FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v AMA16 and Others

[2017] FCAFC 136

Dowsett, Griffiths and Charlesworth JJ

7, 30 August 2017

Immigration — Immigration Assessment Authority — Fast track reviewable decision — Review material provided by Secretary to Immigration Assessment Authority — Review material prejudicial to visa applicant — Whether appellant denied procedural fairness — Whether decision by Immigration Assessment Authority affected by apprehended bias — Migration Act 1958 (Cth), Pt 7AA, ss 473CB(1)(c), 473FA(1).

Part 7AA of the *Migration Act 1958* (Cth) (the Act) provided for a "fast track" assessment process for review of certain adverse protection visa decisions, defined as "fast track reviewable decisions". The body constituted under Pt 7AA to review those decisions was the Immigration Assessment Authority (the IAA). By s 473FA(1) of the Act, the IAA was to carry out its functions, relevantly, free of bias.

The Minister for Immigration and Border Protection (the Minister) was required to refer a fast track reviewable decision to the IAA as soon as practicable after it had been made. The Secretary of the Department of Immigration and Border Protection (the Secretary) was required by s 473CB of the Act to give the IAA "review material" in relation to each decision when making a referral. Such material was required by s 473CB(1)(c) to include any material in the Secretary's possession or control that the Secretary considered to be relevant to the review.

A delegate of the Minister refused the first respondent's application for a protection visa. The Minister referred the delegate's decision, which was a "fast track reviewable decision", to the IAA for review under Pt 7AA. The Secretary sent review material to the IAA in relation to the decision. Among the material which the Secretary sent to the IAA was a Departmental communication which stated that the first respondent had been charged with certain offences.

A judge of the Federal Circuit Court of Australia held that the decision of the IAA was affected by apprehended bias arising from the Secretary's provision of the Departmental communication. The judge also held that the Secretary had not provided the Departmental communication to the IAA in accordance with s 473CB(1)(c) of the Act.

The Minister appealed from the judgment of the Federal Circuit Court on two grounds. First, the Minister contended that the judge at first instance had denied him procedural fairness by finding that the Departmental communication had not been provided to the IAA in accordance with s 473CB(1)(c) of the Act, on the basis that this had not been raised before the Federal Circuit Court. Secondly,

the Minister contended that the judge had erred in holding that the IAA's decision was vitiated by apprehended bias merely because the Departmental communication had been provided to it.

Held: Dismissing the appeal: (1) In circumstances where the Minister had advanced a submission before the Federal Circuit Court that the Departmental communication had been provided to the IAA in accordance with s 473CB(1)(c), the Court had not denied the Minister procedural fairness by determining that issue adversely to him. [1], [59], [97]

(2) The judge at first instance did not err in holding that the IAA's decision was vitiated by apprehended bias. [4], [78], [99]

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; *Webb v The Queen* (1994) 181 CLR 41, applied.

Crowley v Holmes (2003) 132 FCR 114; *O'Sullivan v Medical Tribunal (NSW)* [2009] NSWCA 374, distinguished.

Per Dowsett J: (i) A fully informed, fair-minded lay observer would not apprehend bias merely because the decision-maker was aware that the first respondent had been charged with a criminal offence. However, in circumstances where the Secretary had communicated the material to the IAA on the basis that it was relevant to the decision under review, the fair-minded lay observer might apprehend bias where the decision-maker had neither expressly identified such information as irrelevant nor said that he or she has excluded it from consideration in the decision-making process. [3], [4]

(ii) It is at least arguable that the reference to bias in s 473FA(1) of the Act refers to actual bias and not to apprehended bias. [2]

Per Griffiths J: Having regard to the highly prejudicial nature of the Departmental communication, a fair-minded lay observer, acting reasonably, would not dismiss the possibility that the IAA may have been affected by that communication, albeit subconsciously. [75]

Islam v Minister for Immigration and Citizenship (2009) 51 AAR 147, followed.

Per Charlesworth J: (i) The finding of apprehended bias did not depend on the attribution to the fair-minded observer of any assumptions as to whether or not the Secretary erred in the performance of the statutory task under s 473CB(1)(c) of the Act. [99]

(ii) It was not necessary for the judge at first instance to find that the Secretary had not provided the review material to the IAA in accordance with s 473CB(1)(c) in order to conclude that the IAA's decision was affected by an apprehension of bias. [99]

Per Dowsett and Griffiths JJ, Charlesworth J not deciding: It is doubtful whether it is appropriate to describe the IAA's task in performing its functions under Pt 7AA of the Act as to determine what is the "correct or preferable decision". [2], [90]-[92], [98]

Cases Cited

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.

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283.

Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577.

Condon v Pompano Pty Ltd (2013) 252 CLR 38.

Crowley v Holmes (2003) 132 FCR 114.

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409.

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337.

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.

Holmes v Mercado (2000) 111 FCR 160.

Immigration and Multicultural Affairs, Minister for v Jia Legeng (2001) 205 CLR 507.

Isbester v Knox City Council (2015) 255 CLR 135.

Islam v Minister for Immigration and Citizenship (2009) 51 AAR 147.

Johnson v Johnson (2000) 201 CLR 488.

Livesey v New South Wales Bar Association (1983) 151 CLR 288.

Natural Resources, Minister for v New South Wales Aboriginal Land Council (1987) 9 NSWLR 154.

NIB Health Funds Ltd v Private Health Insurance Administration Council (2002) 115 FCR 561.

O'Sullivan v Medical Tribunal (NSW) [2009] NSWCA 374.

R v Watson; Ex parte Armstrong (1976) 136 CLR 248.

