedings<sup>311</sup>. O'Connor J considered it "impossible to say, under these circumstances, that the man who was actually the prosecutor, not in the interest of the Society merely, but prosecutor in a charge of using abusive language concerning himself personally, could escape from being reasonably and substantially suspected of bias"<sup>312</sup>. Isaacs J considered that the District Chief Ranger must have "formed a predetermination" about the plaintiff's conduct and was disqualified by reason of that predetermination<sup>313</sup>.

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305 *Dickason* (1910) 10 CLR 243 at 259; see also 263.

306 *Australian Workers' Union v Bowen [No 2]* (1948) 77 CLR 601 at 616. See also *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 at 379; *Frome United Breweries Co v Bath Justices* [1926] AC 586 at 606.

307 *Ebner* (2000) 205 CLR 337 at 358-359 [59]-[63].

308 *Sussex Justices* [1924] 1 KB 256; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

309 (1910) 10 CLR 243 at 248.

310 *Dickason* (1910) 10 CLR 243 at 248.

311 *Dickason* (1910) 10 CLR 243 at 252.

312 *Dickason* (1910) 10 CLR 243 at 257.

313 *Dickason* (1910) 10 CLR 243 at 262.

238 In *Stollery v Greyhound Racing Control Board*<sup>314</sup>, the manager of a greyhound racing association accused a greyhound owner of attempting to bribe him, and reported the incident to the respondent Board. The manager was also a member of the Board which then held an inquiry in response to his complaint. The manager took no active part in the deliberations, but presented a report at the inquiry and remained in the room while the deliberations and decision took place<sup>315</sup>. This Court unanimously concluded that the Board's decision to disqualify the greyhound owner for 12 months should not be allowed to stand. Barwick CJ, with whom McTiernan J agreed<sup>316</sup>, explained that a reasonable person "could very properly suspect that the clear opportunity which [the manager] had for influencing the decision of the Board might well have been used"<sup>317</sup>. Barwick CJ also referred to *R v Sussex Justices; Ex parte McCarthy*<sup>318</sup>, in which the King's Bench Division found a "manifest contradiction" in the "twofold position" of the roles of the deputy clerk to the justices who heard a criminal matter against the applicant arising out of a motor vehicle collision. In that case, the deputy clerk's role required him to retire with the justices to be available to advise them on points of law, while he was also a partner of a firm of solicitors engaged in proceedings for damages against the applicant in respect of the same collision<sup>319</sup>.

239 Similarly, Gibbs J, with whom Stephen J agreed<sup>320</sup>, considered that "[t]he very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal"<sup>321</sup>. Menzies J relied on other factors, considering that the manager had a "personal interest in the outcome of the proceedings" and had "formed a conclusion, adverse to the [greyhound owner]", which was enough to vitiate the Board's decision, "whether or not his presence did in fact influence" its decision<sup>322</sup>.

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314 (1972) 128 CLR 509.

315 *Stollery* (1972) 128 CLR 509 at 513-516.

316 *Stollery* (1972) 128 CLR 509 at 520.

317 *Stollery* (1972) 128 CLR 509 at 519.

318 [1924] 1 KB 256, cited in *Stollery* (1972) 128 CLR 509 at 518-519.

319 *Sussex Justices* [1924] 1 KB 256 at 259-260.

320 *Stollery* (1972) 128 CLR 509 at 528.

321 *Stollery* (1972) 128 CLR 509 at 527.

322 *Stollery* (1972) 128 CLR 509 at 525.

240 In *Isbester*<sup>323</sup>, this Court extended the concept of incompatibility of roles to roles that did not coexist. In this wider sense, the question of incompatibility concerned the "interest"<sup>324</sup> or "frame of mind"<sup>325</sup> that a decision maker may have acquired in an earlier role, with the result that the fair-minded lay observer might reasonably apprehend that their capacity to bring an impartial mind to bear in a different role was compromised.

241 The plurality identified, as instances of incompatibility, the case of a prosecutor or other accuser bringing charges, who may have an interest in the outcome of the hearing of the charges, and who also has a role of deciding the charges or any consequential matters. Their Honours observed that it could "scarcely be doubted" in that case that the prosecutor of criminal charges against a dog owner had a similar interest in the outcome of the charges to the moving parties in *Dickason* and *Stollery*<sup>326</sup>, and that her involvement in the prosecution of the charges created an interest in the final outcome of the matter, being a subsequent decision to destroy the dog the actions of which had given rise to the criminal charges<sup>327</sup>. In reaching that conclusion, the plurality noted that the briefs of evidence for the criminal proceeding were provided to the decision makers for the destruction decision<sup>328</sup>. Their Honours also observed that the prosecutor was the "moving force" for the destruction decision, including by supplying evidence to the decision makers<sup>329</sup>.

242 The plurality referred to a prosecutor's possible interests in vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment<sup>330</sup>. "[O]nce the interest is identified as one which points to a conflict

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323 (2015) 255 CLR 135.

324 *Isbester* (2015) 255 CLR 135 at 149 [34].

325 *Isbester* (2015) 255 CLR 135 at 157 [63], 158 [68].

326 *Isbester* (2015) 255 CLR 135 at 150 [39].

327 *Isbester* (2015) 255 CLR 135 at 151 [42].

328 *Isbester* (2015) 255 CLR 135 at 143 [9], 151 [41].

329 *Isbester* (2015) 255 CLR 135 at 151 [43].

330 *Isbester* (2015) 255 CLR 135 at 152 [46].

of interest, the connection between that interest and the possibility of deviation from proper decision-making is obvious."<sup>331</sup>

243 Gageler J analysed the matter differently, stating the following conception of incompatibility of roles in the same or related proceedings<sup>332</sup>:

"[A] person who has been the adversary of another person *in the same or related proceedings* can ordinarily be expected to have developed in that role *a frame of mind* which is *incompatible with the exercise of that degree of neutrality* required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person."

244 It is significant that this conception was, to Gageler J, limited to the case of an adversary in "the same or related proceedings". There is no reason to apprehend that a former adversary might have the posited frame of mind in some unrelated context. While his Honour did not elaborate on the nature of an adversarial frame of mind, in relation to a prosecutor of the same or related proceedings the reference to "neutrality" is more directed to the question of impartiality than the question of independence. In *Isbester*, the prosecution of charges against the dog owner was plainly related to the council proceedings concerning the dog's future. In that context, it seems obvious that the fair-minded lay observer might reasonably apprehend that the prosecutor might have a mental outlook that could be characterised as an adversarial frame of mind incompatible with the role of impartial decision maker as to the possible destruction of the very dog whose behaviour had led to the prosecution.

#### *No automatic or presumed disqualification*

245 As explained by Kiefel CJ and Gageler J, there is no rule of automatic or presumed disqualification for apprehended bias on the basis of incompatible roles, as such a rule would be irreconcilable with *Ebner*. *Ebner* states clearly that the general test for apprehended bias applies to "problems of apprehended bias, whether arising from interest, conduct, association, extraneous information, or some other circumstance"<sup>333</sup>. Of course, there will be cases where a reasonable apprehension of bias will readily be found by the application of the two-step framework in *Ebner*. For example, a judge's personal interest in the outcome of a case will ordinarily result in disqualification because of the obvious possibility that the judge might decide the case in a way that protects or promotes the personal

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331 *Isbester* (2015) 255 CLR 135 at 153 [49].

332 *Isbester* (2015) 255 CLR 135 at 157 [63] (emphasis added).

333 (2000) 205 CLR 337 at 350 [33]. See also *Webb* (1994) 181 CLR 41 at 74.



interest. The personal interest provides a logical basis for a fear of bias. The logical connection between the interest and the fear of bias is the general human tendency to act in accordance with one's own personal interests. The fact that the second step of the framework, and the reasonableness of the apprehension, are easily assessed does not mean that it is unnecessary to undertake the analysis.

### Applying the *Ebner* framework in this case

#### *QYFM's alternative cases*

246 QYFM did not develop an alternative argument that sought to apply the framework established in *Ebner*. However, his case assumed that the first step in that framework was satisfied by the asserted incompatibility of the judge's role on the visa appeal with his earlier participation in the conviction appeal. As to the second step, and although not explicitly articulated, the logical connection between the asserted incompatibility of the judge's roles and the fear that the judge might not decide the visa appeal on the merits appeared to be that the earlier role gave rise to an apprehension of a lack of independence on the part of the judge from the Minister.

247 QYFM also contended that his case could be articulated by reference to the proposition, stated by Gageler J in *Isbester*<sup>334</sup>, that "a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of [the requisite] degree of neutrality". This case did not suggest any predisposition towards the Minister's success in the visa appeal; nor a predisposition to be influenced by the Minister in deciding the appeal. Nor was it suggested that the judge had any personal interest in the outcome of the visa appeal, such as a desire to vindicate his earlier success in the conviction appeal<sup>335</sup>.

