

FEDERAL COURT OF AUSTRALIA

CNY17 v Minister for Immigration and Border Protection and Another

[2018] FCAFC 159

Mortimer, Moshinsky and Thawley JJ

28 May, 21 September 2018

Immigration — Protection visas — Fast track reviews — Adverse visa decision automatically referred to Immigration Assessment Authority — Secretary required to give relevant material to Authority — Authority required to have regard to material given to it — Whether material given to Authority was irrelevant and contained prejudicial material — Whether decision of Authority affected by reasonable apprehension of bias by reason of having been given prejudicial material — Obligation of Secretary to form view as to whether material relevant to decision under review — Whether decision of Secretary to give Authority documents determined to be irrelevant an act in excess of power — Migration Act 1958 (Cth), s 473CB.

The appellant applied for a safe haven visa under the *Migration Act 1958* (Cth) (the Act). That application was dealt with under Pt 7AA (the Fast Track Review Scheme), which, by s 473CA, relevantly required the Minister to refer to the Immigration Assessment Authority (the Authority) a “fast track reviewable decision”. The Minister’s delegate decided to reject the application on the basis that they were not satisfied that the appellant was a refugee within the meaning of the Act, following which, a referral to the Authority was made under s 473CA.

Section 473CB of the Act relevantly provided that, in making a referral, the Secretary of the Department (the Secretary) had to give to the Authority certain material. Subsection (1)(c) of that section specifically provided that the material that had to be provided to the Authority included material that was in the Secretary’s possession or control that was considered by the Secretary, at the time of the referral, to be relevant to the review.

Pursuant to that subsection, the Secretary gave to the Authority various documents that contained: references to the appellant having spent time in prison and being convicted of offences committed whilst he was in immigration detention; references to him having been involved in a riot whilst in detention and subsequently being transferred to a correctional facility to face charges following that incident; comments by officers of the Department that stated that the appellant had been involved in many “incidents” whilst in detention and that he had a history of aggressive and/or challenging behaviour when engaging with the Department which might have related to his mental health issues; and a reference to the appellant having had an interview with the “National Security Monitoring Section” (the Impugned Documents).

Section 473DB relevantly provided that the Authority had to review the decision under review by considering the material provided to it under s 473CB.

In making its decision, the Authority stated in its reasons that it had reviewed the material referred to it by the Secretary under s 473CB of the Act, but otherwise did not refer to the material contained in the Impugned Documents. It upheld the delegate's decision, finding that the appellant did not meet the requirements for being a refugee contained in s 5H of the Act, and that the complementary protection criterion in s 36(2)(aa) of the Act was not engaged either.

The appellant sought review of that decision. Relevantly, he contended that the decision was affected by error because a reasonable apprehension of bias arose as a result of the Authority being given the Impugned Documents, which he submitted had no relevance to the issue that had to be decided, but which were prejudicial. Further, the appellant contended that the decision of the Authority was affected by error because the Secretary's decision to give the Impugned Documents to the Authority under s 473CB(1)(c), when those documents were not relevant, was an act in excess of power.

Held: By Moshinsky and Thawley JJ, Mortimer J dissenting: (1) The material in the documents provided by the Secretary to the Authority pursuant to s 473CB(1)(c) of the Act, that was said to be prejudicial, was generally already before the Authority as it was contained in the documents supplied by the appellant in his application for a visa. The only material that was not already before the Authority was the reference in the Impugned Documents to the appellant having had an interview with the "National Security Monitoring Section". But without more, that information was not prejudicial. A fair-minded lay observer would not reasonably apprehend, as a result of the Authority being given that information under s 473CB(1)(c), a lack of impartiality by the Authority in making the decision that it was required to make. [66], [134], [135], [171], [174], [177]

Minister for Immigration and Border Protection v AMA16 (2017) 254 FCR 534, distinguished.

Per Moshinsky and Mortimer JJ: It is not necessary for irrelevant material that is provided to a decision-maker to be highly prejudicial for a reasonable apprehension of bias to arise. [71], [137]

By the Court: (2) The obligation on the Secretary under s 473CB(1)(c) of the Act was to "form a view" as to the relevance of each document, and provide those documents considered to be relevant to the Authority. There was no basis to suggest that the Secretary did not form the view that the Impugned Documents were relevant to the Authority's review. [2], [149], [152]

WAGP v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 151 FCR 413, followed.

By Moshinsky and Thawley JJ, Mortimer J not deciding: (3) A determination that a document which the Secretary gave to the Authority was not in fact relevant does not invalidate the Secretary's decision to give the document to the Authority. [2], [149], [152]

Appeal against decision of Judge Street, [2017] FCCA 2731, dismissed.

Cases Cited

Akiba v Queensland (2018) 263 FCR 409.

ALA15 v Minister for Immigration and Border Protection [2016] FCAFC 30.

AMA16 v Minister for Immigration and Border Protection (2017) 317 FLR 141.

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88.

Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38.
CNY17 v Minister for Immigration and Border Protection [2017] FCCA 2731.
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337.
Immigration and Border Protection, Minister for v AMA16 (2017) 254 FCR 534.
Isbester v Knox City Council (2015) 255 CLR 135.
Johnson v Johnson (2000) 201 CLR 488.
Jones v Australian Competition and Consumer Commission (2002) 76 ALD 424.
Kioa v West (1985) 159 CLR 550.
Lacey v Attorney-General (Qld) (2011) 242 CLR 573.
MZXLD v Minister for Immigration and Citizenship [2007] FCA 1912.
NIB Health Funds Ltd v Private Health Insurance Administration Council (2002) 115 FCR 561.
O’Sullivan v Medical Tribunal (NSW) [2009] NSWCA 374.
Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 92 ALJR 481.
Potkonyak v Legal Services Commissioner (No 2) [2018] NSWCA 173.
Refugee Review Tribunal, Re; Ex parte H (2001) 75 ALJR 982.
SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80.
WAGP v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 151 FCR 413.
Webb v The Queen (1994) 181 CLR 41.

Appeal

L De Ferrari SC with *M Guo*, for the appellant.

N Wood, for the first respondent.

21 September 2018

Mortimer J.

1 I have had the advantage of reading Moshinsky J’s reasons for judgment in draft. I gratefully adopt his Honour’s summary of the background to the appeal, the issues arising and the arguments made by the parties.

2 In my opinion the appeal should be allowed, on the basis of ground 1 of the notice of appeal, for the reasons I set out below. In relation to ground 2, I respectfully agree with Moshinsky J’s reasons, especially at [143], and reject the premise of this ground — namely, that the impugned material was relevant to the Immigration Assessment Authority review. As to ground 3, I also respectfully agree with Moshinsky J (at [149]) that there is no basis, on the facts of the present case, to suggest that the Secretary did not form the view that the impugned material was relevant to the review. As his Honour notes, the Secretary’s statutory task was to “form a view” about the relevance of material and if, in the Secretary’s opinion, it was relevant to the review, to give it to the IAA. If the appellant sought to contend to the contrary (that is, the Secretary did not form the requisite opinion) he bore the burden of proving that on the balance of probabilities. If, alternatively, it was contended by this ground that

the conduct of the Secretary in giving the impugned material to the IAA exceeded the power conferred on the Secretary by s 473CB(1), then the ground would have needed to be differently formulated (to challenge the absence of a lawful basis for the Secretary's opinion), but even if established, there would have been a question as to how this was said to affect the exercise of power by the IAA. In the circumstances, these issues need not be determined.

- 3 In summary, my reasons for allowing the appeal on the basis of ground 1 are:
- (a) The Minister submitted the Full Court's decision in *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 could be distinguished on its facts. I do not consider that is the issue.
 - (b) An application of the principles set out in *AMA16*, and other well-established authorities concerning apprehended bias, occurs at a time **before** the IAA has made its decision. The timing of the assessment of whether there is a reasonable apprehension of bias is important. Although it is the ultimate exercise of power which is affected, avoiding apprehended bias is a component of the fair process that the decision-maker is required to afford to a person affected by the exercise of power. The obligation to act fairly (on either limb of the natural justice rule) attaches to what occurs before the exercise of power.
 - (c) The context of the statutory scheme, both as to the Secretary's state of mind about the material, and the duty of the IAA officer to consider it, are relevant to the assessment of whether a reasonable apprehension of bias arises in all the circumstances.
 - (d) In this case, the impugned material sent by the Secretary was more than "contextual", and was considerably more than the appellant had disclosed himself in his protection visa application. It was prejudicial to him, and adverse to his interests on the IAA review.
 - (e) On receipt of the impugned material from the Secretary, the hypothetical, reasonable, lay observer might apprehend that the officer of the IAA whose task it was to review the refusal to grant the appellant a protection visa might not bring an impartial mind to that task, because of the contents of that material.

AMA16

4 The Full Court in *AMA16* has set out the principles applicable to apprehended bias, and this Court was urged by both parties to adhere to those principles. No submission was made that this Court should depart from the approach taken in *AMA16*. Rather, the Minister sought to distinguish the application of the principles set out by the Full Court on the facts.

5 Moshinsky J has described the decision in *AMA16* at [128]-[130] of his Honour's reasons and I respectfully adopt his Honour's summary.

6 As in the present appeal, in *AMA16* the argument of the visa applicant concerning apprehended bias relied on what has been described as the "fourth category" of apprehended bias, as outlined by Deane J in *Webb v The Queen* (1994) 181 CLR 41. That category is described as "disqualification by extraneous information", where "knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias": *Webb* at 74. Deane J was in dissent on the outcome in *Webb*, the majority having found no reasonable apprehension of bias arose from the fact that, in a murder trial and

on the day of the judge's summing up, a juror had left a bunch of flowers at the courthouse to be given to the deceased's mother. As Deane J pointed out in *Webb* at 74, the fourth category of case where disqualification may be necessary because of "extraneous information" known to the decision-maker overlaps with his Honour's third category, being association — namely, some kind of direct or indirect relationship, experience or contact with a person or persons interested in or otherwise involved in the proceeding. The overlap can be seen in the present appeal. The "association" caused by the forwarding of the impugned material to the IAA was that the IAA was drawn into, and privy to, the opinions formed, and comments made, by officers within other agencies about the appellant. The IAA was drawn, indirectly, into a relationship with those making decisions about the suitability of the appellant for release from detention, whether he posed a security risk and the like.

7 In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [24], Gleeson CJ, McHugh, Gummow and Hayne JJ accepted that Deane J's four categories provided a convenient frame of reference, leaving open whether the categories should be seen as comprehensive, and emphasising their utility may vary depending on context. For present purposes, it is enough to accept that the kind of apprehended bias in issue in this appeal falls squarely within the fourth category, but as I have noted, there is an overlap with disqualification by reason of association.

8 Recently in *Akiba v Queensland* (2018) 263 FCR 409 at [46]-[78], I set out the applicable principles relating to apprehended bias, in circumstances of an allegation of apprehended bias against a judge. There are clearly some differences of emphasis, and perhaps in the nature and content of the applicable principles. However, two matters to which I referred in that decision are in my opinion equally applicable to the present circumstances, where the allegation relates to an administrative decision-maker.

9 The first was at [48] of my reasons where, by reference to the Full Court's decision in *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 at [35]-[36] (Allsop CJ, Kenny and Griffiths JJ), I outlined three matters of particular relevance to the application in *Akiba*. They are of relevance to the resolution of ground 1 of the appeal, with appropriate modifications:

- (a) The need for identification of precisely what matters might lead the IAA to decide the review other than on its legal and factual merits;
- (b) The existence, and articulation, of a "logical connection between the matter(s) and the feared deviation from a course of deciding" the review on its merits; and
- (c) The hypothetical fair-minded lay observer, around whom the test revolves, is to be attributed with "appropriate knowledge of relevant matters so as to be in a position to make a reasonably informed assessment of the likelihood of apprehended bias".

10 Secondly, at [63] of my reasons I drew attention to the following passage in the reasons for judgment of Gageler J in *Isbester v Knox City Council* (2015) 255 CLR 135, where his Honour described (at [59]) the determination of an allegation of apprehended bias as involving "three analytical steps":

Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that

deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.

11 Putting to one side whether the third of his Honour's steps represents a new articulation of the established test, I respectfully consider this is a useful summary of how to determine if an apprehension of bias has arisen. The task, as the plurality in *Isbester* pointed out at [20], is largely a factual one.