Shrestha v Migration Review Tribunal (2015) 229 FCR 301.

Singh v Minister for Immigration and Border Protection [2014] FCA 955.

SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80.

Webb v The Queen (1994) 181 CLR 41.

Appeal

BD Kaplan, for the appellant.

L De Ferrari, for the first respondent.

30 August 2017

Dowsett J.

1 I generally agree with the orders proposed by Griffiths J, and with his Honour's reasons. However I wish to make three comments.

2 First, the case has been conducted upon the basis that apprehension of bias is an available ground for review of a decision of the Immigration Assessment Authority (the "IAA"). In my view, it is at least arguable that the reference to bias in s 473FA of the *Migration Act 1958* (Cth) refers to actual bias, and not to apprehension of bias.

3 Secondly, I do not accept that the information in question (the "information") was, by itself, necessarily so prejudicial as to bring the matter within the fourth category of apprehended bias identified by Deane J in *Webb v The Queen* (1994) 181 CLR 41 at 74. A lay jury is quite a different creature from a professional decision-maker in a specialized area. In the present case, the decision concerned the refusal to grant a temporary protection visa, upon the basis that the first respondent would not be at risk of serious harm in Iran. I do not accept that a fully informed, fair-minded, lay observer might apprehend bias, merely because he or she was aware that the first respondent had been charged with a serious offence. After all, even a convicted criminal is entitled to the protection of the law.

4 However, in the present case, there is rather more than knowledge of irrelevant and prejudicial information. Such information had been communicated to the IAA as material considered, by the Secretary, to be relevant to the review. In those circumstances the fair-minded observer might well apprehend bias where the decision-maker has not expressly identified such information as irrelevant, and has not said that he or she has excluded it from consideration in the decision-making process.

5 Finally, I should say something concerning the decision of the Full Court in *Crowley v Holmes* (2003) 132 FCR 114. I agree with Griffiths J that the decision in that case may be distinguished from the present case for the reasons given by his Honour. However I would add one further observation. A fully informed, fair-minded lay observer would not be less confident about the capacity of an IAA decision-maker to set aside irrelevant and damaging evidence, than about the capacity of a professional disciplinary body to do so. In *Crowley*, the relevant decision had not yet been taken. There was good reason for believing that if the prescribed procedures were followed, there would be no apprehension of bias. In this case the decision has been made, but in a way which might lead the fair-minded observer to believe that the decision-maker had treated the information as being relevant to the question of Australia's protection obligations to the first respondent.

Griffiths J.

Introduction

6 The Minister appeals from part of the judgment and all of the orders of the Federal Circuit Court of Australia (**FCCA**) in *AMA16 v Minister for Immigration and Border Protection* (2017) 317 FLR 141. The appeal relates to those parts of the judgment below concerning the primary judge's finding that a decision dated 5 January 2016 by the Immigration Assessment Authority (**IAA**) was vitiated by apprehended bias. The apprehended bias arose from the IAA having been provided with extraneous and prejudicial information (the **Departmental communications**), the nature of which will be explained at [29] below. The Minister also claims that the primary judge denied procedural fairness in finding that the Secretary of the Department of Immigration and Border Protection (the **Secretary**) had given the Departmental communications to the IAA without statutory warrant when that issue was not raised by the judicial review applicant below and no relevant relief was sought by him in respect of that matter.

Summary of background facts

7 The facts are not disputed. Drawing in part upon the primary judge's description of them, they may be summarised as follows. The first respondent is a citizen of Iran. He arrived in Australia on 22 October 2012 as an unauthorised maritime arrival. He was interviewed by a Departmental officer on 2 November 2012. He was told on 27 May 2015 that the Minister had decided under s 46A(2) of the *Migration Act 1958* (Cth) (the **Act**) to permit him to make a valid application for a temporary protection visa. He made such an application on 30 June 2015. It was accompanied by a statutory declaration dated 26 June 2015. The first respondent claimed that he feared returning to Iran as he would be harmed by the Basij and the Iranian authorities by reason of his political opinion and anti-Islam religious views. He claimed to have been a member of the Basij but had fallen out with his commander because of his

concerns regarding the way the Basij treated people. He claimed that the day following the confrontation with his commander about these matters some men on a motorbike told his mother that they would kill him. Thus he said that he fled Iran and his mother moved to Qeshm Island because of what had happened to him.

8 After being interviewed by the Minister's delegate, the delegate decided on 3 December 2015 to refuse to grant the first respondent a temporary protection visa. The delegate found that the first respondent's claims lacked credibility. The delegate did not accept that the first respondent had been a member of the Basij, or had insulted Islam, or had been threatened by the authorities or would in future express any dissident beliefs that would attract persecution. The delegate did not raise any issue concerning the first respondent's character.

9 On 4 December 2015, the delegate's decision was referred by the Minister to the IAA for review under Pt 7AA of the Act. Some relevant provisions in this Part are set out below.

10 On 5 January 2016, the IAA affirmed the delegate's decision pursuant to s 473CC(2)(a) of the Act. The IAA accepted some of the first respondent's claims, including that he had been an ordinary member of the Basij, and had made derogatory comments to his commander about, *inter alia*, the Basij. It accepted that the commander and other members of the Basij may continue to bear a grudge against the first respondent. It also accepted that the first respondent's mother had moved to Qeshm Island after her son's problems with the Basij. But the IAA did not accept that she moved there because of his problems with the Basij. This finding was made by reference to the delay which occurred before the mother relocated. The IAA found that the first respondent was of no ongoing interest to the Basij or other Iranian authorities. It concluded that he did not face a real chance of persecution or significant harm in Iran.