248 Rather, the apprehension concerned an unspecified unconscious bias, or an apprehension that, having appeared against QYFM, the judge might not be able to adopt a mindset of impeccable neutrality. Put in these terms, the apprehension is not about a lack of independence from any party to the visa appeal, or even from any other part of the Executive or the Executive generally. Instead, the feared bias must be said to arise from the fact of the judge's previous association with QYFM through the conviction appeal, leading to a subconscious aversion to QYFM, or an apprehension that, having adopted an adversarial position against QYFM in the past, the judge's attitude towards QYFM might not now be sufficiently

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<sup>334</sup> (2015) 255 CLR 135 at 157 [63].

<sup>335</sup> cf *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 371; *Isbester* (2015) 255 CLR 135 at 152 [46]. See also *CNY17* (2019) 268 CLR 76 at 98 [56].

dispassionate either generally, or in relation to the issues for decision in the Full Court.

*The complexities of the fair-minded lay observer*

249 The fair-minded lay observer is a construct<sup>336</sup> that is intended to maintain public confidence in the administration of justice and rejects any assumption that the public will accept the subjective opinion of a judge as to whether there is a reasonable apprehension of bias affecting that judge<sup>337</sup>. This assumption is rejected because the public is not assumed to believe that a judge is necessarily the personification of a reasonable person.

250 The construct of the fair-minded lay observer is aimed at precluding a judge from making a subjective or idiosyncratic assessment of a claim of apprehended bias, and in particular an assessment that is predicated upon an "unrealistic knowledge and understanding of the culture and traditions of the legal profession"<sup>338</sup> or "insider's blindness"<sup>339</sup>. Public confidence in the judiciary is not advanced by attributing to the fair-minded lay observer knowledge that ordinary experience suggests would not be known by the lay observer<sup>340</sup>.

251 Accordingly, the fair-minded lay observer will not have a detailed understanding of precise ethical rules applying to judges, nor the ethical rules that applied to the relevant judge's prior conduct (such as while acting as counsel). Nor will the fair-minded lay observer know the personal characteristics, experience or expertise of the judge<sup>341</sup>, except to the extent that those matters form part of the material objective facts upon which the claim of apprehended bias is to be

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**336** *R v Abdroikov* [2007] 1 WLR 2679 at 2706 [81]; [2008] 1 All ER 315 at 341. See also *Smits v Roach* (2006) 227 CLR 423 at 456 [95]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 301 [35]; *Isbester* (2015) 255 CLR 135 at 155 [58]; *CNY17* (2019) 268 CLR 76 at 118 [133].

**337** *Webb* (1994) 181 CLR 41 at 51.

**338** Australian Law Reform Commission, *Judicial Impartiality: The Fair-Minded Observer and its Critics*, Background Paper JI7 (2021) at 7-10 [27], citing Groves, "The Rule against Bias" [2009] *Monash University Law Research Series* 10 and Groves, "Bias by the Numbers" (2020) 100 *AIAL Forum* 60 at 65. See also 7-10 [28], citing *Gillies* [2006] 1 WLR 781 at 793 [39]; [2006] 1 All ER 731 at 745.

**339** *Gillies* [2006] 1 WLR 781 at 793 [39]; [2006] 1 All ER 731 at 745.

**340** *Webb* (1994) 181 CLR 41 at 52.

**341** *Charisteas* (2021) 273 CLR 289 at 297 [12], citing *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

decided<sup>342</sup>. However, the fair-minded lay observer is attributed a knowledge of the actual circumstances of the case<sup>343</sup>. Further<sup>344</sup>:

"[b]eing reasonable and fair-minded, the [fair-minded lay observer], before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances".

252 From this description, it is apparent that it is difficult to decide the knowledge to be attributed to the fair-minded lay observer. Further difficulties concern the reasoning processes of the fair-minded lay observer. It has been suggested that the fair-minded lay observer (or at least the British equivalent) is "a paragon of balance, virtue and wisdom"<sup>345</sup>. Being fair-minded, the lay observer does not merely reflect public opinion<sup>346</sup>, nor do they form an opinion based on matters of general impression.

253 The fair-minded lay observer is expected to make a judgement "in the context of ordinary judicial practice" and is capable of taking into account "the exigencies of modern litigation"<sup>347</sup>.

254 However, probably the most important assumption to be challenged by a judge in adopting the perspective of the fair-minded lay observer is that their experience as a "professional judge whose training, tradition and oath or affirmation require [them] to discard the irrelevant, the immaterial and the prejudicial"<sup>348</sup> produces the result that they are "more able than others to resist the

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

343 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 23.

344 *Johnson* (2000) 201 CLR 488 at 508 [53].

345 Olowofoyeku, "Bias and the Informed Observer: A Call for a Return to Gough" (2009) 68 *Cambridge Law Journal* 388 at 393. See also *Smits v Roach* (2006) 227 CLR 423 at 457 [96]; *British American Tobacco* (2011) 242 CLR 283 at 306 [48].

346 See *Webb* (1994) 181 CLR 41 at 52.

347 *Johnson* (2000) 201 CLR 488 at 493 [13].

348 *Johnson* (2000) 201 CLR 488 at 493 [12], citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527 and *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585.

likelihood of bias"<sup>349</sup>. The fair-minded lay observer accepts that a judge has that experience, but will be aware that it should not be given undue weight<sup>350</sup>. They will also "be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality"<sup>351</sup>.

255 The construct of the fair-minded lay observer does not deny "the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim"<sup>352</sup>. In any event, a critical disposition and a cognition of human frailty are points that the fair-minded lay observer<sup>353</sup> and a judge will ordinarily have in common. Both can be expected to be sensitive to the position of the actual party who makes a claim of apprehended bias. Neither can reasonably be taken to think that deference to the judiciary is ingrained in the Australian community. Both can be expected to be cognisant of the possibility of unconscious bias in a judge<sup>354</sup>: Australian judges are now educated on the topic<sup>355</sup>. Both are generally expected to strike an "appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion"<sup>356</sup>. In these ways, the fair-minded lay observer construct will not necessarily require the fair-minded judge to adopt a perspective very different from their own. The chief differences between them are that the fair-minded lay observer does not rely on matters that may be known or believed by a judge but not known or believed by a member of the public, and is assumed to avoid "the risk of having the insider's blindness to the faults that outsiders can so easily see"<sup>357</sup>.

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349 Australian Law Reform Commission, *Judicial Impartiality: The Fair-Minded Observer and its Critics*, Background Paper JI7 (2021) at 7-10 [29].

350 *Wilson* (1996) 189 CLR 1 at 23. See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-88, referring to *Vakauta v Kelly* (1989) 167 CLR 568.

351 *Johnson* (2000) 201 CLR 488 at 508 [53].

352 *British American Tobacco* (2011) 242 CLR 283 at 306 [48].

353 *Ebner* (2000) 205 CLR 337 at 345 [8].

354 See *CNY17* (2019) 268 CLR 76 at 90 [28].

355 Including through publications such as Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 11-18.

356 *Abdroikov* [2007] 1 WLR 2679 at 2706 [81]; [2008] 1 All ER 315 at 342.

357 *Gillies* [2006] 1 WLR 781 at 793 [39]; [2006] 1 All ER 731 at 745.

256 The fair-minded lay observer will appreciate that the mere fact that a judge, as a barrister, had some connection with parties who come before him or her does not necessarily attract such a reasonable apprehension as to require the judge to disqualify himself or herself<sup>358</sup>. In considering whether a previous connection, with a party or between a judge's involvement in two proceedings, creates the requisite "logical connection" for the purposes of the *Ebner* framework, the observer will consider all features of the connection, including the nature, duration, intensity and proximity of the association between judge and party<sup>359</sup>. Relevant factors include: (1) whether the correctness or appropriateness of a decision taken in earlier litigation by the judge, then counsel, is in issue in the case assigned to the judge, so that the judge is effectively being asked to evaluate their own prior conduct; (2) the commonality of facts, evidence and remedies between the earlier litigation and the case assigned to the judge; (3) the passage of time between the earlier litigation and the case assigned to the judge; and (4) any commonality between the parties to the earlier litigation and the case assigned to the judge.

*Issues for determination on the visa appeal*

257 The *Ebner* framework cannot be applied without first identifying the issues arising in the visa appeal, in respect of which there is an asserted apprehension of bias. The visa appeal concerned the legality of a decision of the Administrative Appeals Tribunal and, more directly, the legality of a decision of a Federal Court judge who had dismissed QYFM's claim that the Tribunal's decision was not made according to law. Accordingly, the visa appeal did not require the Full Court to make any findings of fact. There were two grounds of appeal, which concerned whether: (1) the Tribunal's decision was illogical, irrational and/or legally unreasonable; and (2) the Tribunal made findings for which there was no probative evidence.