12 Contrary to the submissions of the Minister on this appeal, the correct issue is not whether *AMA16* can be distinguished on its facts because of the nature of the information given to the IAA in *AMA16*, when compared to the nature of the information given to the IAA in the present circumstances.

13 This Court's task is to apply the principles, reflected in *AMA16* and in other authorities, to the evidence, and to reach a conclusion on that basis. The task being essentially a factual one, comparisons with other factual situations inevitably distract. The Court can take as a starting point acceptance of the principles and observations set out in the reasons of Griffiths J in *AMA16*, being the primary set of reasons, with which Dowsett and Charlesworth JJ substantially agreed. His Honour's reasons were not impugned in any way in this appeal and I respectfully agree with many aspects of them, as I indicate later in these reasons.

The timing for the assessment of whether an apprehension of bias arises

14 In *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [2], Allsop CJ said:

The question whether or not an administrative tribunal has conducted itself in a way that displays apprehended bias is assessed by reference to the hypothetical construct of the informed fair-minded observer. ... The words "fair-minded", however, should be recognized for the central part they play in the assessment. Apprehended bias, if found, is an aspect of a lack of procedural fairness. The rules to assess whether apprehended bias was present form part of the body of principles, rooted in fairness, and directed to the necessity for executive power to be exercised fairly and to appear to be exercised fairly, in support of the maintenance of confidence in the administrative process, and judicial review of it. The relevant enquiry is directed not to the correctness of the outcome, but to the apparent fairness of the *process* (the process being part of the exercise of power, integral to the legitimacy of the outcome): *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88 at 97 [19]; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638 at [209]; and *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40; (2002) 115 FCR 561 at 583 [84].

15 It is worth returning to what was said in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, not at [19], but at [16]. In *VEAL* there was an argument that because the Tribunal had in its reasons disclaimed reliance on a "dob-in" letter, there was no denial of procedural fairness by the non-disclosure of that letter, or the substance of that letter. Relevantly to the present appeal, one of the points made by the plurality was that this argument did not acknowledge the purpose of principles of procedural fairness. After referring to the approach of Brennan J in *Kioa v West* (1985) 159 CLR 550 at 628 to disclosure of material that is "credible, relevant and significant", the plurality said:

Moreover, what is meant by “credible, relevant and significant” must be understood having regard also to the emphasis that his Honour had given earlier in his reasons to the fundamental point that principles of natural justice, or procedural fairness, “are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise”. Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

(Citations omitted and emphasis added in underline.)

16 And at [17]:

It follows that what is “credible, relevant and significant” information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information.

(Emphasis added.)

17 Although *VEAL* concerned procedural fairness, as the Chief Justice noted in *SZRUI*, the underlying legal value or norm is common to both procedural fairness and the rule against bias (actual or apprehended): namely, the fair exercise of public powers. Each limb may deal with different aspects of fairness, but as the plurality in *VEAL* noted, the principles govern what a decision-maker must do in the course of making a decision, or exercising a power, and are not focussed on the outcome of the exercise of power.

18 I consider this question of the timing of when the Court assesses whether an apprehension of bias has arisen is of some importance. First and foremost, it means the Court does not look to what the IAA said in its reasons for decision. Second, it means the Court must place the hypothetical lay observer, and the impression such a person might form, at a relatively early stage of the IAA review, after receipt of the material from the Secretary, and then assess what apprehension might arise once the hypothetical lay observer understands the IAA is considering this material as it is working through its assessment, on the papers, of the appellant and of his claims.

19 In my opinion, placing the hypothetical lay observer at this point in the review process supports the proposition that the requisite apprehension might arise. As the IAA is working through the material (thoroughly and conscientiously, the Court should assume) the reviewer will come across the material I discuss in more detail below. At the time of forming views about the credibility of the appellant, about the reliability of his narrative, about his motives for seeking asylum (which is inevitably part of a credibility assessment) and about whether to grant him a visa (with the consequence he will be released into the Australian community), the reviewer is reading material that is plainly adverse to the appellant’s interest in having these matters decided favourably to him.

20 An assessment of whether or not to believe a person is a subjective, and often impressionistic, exercise. Factors conscious and unconscious are involved. A fair minded lay observer would understand the subjectivity of the process — it being a common human experience — of deciding whether or not to believe what another person says. A fair minded lay observer might apprehend the IAA’s credibility conclusions were reached (at least unconsciously, or

sub-consciously) having taken into account the prejudicial material about the appellant and his past behaviours, and the risks he was alleged to pose.

21 If (contrary to my opinion) confirmation of the apprehension could be sought from the reasons, I consider it is there because the IAA plainly did not accept the appellant to be credible. However, this explanation illustrates why it is wrong to look at the reasons of a decision-maker, because then the Court is assessing fairness by reference to outcome, which is precisely the point made by the plurality in *VEAL* about what should not be done.

The content of Pt 7AA relevant to the issue

22 As Griffiths J noted in *AMA16* at [65], by reference to the plurality’s reasons in *Isbester* at [20] and [23], the relevant legal, statutory and factual framework in which a claim of apprehended bias is made is critical to any determination of whether the claim should be upheld.

23 I agree with Moshinsky J (at [123]) that the legislative scheme does not disclose an intention to exclude the rule against bias from the operation of Pt 7AA, both as to apprehended and actual bias. Unlike Dowsett J in *AMA16* at [2], I see no basis to construe the word “bias” in s 473FA as meaning only actual bias. The word “bias” has a well understood meaning in public law. In a statute disclosing an intention to delineate expressly how public law principles apply to exercises of power in that scheme, I consider it can be assumed the drafters, and parliament, well understood that in public law, the concept of “bias” has two dimensions: see *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

24 Several aspects of the scheme in Pt 7AA are critical. The first is the requirement, imposed by s 473CB(1) on the Secretary to give the “review material” to the IAA. The Secretary is the fundamental source of information for the IAA. The Secretary must give the IAA, amongst other review material, “any other material that is in the Secretary’s possession or control and [that] is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review”: s 473CB(1)(c).

25 The Secretary’s view of the relevance of this “other material” is intended by the scheme to affect the task to be performed by the IAA. So much is apparent from the second aspect of the scheme. The IAA must consider the material provided to the IAA under s 473CB: see s 473DB(1).

26 Third, the scheme’s default position — that is, the position which is intended ordinarily to exist when the IAA conducts a review, is that the review will be undertaken without accepting or requesting new information and without interviewing the applicant: s 473DB(1). The scheme does not intend, ordinarily, that an applicant have any further opportunity to address, explain, correct or supplement the review material. That includes material provided by the Secretary pursuant to s 473CB(1)(c). The function of a review on the papers, such as the review contemplated by Pt 7AA, also carries with it a great emphasis on documentary material, and (ordinarily) requires the IAA to draw all it needs to draw to perform its task from the documentary review material. This includes the central function of deciding whether or not to believe what an applicant has said in the review material. The scheme contemplates that in making such an assessment, all the IAA will have is documents and that it will not, as a default position, hear oral testimony. The documents provided as review material are thus elevated by the scheme.

27 It should be noted that in the present appeal, unlike in *AMA16*, there was an express concession by the Minister that the Secretary considered the impugned documents to be relevant to the IAA review: cf [36] in *AMA16*.

28 Further, the Court can and should assume that the IAA knows and understands how Pt 7AA operates in terms of material provided by the Secretary. So too, should it be assumed that the hypothetical reasonable lay observer has the same understanding. That is, a properly informed lay observer would be aware that any material given to the IAA by the Secretary carries with it the imprimatur of the Secretary as being material “relevant” to the IAA review: that is, as material capable of having probative value, one way or the other, on whether the IAA should or should not confirm the decision to refuse to grant an applicant a protection visa.

29 This context is also relevant to considering how the properly informed lay observer would understand the IAA’s statutory task in examining the material sent to it by the Secretary. In considering the material given to it by the Secretary, as it must, the IAA does not actively engage with the applicant: the review is to be conducted on the papers unless one of the exceptions to this default position applies. Therefore the overwhelming focus of the decision-maker is on what has been provided by the Secretary, in the context of an understanding the Secretary considers the information she or he has provided to be relevant to what the IAA has to decide.

The nature of the material sent by the Department

30 The appellant submitted:

Amongst the materials given by a delegate of the Secretary to the IAA were:

- a. extensive pages of internal Department emails and other material referring to the Appellant having been charged for damaging Commonwealth property;
- b. repeated references to the Appellant having spent time in a prison;
- c. repeated assertions that the Appellant was involved in a “riot”;
- d. assertions that the Appellant had “a history of aggressive and/or challenging behaviour when engaging with the department”, and had been involved in “many incidents while in detention”; and
- e. an imputation that he was a national security risk.

(Citations omitted.)

31 I accept that submission. As to these five matters, I give the following examples from the evidence.

32 As to the first matter, the material given to the IAA included the prosecution report prepared by the Commonwealth Director of Public Prosecutions in relation to the appellant, showing the conviction and sentence of the appellant for contravention of s 29(1) of the *Crimes Act 1914* (Cth), for the offence of destroying or damaging Commonwealth property. This report also disclosed the appellant pleaded guilty to the offence, however obviously no context for that plea, from the appellant’s perspective, could be given. Neither the summary of facts given to the Magistrate, nor the sentencing remarks, were provided.

33 As to the second matter, on 12 November 2015, an email was sent to what appears to be the “TPV” section of the Department (or an individual within it), stating:

He [the appellant] was today transferred from Christmas Island to a WA Correctional facility, following his participation in the recent incident at Christmas Island.

34 The obvious implication from this statement is that the appellant's behaviour was at a level which meant he could not be held in an immigration detention facility, but needed to be held in a more secure facility, or that his behaviour on Christmas Island had been of a kind that could result in the appellant being charged with a criminal offence, or was criminal in nature. Other documents in the email chain make it clear the appellant was held at Albany prison.

35 There are entries which relate to other points in time, but also disclose the appellant was transferred from an immigration detention facility to a correctional facility on more than one occasion, and that in the same period he was "under investigation" and at times "of interest" to an office called "Det Intel":

05/02/15 — SLO advised that [appellant] no longer of interest to Det Intel. Escalated to IMA BVE team
 23/03/15 — interview with National Security Monitoring Section
 20/03/15 — Trans from YHIDC to Casuarina Prison following incident
 28/03/15 — Trans to CI
 29/09/15 — s46A bar lift
 23/10/15 — Esc to s195A
 26/10/15 — Esc to NSSCRT, CI SLO, re on-going investigations
 06/11/15 — Invite to apply rec'd by CM; NOT delivered (riot) — see ADD2015/1515234
 12/11/15 — Trans to WA correctional facility following incident on 9/11/2015

36 Later on the same page, the following entry appears:

Key reasons for continued detention:
 Under AFP investigation for CI riot 09/11/2015

37 The same page contains the extract at [44] below in which the appellant is described as having "aggressive and/or challenging behaviour".

38 The plain inference from these entries is that the appellant has been transferred from immigration detention to detention in a correctional facility, and is being kept in a correctional facility, because of his behaviour, which is of concern to Australian authorities at least in part because it may be criminal, or dangerous, behaviour.

39 Another description of the appellant's relatively long period of time kept in a prison as opposed to an immigration detention facility appears as follows:

I do note that Mr [name redacted] is still in Albany Prison. I've **attached** the most recent Case Review completed by his DIBP Case Manager (as of 16/03/2016). Apparently, the Superintendent from ABF has recommended that he remain at Albany Prison until AFP finalise their investigation into the Christmas Island riot. He has received the invitation to apply for TPV/SHEV in Arabic, and has accepted PAIS assistance. He has also noted that he hopes to lodge his application soon. I'm of the view that he can lodge it from prison, but if that is not possible, it would be good to definitively ascertain how long he will be imprisoned for.

40 This kind of communication conveys to the IAA an "official" view (from the Australian Border Force Superintendent) about the risks posed by the appellant's behaviour.

41 As to the third matter, in the documents discussing the offence for which the appellant was convicted there are the following kinds of descriptions:

He has a number of matters relating to damage of Commonwealth Property as a result of rioting on Christmas Island.

42 Other documents also refer to the appellant's involvement in a "riot", which is a term that carries particular connotations with violence and lawlessness.