Statutory provisions summarised

11 The Court was informed that this is the first proceeding before a Full Court concerning Pt 7AA of the Act.

12 Part 7AA of the Act was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The amendments commenced on 18 April 2015. Under the amendments, a Fast Track Assessment Process (**FTAP**) was introduced in respect of specified adverse protection visa decisions. As explained in the simplified outline of Pt 7AA in s 473BA, the FTAP provides "a limited form of review … of certain decisions to refuse protection visas to some applicants, including unauthorised maritime arrivals who entered Australia on or after 13 August 2012, but before 1 January 2014, and who have not been taken to a regional processing country". Significantly, while emphasising that the objective of the IAA is to provide a mechanism of limited review that is efficient, quick and consistent with Div 3 (conduct of review), the simplified outline also expressly emphasises that the objective is to provide a mechanism of limited review that (within the relevant context) is "free of bias" (see also s 473FA(1), which is discussed in [26] below).

13 Before describing other key relevant provisions of Pt 7A it is convenient to set out some extracts from the Explanatory Memorandum to the Bill which introduced Pt 7AA, which provide a helpful overview of the new regime for review of some adverse protection visa decisions:

> New Part 7AA establishes the IAA and the new limited merits review framework. Under this Part, the Minister will be required to refer fast track reviewable decisions to the IAA and provide the IAA with review material as soon as reasonably practicable after the primary decision to refuse to grant a protection visa has been made under section 65 of the Migration Act. Similar to the RRT, the IAA will have the power to either affirm the decision or remit the decision to the department for reconsideration in accordance with prescribed directions or recommendations.
>
> In carrying out its functions under the Migration Act, the IAA is to pursue the objective of providing a mechanism of limited review that is efficient and quick. While there will be discretionary powers for the IAA to get new and relevant information and to get information in the most suitable and convenient way from applicants, the IAA is under no duty to accept or request new information or interview an applicant.
>
> As a limited review body, other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or an applicant provided it of their own volition. New information will only be considered if the IAA is satisfied that there are exceptional circumstances to justify the consideration of that new information. For example, exceptional circumstances may be found where there is evidence of a significant change of conditions in the applicant's country of origin that means the applicant may now engage Australia's protection obligations. Where an applicant provides or seeks to provide the IAA with new information of their own volition, they would also have to satisfy the IAA that the new information could not have been provided to the Minister before the primary decision was made. The limited review mechanism supports the measures in the Migration Amendment (Protection and Other Measures) Bill 2014 which clarify the responsibility of asylum seekers to specify the particulars of their claim, provide sufficient evidence to establish their claim and encourage complete information to be provided upfront. The measures will prevent those asylum seekers who attempt to exploit the merits review process by presenting new claims or evidence to bolster their original unsuccessful claims only after they learn why they were not found to engage Australia's protection obligations by the Department of Immigration and Border Protection.
>
> The IAA will be independent of the Department of Immigration and Border Protection and be established as a separate office within the RRT. The Principal Member of the RRT will be responsible for the overall operation and administration of the IAA and will be able to issue practice directions and guidance decisions to the IAA. A Senior Reviewer will be appointed to oversee the functions and operations of the IAA and perform any powers and functions delegated by the Principal Member. The Senior Reviewer and reviewers of the IAA will all be engaged under the *Public Service Act 1999*.

14 The IAA is established by Div 8 of Pt 7AA. The IAA is part of the Migration and Refugee Division of the Administrative Appeals Tribunal (**AAT**) (the Refugee Review Tribunal (**RRT**) has been amalgamated into the AAT). The members of the IAA include *inter alia* Senior Reviewers and Reviewers who, under s 473JE(1), are persons engaged under the *Public Service Act 1999* (Cth).

15 The procedure for referring a fast track reviewable decision to the IAA is set out in Div 2 of Pt 7AA. The Minister is obliged to refer a fast track reviewable decision (as defined in s 473BB) to the IAA "as soon as reasonably practicable after the decision is made" (s 473CA). At the same time as the referral is made (or as soon as reasonably practicable thereafter), the Secretary must give to the IAA certain material, which is known as "review material", in respect of each

referred decision (s 473CB(1)). The review material must include a copy of the primary decision-maker's written reasons for decision and any material provided to the primary decision-maker by the referred applicant. Significantly, the review material must also include (emphasis added): "[a]ny 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 [IAA]) to be relevant to the review**" (s 473CB(1)(c)). This provision lies at the heart of the appeal.

16 The IAA is obliged to "review" a fast track reviewable decision which is referred to it under s 473CA (s 473CC(1)).

17 Division 3 of Pt 7AA describes the conduct of a review of a fast track reviewable decision by the IAA. Section 473DA is an important provision:

> 473DA Exhaustive statement of natural justice hearing rule
>
> (1) This Division, together with sections 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.
>
> (2) To avoid doubt, nothing in this Part requires the Immigration Assessment Authority to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.

18 The proper construction of this provision, and whether it entirely ousts the natural justice hearing rule is raised by the notice of contention. It is notable, however, that the exclusion focusses exclusively on the first limb of natural justice, which relates to the fair hearing rule, and not the other limb relating to bias.

19 The legislative scheme obliges the IAA to conduct its review of a fast track reviewable decision referred to it by considering the review material provided to it under s 473CB, without accepting or requesting new information and without interviewing the referred applicant (s 473DB(1)). In other words, the review is generally conducted on the papers and focusses on the review material provided by the Secretary to the IAA.