258 I agree with Steward J as to the more specific facts on the visa appeal that the fair-minded lay observer can be taken to know. None of them involve matters of knowledge peculiar to the judiciary, or matters beyond the appreciation of the fair-minded lay observer.

*Relationship between the judge and the Executive: no apparent lack of independence*

259 QYFM argued that the fair-minded lay observer would perceive the judge as a former member of the Executive Government who had performed "the prosecutorial function of the Executive" and, specifically, a role adverse to QYFM's interests in the conviction appeal. He assumed that the observer would

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358 *S & M Motor Repairs* (1988) 12 NSWLR 358 at 372.

359 *S & M Motor Repairs* (1988) 12 NSWLR 358 at 372-373.

not know, or would not find any significance in, the situation of the CDPP as a statutory office holder subject to significant protections around his independence from other members of the Executive<sup>360</sup>. He did not suggest that there was any reason to think that any member of the Executive had ever attempted to influence the judge in any way concerning QYFM, whether about his prosecution, his conviction, his visa appeal or otherwise.

260 QYFM submitted that such an observer would not think that a former CDPP could never be a Federal Court judge but would perceive a lack of independence between the role of "accuser for the Executive" and the role of a judge whose task is to supervise the legality of the decision by the Executive not to revoke the visa cancellation. This claim was remarkably non-specific and failed to identify any existing influence, conscious or unconscious, that might fairly be thought to affect the judge as a result of his former role as CDPP generally, or his participation in QYFM's conviction appeal specifically. Without more, there was no reason for the fair-minded lay observer to conclude that the judge was affected by any possible lack of independence from the parties to the visa appeal or any influence that might affect his disposition of the visa appeal.

261 In any event, the fair-minded lay observer would not perceive either of the judge's roles in the simplistic terms posited by QYFM. Those terms ignore, in the first place, the statutory role of the CDPP and the legal protections of the independence of the CDPP from other members of the Executive; and, in the second case, the statutory role of the Tribunal, the decision of which was under challenge. While the fair-minded lay observer might not have an understanding of the minutiae, general knowledge of these matters is not beyond the appreciation of the fair-minded lay observer.

*No reasonable apprehension of bias based on the judge's prior negative association with QYFM*

262 As judges are commonly appointed from the legal profession, it is not unusual for a judge to be allocated a case in which a party is a former client. This will particularly be the case for judges who are appointed from the criminal Bar or who were briefed by persons or bodies that form part of the Executive. In that context, issues may arise about whether a judge might have a disqualifying "frame of mind", of the kind described by Gageler J in *Isbester*<sup>361</sup>. Another issue that may arise is whether a judge has been privy to extraneous information that might improperly influence their decision-making. That was the basis of the application for the judge's recusal before the Full Court, but it was not reagitated in this Court.

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**360** See *Director of Public Prosecutions Act 1983* (Cth), especially ss 7 and 8.

**361** (2015) 255 CLR 135 at 157 [63], 158 [68].

263 For the reasons explained above, there was no reasonable basis for an apprehension by the fair-minded lay observer that the judge might have had a predisposition in favour of the Minister. However, it is necessary to ask the obverse question, namely, whether the fair-minded lay observer might reasonably have thought that the judge might have a predisposition against QYFM by reason of their prior association in the conviction appeal.

264 In the absence of any suggested interest on the part of the judge in the outcome of the visa appeal; any prior conduct said to found an apprehension of prejudgement by the judge of the issues in that appeal; or any suggestion that the judge had any extraneous information that might influence his decision-making process, the question comes down to whether the bare fact of the judge's participation in the conviction appeal gives rise to a reasonable apprehension of bias. This requires asking the following question, applying the second step of the *Ebner* framework: is there a "logical connection" between the judge's participation in the conviction appeal and the feared deviation from the course of deciding the visa appeal on its merits? It is then necessary to consider whether any such connection is reasonable from the perspective of the fair-minded lay observer.

265 The nature of the association between the judge and QYFM was as adversaries. They were adversaries in a conviction appeal in which QYFM failed, and in respect of an offence which QYFM now admits. The sole issue on the conviction appeal was a legal question concerning the admissibility of evidence of that admitted offence. The judge's involvement in the conviction appeal occurred seven years before the visa appeal was listed for hearing. The sentence imposed in respect of QYFM's conviction led to the cancellation of his visa. The visa appeal concerned the legality of a decision of the Tribunal in connection with the visa cancellation, and of the Federal Court on review of that decision, and neither decision raised any issue about the conviction or the conviction appeal. There was no issue on the visa appeal relating to the "wisdom, reasonableness or appropriateness"<sup>362</sup> of the judge's conduct while CDPP, nor of the conviction. All of these matters are knowledge that can reasonably be attributed to the fair-minded lay observer.

266 The following matters tell against any reasonable apprehension of the asserted bias: first, the supposed nature of the bias is an undefined subconscious mindset suggested to be the natural consequence of an occasion seven years earlier. The fact that bias might be thought to be unconscious does not mean that its existence can be accepted without identification of its nature (whether racism, bigotry, sectarianism, ageism or some other bias). QYFM also did not identify any form of memory or recollection which might be prompted on reading the appeal papers which reasonably could affect the disposition of the visa appeal. Second, beyond the judge's participation in the conviction appeal, QYFM identified no

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362 cf *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 91.

particular event or information as productive of the supposed mindset. Third, the role of the CDPP is affected by special duties of fairness<sup>363</sup> that the fair-minded lay observer can be taken to know, if only at a high level of generality. A mindset of fairness is incompatible with a mindset of partiality. Assuming in QYFM's favour that the CDPP might not have maintained a mindset of fairness during the conviction appeal despite his statutory and ethical duties, the possibility that he might have developed an unfavourable mindset and retained it over many years, or even regained the mindset after that passage of time, is not reasonable. Fourth, the mindset is suggested to have arisen in proceedings that were concluded favourably to the CDPP as prosecutor, so that there is no suggestion of a grievance towards QYFM. Rather, the apprehension concerned an unspecified unconscious bias or an apprehension that, having appeared against QYFM, the judge might not be able to adopt a mindset of impeccable neutrality in the visa appeal.

267 In my view, it is very unlikely that the fair-minded lay observer would consider the bare fact of the judge's participation in the conviction appeal to be a possible threat to his neutrality in the visa appeal. However, accepting that possibility, QYFM has failed to articulate a logical connection between that participation and the requisite fear that the judge might not decide the visa appeal on its merits. Not only has QYFM failed to identify a reasonable basis for apprehending that the judge had any particular state of mind resulting from his participation in the conviction appeal, but he has failed to articulate how that state of mind would impinge upon the visa appeal, concerned as it was with the legality of the decision of the court below. The possibility of an adversarial frame of mind (whatever that might mean) that either might have survived seven years, or might have been reignited when the judge considered the visa appeal, is no more than speculation.

268 As to the possibility of an adverse attitude towards QYFM, either surviving or reignited, there is nothing to suggest that any negativity would be greater than or different from that which would reasonably arise on reading the appeal papers in the visa appeal, setting out, as they did, full details of QYFM's failure of the "character test" in s 501(3A) of the *Migration Act 1958* (Cth) and other matters to his discredit, recorded by Steward J. These are matters that the fair-minded lay observer can be expected to know. They include unchallenged findings that: (1) the nature of QYFM's offending was "very serious" and included the use of his mother-in-law as an "unwitting ... drug mule"; (2) the jury trial and the conviction appeal would have been unnecessary "if QYFM [had been] truthful about his guilt"; (3) QYFM presented "bogus" evidence to the Tribunal; (4) there was a "real and unacceptable risk" that QYFM would reoffend if released, which was a matter that weighed "very substantially" against revocation of the decision to cancel QYFM's

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**363** *Libke v The Queen* (2007) 230 CLR 559 at 586 [71]; *HT v The Queen* (2019) 269 CLR 403 at 428 [59].



visa; and (5) in the Tribunal's view, the expectations of the Australian community were also matters that weighed very substantially in favour of non-revocation.

269           Accordingly, this is not a case in which the fair-minded lay observer might reasonably have contemplated that the judge might not bring to the resolution of the issues before the Full Court a disqualifying "frame of mind".

### **Conclusion**

270           I would dismiss the appeal with costs.

271           Finally, and noting that it is unnecessary to express an opinion as to the questions raised about the practice of multi-member judicial panels faced with an application for disqualification of one of its members, I prefer not to address those questions in the face of possible law reform.

JAGOT J.

**Disposition**

272 This appeal should be allowed. A member of the bench of the Full Court of the Federal Court of Australia which decided the appeal was subject to a reasonable apprehension of bias. Accordingly, the orders of the Full Court dismissing the appellant's appeal are vitiated. My reasons follow.