43 I note some documents also describe the appellant as having taken part in a "peaceful protest". While this kind of information may lack the connotations of participation in a riot, it nevertheless is capable of giving rise to an apprehension that the appellant is a "trouble maker", or a person who actively challenges authority.

44 As to the fourth matter, the email chains in evidence contain the following kinds of communications:

Behaviour:

Mr [name redacted] has a history of aggressive and/or challenging behaviour when engaging with the department this could be due to frustration in held detention and or his mental health issues.

45 These sorts of entries convey a number of impressions. The appellant is a troublemaker. He is aggressive. In particular, he is aggressive to the authorities. He has mental health issues — without any specification of what these are, or how they arose (for example from torture or trauma, or from some other cause). These are the kinds of matters easily capable of affecting the view taken of the appellant's reliability as a historian and a witness, as well as his credibility.

46 Still dealing with the fourth matter, there are other emails which clearly convey the impression that those in positions of authority consider the appellant repeatedly behaves in ways which require extra supervision and control. For example:

The criminal matters are in relation to involvement in rioting on CI. Correspondence on TRIM at [file number redacted] indicates that Magistrate Court in Perth passed down a sentence in relation to damage of Commonwealth property. However, we are mindful that records under Mr [name redacted] Criminal Justice Service on CCMD notes multiple incidents occurred. We just wish to check if the sentence covers off all criminal matters for this client or whether there is anything else pending decision.

47 These sorts of comments also leave the reader in a state of uncertainty about what else may be alleged against the appellant, and what else he might have done. The reader is encouraged to speculate that there may be more bad behaviour than the particular incidents identified.

48 This impression could be confirmed by other communications:

Mr. [name redacted] has been considered on several occasions for release from detention as the holder of a Bridging E visa, the latest on 23/10/15. He has been involved in many incidents while in detention and will be considered as a Cat 2 BVE consideration.

49 This information discloses that those in positions of authority have decided not to release the appellant into the Australian community. This compounds the impression that he poses a high level of risk to the community, but no detail or explanation is provided which might offset or contextualise that adverse impression. There are several other examples of such comments by persons in

authority and with decision-making responsibility, about the appellant, which convey the impression that the appellant continued to be assessed as a person who posed risks:

On 12/11/15, Mr. [name redacted] was transferred from Christmas Island IDC to a correctional facility and detained under s189(1) of the Migration Act. His placement in a correctional facility will continue to be monitored by Australian Border Force.

Mr. [name redacted]'s health and welfare needs are currently provided for at Albany Regional Prison. CM recommended review of placement since AFP has not placed any charges. Superintendent from ABF recommend detainee to remain at Albany until AFP finalize their CI riot investigation.

50 I take the abbreviation "ABF" in the second paragraph to be a reference to the Australian Border Force, as set out in the first paragraph. The role of officers assigned to that entity in matters concerning the liberty of the appellant, and where he was to be detained, and from what statutory basis their role in relation to his detention in a correctional facility is derived, remains wholly unclear.

51 As to the fifth matter, examples from the information reveal several aspects of this category of material. In a document headed "case review", which appears intended to provide an occasion for the review of the appellant's circumstances as a detainee, in the chronology of what has happened to the appellant since he arrived in Australia (extracted in part above at [35]), there is the following entry:

23/03/15 — interview with National Security Monitoring Section

52 Again, there are no details, no explanation, and no context. All that is conveyed is that a person or persons holding some kind of office or authority considered the appellant to be a person of interest to the "National Security Monitoring Section". There is no evidence about this section — what it is, under what legislative scheme it is constituted or subject to (if any), but what a hypothetical reasonable lay observer would know is that the term "National Security" is one which is used in relation to people who are alleged to pose threats to the Australian community at a serious level, usually involving violence and in a context where the word "terrorism" is also often found. The hypothetical lay observer would also understand that the use of the word "Monitoring" suggests that there is an officer or officers within the Department (or within government more broadly) with a function of keeping an eye on identified people, and that the appellant has been so identified. The hypothetical lay observer is likely to understand that, in the lawful and proper discharge of such a function, there would be some basis for the appellant to be interviewed. The basis is not specified, and no context is given, so that all is left is a general, prejudicial, suspicion that the appellant is a security concern.

53 There is also information about the appellant's case being classified as initially needing attention from the "Sensitive Cases Section" of the Department, but then being recommended for "de-escalation" out of this section. What role that section performs, and who decides whether a person's visa application is transferred to that section for management, was not revealed by the evidence. The reasonable observer would not be attributed with knowledge of the work of that section — there was no evidence the IAA was informed about the work of that section. However, the impression conveyed that the appellant's case was out of the ordinary and "sensitive" is again one which suggests there is a significant level of official concern about the appellant.

54 What the appellant disclosed, in his protection visa application, was the following (capitals in the original):

AWAITING TRIAL ON CHARGES OF SPITTING AT A GUARD & BREAKING A WINDOW, FOLLOWING DEATH OF FAIZAL ON CHRISTMAS ISLAND.

55 That disclosure was made on 1 September 2016. Thus, this was not a reference to the appellant's earlier conviction, on a guilty plea, of an offence pursuant to s 29(1) of the *Crimes Act* for damaging Commonwealth property. That conviction had occurred on 26 February 2016, and related to an incident on 20 March 2015. The February 2016 conviction appeared to be disclosed by the tick in a box on the protection visa application form. However, it does not appear that any details of that earlier conviction are given. Nevertheless, the delegate's decision refers to the February 2016 conviction and it was therefore before the IAA from that source. The delegate considered that the fact of this conviction could be relevant to s 5H(2) of the *Migration Act 1958* (Cth), but ultimately decided that it was unnecessary to examine the matter any further. Section 5H(2) is a statutory exception to the circumstances in which a person will be found to be a "refugee" as defined in s 5H(1). Subsection (2) resembles Art 1F of the Refugees Convention, and provides:

- (2) Subsection (1) does not apply if the Minister has serious reasons for considering that:
 - (a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
 - (b) the person committed a serious non-political crime before entering Australia; or
 - (c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

56 How the delegate could possibly have considered an offence against s 29(1) of the *Crimes Act*, for which the appellant was given a good behaviour bond and ordered to pay a relatively small amount of reparation, could be relevant to any consideration of s 5H(2) is difficult to understand.

57 These disclosures appear on the protection visa application form under a heading entitled "Character". The list of matters there are plainly intended to alert decision-makers to grounds which might exist to refuse to grant a protection visa, whether under the *Migration Act* (eg s 501(1)) or by reason of the "character" criteria required to be satisfied before a visa can be granted (eg — Public Interest Criterion 4001 in Sch 4 to the *Migration Regulations 1994* (Cth)).

58 What impression would a hypothetical lay observer be left with from this material? In my opinion, a strong impression that the appellant was not trustworthy, that he was aggressive towards authority, that he challenged authority, that he was a person of interest to officers within the Commonwealth Government who were dealing with issues of sensitivity and of national security, that he had a disregard for Australian law and that overall, there were considerable, sustained concerns at an official level within the department and within other agencies (such as the Australian Border Force, the AFP and the "National Security Monitoring Section") that the appellant posed a risk to the safety of the members of the Australian community and needed to continue to be held separately from the Australian community. The latter matter is of

considerable significance, since the task of the IAA was to decide whether the appellant should be granted a protection visa, which would result in his release into the Australian community.

A reasonable apprehension arose

59 I respectfully adopt [72] of the reasons of Griffiths J in *AMA16*:

Apart from a sweeping reference to these APS instruments, the Minister pointed to no specific provision or provisions which would justify a finding that the fair-minded lay observer might view the Reviewer as having the capabilities of either the judicial member of the Tribunal in *O'Sullivan* or those of the non-judicial members in that case having regard to their obligation to act in accordance with the judicial member's direction on certain legal matters. As an aside, even though I have rejected the tender of further evidence concerning the IAA Reviewer's qualifications, including that she was qualified to practice as a solicitor, I do not consider that such a legal qualification alone would attract the approach taken by the NSW Court of Appeal in *O'Sullivan*.

60 The Minister did not make a similar submission in the present appeal, but the point is still a relevant one. Division 8 of Pt 7AA deals with the establishment of the IAA within the Migration and Refugee Division of the Administrative Appeals Tribunal. It is to be constituted by a President, a Division Head, a Senior Reviewer and other Reviewers. The *Migration Act* does not prescribe any minimum qualifications for reviewers. It does not prescribe any security of tenure applicable to the office of Reviewer. It does not prescribe any particular removal provisions. Rather, by s 473JE(1), the Senior Reviewer and other Reviewers are to be persons engaged under the *Public Service Act 1999* (Cth). I respectfully agree with the view expressed by Griffiths J above that there is no specific provision or provisions which would justify a finding that the fair-minded lay observer might view a Reviewer as having the capabilities of a judicial member of the Tribunal in a case such as *O'Sullivan v Medical Tribunal (NSW)* [2009] NSWCA 374.

61 It is also important that, as the Full Court pointed out in *AMA16* (at [4], [78] and [99]) and as I have explained above, when material is given to the IAA by the Secretary, it is given pursuant to a statutory duty imposed on the Secretary to give the IAA such information in the possession or control of the Secretary that is considered, by the Secretary, to be relevant to the review: see s 473CB(1)(c). Knowledge of such a key aspect of the statutory scheme can be attributed to the hypothetical lay observer, with the result that it is not simply the nature of the material which might lead that observer to conclude the IAA might not bring an impartial mind to the determination of the appellant's review, but also the fact that the IAA will be aware that the Secretary, a critical office holder under the legislative scheme, considered the impugned material to be relevant to the task to be performed by the IAA.

62 Of course, objectively, the material was irrelevant. The Minister submitted that the less relevant the "extraneous" material (picking up the term from *Webb*), the less tenable any contention that the requisite "logical connection" exists between the material and "the feared deviation from the course of deciding the case on its merits". The Minister cited *Isbester* at [21] for this argument. *Isbester* is certainly an authority for the proposition that the "fear" for the purposes of assessing apprehended bias is a fear "of a deviation from the true course of decision-making". That fear can arise irrespective of the legal relevance of the impugned material to the decision in issue. Indeed, a central

aspect of several kinds of apprehended bias is that matters irrelevant to the decision-maker's task will influence the decision. That, for example, is the whole point of apprehensions of bias based on association between the decision-maker and a party or witness.

63 As the evidence shows, the delegate erroneously considered the appellant's conviction relevant to s 5H(2). I do not consider that where the authorities refer to a "logical" connection between the material and the feared deviation from impartiality, this requires the Court to embark on an investigation of the relevance of the impugned material in a legal sense.

64 For that purpose, the fact that the conveying of the information from the Secretary to the IAA carried with it the premise that it was relevant to the review contributes to the existence of the apprehension. The hypothetical observer would understand the IAA would start with the assumption that the Secretary thought the impugned material was relevant to its task, and if performing its function appropriately, would be unlikely to ignore it, or not read it. Indeed, the hypothetical observer would apprehend the IAA might give weight to the material, since the Secretary had formed the view it was relevant.

65 I return then to the steps set out by Gageler J in *Isbester*, recalling my opinion that the time at which these steps are to be applied is at or shortly after the receipt by the IAA of this material, while it was conducting its review of the appellant's claims "on the papers".

66 The factor which might cause the appellant's review of the delegate's decision to be decided otherwise than as the result of a neutral evaluation of the merits of his review application is the receipt of the impugned material by the IAA, on the basis (pursuant to s 473CB(1)(c)) that the Secretary considered the material relevant to its review. The impugned material was legally irrelevant, prejudicial and adverse to the appellant in the ways I have described above. A hypothetical lay observer might apprehend that the reading and consideration of that material by the IAA (as required by s 473DB(1)) might cause the IAA to deviate from a neutral evaluation of the appellant's evidence and of his claims, because of the way that material fixed the appellant with certain characteristics, where those characteristics were capable of affecting both the ultimate question (if he should be granted a visa to be released into the Australian community) and questions along the way (whether he should be believed in what he said in support of his protection visa application). Third, there is a reasonable basis for such an apprehension to arise because of the official source and quality of the material, and the task of the IAA involving a decision that has the effect of releasing the appellant into the Australian community.

67 If, contrary to the view I have expressed, it was permissible to examine the content of the IAA's reasons as part of determining whether a reasonable apprehension of bias arose, then in my opinion the contents of the decision would confirm the apprehension.