20 There are provisions in Subdiv C of Div 3 concerning the IAA getting documents or information which were not before the primary decision-maker when he or she made the decision under s 65 and which the IAA considers may be relevant. Such documents or information are described as "new information" (s 473DC). It is made clear that the IAA does not have a duty to get, request or accept, any new information if requested to do so by a referred applicant or anyone else (s 473DC(2)). The IAA may, however, invite a person to give new information to it, either orally or in writing (s 473DC(3)).

21 The IAA is prohibited from considering any new information unless:

(a) it is satisfied that there are "exceptional circumstances to justify considering the new information"; and

(b) the referred applicant satisfies the IAA that the new information was not, and could not have been, provided to the Minister before a decision was made under s 65 or the new information is "credible personal information" which was not previously known but, if known, may have affected the consideration of the referred applicant's claims (s 473DD).

22 The IAA is obliged to give certain new information to a referred applicant in the circumstances specified in s 473DE.

23 When it makes a decision on a review under Pt 7AA, the IAA is obliged under s 473EA to give a written statement, which must:

(a) set out the IAA's decision on the review;
(b) set out the reasons for the decision; and
(c) record the day and time the statement is made.

24 After making the written statement, the IAA is obliged to return to the Secretary any document that the Secretary has provided to it in relation to the review and to give the Secretary a copy of any other document that contains evidence or material on which the IAA's findings of fact were based (s 473EA(4)).

25 The IAA is obliged to notify the referred applicant of its decision on a review by giving a copy of the written statement to the person within 14 days after the day on which the decision is taken to have been made (s 473EB(1)).

26 Division 5 of Pt 7AA contains provisions concerning the exercise of the IAA's powers and functions. It is desirable to set out s 473FA, which describes *inter alia* how the IAA is to exercise its functions:

> 473FA How Immigration Assessment Authority is to exercise its functions
>
> (1) The Immigration Assessment Authority, in carrying out its functions under this Act, 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).
>
> Note: Under section 473DB the Immigration Assessment Authority is generally required to undertake a review on the papers.
>
> (2) The Immigration Assessment Authority, in reviewing a decision, is not bound by technicalities, legal forms or rules of evidence.

27 It is notable that it is explicitly stated in s 473FA(1) that, in carrying out its functions, the IAA is to pursue the objective set out therein and that an element of that objective is to provide a mechanism which is free of bias (and consistent with Div 3).

The judicial review proceeding below

28 After obtaining leave to amend the judicial review application on three occasions, the first respondent challenged both the IAA's decision and the Secretary's decision to provide certain documents to the IAA. Grounds 1 and 2 concerned the IAA's decision. Ground 3 concerned the Secretary's decision.

29 It is desirable to say something more concerning the judicial review challenge advanced by the first respondent below having regard to the Minister's complaint on appeal that there was a denial of procedural fairness concerning the FCCA's finding that there was no statutory mandate for the Secretary to provide the Departmental communications to the IAA. The material sent to the IAA by the Secretary included a Departmental email dated 30 July 2015. It 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. It also stated that the charge of indecent assault had a Court date of 11 September 2015 at the Melbourne Magistrates' Court.

30 Ground 1 of the final judicial review application claimed that the IAA's decision was affected by jurisdictional error, which was described as "excess of jurisdiction/denial of natural justice". In essence, this ground focussed on the natural justice hearing rule and the extent to which it had been ousted by s 473DA.

31 The claim that the IAA's decision was affected by jurisdictional error (excess of jurisdiction/denial of natural justice) was repeated in ground 2, but this

ground focussed on the IAA's failure to disclose to the judicial review applicant that it had received legal advice (which related to the proper address to which Departmental correspondence should be sent to the visa applicant) and the Departmental communications from the Secretary as part of the "review material". The particulars to ground 2 included a claim that the Secretary had no power to give legal advice to the IAA as part of the "review material", and a cross-reference was given to ground 3 of the final judicial review application (see ground 2(b)). There was no similar express claim of a lack of power by the Secretary to give the Departmental communications to the IAA, however, particular (d) claimed that the Secretary's provision of "review material" in excess of power necessarily vitiated the IAA's decision. Arguably, this may have implicitly referred to the Departmental communication even though the immediate context might suggest that it related to the legal advice. And particular (f) to ground 2 claimed that the legal advice **and** Departmental communications were material given to the IAA by a person other than the judicial review applicant that could not be dismissed as not relevant, not credible or not significant and were potentially adverse. It was then contended that the Act did not exclude the common law obligation to provide the judicial review applicant with an opportunity to rebut, qualify or comment upon the legal advice and Departmental communications. Finally, particular (h) to ground 2 stated that, in the alternative, the IAA's decision was affected by apprehended bias because of the provision to the IAA of the legal advice and Departmental communications, both of which must have been considered to be relevant to whether the delegate's decision should be affirmed, without disclosing that material to the judicial review applicant.

32 Ground 3 complained that the Secretary's decision was affected by jurisdictional error (excess of jurisdiction) because the Secretary included the legal advice in the review material given to the IAA. It was contended that the Secretary had no power under s 473CB to give legal advice to the IAA in the conduct of a review under Pt 7AA of the Act.

33 The primary judge rejected grounds 1 and 3 of the final judicial review application, as well as that part of ground 2 which concerned the alleged denial of a fair hearing to the judicial review applicant arising from the provision of the legal advice and the Departmental communications. However, the primary judge upheld that part of ground 2 relating to apprehended bias arising from the provision of the Departmental communications to the IAA. Her Honour's reasoning on this matter may be summarised as follows.