**Apprehended bias – an excursus**

273 Judicial decision-makers must be, and must be seen to be, impartial and independent. These are constitutive elements of the "skeleton of principle"<sup>364</sup> which shapes the common law of Australia. In ensuring that justice is seen to be done, the law insists that the relevant perspective is not that of judges or lawyers. The relevant perspective is that of the "fair-minded lay observer"<sup>365</sup>. This hypothetical observer is taken to be a representative of the Australian public, the continuing confidence of which in the rule of law is secured, in part, by acceptance that judicial decisions are made by impartial and independent judges doing "right to all manner of people according to law without fear or favour, affection or ill will"<sup>366</sup>.

274 The test for apprehended bias is not in doubt. The test is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide"<sup>367</sup>. If so, the judge is disqualified from deciding the matter.

275 The apparent clarity of the test does not mean that its application in any given case is incontestable. This follows from: (a) the potentially infinite circumstances in which the issue might arise for determination; (b) the fact that the construct of the fair-minded lay observer functions as a proxy for reasonable members of the public at large, reflecting contemporary values and judgments; and (c) the evaluative boundaries which shape elements of the test, including the construct of the fair-minded lay observer, the attribution of knowledge to that

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**364** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

**365** *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ("*Ebner*") at 344 [6].

**366** These are part of the terms of the judicial oath: see, eg, s 11 of the *Federal Court of Australia Act 1976* (Cth) and the Schedule to that Act, and s 11 of the *High Court of Australia Act 1979* (Cth) and the Schedule to that Act.

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

construct, and the reasonableness of any apprehension of a genuine risk of lack of impartiality or independence in the circumstances.

276 To these considerations must be added other dimensions.

277 A judge who is subject to a reasonable apprehension of bias in respect of a matter is disqualified from deciding that matter. But a judge who is not so disqualified generally has a duty to hear and decide the matters assigned to that judge (referred to as the "duty to sit"<sup>368</sup>). A further part of the judicial oath or affirmation is that the judge must "well and truly serve" the current sovereign, and their heirs and successors. Such service is performed by discharging the functions of judicial office. If, from a judge's too ready acceptance of spurious or ill-considered applications for disqualification for apprehended bias, a party could influence the constitution of the court, another source of apprehended bias would arise – a prospect which has been described as "intolerable"<sup>369</sup>. Accordingly, judges are mindful that "[d]isqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers" and that they must "be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay"<sup>370</sup>.

278 In applying the test for apprehended bias, with its "double might"<sup>371</sup> components, a judge must be faithful to their judicial duty to discharge the functions of their judicial office. This duty to sit underlies such statements as that: (a) it "would be an abdication of judicial function"<sup>372</sup> for a judge to adopt the approach that the judge will not sit if a party requests the judge not to do so on the ground of apprehended bias; (b) "[a]lthough it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to

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368 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

369 *Ebner* (2000) 205 CLR 337 at 348 [20].

370 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 12.

371 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 87 [18].

372 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294.

sit"<sup>373</sup>; and (c) a conclusion of apprehended bias "must be firmly established and should not be reached lightly"<sup>374</sup>.

279 Yet the intensity and demands of this duty of judicial office may also yield to circumstance. The duty to sit is not absolute, even where no reasonable apprehension of bias is involved. Accordingly, in "a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification"<sup>375</sup>. This reflects the fact that, along with their duty to sit, a judge has a duty to ensure continuing public confidence in the administration of justice. Generally, the latter duty is best fulfilled by judges adhering to the former duty unless they are disqualified from so doing on a proper basis (be it a reasonable apprehension of bias or actual bias). But if tension between these two duties exists and is irreconcilable, the latter must prevail.

280 While the nexus of factors relevant to an evaluation of these duties may be different before and after the commencement of a hearing of the substantive issues, the duties continue throughout a judge's involvement in a matter. They do not cease on the judge commencing the substantive hearing. And if circumstances thereafter change, a judge who has not disqualified themselves for bias (apprehended or actual) may have a duty to reconsider the issue or, at the least, to make further disclosure to the parties of the changed circumstances and hear further argument on the issue. This prospect should not be seen as potentially undermining public confidence in the administration of justice. To the contrary, the continuation of these duties, and the potential that a judge might properly change their mind about an issue of bias if further information comes to light or new circumstances arise, should be understood as enhancing such confidence.

281 Consistently with this, it has been said that the circumstances in which a judge may properly decide not to sit by reason of an arguable apprehension of bias may vary and "may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted"<sup>376</sup>. But, of course, any judge who concludes that they are affected by bias (apprehended or actual) in respect of a particular matter must disqualify themselves and must not sit.

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**373** *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

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

**375** *Ebner* (2000) 205 CLR 337 at 348 [20].

**376** *Ebner* (2000) 205 CLR 337 at 348 [21].

282 This nuanced approach reflects that, although the test for apprehended bias involves a question of law to be determined objectively, the test involves an evaluation of questions "of degree and particular circumstances [which] may strike different minds in different ways"<sup>377</sup>.

283 These considerations are relevant to the resolution of both questions in this appeal. The first, the dispositive question, is whether a member of the Full Court hearing the appeal was subject to a reasonable apprehension of bias. The second is whether the Full Court erred in adopting a process whereby the judge the subject of the allegation of apprehended bias decided that issue. As will be explained, I would answer these questions "yes" and "no" respectively.

### **The present case – a reasonable apprehension of bias?**

284 The primary judge (Kerr J) had dismissed the appellant's judicial review application on 18 December 2020<sup>378</sup>. In that application, the appellant alleged that a decision of the Administrative Appeals Tribunal ("the AAT") was invalid by reason of jurisdictional error because of a lack of procedural fairness. The AAT had affirmed a decision of a delegate of the Minister not to revoke the mandatory cancellation of the appellant's visa, which was consequential on the appellant having been convicted and sentenced to a term of imprisonment of 12 months or more and thereby failing the "character test" under the *Migration Act 1958* (Cth).

285 The appellant appealed to the Full Court. On 23 July 2021, the parties were notified of the constitution of the Full Court (McKerracher, Griffiths and Bromwich JJ) for the hearing of the appeal on 17 August 2021<sup>379</sup>. By the time an amended notice of appeal was filed on 2 August 2021, the appellant had legal representation. In all Court documents, as required, the appellant was identified only by pseudonym<sup>380</sup>. The appeal papers included the reasons for sentence of the appellant in the County Court of Victoria and reasons for judgment of the Court of Appeal of the Supreme Court of Victoria dismissing the appellant's appeal against conviction in 2014. The Victorian Court of Appeal had rejected the appellant's contention of wrongful conviction based on the alleged wrongful admission of

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377 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294, citing *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 16; 32 ALR 47 at 54.

378 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810.

379 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 346 [60].

380 Section 91X of the *Migration Act 1958* (Cth).

evidence. This was the conviction that caused the cancellation of the appellant's visa.

286 The judgment of the Victorian Court of Appeal also disclosed that Bromwich J, in his former capacity as the Commonwealth Director of Public Prosecutions, appeared for the respondent, the Crown, defending the appeal. Bromwich J apparently discovered this document on the morning of the hearing. Before this, neither party had communicated to the Full Court any concern about the constitution of the Court.

287 Shortly before the scheduled commencement of the hearing, Bromwich J arranged for an email to be sent to the parties informing them that he "appeared for the Crown in the appellant's unsuccessful conviction appeal before the Victorian Court of Appeal on 12 August 2014". The email said that Bromwich J did not "consider that this [was] a cause for apprehended bias because that appeal related to a pure legal question, but nonetheless ... [wished] to raise it with the parties in order that any application for his Honour to recuse himself [could] be made". This disclosure was necessary and appropriate as the circumstances meant that a genuine question of apprehended bias had arisen, and it was unclear whether the parties were aware of that fact. "[P]arties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest"<sup>381</sup>.

288 At the start of the hearing, and after dealing with some formal matters, the presiding judge, McKerracher J, referred to the email that Bromwich J had caused to be sent to the parties that morning. In response, the appellant's counsel said he had instructions to apply for Bromwich J to recuse himself and made short oral submissions to the effect that a reasonable apprehension of bias arose in the circumstances. McKerracher J said he would ask Bromwich J to deal with the application. Bromwich J did so, giving brief oral reasons explaining why he declined to recuse himself. The hearing of the appeal proceeded. The Full Court unanimously dismissed the appeal<sup>382</sup>. McKerracher and Griffiths JJ provided joint reasons for judgment which dealt with the substantive grounds of appeal and not the recusal application. Bromwich J provided separate reasons for judgment which agreed with the reasons of McKerracher and Griffiths JJ and also explained why his Honour had rejected the application that he recuse himself.