68 It is true that the IAA does not refer to the impugned material. That fact makes the apprehension more likely rather than less, in my opinion. The hypothetical lay observer reading the decision is left wondering what effect what was said about the appellant by officials in the documents might have had. The hypothetical lay observer is not however left wondering about what the IAA thought of the appellant — the IAA thought he was a liar. It did not use that word but that is the effect of its findings: that he was not trustworthy in his evidence. These were not hesitant or mild findings. In its reasons of

12 May 2017, in respect of a core aspect of the appellant’s case that he was stateless, the IAA found that the appellant had “provided substantially inconsistent evidence”, aspects of the evidence were “hard to accept”, and the explanations for where he had been living prior to departure for Australia were not “plausible”.

69 I have set out above my view that a factual comparison between cases, such as the Minister invited this Court to undertake, distracts from the main issues in the appeal. Further, and in contrast to Moshinsky J (at [136]), I would not necessarily characterise the information in the present case as any less prejudicial than that in *AMA16*. In my respectful opinion, one needs to be careful about describing information by placing an adjective in front of the word “prejudicial”. That is for at least two reasons. First, as appears to have occurred in the Federal Circuit Court’s decision in this case, it can lead to an impression that the threshold set for determining whether a reasonable apprehension of bias exists includes the adjectival phrase when it does not. Second, while there can be no doubt that the charge against the appellant in *AMA16* was serious, what was being said about the appellant by departmental officers and contractors was equally serious. For my own part, the fact that the charge in *AMA16* involved a sexual aspect, in the context of the determination of a protection visa process, is not a matter necessarily more prejudicial than statements about an applicant’s behaviour giving rise to implications about unsuitability for release into the community, or implications she or he was being investigated for security concerns, or criminal conduct. Indeed, the contrary might be true given the statutory criteria for the grant of a protection visa. However, these sorts of comparisons are something of a distraction. The real question is: what might a reasonable hypothetical lay observer think about whether the IAA officer might not bring an impartial mind to the appellant’s review because of the information the IAA officer had considered?

The Federal Circuit Court reasons

70 I consider the Federal Circuit Court erred in not accepting the appellant’s contention that the decision of the IAA was affected by apprehended bias and should be set aside.

71 I accept the appellant’s submission that, in finding that some of the materials which I have described above had some “relevance” to the task of the IAA on review, the Federal Circuit Court was in error. Further, I accept the appellant’s submission that the formulation by Deane J in *Webb* of the fourth category (accepting these “categories” are not fixed rules but rather to be used as a guide) does not impose a threshold that material must be “highly” prejudicial. As the appellant submitted, another difficulty with such an adjective is that it tends to frustrate the operation of the “double might” nature of the approach to the existence of apprehended bias. The Federal Circuit Court was in error to impose such a requirement.

72 However these were errors, albeit important ones, along the way to the principal error, which was the failure to find that the decision of the IAA was affected by apprehended bias and should be set aside.

Conclusion

73 In *AMA16* at [83]-[84], Griffiths J deals with some of the possible scenarios if

the IAA is given material which, on reflection, it accepts is prejudicial and irrelevant. His Honour found at [84] it was unnecessary to resolve these issues in *AMA16*. The same is the case on this appeal.

74 However, it is important to note that those issues do need to be considered and addressed. It may be that once material such as the impugned material in this appeal is before a member of the IAA, the proper course is for that member to disqualify herself or himself from the particular review. Alternatively, it may be that such material should be disclosed and an applicant given an opportunity to make submissions about what should occur. In *AMA16* there was some debate about the powers of the IAA to take such a course.

75 What is apparent from the facts of this appeal, and the facts of *AMA16*, is that there is a real problem with the transmission of information between the Secretary and the IAA, which should be promptly and carefully addressed.

76 What also needs to be addressed, arising out of the way this appeal was conducted, is that on any judicial review before the Federal Circuit Court at first instance, there should be absolute clarity about what material was before the IAA, and how that occurred.

77 I would allow the appeal, set aside the orders of the Federal Circuit Court with costs, and remit the matter to the IAA, differently constituted, for determination according to law.

Moshinsky J.

Introduction

78 The appellant, who is a Faili Kurd from Iraq, arrived in Australia by boat in August 2013. He subsequently applied for a Safe Haven Enterprise (subclass 790) visa (a **safe haven visa**), being a form of protection visa. His application was refused by a delegate of the first respondent (the **Minister**). That decision was affirmed by the Immigration Assessment Authority (the **Authority**).

79 The appellant applied to the Federal Circuit Court of Australia for judicial review of the Authority's decision. The appellant contended that, amongst other things, the decision of the Authority was affected by apprehended bias by reason of the Authority receiving and considering prejudicial material that had been provided to it by the Secretary of the Department of Immigration and Border Protection (the **Department**). The Federal Circuit Court rejected this contention and dismissed the application for review. The appellant appeals to this Court from the orders of the Federal Circuit Court.

80 The appellant's notice of appeal contains the following three grounds:

1. The Federal Circuit Court erred in failing to find that the presence of prejudicial material before the [Authority] gave rise to apprehended bias.
2. The Federal Circuit Court erred in failing to find that the Appellant was denied procedural fairness.

Particulars

On a proper construction of Part 7AA of the *Migration Act 1958* (Cth), the [Authority] was obliged to disclose the prejudicial material to the Appellant and give him the opportunity to rebut, qualify or comment upon it.

3. The Federal Circuit Court erred in failing to find that the [Authority]'s decision was made in excess of jurisdiction.

Particulars

The excess of jurisdiction arose from the Secretary providing certain material that was not relevant to the [Authority]'s decision.

81 For the reasons that follow, in my view each of these grounds is to be rejected.

Background facts

82 The following summary of the background facts is based on the documents in the Appeal Book.

83 The appellant arrived in Australia by boat in August 2013. He is a Faili Kurd from Iraq. He was detained in immigration detention at Christmas Island.

84 On 20 March 2015, the appellant was involved in an incident at the Christmas Island immigration detention centre (the **March 2015 Incident**), which led to the appellant being charged with an offence (referred to below).

85 By letter dated 6 November 2015, the Department wrote to the appellant (at the immigration detention centre at Christmas Island). The letter indicated that, as a result of legislative changes, a new Fast Track Assessment process applied to the protection claims of certain individuals (apparently including the appellant). The appellant was informed that the “bar” in s 46A of the *Migration Act 1958* (Cth) had been lifted, and was invited to lodge an application for either a Temporary Protection (subclass 785) visa or a safe haven visa. It is apparent from documents in the Appeal Book that, due to certain events (described below), the letter could not be delivered immediately to the appellant.

86 On 8 and 9 November 2015, following the death of a detainee at the Christmas Island immigration detention centre, protests (also referred to as a riot) took place at the centre (the **November 2015 Incident**). The appellant was involved in this incident. The material before the Court indicates that the appellant was subsequently charged with offences in connection with this incident, but the material does not include details of the charges or their ultimate disposition.

87 On 12 November 2015, as a result of his participation in the November 2015 Incident, the appellant was transferred to a Western Australian correctional facility.

88 By letter dated 19 January 2016, the Department wrote to the appellant to the effect that he was eligible to receive assistance from the Primary Application and Information Service (referred to as PAIS) in making an application for protection. The appellant accepted the offer of assistance.

89 On 26 February 2016, the Magistrates Court of Western Australia made orders in relation to the March 2015 Incident. The appellant pleaded guilty and was convicted of the offence, “Intentionally destroyed or damaged property belonging to the Commonwealth or any public authority under the Commonwealth”. The Court ordered the release of the appellant under s 20(1)(a) of the *Crimes Act 1914* (Cth) without passing sentence, upon the appellant giving security by recognisance of \$500 to comply with the following conditions: (a) to be of good behaviour for a period of six months; and (b) to make restitution of \$820.60 to the Commonwealth by 26 March 2016.

90 On 16 September 2016, the appellant lodged an application for a safe haven visa. In the section dealing with “Character”, the appellant responded “Yes” to a question whether he had ever been charged with an offence that was awaiting

legal action, and “Yes” to a question whether he had ever been convicted of an offence in any country. Further down that page, the form stated: “If you answered ‘Yes’ to any of the above questions, provide all the relevant details. If the matter relates to a criminal conviction, please provide the nature of the offence, full details of sentence and dates of any period of imprisonment or other detention at Question 86 of Part C”. The appellant’s response included the following (AB 103):

AWAITING TRIAL ON CHARGES OF SPITTING AT A GUARD &
BREAKING A WINDOW, FOLLOWING DEATH OF FAIZAL ON CHRIST-
MAS ISLAND.

It is apparent that this information related to the November 2015 Incident.

- 91 Later in the application form, in the section headed “Convictions, charges, investigations or crimes committed”, the appellant responded “Yes” to a question whether he had been found guilty or convicted of a crime or any offence in any country, and “Yes” to a question whether he was aware that he was the subject of a criminal investigation or criminal charges were pending against him. The form then stated: “If you answered ‘Yes’ to any of the above questions, give details (including all the relevant dates and the country where the crime occurred or where the conviction, charge or investigation took place)”. The form provided separate places for details to be provided of crimes/offences and pending criminal charges. In the section for crimes/offences, the appellant stated (AB 131):

Breaking window — in prison and has 6 month good behaviour bond started in February 2016 approx.

There may be further updates on the cases.

In the section for pending criminal charges, the appellant stated:

FOLLOWING THE DEATH OF MY FRIEND FAISAL ON CHRISTMAS ISLAND, I WAS CHARGED WITH SPITTING AT A DETENTION OFFICER & BREAKING A WINDOW. THE INCIDENTS OCCURRED IN NOVEMBER 2015 (approx)

- 92 One of the attachments to the appellant’s visa application listed his previous addresses, together with the dates when he was at each address. The addresses listed included Casuarina Prison (on three different occasions) and Albany Regional Prison.

- 93 On 14 March 2017, a delegate of the Minister refused the appellant’s application for a safe haven visa. The delegate accepted that the appellant and his family were Faili Kurds and that they were expelled from Iraq to Iran in approximately 1984 as the appellant claimed. The delegate accepted that the appellant and his family lived in Iran as registered Iraqi refugees as claimed. The delegate stated that several major inconsistencies had been identified in the appellant’s claims that raised doubts about his claimed statelessness. The delegate noted that these concerns had been raised with the appellant in a natural justice letter, in which the delegate indicated a concern that the appellant may have regained his Iraqi citizenship. After referring to the evidence, the delegate found that the appellant had regained his Iraqi citizenship. The delegate also found that the appellant had resided in Iraq from 2009 until 2013 (as he had stated in his Unauthorised Maritime Arrival interview in September 2013).

- 94 Under the heading “Protection claims”, the delegate stated that the appellant’s “claims for protection, including those provided at interview, and

supporting evidence” were contained in “CLF2015/67717”. The delegate then summarised the appellant’s claims for protection. In summary, the appellant sought to engage Australia’s protection obligations by reference to: being a stateless Faili Kurd who was persecuted in Iraq because of his ethnicity; being someone born in Iraq, who was later expelled by the Saddam Hussein regime and rendered stateless as a result; his fears of persecution in Iraq at the hands of various extremist groups because of his Shia religious identity, his imputed anti-Iraq political views on account of him having lived and worked in Iran following his expulsion from Iraq, and imputed political views of being anti-Islam or pro-West because of the time he had spent in Australia.

95 The delegate considered these claims in a section headed “Australia’s protection obligations”. The delegate referred to a Department of Foreign Affairs and Trade report regarding Faili Kurds in Iraq. After setting out statements from that report, the delegate stated that it was clear from this information that Faili Kurds in Iraq were not persecuted and that the appellant was not at risk of serious harm from either the government or extremist insurgent groups due to his ethnicity. The delegate also expressed the view that the appellant would not be at risk of serious harm due to his Shia religion if he were to return to his home region. The delegate rejected the appellant’s other protection claims and concluded that he was not satisfied that the appellant was a refugee as defined in s 5H(1) of the *Migration Act*. The delegate was therefore not satisfied that the appellant was a person in respect of whom Australia had protection obligations under s 36(2)(a) of the *Migration Act*.