34 First, there was no dispute that the Departmental communications were provided by the Secretary to the IAA ([29]).

35 Secondly, the Departmental communications about the judicial review applicant being charged with indecent assault could not have been relevant to any issue the IAA had to decide, and were not probative of whether he was truthful or whether he faced serious or significant harm in Iran. The Minister submitted that the FCCA should infer that the Secretary, at the time of referral, considered the Departmental communications to be relevant ([33]). (It should be interpolated at this point that subsequent to the IAA's decision the indecent assault charge against the first respondent was dismissed: see [27] of the primary judge's reasons for judgment).

36 Thirdly, in the absence of an affidavit from the Secretary, the primary judge was not prepared to infer that the Secretary considered the Departmental

communications to be relevant to the review. Accordingly, her Honour found that the Secretary provided the Departmental communications to the IAA without any statutory warrant ([34]). As noted above, the Minister contends that this finding was made in denial of procedural fairness and without prior notice to the parties.

37 Fourthly, because the natural justice hearing rule had been excluded, and there was nothing of direct relevance in Pt 7AA, the IAA was not required to disclose the Departmental communications to the judicial review applicant and seek his comments ([35]).

38 Fifthly, although the natural justice hearing rule was excluded, it was common ground that apprehended bias was not excluded. Relying upon Deane J's decision in *Webb v The Queen* (1994) 181 CLR 41 (*Webb*) at 74, apprehended bias encompasses a category of "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". The Departmental communications concerning the charge of indecent assault were highly prejudicial and irrelevant. In the IAA, evidence is not inadmissible as such, as the rules of evidence do not apply but, in the context of non-judicial decision-makers, the concept of "inadmissible" can be understood as meaning "irrelevant" ([36]-[40]), so held the primary judge.

39 Sixthly, applying "normal principles", the decision of the IAA was affected by a reasonable apprehension of bias ([40]).

40 The FCCA set aside the IAA's decision and remitted the matter to the IAA for determination according to law. These orders substantially reflected the orders sought by the judicial review applicant in the final judicial review application. It is notable that no relief was sought by the judicial review applicant nor granted by the FCCA concerning the contents of the review material provided by the Secretary to the IAA. On its face, therefore, absent a reconsideration by the Secretary of what material should be given to the IAA under s 473CB on the remitter, the material would presumably again include the Departmental communications which underpinned the finding of apprehended bias. The first respondent did not seek to challenge the FCCA's orders on the appeal notwithstanding that the Court drew his counsel's attention to the anomaly presented by those orders.

The appeal

41 The Minister's appeal raises two grounds:

(a) the primary judge denied the Minister procedural fairness in upholding a part of ground 2 on a basis that had not been raised by the judicial review applicant below, namely that the Departmental communications had not been given to the IAA in accordance with s 473CB(1)(c) of the Act (ground 1); and

(b) the primary judge erred in holding that the IAA's decision was affected by apprehended bias merely because the Departmental communications had been provided to it (ground 2).

42 In support of ground 1, the Minister contended that it was common ground below that the Departmental communications had lawfully been given to the IAA by the Secretary. It was contended that the primary judge departed from that position without putting the parties on notice of her Honour's proposed conclusion and therefore the Minister was denied a reasonable opportunity to adduce evidence and make submissions on the matter (citing *Farah*

Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 at [132] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ and *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301 at [37]-[44] per Mansfield, Tracey and Mortimer JJ). The Minister contended that, if he had been on notice of the point, he may have drawn the primary judge's attention to the operation of the presumption of regularity. Thus, so it was contended, unless it could be demonstrated otherwise, the primary judge should have presumed that the preconditions to the lawful performance of the Secretary's duty existed.

43 In support of ground 2 of the appeal, the Minister emphasised that the primary judge's reasoning with respect to the first respondent's complaint of apprehended bias turned on the prejudicial and objectively irrelevant content of the Departmental communications. The Minister did not contest that the IAA was subject to the test of apprehended bias, but he contended that the primary judge's reasoning was in error for the following reasons.

44 First, the primary judge ought to have applied the presumption of regularity and found that the Departmental communications comprised a part of the "review material" as defined in s 473BC(1).

45 Secondly, the judicial review applicant carried the burden of proof and it was not for the Secretary or the Minister to file evidence going to the formation of the Secretary's state of mind concerning the relevance of the Departmental communications.

46 Thirdly, given the IAA's obligation to provide a statement of reasons for its decision, it should be inferred from the absence in that statement of any express reference to the Departmental communications that the IAA did not consider them to be material to the review. This is to be contrasted with the Secretary's subjective view (under s 473CB(1)(c)), at the time the delegate's decision was referred to the IAA that the Departmental communications were relevant to the review.

47 Fourthly, any allegation of apprehended bias is overcome by a finding that the Departmental communications were given to the IAA by the Secretary in accordance with s 473CB(1)(c) and is sufficient to avoid Deane J's fourth category in *Webb*. In any event, the Departmental communications were not "inadmissible" or "extraneous" in the sense described by Deane J in *Webb* if the communication was lawfully given by the Secretary to the IAA.

48 Fifthly, even if the Departmental communications were "inadmissible" or "extraneous", that is insufficient to ground a reasonable apprehension of bias where the complaint is no more than that the information was put before the IAA. That is because the IAA is not bound by the rules of evidence (s 473FA(2)). Moreover, the first respondent has not identified how the Departmental communications might cause the IAA to deviate from a neutral evaluation of the merits of his case (citing *O'Sullivan v Medical Tribunal (NSW)* [2009] NSWCA 374 (*O'Sullivan*) at [24]-[25] per Basten JA).