289 In his separate reasons, Bromwich J identified that the Minister, as respondent to the appeal in the Full Court, opposed the application for recusal on

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**381** Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 12.

**382** *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328.

the basis that the parties had known of the constitution of the bench from 23 July 2021 and, in any event, the appellant's criminal conviction was not in issue in the appeal as there was no dispute that the appellant did not pass the "character test"<sup>383</sup>. Bromwich J said he refused to recuse himself as he did not consider there was a proper basis to do so given, in effect: (a) as Commonwealth Director of Public Prosecutions, he appeared only in appeals on issues of principle and had but a faint recollection of the facts of the appellant's appeal against conviction; (b) he had no knowledge of the appellant's other criminal history; (c) his knowledge was confined to the reasons for judgment of the Victorian Court of Appeal and therefore was the same as that of the other members of the bench; and (d) given that there was no dispute that the appellant failed the "character test", and given that his Honour's knowledge was no different from that of any other member of the bench, his appearance in the Victorian Court of Appeal could not be relevant to any issue before the Full Court<sup>384</sup>.

290 It is necessary to say something more about the appellant's conviction and the "character test". The "character test" is a concept created by the *Migration Act*. The Minister must cancel a person's visa if, amongst other requirements, the person does not pass the "character test"<sup>385</sup>. A person does not pass the "character test" if, relevantly, the person has a substantial criminal record, which includes if a person has been sentenced to a term of imprisonment of 12 months or more<sup>386</sup>. A person whose visa has been the subject of mandatory cancellation because they do not pass the "character test" may make representations to the Minister about revocation of the cancellation<sup>387</sup>. The Minister may revoke the cancellation of the visa if satisfied that the person passes the "character test" or "there is another reason why the original decision should be revoked"<sup>388</sup>. If the decision not to revoke the cancellation of the visa was made by a delegate of the Minister, the person may apply to the AAT for review of the non-revocation decision<sup>389</sup>. The AAT may affirm, vary, or set aside the decision and in so doing may exercise "all the powers and discretions that are conferred by any relevant enactment on the person who

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**383** *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 346 [60].

**384** *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at 346 [61].

**385** Section 501(3A)(a) of the *Migration Act*.

**386** Section 501(6), (7) of the *Migration Act*.

**387** Section 501CA(3)(b) of the *Migration Act*.

**388** Section 501CA(4)(b) of the *Migration Act*.

**389** Section 500(1)(ba) of the *Migration Act*.

made the decision"<sup>390</sup>. The jurisdiction of the Federal Court to review such a decision of the AAT, however, is confined to review for jurisdictional error<sup>391</sup>.

291 The point Bromwich J was making about it being undisputed that the appellant did not pass the "character test" was that the appellant accepted that he did not pass the "character test", and the appellant's case was confined to alleged jurisdictional error by the AAT in deciding if there was "another reason" why the cancellation of his visa should be revoked. Accordingly, in the context of the appeal before the Full Court, the appellant's conviction, while the cause of the cancellation of his visa, was an undisputed historical fact. On this basis, it is apparent that Bromwich J was not persuaded that his appearance for the Crown in the appellant's appeal against conviction in the Victorian Court of Appeal, and the asserted knowledge of the appellant's criminal history his Honour thereby acquired, bore a "logical connection"<sup>392</sup> to a reasonable perception that his Honour might do anything other than decide the appellant's appeal to the Full Court on its merits.

292 Bromwich J's alleged knowledge of the appellant's criminal history was not the only factor which might have had a "logical connection" to an apprehended deviation from a decision on its merits, by reference to which the reasonableness of that apprehension was (and is) to be tested<sup>393</sup>. Rather, the factors included that his Honour had appeared against the appellant in respect of the very issue, the appellant's conviction, which caused the cancellation of the appellant's visa. Framed in this way, the logical connection between the relevant factor (the previous appearance by Bromwich J against the appellant) and the "feared deviation from the course of deciding the case on its merits"<sup>394</sup> is apparent. It is logical that the fair-minded lay observer might apprehend that Bromwich J might not decide the appeal independently and impartially because the subject-matter of the appeal was the legality of a decision about the non-revocation of the cancellation of the appellant's visa, and Bromwich J had appeared against the appellant to sustain the conviction which caused the cancellation of the appellant's visa. Further, the reasonableness of this apprehension on the part of the fair-minded lay observer is also apparent.

293 It is not that there is any class of case in which automatic disqualification must follow. The approach in *Ebner v Official Trustee in Bankruptcy* (that the test

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**390** Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

**391** Section 476A(1)(b) of the *Migration Act*.

**392** *Ebner* (2000) 205 CLR 337 at 345 [8].

**393** *Ebner* (2000) 205 CLR 337 at 345 [8].

**394** *Ebner* (2000) 205 CLR 337 at 345 [8].



involves first "the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits", next "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits", and then the assessment of the "reasonableness of the asserted apprehension of bias") is to be applied in all cases<sup>395</sup>. But the result may well be more readily apparent in some kinds of cases than others<sup>396</sup>.

294 As this Court has said, the conclusion that a judge, under the "pressure of a possible need for immediate decision" and without the luxury of full argument and the kind of wisdom that hindsight brings, has erred in not disqualifying themselves for apprehended bias "does not involve any personal criticism of the judge"<sup>397</sup>. Nor does it involve any assessment of the judge's ability to have dealt with the case "fairly and without pre-judgment or bias"<sup>398</sup>. The law so closely guards the principle that justice must be seen to be done that the relevant fact, in this context, is not lack of impartiality. It is the reasonable perception of the possibility of lack of impartiality that is determinative.

295 *Isbester v Knox City Council*<sup>399</sup> does not, implicitly or otherwise, limit the potential scope of disqualification for reasonable apprehension of bias to cases in which the judge has had a role in prosecuting a party in the same, related, or consequential proceedings. But nor does every case in which a judge has previously appeared or acted against a person or their interests, even in a criminal context, necessarily give rise to a reasonable apprehension of bias. Such a conclusion would be contrary to *Ebner*<sup>400</sup> and must be rejected. In some cases, by reference to subject-matter, time, and role, the perceived connection between the judge's previous involvement and the case to be decided may be manifestly tenuous. Context is all.

296 The qualities attributed to the fair-minded lay observer are important. For example, a lawyer knows, or is taken to know, that a prosecutor is subject to unique duties. While the criminal trial process is accusatorial and adversarial, a prosecutor must "act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's

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**395** (2000) 205 CLR 337 at 345 [8].

**396** *Ebner* (2000) 205 CLR 337 at 348-351 [22]-[37].

**397** *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294.

**398** *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294.

**399** (2015) 255 CLR 135 at 149 [34].

**400** (2000) 205 CLR 337 at 345 [8], 348-351 [22]-[37].

trial is a fair one"<sup>401</sup>. A prosecutor must not "obtain a conviction at all costs", but is to act as a "minister of justice"<sup>402</sup> to ensure that the "Crown case is presented with fairness to the accused"<sup>403</sup>. A lawyer might give significant weight to these factors in evaluating whether a judge who has acted as a prosecutor in a criminal trial or appeal against a person might subsequently be able to decide a case involving that person. Similarly, the effluxion of time between the performance of the first and second functions and the confined nature of judicial review for jurisdictional error may be prominent in an evaluation from a lawyer's perspective. That is not the relevant perspective, however.

297 Depending on the circumstances, an institutional incompatibility of roles might reasonably be seen by the fair-minded lay observer as involving a possible feared deviation from a decision on the merits. In assessing such an issue from the perspective of the fair-minded lay observer it is necessary to recognise that this construct is intended to reflect the context of contemporary Australian society. Habits of deference to authority are no longer ingrained. The vagaries of "human frailty"<sup>404</sup>, even in those wielding power, are now accepted. The unknowable effects of the subconscious are also acknowledged to exist<sup>405</sup>. The apprehension of the fair-minded lay observer is informed by this context.

298 Further, while the overall context of the subsequent case will be relevant to the fair-minded lay observer, that person is not to be attributed with a "detailed knowledge of the law"<sup>406</sup>. Once this is acknowledged, the fact that the fair-minded lay observer is taken to know that a judge is a "professional ... whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the

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**401** *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664.

**402** *Libke v The Queen* (2007) 230 CLR 559 at 586 [71], citing *Randall v The Queen* [2002] 1 WLR 2237 at 2241, in turn citing *R v Puddick* (1865) 4 F & F 497 at 499 [176 ER 662 at 663] and *R v Banks* [1916] 2 KB 621 at 623.