96 The delegate then referred to the exception in s 5H(2) to the definition of a refugee. It is convenient, at this stage, to set out s 5H(2):

Subsection (1) does not apply if the Minister has serious reasons for considering that:

- (a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- (b) the person committed a serious non-political crime before entering Australia; or
- (c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

97 In relation to s 5H(2), the delegate stated:

Information held by the Department indicates that on 26 February 2016 the applicant was convicted of intentionally destroying or damaging property belonging to the Commonwealth or any public authority under the Commonwealth. As a result of this conviction the applicant was placed on a 6 month good behaviour bond and also required to pay restitution of \$820.60 to the Commonwealth and a security of \$500.00.

As I am not satisfied [the applicant] is a refugee, as defined by s 5H(1) of the Act, an assessment in relation to s 5H(2) of the Act has not been made.

98 The delegate then dealt with the complementary protection criterion in s 36(2)(aa) of the *Migration Act*. The delegate found that there was no real risk of the appellant facing significant harm as defined by s 36(2A) if he was returned to Iraq in the foreseeable future.

99 An attachment to the delegate’s decision record was headed “Material before the decision maker”. The attachment listed a number of materials including “Departmental file CLF2015/67717 relating to the applicant”.

100 On 23 March 2017, the Minister referred the matter to the Authority pursuant to s 473CA of the *Migration Act*. That section provides that the Minister “must refer a fast track reviewable decision to the Immigration Assessment Authority as soon as reasonably practicable after the decision is made”. The appellant was notified of the referral by a letter dated 23 March 2017. An information sheet was attached to the letter. This provided an overview of the processes of the Authority. The information sheet stated that the Department would provide the Authority with “all documents the department considers relevant to your case”. The information sheet also stated that “[y]ou can request access under the *Freedom of Information Act 1982* to any documents that the IAA holds in relation to your case, subject to some restrictions”.

101 On or about the same date, the Secretary of the Department provided material to the Authority. It is convenient to set out s 473CB of the *Migration Act*, which deals with the provision of material by the Secretary to the Authority:

- (1) The Secretary must give to the Immigration Assessment Authority the following material (*review material*) in respect of each fast track reviewable decision referred to the Authority under section 473CA:
 - (a) a statement that:
 - (i) sets out the findings of fact made by the person who made the decision; and
 - (ii) refers to the evidence on which those findings were based; and
 - (iii) gives the reasons for the decision;
 - (b) material provided by the referred applicant to the person making the decision before the decision was made;
 - (c) **any other material that is in the Secretary’s possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;**
 - (d) the following details:
 - (i) the last address for service provided to the Minister by the referred applicant for the purposes of receiving documents;
 - (ii) the last residential or business address provided to the Minister by the referred applicant for the purposes of receiving documents;
 - (iii) the last fax number, email address or other electronic address provided to the Minister by the referred applicant for the purposes of receiving documents;
 - (iv) if an address or fax number mentioned in subparagraph (i), (ii) or (iii) has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister is no longer correct — such an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred to the Authority;
 - (v) if the referred applicant is a minor — the last address or fax number of a kind mentioned in subparagraph (i), (ii), (iii) or (iv) (if any) for a carer of the minor.
- (2) The Secretary must give the review material to the Immigration Assessment Authority at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority.

(Emphasis added.)

102 It is common ground that the documents provided by the Secretary to the Authority included the documents appearing at AB 41-89. The appellant's contention that the Authority's decision is affected by apprehended bias centres on these documents. The documents at AB 41-89 comprise a number of different types of documents, including emails between officers of the Department, emails between the Department and "WA Compliance Courts Prisons", letters sent by the Department to the appellant, a notice of conviction and an order issued by the Magistrates Court of Western Australia, a Prosecution Report by the Commonwealth Director of Public Prosecutions and a Department "case review" in relation to the appellant. The documents contained the following material that is said to be prejudicial:

- (a) references to the appellant having spent time in prison following the March 2015 Incident;
- (b) details of the appellant's conviction on 26 February 2016 in connection with the March 2015 Incident;
- (c) references to the appellant having been involved in the November 2015 Incident (referred to in some documents as a "riot"), to the appellant having been transferred to a Western Australian correctional facility following the incident, and to the appellant facing charges in connection with the incident;
- (d) a comment by an officer of the Department that the appellant had "a history of aggressive and/or challenging behaviour when engaging with the department", which "could [be] due to frustration [at being] held [in] detention" and/or "his mental health issues";
- (e) a comment by an officer of the Department that the appellant "had been involved in many incidents while in detention"; and
- (f) a reference to the appellant having an interview with "National Security Monitoring Section".

103 At the hearing of the appeal, an issue emerged as to whether the documents at AB 41-89 were before the delegate at the time he made his decision. The Minister submitted that the documents formed part of file CLF2015/67717, which was before the delegate. The Minister submitted that an inference that the documents were before the delegate at the time of the decision could be drawn from, among other things, a checklist completed by an officer of the Department (who was the person who, as the delegate of the Minister, had made the decision to refuse the application for a visa) (AB 242). The appellant submitted that the evidence did not establish that the documents in question were before the delegate at the time of the decision. This issue is discussed further below.

104 On 12 May 2017, the Authority affirmed the decision of the delegate to refuse the appellant's visa application. At [2] of the Authority's reasons, the Authority stated that it had "had regard to the material referred by the Secretary under s.473CB of the *Migration Act*". The Authority stated, at [3], that on 11 April 2017, the appellant's representative had provided a submission to the Authority, containing arguments addressing the delegate's decision, including the delegate's findings in relation to the appellant's citizenship. The Authority stated that it did "not consider these aspects of the submission to be new information". In light of the restrictions on the receipt by the Authority of "new information" in s 473DD of the *Migration Act*, the Authority was here indicating that it would consider these aspects of the submission, and that it was not necessary for the appellant to satisfy the conditions for receipt of new

information in relation to these aspects of the submission. However, the Authority was not prepared to receive certain other materials provided by the appellant, on the basis that they constituted “new information” as defined in s 473DC(1) and the conditions for receipt of such information in s 473DD were not satisfied: see [6]-[12] of the Authority’s reasons. On the other hand, the Authority indicated at [13] that it had obtained a document produced by the United Nations High Commissioner for Refugees titled “UNHCR Position on Returns to Iraq”, dated November 2016. The Authority was satisfied that there were exceptional circumstances to justify consideration of the information in this document.

105 The Authority outlined the appellant’s claims for protection at [14] of its reasons. The Authority made factual findings at [15]-[31]. In particular, for the reasons there set out, the Authority did not accept that the appellant was stateless and found that he was a citizen of Iraq. The Authority assessed whether the appellant met the requirements of the definition of a refugee in s 5H(1) of the *Migration Act*, having regard to the meaning of “well-founded fear of persecution” in s 5J, at [32]-[63]. The Authority concluded that the appellant did not meet these requirements and therefore did not meet the criterion for a protection visa in s 36(2)(a). The Authority considered the complementary protection criterion at [64]-[70], concluding that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there was a real risk that the appellant would suffer significant harm.

106 The Authority did not refer in its reasons to the documents that appear at AB 41-89. The Authority did not refer to the appellant’s conviction or charges or to conduct issues concerning the appellant.

The proceeding in the Federal Circuit Court

107 The appellant applied to the Federal Circuit Court for judicial review of the Authority’s decision. His amended application contained two grounds, but only the first ground is relevant for present purposes. The first ground was as follows:

The decision of the Immigration Assessment Authority (**IAA**) was affected by jurisdictional error (excess of jurisdiction / denial of natural justice).

Particulars

- a. The IAA made a decision adverse to the Applicant, without disclosing to him that it had received certain material from the Secretary (including at CB 41-83 and 88-90) as part of the “review material”.
- b. The IAA was under the duty to consider the “review material”. Review of the “review material” that [had] been provided by the Secretary was the precise extent of the IAA’s jurisdiction, duty and power.
- c. The Secretary’s provision of “review material” in excess of power necessarily vitiated the IAA’s decision.
- d. The material was given to the IAA by a person other than the Applicant could not be dismissed as not relevant, not credible or not significant, and was potentially adverse.
- e. The *Migration Act 1958* (Cth) does not exclude the common law obligation on the IAA of affording an opportunity to rebut, qualify or comment upon material of the kind identified at a. above.
- f. If, contrary to e. above, the common law obligation there referred is excluded, the IAA’s decision is affected by apprehended bias. A fair

minded and informed observer might conclude that the IAA might not be impartial or approach the issues with an open mind, when it conducts a review “on the papers” after having been provided, by a person within the Minister’s department, with material considered relevant to whether the Minister’s decision will be affirmed.

108 The hearing before the Federal Circuit Court took place on 8 November 2017 and reasons were given on the same day: *CNY17 v Minister for Immigration and Border Protection* [2017] FCCA 2731 (the **Reasons**). The application was dismissed.

109 As recorded in [27] of the Reasons, the appellant’s counsel submitted, in relation to ground one, that there were six categories of information that enlivened an obligation upon the Authority to disclose the information to the appellant, because it was said to be highly prejudicial. The primary judge noted, at [28], that the appellant relied on the decision of the Full Court in *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 (*AMA16*). The primary judge then considered each of the six categories of information, referring to them as “particulars”. The primary judge reasoned as follows at [30]-[39]:

Particular a

30. The first category of information Mr Guo of counsel identifies is the conviction of the applicant. In relation to that category of information, it is clear that the Safe Haven Enterprise visa [application form] asked a question referable to the existence of outstanding charges and that the applicant provided information in his Safe Haven Enterprise visa [application form]. For that reason alone, the decision in *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 is distinguishable.
31. Further, in the present case it is apparent that the delegate identified the material in respect of the conviction by the applicant of what was at the time of his Safe Haven Enterprise visa [application] identified as a charge. That conviction was potentially relevant to s 5H of the *Act*. Given the delegate’s identification of that material in the delegate’s reasons, this is a further basis upon which the decision in *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 is distinguishable.
32. Further, the nature of the charge and the alleged conviction on the present case are not ones on their face that meet the characterisation of being highly prejudicial for a fair-minded lay observer. The existence of the conviction provided to the Authority under s 473CB of the *Act* is not conduct by reason of which a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on its merits. No jurisdictional error is made out by particular a.

Particular b

33. The next category of information said to enliven an allegation of apprehended bias was the provision of information in respect of the movement of the applicant to correctional facilities. The movement information identified by Mr Guo is not conduct by reason of which a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on the merits. The movement information in respect of the

correctional facilities cannot be identified as highly prejudicial material in the eyes of a fair-minded informed lay observer. No jurisdictional error is made out by particular b.

Particular c

34. The third category identified by Mr Guo of counsel, concerned information reflecting the applicant having been potentially involved in a riot. That information is not information that a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on its merits. The information relating to the possible involvement by the applicant in a riot is not highly prejudicial information. No jurisdictional error is made out by particular c.

Particular d

35. The fourth category of information identified by Mr Guo of counsel was information identifying an assessment of the applicant's behaviour whilst in detention. The information referred to by Mr Guo in respect of the applicant's behaviour is not information by reason of which an informed lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on the merits. The behaviour information is not highly prejudicial. No jurisdictional error is made out by particular d.

Particular e

36. The fifth category of information was the suggestion that the applicant might still be under investigation in respect of other criminal charges. On a fair reading, the communication was concerned with seeking to clarify whether there were any outstanding charges. Those communications cannot be characterised by a fair-minded lay observer as highly prejudicial. Those communications do not give rise on a fair-minded lay observer test, to circumstances in which a reasonably informed fair-minded lay observer might reasonably apprehend that the Tribunal might not bring an independent and impartial mind to the determination of the matter on its merits. No jurisdictional error is made out by particular e.

Particular f

37. The sixth category of information identified by Mr Guo of counsel arose from reference to the National Security Monitoring Section. That entry appears to refer to an interview on 23 March 2015 in the context of a chronological summary relating to the applicant's immigration history. That information is not information by reason of which a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on its merits. The reference to the National Security Monitoring Section is not information that a fair-minded lay observer would regard as highly prejudicial. No jurisdictional error is made out by particular f.
38. None of the categories of information identified by Mr Guo of counsel are grounds upon which an informed fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent and impartial mind to the determination of the matter on its merits.
39. Mr Guo of counsel also submitted that the information to which he referred to in the six categories was information enlivening an obligation to afford procedural fairness that required disclosure by the Authority to the applicant because of its provisional nature. I do not accept that any of the information identified can be properly characterised as credible, relevant and significant. Accordingly, any failure of the Authority to

disclose the existence of the information, singularly or cumulatively did not give to any practical injustice or any jurisdictional error or any breach of the requirements of procedural fairness. Further, I find that there was no failure to disclose in respect of particular a, as this was in substance disclosed by the applicant and in the delegate's reasons. No jurisdictional error as alleged in ground 1 is made out.