49 Finally, the Minister submitted that IAA Reviewers (such as the person who constituted the IAA in this proceeding) have to be engaged under the *Public Service Act* and must abide by the Australian Public Service Values and Code of Conduct, which knowledge should be imputed to the fair-minded lay observer.

50 The Minister's written submissions were elaborated upon, at considerable length, in oral address.

The objection to competency

51 The objection to competency was directed to ground 1 of the Minister's notice of appeal. It was contended that the Minister could not complain of a denial of procedural fairness in circumstances where the Secretary had submitted to the FCCA's jurisdiction (save as to costs). Ms De Ferrari, who appeared for the first respondent, candidly acknowledged in oral address that the complaint was essentially one concerning the Minister's standing to complain of procedural fairness to a third party.

52 The objection to competency is misconceived. The Minister was a proper party and contradictor in the judicial review proceeding below (see s 479 of the Act). Having portfolio responsibility for the administration of the Act, the Minister's interests were affected by the FCCA's orders.

The Minister's application to adduce fresh evidence

53 At the outset of the hearing, the Minister sought leave to file and serve an affidavit of Paul Lajos Takacs affirmed on 25 July 2017. Mr Takacs annexed to his affidavit extracts from the Commonwealth Public Service Gazette for 12 March 2015 regarding candidates for appointment to the then Migration Review Tribunal and RRT. It made reference to the proposed establishment of the IAA within the RRT to review fast track protection visa decisions. It contained the following information:

> Successful candidates will have very good analytical, interpersonal and communication skills, possess a strong sense of fairness, have sound knowledge of administrative law, exercise good judgement and be able to make and write high quality decisions. The IAA will consist of the Senior Reviewer, a number of reviewers and APS employees allocated to the IAA. Reviewers report to the Senior Reviewer.

54 Also annexed to Mr Takacs's affidavit was a Certificate of Enrolment for Ms Patricia Anne Tyson, who was the person who constituted the IAA in this matter. The certificate disclosed that Ms Tyson had been entered on the roll of Legal Practitioners of the Supreme Court of the ACT on 16 December 2005.

55 Mr Kaplan, who appeared for the Minister, submitted that the material was relevant to ground 2 of the notice of appeal, concerning apprehended bias. He said that the hypothetical lay observer in the apprehended bias test should be attributed with knowledge of the fact that Ms Tyson had legal qualifications and would, therefore, be able to put out of her mind irrelevant material. He also explained that, even if the proposed tender of the material was rejected, the Minister would submit that the informed lay observer should be attributed with knowledge that Ms Tyson, as an employee under the *Public Service Act*, was obliged to act in accordance with the APS Values and Code of Conduct associated with such employment.

56 The Court rejected the further evidence on the ground of lack of relevance. The Act is silent on the qualifications of a Reviewer, save that it is provided in s 473JE(1) that Reviewers are to be persons engaged under the *Public Service Act*. Accordingly, unlike the position in *O'Sullivan*, the professional qualifications of Reviewers is unspecified in the legislation. The Minister did not point to any legal authority which supported the tender of such material in an apprehended bias case. Indeed, the proposed tender would appear to be

contrary to authority (see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 (*Livesey*) at 298-299 per Mason, Murphy, Brennan, Deane and Dawson JJ).

Disposition of the appeal

57 **Ground 1 (procedural unfairness)**: For the following reasons, I consider that the primary judge's finding that there was no statutory warrant for the Secretary to include the Departmental communications in the material provided to the IAA did not involve procedural unfairness. The relevant particulars in the final judicial review application did not include an express claim that the Secretary lacked power to include the Departmental communications (as opposed to the legal advice) in the material referred to the IAA. However, as noted above, it is arguable that such a claim was implicit in particular (d) to ground 2. This particular asserted that the Secretary's provision of "review material" in excess of power necessarily vitiated the IAA's decision.

58 More significantly, however, I consider that the primary judge was entitled to determine the matter on the basis of how the case was argued. A copy of the transcript of the FCCA hearing was not included in the appeal papers, but the Court was provided with copies of the multiple written submissions prepared by the parties below. The Minister included in his further written outline of submissions dated 23 December 2016 in the FCCA a submission to the effect that the Court should infer that the Departmental communications were (lawfully) included in the material provided by the Secretary to the IAA under s 473CB. This contention was made in response to the Court having granted leave to the judicial review applicant on 2 December 2016 to further amend his application for judicial review to contend that the IAA's decision was affected by apprehended bias by reference to the Departmental communications. Paragraph 4 of the Minister's further written outline of submissions stated:

> The Court should infer that the "departmental communications" formed part of the material that the delegate of the Secretary provided the Authority under section 473CB of the Act. And in particular, the Court should infer that the "departmental communications" formed part of the material that was in the delegate's position or control and were "considered by the [delegate] (at the time the decision is referred to the Authority on or about 3 December 2015) to be relevant to the review" (Section 473CB(1)(c)). On this basis, the "departmental communications" formed part of the "review material" as defined in section 473CB.

59 Accordingly, in circumstances where the Minister himself advanced a submission below to the effect that the Departmental communications had lawfully been included by the Secretary in the review material provided to the IAA (and the IAA was required by s 473DB(1) to consider such material), I consider that it was a legitimate matter for the primary judge to decide whether or not to accept that submission. Her Honour found that there was no statutory warrant for the Secretary to provide the Departmental communications to the IAA. There was no procedural unfairness in making this finding.

60 **Ground 2 (apprehended bias)**: For the following reasons, this ground of appeal should also be rejected.