**403** *Libke v The Queen* (2007) 230 CLR 559 at 586 [71], quoting *Richardson v The Queen* (1974) 131 CLR 116 at 119.

**404** *Ebner* (2000) 205 CLR 337 at 345 [8].

**405** *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 90 [28].

**406** *Webb v The Queen* (1994) 181 CLR 41 at 73. See also *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

immaterial and the prejudicial"<sup>407</sup> does not answer the reasonable apprehension of a possible lack of impartiality in this case. Similarly, attribution to the notional observer of knowledge of "the nature of the decision and the context in which it was made ... [and] the circumstances leading to the decision"<sup>408</sup>, as well as of "the context of ordinary judicial practice"<sup>409</sup>, also would not quell the real possibility of the reasonable apprehension of bias in this case. Here, the focus of the fair-minded lay observer would be that the judge deciding whether a decision not to revoke the cancellation of the appellant's visa is legal is the same person who defended the conviction leading to the cancellation of the appellant's visa. Put in these terms, the reasonableness of the fair-minded lay observer's possible perception of a genuine "incompatibility"<sup>410</sup> of roles is apparent.

299 In this case, the specific "twofold position"<sup>411</sup> of Bromwich J involves the "real and not remote"<sup>412</sup> possibility of a reasonable apprehension of bias on the part of the fair-minded lay observer. The nature and quality of the connection between the two positions, one involving the cancellation of the appellant's visa consequential on the upholding of the conviction sought by Bromwich J in the previous role, and the other involving Bromwich J in deciding the legality of a decision not to revoke that cancellation, gives rise to a reasonable apprehension of bias.

300 Earlier decisions on which the Minister relied, *McCreed v The Queen*<sup>413</sup> and *R v Garrett*<sup>414</sup>, correctly recognised that questions of apprehended bias depend on

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**407** *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], quoting *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585.

**408** *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23].

**409** *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

**410** *Dickason v Edwards* (1910) 10 CLR 243 at 259. See also *Ebner* (2000) 205 CLR 337 at 359 [62]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 149-153 [34]-[49].

**411** *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519, citing *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

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

**413** (2003) 27 WAR 554.

**414** (1988) 50 SASR 392.

the circumstances<sup>415</sup>. But it is now apparent that *McCreed v The Queen* involved unjustified weight being given to the passage of time between the judge acting as prosecutor and the judge discharging his judicial duty in circumstances where the offences, although unrelated, were both serious and involved violence<sup>416</sup>. And *R v Garrett* involved applying the kind of practical considerations which a judge may rightly consider in deciding not to sit to the reasonableness of the apprehension of the fair-minded lay observer of a possible lack of impartiality<sup>417</sup>. A judge's decision not to sit may rightly be described as a "practical" one<sup>418</sup>. A judge's decision that the judge is not precluded from sitting by reason of apprehended bias, however, involves the application of an objective standard and is a conclusion of law<sup>419</sup>.

301 For the reasons given, the hearing before the Full Court miscarried on the  
basis that one of the members of the bench was subject to a reasonable  
apprehension of bias.

302 While this is sufficient to dispose of the appeal, another issue has been the  
subject of argument – in a multi-member bench, who decides?

### **The multi-member bench – who decides?**

303 There is a degree of artifice and unreality in the appellant's contention that  
the Full Court erred in hearing the appeal "after Bromwich J alone, rather than the  
Full Court, determined a question of apprehended bias".

304 If Bromwich J was right that no reasonable apprehension of bias arose, the  
Full Court had jurisdiction to hear and determine the appeal. If not, then, as  
concluded above, the Full Court did not have jurisdiction to hear and determine  
the appeal. Accordingly, the question who decides on a multi-member bench is  
incapable of affecting the substantive outcome on appeal.

305 The process undertaken by the Full Court in this case reflects a  
long-standing convention in Australia and some other common law countries  
applied to issues of bias (apprehended or actual) in both single judge and  
multi-member bench hearings. The determination of any issue of bias by the judge

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**415** *McCreed v The Queen* (2003) 27 WAR 554 at 561 [17]; *R v Garrett* (1988) 50 SASR 392 at 400.

**416** (2003) 27 WAR 554 at 568 [45].

**417** (1988) 50 SASR 392 at 400-401.

**418** *R v Garrett* (1988) 50 SASR 392 at 400.

**419** *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]-[29], citing *Ebner* (2000) 205 CLR 337 at 363 [81], 373 [116].

against whom the allegation is raised has been described as the "almost invariable practice"<sup>420</sup> in (at least) Australia and the United States. It has also been said that it is "well established that it is for the judge assigned to hear the matter in the first place to determine whether he or she ought to withdraw on the ground of ostensible bias"<sup>421</sup>.

306 It is one thing to acknowledge that this judicial practice has been subject to critical scrutiny by academics<sup>422</sup>, law reform bodies<sup>423</sup>, and some former judges<sup>424</sup>, and even that the convention may no longer be universal<sup>425</sup>. It is another to conclude that a judge or court which adopts this convention has erred in some way.

307 In the keystone authority in Australia of *Ebner*, when Callinan J raised the issue of a judge other than the judge the subject of the bias allegation deciding the issue<sup>426</sup>, four members of this Court described the conventional approach as "correct"<sup>427</sup>. While the context in *Ebner* was a hearing before a single judge and not a multi-member bench, if the principle is that the judge the subject of the bias issue must decide (as it was in *Ebner*), that principle holds good in Australia for a multi-member bench.

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420 Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89 at 90.

421 Perry, *Disqualification of Judges: Practice and Procedure*, Australasian Institute of Judicial Administration Discussion Paper (2001) at 22 [2.39].

422 eg, Olowofoyeku, "Bias in Collegiate Courts" (2016) 65 *International and Comparative Law Quarterly* 895; Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20 *Legal Ethics* 89.

423 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 234-240 [7.12]-[7.32], 263-270 [7.102]-[7.125].

424 Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21; "Senior law lord told to make sure embarrassment is not repeated", *The Guardian*, 18 December 1998 at 7.

425 See, eg, fnn 33 to 39 in the reasons of Kiefel CJ and Gageler J.

426 (2000) 205 CLR 337 at 397-398 [185].

427 (2000) 205 CLR 337 at 361 [74].

308 The approach the plurality described as "correct" in *Ebner* also accords with the practice this Court in fact adopted in both *Kartinyeri v The Commonwealth*<sup>428</sup> and *Unions NSW v New South Wales*<sup>429</sup>. I will return to these examples below, but the present question concerns the foundation for the view for which the appellant advocated, that this well-established convention of judicial practice in Australia should now be said to be wrong in respect of multi-member benches.

309 The apparent answer to this question is that the composition of a court by an independent and impartial judge or judges goes to the jurisdiction of the court, which that court (however constituted) must decide for itself<sup>430</sup>. Accordingly, it is contended that if the court is constituted by a single judge, that judge must decide any issue of bias. If the court is constituted by a multi-member bench, all judges constituting the court must decide any issue of bias. In the event of disagreement in the latter case, it is said that the majority decision prevails.

310 I disagree.

311 Whatever its origins, the conventional judicial practice does not deny that a court's jurisdiction depends on the court being constituted by an independent and impartial judge or judges. The conventional judicial practice is only that, in Australia, this issue of bias, and its jurisdictional consequences, has been (and, in my view, should continue to be) recognised to be of a unique kind, with the consequence that the judge the subject of the alleged issue of bias is to decide the issue. This unique quality, and the broader and deeper implications it has for courts and judges, reinforces the two aspects of the convention which are fundamental. First, any issue of bias (apprehended or actual) is to be determined by the judge said to be subject to disqualification. Second, and equally importantly, no other judge exercising co-ordinate jurisdiction (that is, jurisdiction in respect of the relevant matter at the same level in the judicial hierarchy) can gainsay that judge's decision. The jurisdiction of the court as constituted rises or falls on the decision of that judge.

312 The pithy statement of Jackson J (with which Frankfurter J concurred) in the Supreme Court of the United States that there is "no authority known to me under which a majority of this Court has power under any circumstances to exclude

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428 [1998] HCATrans 43 (18 February 1998) at lines 28-30; *Kartinyeri v The Commonwealth [No 2]* (1998) 72 ALJR 1334; 156 ALR 300.

429 [2013] HCATrans 263 (5 November 2013) at lines 53-77.

430 For example, under the *Federal Court of Australia Act 1976* (Cth) a Full Court of the Federal Court "consists of 3 or more Judges sitting together" (s 14(2)) and the appellate jurisdiction of the Court must be exercised by a Full Court subject to immaterial exceptions (s 25(1)).

one of its duly commissioned Justices from sitting or voting in any case"<sup>431</sup> both is accurate and involves a deep wisdom about common law courts as human institutions and judges as human beings. The fact is this – there is no authority in Australia that the judge the subject of the alleged disqualification may not properly decide the issue and there is no authority that one or more judges exercising co-ordinate jurisdiction with another judge may prevent that judge from hearing a case. Mere disagreement with the conclusion reached by that other judge said to be subject to disqualification for bias, even if by a majority of the judges constituting the multi-member bench, is an unsound basis for any such purported exercise of judicial power against that other judge.