110 It is not necessary to refer to the primary judge's reasons in relation to ground two, as this ground is not pursued on appeal.

The appeal to this Court

111 The appellant appeals to this Court from the orders of the primary judge. The grounds in the notice of appeal have been set out at [80] above.

112 In the course of the appeal hearing, an issue emerged as to whether or not the documents at AB 41-89 had been before the delegate at the time of his decision. This issue had not been squarely addressed by either party at the hearing below. At the conclusion of the hearing of the appeal, the Court made the following orders:

1. On or before 4 pm on 4 June 2018, the Minister serve on the appellant any affidavit dealing with the question of whether the documents at 41 to 89 of the appeal book in this proceeding were or were not before the delegate when the decision under s 65 of the *Migration Act 1958* (Cth) was made.
2. On or before 4 pm on 18 June 2018, the parties are to inform the Court by way of submissions about the course they propose the Court should take.

113 On 18 June 2018, each party filed further submissions. The appellant stated that the Minister had served an affidavit of Alexander Lochland dated 4 June 2018 and attached a copy of the affidavit. In [16] of the appellant's further submissions, the appellant contended that, if the Minister had filed the affidavit of Mr Lochland at the hearing below, and if certain other things had occurred at that hearing, the appellant would have raised certain different arguments. In [17] of the further submissions, the appellant stated that he did not oppose leave being granted to the Minister to rely on the affidavit of Mr Lochland as fresh evidence on the appeal, but that, if leave were granted, the appellant should have leave to make the submissions outlined in [16] of the further submissions.

114 In the Minister's further submissions, the Minister submitted that it appeared that the appellant's position was conditional and that this was inappropriate. The Minister submitted that the appellant should be given a further week to advise the Court whether he did or did not agree to the affidavit of Mr Lochland being filed.

115 On 19 June 2018, the Court indicated to the parties that, given that there was no consensus between the parties as to reception of the affidavit, the Court was inclined to decline leave to the Minister to file the affidavit. It followed, the Court indicated, that the Court did not propose to have regard to the submissions in [16] of the appellant's further submissions.

116 The potential significance of whether or not the documents at AB 41-89 were before the delegate at the time he made his decision arises because Pt 7AA of the *Migration Act* contains specific rules in relation to "new information". The expression "new information" is defined as meaning documents or information that: (a) were not before the Minister when the Minister made the decision under s 65; and (b) the Authority considers may be relevant (ss 473BB,

473DC(1)). Under s 473DD, the Authority must not consider any new information unless the conditions in that section are satisfied. If the documents were not before the delegate at the time of the decision, they may constitute “new information”; if so, the conditions would need to be satisfied: see *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481; 353 ALR 600 (*Plaintiff M174*) at [48]. However, for the reasons set out below, it is not necessary in the present case to reach a concluded view on this matter.

Ground one

117 By this ground, the appellant contends that the Federal Circuit Court erred in failing to find that the presence of prejudicial materials before the Authority gave rise to apprehended bias.

The appellant’s submissions

118 The appellant submits that s 473DB(1) of the *Migration Act* makes clear that the task of the Authority is to “review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB”. The appellant refers to the definition of “review material” in s 473CB(1), and submits that the *Migration Act* forces the Authority to consider everything that is given to it by the Secretary, even when the material is both objectively irrelevant and at least prima facie prejudicial (noting that it may remain prejudicial, in the absence of disclosure that it had been received and the giving of an opportunity to comment).

119 The appellant submits that, objectively, none of the documents at AB 41-89 could have had any relevance to whether the appellant’s claims, as made in his application for a visa (including the information he gave at the interview before the delegate), engaged Australia’s protection obligations. Further, the appellant submits that, given the limitations on the Authority’s power to remit to the Minister (see reg 4.43 of the *Migration Regulations 1994* (Cth)), none of the documents could have had any relevance to the Authority’s duty (coupled with a power) under s 473CC.

120 Accordingly, the appellant submits, all of the documents at AB 41-89 came within what Deane J in *Webb v The Queen* (1994) 181 CLR 41 defined (at 74) as the “fourth category” of disqualification by apprehended bias (his Honour not excluding that there may be more categories, and also noting that the fourth category may often overlap with the third): “disqualification by extraneous information ... [which] consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias”.

121 The appellant submits that: nothing in Deane J’s formulation of the fourth category suggests the existence of a threshold of “highly” prejudicial; indeed, the imposition of such a requirement would be (and is) inconsistent with the “double might” nature of the test for apprehended bias; and by finding, in respect of the documents in question, that they failed a requirement of being “highly prejudicial”, the primary judge erred.

The Minister’s submissions

122 The Minister submits that the primary judge was correct to reject the contention that a fair-minded lay observer might reasonably apprehend that the Authority might not bring an independent mind to the determination of the

review by reason of the referral to it of the various categories of information in the Departmental material, and was correct to distinguish the Full Court's decision in *AMA16*.

Consideration

123 There is no issue between the parties that the principles of apprehended bias are applicable to the Authority. Section 473DA(1) of the *Migration Act* provides that Div 3 of Pt 7AA, together with ss 473GA and 473GB, "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority". In circumstances where the rules of procedural fairness (or natural justice) are conventionally conceived of as having two distinct aspects — the hearing rule and the rule against bias — it is plain that the legislature did not intend to exclude or limit the rule against bias and it continues to apply. This is reinforced by s 473FA(1), which provides that the Authority, in carrying out its functions under the *Migration Act*, is to pursue the objective of providing a mechanism of limited review that is, among other things, "free of bias". Even if that reference were to be read as referring to actual bias (see *AMA16* at [2] per Dowsett J), it remains the case, for the reasons given above, that the legislature did not intend to exclude or limit the rule against bias, including the principles relating to apprehended bias.

124 The principles regarding apprehended bias in connection with decisions of courts and administrative decision-makers are well established. In the contexts of courts, the test for apprehended bias 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 to be decided: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Johnson v Johnson* (2000) 201 CLR 488 at [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. In *Isbester v Knox City Council* (2015) 255 CLR 135, in the context of a decision by a local council committee, Kiefel, Bell, Keane and Nettle JJ at [20] stated the test in terms of "whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made". Their Honours stated that this was largely a factual question "albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made". Their Honours also stated, at [22], that the application of the principle in *Ebner* to decision-makers other than judges, "must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making". Their Honours stated at [23]:

How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.

(Footnotes omitted.)

125 In *Isbester*, Gageler J stated (at [57]):

The test for the appearance of disqualifying bias in an administrative context has

often been stated in terms drawn from the test for apprehended bias in a curial context. The test, as so stated, is whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the administrator might not bring an impartial mind to the resolution of the question to be decided. Such statements of the test have nevertheless been accompanied by acknowledgment that the application of this requirement of procedural fairness “must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making”.

(Footnotes omitted.)

126 The applicable principles regarding apprehended bias were discussed by Griffiths J in *AMA16* at [61]-[66]. I respectfully agree with his Honour’s statement of the applicable principles.

127 Part 7AA of the *Migration Act* was inserted in 2014, to provide for what the simplified outline of the Part in s 473BA describes as “a limited form of review” of a “fast track decision” constituted by a refusal to grant a protection visa to an applicant described as a “fast track applicant”. The legislative scheme was described by the High Court in *Plaintiff M174* at [6]-[7], [13]-[36] per Gageler, Keane and Nettle JJ (Edelman J agreeing), at [80], [85]-[88] per Gordon J. Two features of the statutory scheme are important to note for present purposes. First, under s 473CB(1)(c) (set out above) the Secretary is required to give the Authority “any other material that is in the Secretary’s possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review”. Secondly, under s 473DB(1), subject to the Part (being Pt 7AA), the Authority must review a fast track reviewable decision referred to it under s 473CA “by considering the review material” provided to the Authority under s 473CB.

128 These two features of the legislation were important, if not critical, to the Full Court’s decision in *AMA16*. In that case, the primary judge in the Federal Circuit Court had concluded that apprehended bias arose from the Authority having been provided with extraneous and prejudicial information, referred to in the judgment of Griffiths J as the “Departmental communications”. The material sent to the Authority by the Secretary included a Departmental email dated 30 July 2015, which stated that the first respondent had been charged in Melbourne on 17 July 2015 with assaulting a female in indecent circumstances while being aware that the person was not consenting. The email also stated that the charge of indecent assault had a Court date of 11 September 2015 at the Magistrates’ Court (see *AMA16* at [29]). At first instance, in circumstances where the Departmental communications could not have been relevant to any issue the Authority had to decide, and in the absence of an affidavit from the Secretary, the primary judge had not been prepared to infer that the Secretary had considered the Departmental communications to be relevant to the review. Accordingly, the primary judge had found that the Secretary provided the Departmental communications to the Authority without any statutory warrant (see *AMA16* at [36]).

129 On appeal, the Minister relied on two grounds. The first was that the primary judge had denied the Minister procedural fairness in finding that the Departmental communications had not been given to the Authority in accordance with s 473CB(1)(c). This ground of appeal was rejected: *AMA16* at [1], [57], [59] and [97]. The second ground of appeal was that the primary judge had erred in holding that the Authority’s decision was affected by apprehended bias. This ground was also rejected: *AMA16* at [1], [60] and [97].

In rejecting the second ground, the Full Court gave considerable emphasis to the two aspects of the statutory scheme highlighted above, namely that documents (other than those referred to in s 473CB(1)(a) and (b)) were to be provided by the Secretary to the Authority only if the Secretary considered them relevant to the review, and the Authority was obliged to consider the review material that had been provided by the Secretary: see, eg, at [4] per Dowsett J, at [73], [78] and [82] per Griffiths J. Further, it seems that the Full Court's rejection of this ground of appeal did not depend on the primary judge's finding that the Secretary had provided the Departmental communications without statutory authority. This was explicit in the reasons of Charlesworth J at [99]; it is implicit, if not explicit, in the reasons of Griffiths J at [73], [78] and [89].

130 In concluding that the Minister's second appeal ground should be rejected, Griffiths J referred to the "highly prejudicial" nature of the communications: *AMA16* at [75] and [78]. The Full Court also noted that the Authority's reasons for decision were silent on the relevance or irrelevance of the Departmental communications: *AMA16* at [73]-[75], [77]-[78]; see also [4].

131 In my view, for the reasons that follow, the decision of the Authority in the present case was not affected by apprehended bias, and the facts of *AMA16* are distinguishable.

132 I accept the appellant's submission that the documents at AB 41-89 were irrelevant to the issues that the Authority had to determine. The Authority was concerned to determine whether or not the appellant was a refugee as defined in s 5H(1) and whether he satisfied the complementary protection criterion. The documents were irrelevant to these issues.

133 It is also the case that the documents were provided by the Secretary to the Authority as documents that were considered, by the Secretary, as relevant to the review (s 473CB(1)(c)). (I do not consider there to be a basis, on the facts of the present case, to suggest that the Secretary did not form the view that the documents were relevant to the review: see further below, in relation to ground three.) Further, the Authority was obliged to consider the documents, which formed part of the "review material" (s 473DB(1)). Indeed, the Authority stated at [2] of its reasons that it had had regard to the material referred by the Secretary under s 473CB.

134 However, much of the information that the appellant contends was prejudicial was before the Authority in any event, in the appellant's application for a visa and in the reasons of the delegate. The most significant matters contained in the documents at AB 41-89 were that the appellant had been convicted on 26 February 2016 of an offence in relation to the March 2015 Incident and that he was facing charges in relation to the November 2015 Incident. These matters were disclosed in the appellant's visa application: see [90]-[91] above. The appellant's conviction was also disclosed in the delegate's reasons: see [97] above. The fact that the appellant had spent time in prison was also disclosed in his application for a visa: see [92] above.