(a) Relevant legal principles

61 The relevant principles relating to apprehended bias in an administrative decision-making context are relatively well settled. Difficulty sometimes arises

in their application to particular facts and circumstances. Many of the principles were conveniently summarised by the Full Court in *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 at [35] and [36] per Allsop CJ, Kenny and Griffiths JJ:

> 35 Although the application of the apprehended bias test can give rise to difficulties, the parties were in substantial agreement as to the primary elements of the test. That is hardly surprising because the test is relatively well settled. It is whether a fair-minded and appropriately informed lay observer might reasonably apprehend that the Court might not bring a fair, impartial and independent mind to the determination of the matter on its merits (see, for example, *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (***Ebner***); *Concrete Pty Limited v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577 and *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283 (***British American Tobacco***)).
>
> 36 Other relevant principles are:
>
> (a) at least the following two steps are involved in a case involving an allegation of apprehended bias:
>
> (i) there must be an identification of what it has said might lead a judge to decide a case other than on its legal and factual merits; and
>
> (ii) there must be an articulation of the logical connection between the matter and the feared deviation from a course of deciding a case on its merits (*Ebner* at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ);
>
> (b) an allegation of bias against a judge on the basis of prejudgment is a serious matter not the least because it carries with it the suggestion that the judge has failed to honour his or her judicial oath as such might be questioned by the fair-minded observer. As is also the case where such an allegation is made against an administrative officer, the allegation must be "distinctly made and clearly proved" (*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 (***Jia Legeng***) at [69] per Gleeson CJ and Gummow J); and
>
> (c) as noted above, the test assumes that the hypothetical fair-minded lay observer 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 (see, for example, *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [13] per Gleeson CJ, Gaudron, McHugh and Gummow and Hayne JJ and at [53] per Kirby J; *British American Tobacco* at [47]-[48] per French CJ and at [144] per Heydon, Kiefel and Bell JJ and *Isbester v Knox City Council* [2015] HCA 20 at [23] per Kiefel, Bell, Keane and Nettle JJ and at [57] per Gageler J).

62 These principles are not applied in a vacuum. They reflect an underlying and fundamental value to preserve and promote confidence in the integrity and impartiality of administrative decision-making and the judicial review process which attaches to it. This important consideration is well reflected in Allsop CJ's observations in *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [2], with which I respectfully agree:

> 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. There was no debate as to the proper formulation of the relevant test. Nor could there be, governed, as it is, by High Court authority. 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].

63 To similar effect, in *Islam v Minister for Immigration and Citizenship* (2009) 51 AAR 147 (*Islam*) at [51], in the context of considering an allegation of apprehended bias against an AAT member, Finn J said that the essential concerns "are to maintain integrity of the Tribunal's processes and procedures to provide public reassurance of that integrity".

64 Another important feature of the test in Australia for reasonable apprehension of bias should also be noted. As Hayne J observed in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [184], the development and application of the test in Australia avoids the need for the reviewing court:

> … to attempt some analysis of the likely or actual thought processes of the decision-maker. It objectifies what otherwise would be a wholly subjective inquiry and it poses the relevant question in a way that avoids having to predict what probably will be done, or to identify what probably was done, by the decision-maker in reaching the decision in question.

65 In applying these general principles and considerations, it is also critical to acknowledge the importance of the relevant legal, statutory and factual framework within which a claim of apprehended bias is made, as was emphasised in *Isbester v Knox City Council* (2015) 255 CLR 135 (*Isbester*) at [20] per Kiefel, Bell, Keane and Nettle JJ. In *Isbester*, the plurality said 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.)

66 The application of these general principles and considerations should take into account the nature of the particular conduct or event which is said to give

rise to apprehended bias. Four distinct but overlapping categories were identified by Deane J in *Webb*, namely interest, conduct, association, and extraneous information. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*) at [24], Gleeson CJ, McHugh, Gummow and Hayne JJ said that it was unnecessary to rule upon the comprehensiveness of these four categories. Their Honours also noted that the utility of the categories may depend upon the context in which they are employed, however, the four categories were described as providing a "convenient frame of reference". In *Isbester*, the plurality stated at [24] that different factors may assume relevance depending upon the particular category of bias which arises for consideration.

(b) Minister's legal authorities distinguishable

67 The Minister's reliance on cases such as *O'Sullivan* and *Crowley v Holmes* (2003) 132 FCR 114 (*Crowley*) is misconceived. Those cases are plainly distinguishable. They reflect their own particular statutory and factual contexts. It is convenient to explain why that is so by reference to these cases in turn.

(i) *O'Sullivan* distinguishable

68 *O'Sullivan* concerned an inquiry by the NSW Medical Tribunal (the **Tribunal**) into two complaints by the Health Insurance Commission (the **Commission**) against a medical practitioner. The Commission prepared a bundle of documents to be tendered to the Tribunal at the hearing, which was of an adversarial nature. The documents included a statutory declaration which may have been a forgery and for which the practitioner may have been responsible. The Tribunal upheld the practitioner's objection to the tender of the document as having no relevance to the issues before the Tribunal. The chairperson said that the document would not be taken into account by the Tribunal. In accordance with the relevant statutory requirements, the chairperson was a District Court judge (a person with the status of a Supreme Court judge was also eligible to chair the Tribunal). The Tribunal had to be constituted by three additional members, two of whom had to be registered medical practitioners and the other a person who was not a registered medical practitioner (ie a lay member) but who may be a lawyer. The particular lay member in this case was not a lawyer but had tertiary qualifications. Notwithstanding the rejection of the tender of the statutory declaration, the appellant contended that the Tribunal should disqualify itself for apprehended bias, having allegedly been compromised by having access to the prejudicial material. The Tribunal refused to recuse itself, and the practitioner promptly appealed to the Court of Appeal before the Tribunal hearing proceeded any further.