313        This context is important. We are not dealing with an issue of the statutory power of a Chief Justice or another judge (with authority to do so) to manage and make arrangements for the conduct of the business of a court. No doubt all courts have internal administrative and other arrangements to ensure, so far as possible, that disputes about one or other judge being subject to an apprehension of bias are avoided. All this is proper. But sometimes the resolution of the issue in open court by an exercise of judicial power cannot or should not be avoided. We are concerned only with such an exercise of judicial power.

314        In this context, an exercise of judicial power, the judge the subject of the issue of bias (apprehended or actual) should always decide the issue whether the judge is to sit, whether sitting as a single judge or as part of a multi-member bench. No other judge exercising any form of co-ordinate jurisdiction may decide that issue. Nor, on a multi-member bench, may any judge prevent any other judge from sitting by an exercise of judicial power. This is dictated by well-established convention. It also results from the lack of any apparent source of judicial power by judges exercising co-ordinate jurisdiction to make any such order against the other judge.

315        This is not to suggest that there is no remedy for a party where a judge has refused to disqualify themselves for apprehended or actual bias. A judge who has refused to disqualify themselves should make an order, if necessary, to enable any appeal or other proceeding challenging that decision to be instituted. An appeal from such an order to a court exercising appellate jurisdiction, even if the order is treated as interlocutory, or the seeking of a writ of prohibition from a supervisory court, may be preferable to proceeding with the substantive hearing before that

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**431** *Jewell Ridge Coal Corp v Local No 6167* (1945) 325 US 897 at 897.

judge<sup>432</sup>. But the proper judicial remedy is not (or should not be) in the hands of the judge's judicial colleagues exercising co-ordinate jurisdiction.

316 The consequence is that the approach taken by the Full Court in the present case, where Bromwich J decided he was not disqualified from sitting, which McKerracher and Griffiths JJ did not question, was correct. If Bromwich J had been required to make that decision at an earlier time, it might have been possible for the appellant to appeal (or seek leave to appeal) or to seek a writ of prohibition. But these possibilities do not mean such a course would have been preferable in this case. This matter involved a short hearing where judgment was able to be delivered in a matter of weeks. The objection having been taken, the appellant's capacity to seek special leave to appeal was preserved. The fact that the Full Court's order will be set aside in this case does not imply that the current system did other than work precisely as it should.

317 I now identify the reasons the existing convention remains sound.

318 First, while the tests for apprehended and actual bias are different, they are sourced from the same stream and therefore should be dealt with in the same manner by courts.

319 Second, in deciding any question of apprehended bias, the judge the subject of the issue is best placed to fulfil a number of inter-connected functions, including: (a) complying with the duty of disclosure to the parties, a duty which that judge alone can discharge; (b) applying the test for apprehended bias with all knowledge then available; (c) weighing the outcome of the test for apprehended bias with the judge's other duties, including the duty to sit, not to sit, and to maintain public confidence in the administration of justice; and (d) ensuring their capacity to sit in accordance with their judicial oath or affirmation. Moreover, these duties are not to be assessed in isolation from each other. Each informs the others.

320 This second consideration recognises two further relevant factors. One is that issues of apprehended bias, while involving a question of law to be resolved on an objective basis, also involve evaluative processes about which reasonable minds may differ. The other is that the duty to sit is not absolute and, in my view, does not become absolute merely because a court has been formally constituted or has commenced to hear a matter. Further, and as will be explained, I do not see any difficulty for public confidence in the administration of justice arising from the events in *Kartinyeri* or *Unions NSW* in this Court. To the contrary, from the

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**432** eg, *GetSwift Ltd v Webb* (2021) 283 FCR 328 at 330 [1]; cf Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 22.



perspective of public confidence in the administration of justice, the system operated as it ought to do in both cases.

321 Third, the existing convention does not create any difficulty with disclosure of the relevant circumstances as known by the judge the subject of the issue. The relevant judge alone is subject to the duty of disclosure and, under the existing convention, may make the disclosure as that judge sees fit. The disclosure is not evidence and is not required to be taken at face value. It does not expose the judge to cross-examination<sup>433</sup>. The parties are free to make submissions about the relevance and materiality of that disclosed information to the fair-minded lay observer. By contrast, all suggested alternatives to the conventional practice would appear to place judges exercising co-ordinate jurisdiction with that judge in the potentially invidious position of having to obtain information from and second-guess the views of their judicial colleague.

322 Fourth, it is one thing for judges comprising a multi-member bench to disagree about some issue of fact or law as between the parties to a proceeding and for the majority decision to dictate the outcome of the dispute between the parties. It is another for judges comprising a multi-member bench to disagree with a decision by their fellow judge and, by majority, exercise judicial power *against that judge* by requiring the judge either to disqualify themselves from hearing or to hear the matter. I am not convinced that the source of power is found in the duty of a court to satisfy itself that it has jurisdiction. If the judge the subject of the issue rightly disqualifies themselves, no question of jurisdiction arises. If the judge the subject of the issue wrongly fails to disqualify themselves, the court will not have jurisdiction. This applies to both a single judge bench and a multi-member bench. Any error may be corrected either on appeal (before or after the substantive decision) or by writ of prohibition from the relevant supervisory court. By this means, the judicial hierarchy, fundamental to the Australian legal system, is maintained and observed. And by this means, the exercise of judicial power by judges against another judge exercising co-ordinate jurisdiction, and all the potential difficulties it entails (legal and practical), are avoided.

323 Fifth, the reasons advanced for a change to the judicial convention in Australia are not convincing. The principle that no-one may be a judge in their own cause is inapt in this context. Judges have, or should have, no particular interest in deciding any matter. As was said in *Ebner*, if "a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise"<sup>434</sup>. It is generally (and rightly) accepted that actual bias involves the conscience or state of mind of the individual judge and no-one else. It is not mere expediency for the judge in question also to decide any

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433 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 466-467.

434 (2000) 205 CLR 337 at 348 [21].

issue of apprehended bias. The issue of apprehended bias is one of law which, while evaluative, no more involves the interests of the judge than any other question of law. And if questions of disabling embarrassment or any sense of grievance, disappointment, or disturbance on the part of the judge arise, the relevant territory is actual, not apprehended, bias. This said, it would be wrong to assume that judges approach judicial work or issues of apprehended bias as if they were personal in any way.

324 Sixth, all suggested alternatives involve their own difficulties, without a sufficiently compelling reason for the introduction of a new judicial practice. The problems are not confined to the maintenance of judicial collegiality. They potentially go to the heart of the judicial hierarchy, which is fundamental to our legal system, to the individual judicial conscience, and to the continued integrity of the judicial system. The issues which arise on the conventional practice, by contrast, are known and have proven to be manageable.

325 Seventh, judicial practice should not be driven by unfounded fears of judicial conduct at or beyond the margins. By this I mean that a mere possibility of an exceedingly rare case in which the decision of the judge the subject of the bias issue might consequentially call into play the judicial conscience of the other judges on the multi-member bench is not a sufficient reason to introduce a new judicial practice.

326 Eighth, while respect for expertise may have diminished in contemporary society, judges are professionals, by education, training, experience, and tradition, and are bound by their judicial oath or affirmation. It is neither necessary nor appropriate that judges of co-ordinate jurisdiction be called upon to judge their judicial colleagues in the discharge of their individual judicial function of ensuring they are not subject to apprehended or actual bias.

327 The interplay between these considerations is considered in greater detail below.

328 Disqualification for reasonable apprehension of bias arises from the risk of the perception of a possible lack of impartiality or independence in the judge deciding the issue which must be decided. It does not arise from a fear (however well-founded) that a judge might decide a case adversely to one or other party<sup>435</sup>. Allegations of bias are ordinarily determined at the level of apprehended bias as an objective question of law. Where the issue of apprehended bias is genuinely arguable, its resolution, as discussed, almost always involves questions of degree which the judge with personal knowledge of the circumstances (fallible as the judge's recollection might be) is best placed to weigh.

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435 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

329 Further, the circumstances in which an arguable case of reasonable apprehension of bias might arise are as wide and diverse as human experience. The law weaves together multiple strands into an overall fabric richer and more nuanced than any one doctrine considered in isolation. Disqualification for apprehended bias is also not applied by any judge in a vacuum. There may be a complex interaction of factors involved.