135 While the documents at AB 41-89 contained additional information about the appellant (see [102] above), I do not consider the additional information to provide a sufficient basis to conclude that a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made. The information broadly concerned the appellant's conduct while in immigration detention. This was irrelevant to the issues that the Authority had to determine. Although the Authority was required to consider the documents,

the fair-minded lay observer would consider it likely that the Authority would put the information aside as irrelevant to its task. Insofar as the documents referred to the appellant having had an interview with “National Security Monitoring Section”, I do not consider this, without more, as prejudicial. In these circumstances, notwithstanding that the documents were provided by the Secretary to the Authority as documents considered to be relevant to the review, and that the Authority was required to consider the documents, I do not consider that a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made.

136 The facts of the present case are quite different from those in *AMA16*. In the present case, as discussed above, much of the information that the appellant contends was prejudicial was before the Authority in any event. Further, to the extent that the documents contained additional information, this information did not have the same prejudicial quality as the Departmental communications in *AMA16*. In *AMA16* at [75], Griffiths J stated that, “[h]aving regard to the highly prejudicial nature of the communications, the fair-minded lay observer, acting reasonably, would not dismiss the possibility that the IAA may have been affected by them *albeit* subconsciously”. For the reasons already indicated, I would not draw an inference to like effect in the present case: much of the information was before the Authority in any event; and, to the extent that the documents in question contained additional information, this did not have the same prejudicial quality as in *AMA16*.

137 As the cases discussed above make clear, it is not necessary for material to be “highly prejudicial” for apprehended bias to arise. To the extent that the primary judge approached the matter in that way, this was incorrect. While it is true that the appellant’s counsel had characterised the documents as highly prejudicial (see the Reasons at [27]), he had not suggested that that was the test for apprehended bias. Thus a rejection of this characterisation did not resolve the issue of apprehended bias. However, for the reasons set out above, I consider the primary judge’s conclusion in relation to apprehended bias to be correct.

138 For completeness, I note that I do not consider it necessary for a finding to be made, one way or the other, as to whether the documents at AB 41-89 were before the delegate at the time he made the decision to refuse the appellant’s application for a visa. The case as propounded by the appellant below did not allege that the documents were not before the delegate at the time of the decision. The factual issue emerged in the course of the hearing of the appeal. It is unnecessary to resolve this factual issue in order to determine the appeal, which is framed by the grounds of review advanced by the appellant below, and the appellant’s grounds of appeal.

139 For the above reasons, ground one is rejected.

Ground two

140 By this ground, the appellant contends that the primary judge erred in failing to find that the appellant was denied procedural fairness. The appellant contends, in the particulars to this ground, that the Authority was obliged to disclose the prejudicial material to the appellant and give him the opportunity to rebut, qualify or comment upon it.

141 In the appellant’s written submissions, this ground is expressed to be in the alternative to ground one, and to depend on an alternative characterisation of the documents at AB 41-89 as being *relevant* to the discharge of the Authority’s duty under s 473CC. The appellant submits that: if there was no opportunity to

comment on prejudicial materials provided ex parte, apprehended bias may arise; although s 473DA(1) ousts the hearing rule of common law procedural fairness, it does not affect the bias rule; and there is an obligation and thus a correlative power of the Authority to invite a person in the position of the appellant to comment on information that has been provided ex parte by the Secretary that is prejudicial, if not to do so would bring about a breach of the bias rule.

142 Although in his written submissions the Minister submitted that the appellant could not raise ground two, as no substantive submissions had been made below in support of this contention, it was indicated at the appeal hearing that the Minister did not press this objection (T2).

143 To the extent that ground two is premised on the documents at AB 41-89 being *relevant* to the issues that the Authority was required to consider, I reject this premise. As indicated above in connection with ground one, I accept the appellant's primary contention, namely that the documents were not relevant.

144 Further, given that ground two is (necessarily) based on the rule against bias (rather than the hearing rule), it does not appear to add anything to ground one. If the appellant had been successful in relation to ground one, he would not have needed ground two. In circumstances where (as I have concluded) ground one is not made out, the rule against bias does not require the documents to be disclosed.

145 For these reasons, ground two is rejected.

Ground three

146 By ground three, the appellant contends that the primary judge erred in failing to find that the Authority's decision was made in excess of jurisdiction. The excess of jurisdiction is said to have arisen because the Secretary provided material that was not relevant to the Authority's decision.

147 The appellant submits that, in the absence of evidence from the delegate of the Secretary that he considered the documents at AB 41-89 to be relevant to the Authority's review (including an explanation as to how he reached that conclusion), there is no basis to infer that the Secretary considered the materials to be relevant to the review: see *AMA16 v Minister for Immigration and Border Protection* (2017) 317 FLR 141 at [34] (the decision at first instance). The appellant further submits that: the Authority is obliged to consider the entirety of the "review material", even where some parts of that material have been given to it by the Secretary without a lawful basis; and, on the proper construction of the *Migration Act*, the Authority acted in excess of jurisdiction, by purporting to conduct its review on the "review material" in its entirety, in circumstances where part of that material had been provided by the Secretary in breach of the *Migration Act*.

148 In his written submissions, the Minister submitted that the appellant advanced no substantive submissions below in relation to this issue, and therefore could not raise the issue on appeal. However, at the hearing of the appeal, it was indicated that the Minister did not press this objection (T2).

149 As noted above, I do not consider there to be a basis, on the facts of the present case, to suggest that the Secretary did not form the view that the documents at AB 41-89 were relevant to the review. Although I have concluded that the documents were not relevant, I nevertheless consider that it was open to the Secretary to form the view that the documents were relevant. The

documents contained background or contextual information concerning the appellant's application for a visa and detention in immigration detention. The obligation on the Secretary was to "form a view" as to the relevance of each document: see, in the context of s 418(3) of the *Migration Act*, *WAGP v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 413 at [64]. The fact that a different view might now be formed by the Court, with the assistance of detailed legal submissions, as to the relevance of certain material does not mean that the Secretary's decision to give that material to the Authority was invalid.

150 For these reasons, ground three is rejected.

Conclusion

151 It follows that I would dismiss the appeal. There is no apparent reason why costs should not follow the event. Accordingly, I would also order that the appellant pay the Minister's costs of the appeal. It is appropriate for directions to be made to facilitate the payment of costs by way of a lump sum.

Thawley J.

152 I have had the advantage of reading the draft reasons for judgment of Mortimer J and Moshinsky J. I agree with Moshinsky J that the appeal should be dismissed. I have nothing to add in relation to grounds two and three. These reasons address why I prefer the conclusion of Moshinsky J in relation to ground one.

153 Where apprehended bias is said to arise by reason of the receipt of extraneous and prejudicial information (the "fourth category" in *Webb v The Queen* (1994) 181 CLR 41), the relevant principles include:

- (1) As Moshinsky J observes at [124]-[126], the test in curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the decision to be made — see also: *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 (*Ex parte H*) at [27]; *Potkonyak v Legal Services Commissioner (No 2)* [2018] NSWCA 173 (*Potkonyak*) at [172], per Beazley P (with whom Payne JA agreed).
- (2) The test is an objective test of possibility, not probability: *Ex parte H* at [28]; *Isbester v Knox City Council* (2015) 255 CLR 135 (*Isbester*) at [59]. However, it must be recognised that there are degrees of possibility. It is not sufficient if a reasonable bystander "has [only] a vague sense of unease or disquiet": *MZXLD v Minister for Immigration and Citizenship* [2007] FCA 1912, per Gordon J, referring to *Jones v Australian Competition and Consumer Commission* (2002) 76 ALD 424 (Weinberg J).
- (3) As Mortimer J emphasises at [18] and [19], and consistently with Moshinsky J's statement and application of the test, the question which the test requires be answered is one which focusses attention on a point in time before the decision is made. As Beazley P said in *Potkonyak* at [172]: "The 'double might' test is future looking, about a decision to be made in the future".
- (4) The principle applies not only to judicial decision-making. It extends to administrative decision-making. The analogy with the curial process is less apposite the further the divergence from the judicial paradigm. The application of the principle must accommodate the difference between

court proceedings and other decision-making: *Isbester* at [22]. The formulation of the test in relation to administrative proceedings held in private was considered in *Ex parte H* at [28] and [29].

- (5) The question the test raises is largely factual. The test assumes a fair-minded lay observer with appropriate knowledge not only of the factual context but also of the legal context, in particular the statutory context within which the administrative decision is to be made.
- (6) It follows from the two preceding matters that it is necessary to identify how the particular administrative decision-making process under consideration differs from the judicial paradigm in order to apply the test.
- (7) As Mortimer J observes at [10], the application of the test was described by Gageler J in *Isbester* at [59] as requiring the following three steps:
 - (a) First, an identification of the factor which it is hypothesised might cause the decision-maker to resolve a question otherwise than as the result of a neutral evaluation of the merits.
 - (b) Secondly, an articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits.
 - (c) Thirdly, a consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.

154 The statutory framework in which the question here arises is Pt 7AA of the *Migration Act 1958* (Cth). The following is particularly relevant:

- (1) The Authority is part of the Migration and Refugee Division of the Administrative Appeals Tribunal: s 473JA(1) of the Act. Its members include the President, the Division head, the Senior Reviewer and other Reviewers: s 473JA(2). Reviewers are engaged under the *Public Service Act 1999* (Cth): s 473JE(1). They do not require legal qualifications.
- (2) Section 473FA(1) contains an express exhortation that, in carrying out its functions under the Act, the Authority “is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)”. See also s 473BA.
- (3) The Authority “must review a fast track reviewable decision referred to” it: s 473CC(1). Subject to the terms of Pt 7AA, the Authority must conduct its review “by considering the review material” and “without accepting or requesting new information” or “interviewing the referred applicant”: s 473DB(1).
- (4) The “review material” which the Secretary “must” provide to the Authority under s 473CB(1) includes:
 - (a) a statement setting out the delegate’s findings of fact, referring to the evidence on which those findings were based and giving the delegate’s reasons: s 473CB(1)(a);
 - (b) material provided by the “referred applicant” (the appellant) to the delegate before the decision was made: s 473CB(1)(b); and

(c) material which the Secretary considers to be relevant to the review: s 473CB(1)(c).

155 The administrative decision-making the subject of this appeal differed from the curial process in a number of ways, including:

- (1) The decision was made by a specialist tribunal whose decision-makers, being “Reviewers”, may or may not have legal qualifications, but who deal with a particular and limited area of migration law in respect of which they might be expected to have developed some expertise.
- (2) The review was not conducted on the “adversarial” basis upon which curial proceedings are conducted. The particular process contemplated by the statutory scheme does not bear many of the characteristics usually associated with an “inquisitorial” system either. For example, a prohibition (subject to exceptions) on obtaining “new information” is not normally associated with the processes of an inquisitorial tribunal. In any event, attaching a label is not helpful as it only serves to distract attention from the important issue which is precisely how the particular statutory scheme operates and how it differs from the curial process so that the test for apprehended bias can be applied consistently with the principles identified above.
- (3) The statutory scheme expressly modifies the rules of procedural fairness and denies aspects of the fair hearing rule which would be found in curial proceedings — see: Div 3.
- (4) There is no entitlement to a hearing and, except in the limited circumstances contemplated by the statutory scheme, the referred applicant is not in fact heard.
- (5) The review contemplated by the scheme is one of limited merits review, conducted — except in the limited circumstances contemplated by Pt 7AA — in substance on the papers (s 473DB(1)), without a duty to get any new information, whether requested to do so or not: s 473DC(2).

156 In terms of the three step analysis referred to by Gageler J in *Isbester*:

- (1) First, it is the receipt of irrelevant and prejudicial material which is the factor which it was said might cause the decision-maker to resolve the question otherwise than as a result of a neutral evaluation of the merits.
- (2) The second step is to analyse how the receipt of that material might cause a deviation from a neutral evaluation of the merits. This might lie, for example, in a contention that the irrelevant and prejudicial material might cause the decision-maker, consciously or subconsciously, to deviate from a neutral evaluation by:
 - (a) taking that irrelevant and prejudicial material into account when the material should have played no role in the decision-making process; or
 - (b) acting in accordance with the views which the irrelevant material might imply have been formed by others.
- (3) The third step is to analyse the reasonableness of the apprehension of that deviation being caused in that way.

157 As to the second step, Mortimer J at [66] points to the irrelevant material:

- (1) fixing the appellant with certain adverse characteristics capable of affecting the ultimate question (whether he should be granted a visa and

released into the Australian community) and subsidiary questions (whether he should be believed in his claims for protection); and

(2) indicating that officials or people in positions of authority considered the appellant to have those undesirable characteristics.

158 As to the third step, her Honour at [66] points to:

(1) the official source and quality of the irrelevant material; and

(2) the fact that the irrelevant material came to the Authority under s 473CB(1)(c) meaning that the Secretary must have considered the material relevant to the review to be conducted by the Authority.

159 The appellant's case was based on the fact that the Secretary had provided to the Authority, under s 473CB(1)(c), irrelevant material which was prejudicial. The irrelevant and prejudicial material is set out by Moshinsky J at [102] and in further detail by Mortimer J at [30]-[57].

160 I agree with Moshinsky J that much of the substance of the prejudice in that material was contained in the material referred to the Authority under s 473CB(1)(a) and (b). That is, the statutory scheme necessarily required that the Authority have before it:

- the statement setting out the delegate's findings of fact, referring to the evidence on which those findings were based and giving the delegate's reasons: s 473CB(1)(a); and
- material provided by the "referred applicant" (the appellant) to the delegate before the decision was made: s 473CB(1)(b).

161 That material, in particular the delegate's reasons and the appellant's visa application already contained much of the information which the appellant contended was prejudicial and contained in the documents provided to the Authority under s 473CB(1)(c). This fact is important to the required analysis because the analysis must be undertaken recognising that there was necessarily prejudicial material before the decision-maker in any event because of the way the statutory scheme operated. The particular material before the Authority by reason of s 473CB(1)(a) and (b) is referred to below, as is other material that was before the Authority which had been provided by the appellant before the Authority made its decision.

162 The mere existence of irrelevant material provided under s 473CB(1)(c) cannot give rise to an apprehension of bias. There must be some quality to the irrelevant material which might give rise to a reasonable apprehension of the possibility that the decision-maker might not bring an impartial mind to the decision to be made. Administrative decision-makers regularly have irrelevant material placed before them. The ability to ignore irrelevant material is not a skill enjoyed only by lawyers. In my view, a fair-minded observer would not conclude that a "Reviewer", being a part of a specialist division of the Tribunal familiar with the particular and limited legal questions which arise for its consideration, is (as an absolute proposition) unable to disregard irrelevant material.

163 It is sometimes difficult to identify with certainty matters which might influence the making of a decision, consciously or subconsciously. The context here is that the decision-maker is focussed on answering specific questions which arise in a limited merits review. In that process, the decision-maker is required to consider the material before him or her. The decision-maker may consciously consider whether the material is relevant to the issues which need to be answered. Equally, the decision-maker may do so subconsciously or not at

all. Whether a reasonable lay observer might apprehend that irrelevant material was such that the decision-maker might not bring an impartial mind to the questions to be answered depends on all the facts and, in this context, particularly on the nature of the prejudicial material, its prominence and the nature and content of the material which was otherwise before the decision-maker.

164 As Mortimer J observes at [30], the appellant's case was that the irrelevant material provided under s 473CB(1)(c) contained:

- a. extensive pages of internal Department emails and other material referring to the Appellant having been charged for damaging Commonwealth property;
- b. repeated references to the Appellant having spent time in a prison;
- c. repeated assertions that the Appellant was involved in a "riot";
- d. assertions that the Appellant had "a history of aggressive and/or challenging behaviour when engaging with the department", and had been involved in "many incidents while in detention"; and
- e. an imputation that he was a national security risk.

165 It was not expressly a part of the appellant's case that the material suggested he had mental health issues (although the irrelevant material did state that) or that he was unreliable as a historian or lacked credibility (which, in my view, the irrelevant material neither stated nor implied). Nor was it part of the appellant's case that the apprehension of bias arose by reason of the material making such suggestions. His case was based on the irrelevant material having the prejudicial quality of suggesting the appellant had been charged for damaging Commonwealth property, had spent time in prison, was involved in a riot, had a history of aggressive and challenging behaviour and was a national security risk.

166 The irrelevant material provided under s 473CB(1)(c) did suggest those matters and also stated that he had mental health issues. In my view, the substance of those matters was also conveyed by the material necessarily before the decision-maker under s 473CB(1)(a) and (b) and, in relation to mental health issues, by further material put to the Authority by the appellant. The material provided under s 473CB(1)(c) in some ways went further than the material which was otherwise before the Authority in any event, but not to an extent that might cause a fair-minded lay observer to think the Reviewer might not bring an impartial mind to the questions to be asked.

167 The material which was before the Authority by reason of s 473CB(1)(a) and (b) in any event included:

- (1) the delegate's reasons for decision dated 14 March 2017, which referred to the fact that the appellant had been convicted of intentionally destroying or damaging Commonwealth property on 26 February 2016, placed on a 6 month good behaviour bond and required to pay restitution;
- (2) the appellant's statutory declaration dated 6 February 2017, which contained information which indicated a history of trauma and abuse and implied the likelihood of mental health issues, including:

When I told the department that I wanted to return to Iraq I said that out of frustration and anger. I have had a great deal of trauma and abuse, including sexual abuse perpetrated on me. ... When I then came to

Australia I was locked up again and it brought back all sorts of trauma all over again. I was so sick of being in detention again, so I said I wanted to leave so that I could be free again.

(3) the appellant's visa application which referred to:

- (a) "following the death of my friend Faisal on Christmas Island, I was charged with spitting at a detention officer & breaking a window. The incidents occurred in November 2015 (approx)";
- (b) the appellant "awaiting trial on charges of spitting at a guard & breaking a window, following death of Faizal on Christmas Island";
- (c) the appellant being in detention or custody from 18 August 2013 in "NWP IDC [North West Point Immigration Detention Centre], Christmas Island, Albany Regional Prison and others";
- (d) the appellant "breaking window — in prison and 6 month good behaviour bond started in Feb 2016 approx";
- (e) the appellant's previous addresses which included: North West Point IDC, Casuarina Prison (3 or 4 days in June 2016), Albany Regional Prison (from November 2015 until June 2016), Casuarina Prison (1 month in 2015), Perth IDC, Casuarina Prison (10 days in March 2015) and various IDCs in Perth, Darwin, Yongah Hill and Melbourne.

168 In addition, the Authority had before it a submission dated 10 April 2017 from the appellant's representative which referred to the appellant's traumatic experiences and recorded observations of his actions which implied the appellant had mental health issues and recorded that he had been receiving treatment from a psychologist:

4. Trauma recovery

I have visited [the appellant] 5 times since his move from Christmas Island to Yongah Hill in November, 2016 (I met him at MIDC in July 2016) and have recently become his primary support person.

[The appellant] has started disclosing significant traumatic information in the past two months and I have observed him shaking, crying, rocking, slapping his face, curling up and refusing to look at me when recalling events, very few of which are referenced in his submission or the response to his SHEV application. In relation to at least two disclosures regarding his mother and fiancée, he tells me that he has not felt sufficiently safe or stable to disclose this to anyone outside his immediate family.

I am uncertain how much specialist trauma counselling [the appellant] has had access to, but he has said many times that sessions with psychologists "feel like a police interrogation".

169 In my view, with one exception, the material before the Authority substantially raised the matters of prejudice identified by the appellant and set out at [164] above as arising from the irrelevant material. To the extent the irrelevant material went further, it was not such that a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the decision to be made.

170 The exception is the reference to the appellant having had an interview on 23 March 2015 with "National Security Monitoring Section". In my view, the

mention of this, without explanation or context, is not so prejudicial that it might cause a bystander to think a decision-maker receiving the material might not evaluate the issues neutrally. The reference is isolated, suggesting it was not an ongoing issue. There is no suggestion in the irrelevant material that the result of the interview was negative or that the appellant was in fact considered a national security risk. Indeed, the reference to the interview sits in an itemised chronology of events which includes:

- the interview with “National Security Monitoring Section” on 23 March 2015 occurred whilst the appellant was in Casuarina Prison (his being in prison in March 2015 was known to the Authority because it was in his visa application);
- he was transferred to Christmas Island on 28 March 2015;
- the s 46A bar was lifted on 29 September 2015;
- on 23 October 2015, s 195A was considered (s 195A allows for the Minister to grant a visa to a person in detention if it is in the public interest, whether or not the person applies for a visa).

171 In my view, the isolated reference to the “National Security Monitoring Section” interview was not sufficiently prejudicial to engage the operation of the “fourth category” of the apprehended bias principle, especially in light of the context in which the reference appears.

172 As noted above, it was not submitted by the appellant that the irrelevant material provided under s 473CB(1)(c) in stating that the appellant had mental health issues gave rise to an apprehended bias issue. The irrelevant material did expressly refer to “mental health issues” and, as Mortimer J observes at [45], does not explain what they were or how they arose. However, the Authority had before it material (referred to at [167(2)] and [168] above) which made it clear that the appellant had mental health issues related to past trauma. In my view, the irrelevant material in referring to “mental health issues”, when considered in the context of the other material before the Authority, was not of a nature which, either alone or cumulatively with the other matters, engaged the apprehended bias principle.

173 Nor did the appellant submit that: (a) the irrelevant material indicated that he was an unreliable historian or that he could not be believed or was not credible; or (b) an apprehended bias issue arose because the material suggested he was unreliable and not credible. In my view, the irrelevant material did not touch on credibility in any meaningful way. It certainly could not be said to have taken credibility issues further than the material which was before the Authority in any event (which included the delegate’s reasons the subject of the review). The irrelevant material provided under s 473CB(1)(c) did not suggest inaccuracies in the history given or say or imply anything about whether the appellant could be believed. In my view, the irrelevant material would not reasonably be perceived for the purpose of the apprehended bias test as possibly affecting the view which might be taken by the decision-maker of the appellant’s credibility, reliability as a historian or as a witness; *a fortiori*, when compared with the other material before the Authority.

174 In reaching my conclusion, I have taken into account that the irrelevant material was provided under s 473CB(1)(c), carrying the implication that the Secretary considered the material to be relevant to the review. In my view, the reasonable lay observer would be taken to know that it was not the Secretary personally who provided the review material. Rather, the lay observer would

know that the referral to the Authority was implemented on behalf of the Secretary by persons with relevant authority, as indicated by the material before the Court which showed the manner in which the referral was made. The reasonable lay observer has an understanding of what in fact occurred (the factual context).

175 The reasonable lay observer also understands the statutory context. The referral of the “fast track reviewable decision” to the Authority, and the provision to the Authority of the “review material”, are important administrative processes to be taken seriously, particularly in light of the significance of the subject matter. The statutory context includes that the Secretary must refer the matter to the Authority “as soon as reasonably practicable after the decision is made”: s 473CA. Also, the Secretary must give the “review material” to the Authority at the time the decision is referred or as soon as reasonably practicable after the referral: s 473CB(2). The statutory scheme relevantly contemplates two decisions of particular materiality to the visa applicant: the delegate’s decision and the Authority’s limited merits review of that decision. The provision of the material to the Authority by the Secretary under s 473CB is to facilitate the Authority’s “review” and is to be provided quickly, consistently with achieving a limited review that is efficient, quick and free of bias: s 473BA.

176 There is a risk in attributing significance to the fact that the material under s 473CB(1)(c) is material which is considered by the Secretary to be relevant without also acknowledging the practicalities of what in fact occurred in the case being considered (the factual context) and the place that s 473CB(1)(c) holds in the statutory scheme (the whole statutory context). As to the latter consideration, the role of the Authority is to review “by considering” the review material: s 473DB(1). Its role is not to assume that what it receives is necessarily relevant (although it would legitimately assume that the person providing it considered it to be relevant) or of some particular or special significance apart from its relevance to the review.

177 A fair-minded lay observer would have these matters in mind when assessing the significance of the fact that irrelevant material had been provided under s 473CB(1)(c). Having regard to my view of the nature of the irrelevant material and to the factual context (including the other material before the Authority), the fact that the irrelevant material in the present case was provided under s 473CB(1)(c) (therefore carrying the implication that the Secretary considered the material relevant) would not cause a fair-minded and informed lay observer to think that the Authority might give particular or undue weight to the irrelevant material or that it might not bring an impartial mind to the matter or that it might deviate from a neutral evaluation of the issues.

178 I agree with the orders proposed by Moshinsky J.

Orders accordingly

Solicitors for the appellant: *Estrin Saul Lawyers*.

Solicitors for the first respondent: *Australian Government Solicitor*.

NICHOLAS DERRINGTON