330 For example, if the issue emerges at an early stage and is apparently arguable, court management practices generally operate, quite properly, to avoid wasting resources of parties on a satellite issue by the expedient of allocation of the case to a judge not subject to the issue. Courts, including this Court, have also routinely endorsed the prudent approach of judicial self-exclusion at an early stage, if possible<sup>436</sup>, because litigation of satellite issues at the expense of parties may involve nothing but unnecessary delay and cost. Equally importantly, however, parties do not get to choose their judge, either directly, or indirectly by specious or trivial allegations of bias. As noted, judges have a duty to sit<sup>437</sup>. And they have a duty of fidelity to the law and to their judicial oath or affirmation. To add to the potential complexity, judges and parties do not always know about an alleged bias issue in sufficient time to avoid formal judicial determination of the issue. Or there may be important considerations of principle or fairness to the parties and other litigants in having the question of bias resolved only after a hearing and by formal judicial determination. The potential factors in play are infinite. They may be transformed on constitution of the court or commencement of the hearing, but do not necessarily all cease at that moment.

331 While appellate and multi-member benches operate by majority decision<sup>438</sup>, apprehended bias, as noted, involves "questions of degree" about which reasonable minds may differ<sup>439</sup>. And, if it comes to it, only the judge the subject of the alleged bias issue can truly know if they can decide the case according to their judicial oath. This is why such applications are made to the judge against whom the bias issue is alleged. It is also why that judge alone decides the issue. If that judge errs, correction by appeal or by writ is available, either immediately, if practicable, or

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436 *Ebner* (2000) 205 CLR 337 at 348 [20].

437 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

438 eg, s 23 of the *Judiciary Act 1903* (Cth); s 16 of the *Federal Court of Australia Act 1976* (Cth).

439 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294, citing *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 16; 32 ALR 47 at 54.

ultimately<sup>440</sup>. Nothing in this undermines the fact that it is the "first duty" of a court, as constituted, to ensure that it has jurisdiction<sup>441</sup>. The convention concerns only how this duty is discharged.

332 Even if, in a court such as the Federal Court, an expansive view is taken of the provision governing majority opinions<sup>442</sup>, so that a decision about bias of a member of the Full Court is "for the purposes of any proceeding ... [a] judgment to be pronounced", this does not mean that if a decision and any consequential order is made by the judge the subject of the allegation of bias alone then there is error.

333 Whether they say they agree or not<sup>443</sup>, the convention that judges exercising co-ordinate jurisdiction are not able to impose their views on the judge the subject of a bias issue, by any exercise of judicial power or otherwise, is sound. This means that, in a multi-member bench, the judges not the subject of the issue of bias must accept the decision of the relevant judge. There is no capacity for those judges to purport to exercise judicial power against their fellow judge. Those judges must discharge their own duty to sit unless they are subject to actual or apprehended bias for some reason. But mere disagreement, even strong disagreement, with the decision of a judge about a bias issue said to disqualify that judge from sitting does not engage the judicial oath or affirmation of the other judges constituting the multi-member bench.

334 The wisdom of this course is that it focuses the decision on the one person who can be taken to know the most about the relevant issue and whose own conscience or state of mind might be involved. It casts the relevant duty to decide on the person the subject of the alleged bias, who generally has a duty to sit if no such bias (apprehended or actual) arises, and who must not sit if they cannot do so in accordance with their judicial oath or affirmation. This course also prevents potentially unseemly and corrosive division between judges exercising co-ordinate jurisdiction. In a human system, involving "human frailty"<sup>444</sup>, the existing

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440 cf Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law & Policy Review* 21 at 22; see also Campbell, "Review of Decisions on a Judge's Qualification to Sit" (1999) 15 *Queensland University of Technology Law Journal* 1 at 3-4.

441 *Re Nash [No 2]* (2017) 263 CLR 443 at 450 [16], quoting *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415.

442 s 16 of the *Federal Court of Australia Act 1976* (Cth).

443 eg, *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 at [50].

444 *Ebner* (2000) 205 CLR 337 at 345 [8].

convention protects the overall integrity of the judicial system better than the suggested alternatives.

335 The existing judicial practice is none the worse for being a convention. Nor does the fact that the convention is not immune from rightful scrutiny mean that the practice is wrong or should be changed.

336 The circumstances in *Unions NSW* disclose one potential difficulty that may arise in a case where the conventional practice is abandoned. In that case, the basis of the suggestion of apprehended bias was legal advice Gageler J had given to the Commonwealth in his previous capacity as Solicitor-General of the Commonwealth. Legal professional privilege in the fact that the advice had been given was waived by the act of counsel for the Attorney-General of the Commonwealth disclosing that fact. But privilege continued in the content of that advice. Only Gageler J and the Commonwealth knew the substance of the advice. Neither was free to disclose the substance to the other members of the Court. The objective reasonableness of the apprehension of bias followed from this lack of information, leading to Gageler J disqualifying himself from the hearing. That is no more than the system working as it should. But even if the content of the legal advice had been disclosed, Gageler J alone could have assessed whether he was able to hear the case in accordance with his judicial oath or affirmation to do so without "affection". The concept of "affection" can undoubtedly extend to a judge's possible "affection" for previous advice given to the person who is now a litigant before them on the same or a similar issue. And in that event even if the other judges, or a majority of them, had concluded that the advice said to give rise to the issue did not in fact involve a reasonable apprehension of bias, the judge the subject of the allegation alone can and must decide if the case is one in which the duty to sit must yield to the duty of fidelity to the judicial oath or affirmation.

337 The circumstances of *Kartinyeri* disclose another potentially difficult issue which would arise if a person other than the judge the subject of the allegation of bias were to decide the issue. In *Kartinyeri* the issue of alleged apprehended bias involved Callinan J. Callinan J provided a detailed description of the circumstances as he recalled them relevant to his initial decision not to disqualify himself from the hearing<sup>445</sup>. But judicial recollection is no more infallible than that of any other person. Following the substantive hearing in *Kartinyeri*, in which Callinan J did sit, a party made a further application to the Court as a whole for his Honour's disqualification. Callinan J then decided to disqualify himself from all further involvement in the matter. Again, Callinan J alone could know whether the duty to sit had to yield to the duty of fidelity to the judicial oath or affirmation. And his Honour was best placed to re-assess the issue of apprehended bias by reference to all information available at the time of the further application. It

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**445** *Kartinyeri v The Commonwealth [No 2]* (1998) 72 ALJR 1334 at 1334-1336 [1]-[26]; 156 ALR 300 at 300-304.

appears that, having done so, his Honour adopted the prudent course of self-disqualification. Again, this exposes the proper working of the system.

338 The point also remains that in both cases where this Court had to confront the issue, it adopted the conventional practice.

339 Further, the question when a court is constituted and seized of the hearing of a matter, be it by a single judge or a multi-member bench of judges, may also depend on its enabling statute or involve a contestable fact. It follows that, in the case of a multi-member bench, identifying the point at which it is said that the court as a whole must hear and decide any issue of bias might not be straightforward. By contrast, the conventional approach provides a court as an institution and an individual judge with the greatest degree of flexibility to decide what course is in the best interests of the administration of justice in any given case. As noted, if there is no issue of principle involved and another judge can hear a case without delay or disruption being caused, the prudent approach of self-disqualification by the relevant judge may be in the best interests of the administration of justice, particularly if the apprehended bias issue is reasonably arguable. But where there is an issue of principle, or it is important that the court not act in any way which might be misconstrued as meeting the demands of a particular party, or where disqualification may result in disruption to a scheduled hearing, it may be in the best interests of the administration of justice for the arguments to be made in open court and reasons for the decision to be given. The current convention enables the response of the court as an institution and the judge as an individual discharging judicial office to be best adapted to the circumstances of any case.

340 The current convention of an issue of bias being raised with and, if necessary, formally determined by the relevant individual judge also reflects the twin faces of the requirement for judicial independence and impartiality – that justice be done and be seen to be done. The law accepts that a reasonable apprehension of bias has the same corrosive potential on the maintenance of the rule of law as actual bias. Further, the effect of the two forms of bias is the same: it vitiates any decision made. The conventional practice enables the judge best placed to know the relevant information to disclose it to the parties with the least formality and potential embarrassment to all involved, including, possibly, third parties. It also enables the judge, with the benefit of having heard the parties, to examine their own conscience to ensure that the duty to sit and adherence to the judicial oath or affirmation are not in tension (in which event, if the tension cannot be resolved, the latter must prevail). A mere change in preference as to judicial practice is not a sufficient basis for the articulation of any new principle of general application.

341 The conventional practice also conforms to the current guidelines published by the Council of Chief Justices of Australia and New Zealand that "in the end the

decision to sit or not to sit must rest comfortably with the judicial conscience"<sup>446</sup>. The conception of the judicial conscience in question being that of the judge the subject of the possible or alleged bias remains sound.

342        It should not be taken from these conclusions that all judicial conventions and practices are "frozen in time"<sup>447</sup>. They are not. But nor should they be lightly abandoned.

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**446** Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed (rev) (2022) at 18.

**447** *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].