69 The appeal was dismissed for reasons which, relevantly, may be summarised as follows:

(a) Where apprehended bias is said to relate to the contents of particular prejudicial documents, it is relevant to have regard to the nature of the material and the sense in which it is extraneous to the inquiry being undertaken (at [24]).

(b) The nature of the Tribunal is also relevant (at [24]). Here, the Tribunal was not bound by the rules of evidence, and was presided over by a District Court judge, who could distinguish and disregard the irrelevant and prejudicial material. Similarly, in circumstances where non-judicial members of the Tribunal were obliged to follow the direction of the

judicial member on evidentiary matters, a fair-minded observer would consider that experienced medical practitioners and a lay person holding tertiary qualifications would abide by the judicial member's direction (at [43]).

(c) There was no act, comment or conduct of any kind on the part of any member of the Tribunal which could found an apprehension of partiality and it was insufficient that there was a concern that "a passing exposure to potentially prejudicial material early in the course of the hearing might affect the final outcome" (at [44]).

70 As the above summary reveals, there are important differences between the circumstances in *O'Sullivan* and those here. They include the following distinguishing features. First, the qualifications for membership of the Tribunal were set out in the *Medical Practice Act 1992* (NSW). As noted above, the Tribunal chairperson had to be a person with judicial status who had the power to direct the non-judicial members on matters of evidence and procedure. A fair-minded observer would be attributed with knowledge of these matters and their implications for the particular allegation of apprehended bias. That is to be contrasted with the position here regarding the Reviewer who simply had to be employed under the *Public Service Act*. The APS Values and Code of Conduct, which are expressed at a high level of generality, even if attributed to the fair-minded observer, would not support a reasonable view that the Reviewer was able to distinguish and disregard irrelevant and prejudicial material.

71 It is desirable to set out ss 10 and 13 of the *Public Service Act*:

> 10 APS Values
>
> Committed to service
>
> (1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.
>
> Ethical
>
> (2) The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.
>
> Respectful
>
> (3) The APS respects all people, including their rights and their heritage.
>
> Accountable
>
> (4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.
>
> Impartial
>
> (5) The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.
>
> …
>
> 13 The APS Code of Conduct
>
> (1) An APS employee must behave honestly and with integrity in connection with APS employment.
>
> (2) An APS employee must act with care and diligence in connection with APS employment.
>
> (3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.

(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
  (a) any Act (including this Act), or any instrument made under an Act; or
  (b) any law of a State or Territory, including any instrument made under such a law.
(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
(7) An APS employee must:
  (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
  (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.
(8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
(10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
  (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
  (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
(11) An APS employee must at all times behave in a way that upholds:
  (a) the APS Values and APS Employment Principles; and
  (b) the integrity and good reputation of the employee's Agency and the APS.
(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
(13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

72 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*.

73 Secondly, in *O'Sullivan*, the presiding judicial member rejected the proposed tender and stated unambiguously that the Tribunal could properly put the document out of its mind and not bring it to bear in any way in determining the matter. That is to be contrasted with the position here where the Reviewer's

statement of reasons is simply silent on the relevance or irrelevance of the Departmental communications. This should be viewed against a background of the plain fact that the Secretary had formed the subjective view that the document was relevant to the review because otherwise it would not have been included in the review material. Furthermore, as emphasised above, in fulfilling its statutory function, the IAA must, subject to Pt 7AA, consider the review material provided to it under s 473CB (see s 473DB(1)). These matters are properly attributed to the fair-minded lay observer.

74 Thirdly, the mere fact that there is no reference in the IAA's statement of reasons to the Departmental communications does not mean that the fair-minded observer would conclude that the material could have had no bearing on the IAA's decision. The fair-minded lay observer should be attributed with knowledge of the following relevant matters:

(a) the IAA had a statutory obligation under s 473EA to give a written statement for its decision, including the reasons for the decision; and

(b) consistently with the Minister's concession in the appeal, s 25D of the *Acts Interpretation Act 1901* (Cth) also applies with the consequence that the IAA's statement of reasons must also set out the IAA's findings on material questions of fact and refer to the evidence or other material on which those findings were based.

75 That does not mean, however, that the fair-minded lay observer would conclude from the absence of any reference in the IAA's statement of reasons to the Departmental communications, that those communications may not have influenced the IAA's decision. Having 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. It is this consideration which supplies the necessary connection between the nature of the Departmental communications and the fear that the IAA might not decide the referral on its merits, as required by *Ebner* (see [61] above).

76 I respectfully agree with Finn J's views in *Islam* at [49] that, while the significance of "subconscious effect" is to be treated with circumspection in a case involving the first limb of procedural fairness (see *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [19]),

> … the issues of appearance and judgment in apprehended bias cases are … differently appointed. They do involve an appeal to the good sense and experience of the reasonably informed and fair minded *lay* (not *judicial*) observer.

(Emphasis in original.)

77 It is unnecessary to determine in this case what significance, if any, should attach to an express assertion by the IAA that highly prejudicial material has been discarded and played no role in its decision. That is because, in contrast with *O'Sullivan*, no such assertion was made by the IAA here.

78 The Minister contended that merely because the IAA was in possession of prejudicial material was insufficient, without more, to give rise to apprehended bias. It is also unnecessary to determine that submission in circumstances where in this case there is present more than the mere fact that the IAA had possession of the prejudicial material. In particular, as noted above, when the matter was referred to the IAA, the Secretary must have considered that the Departmental communications were relevant to the review. The IAA must have known that to

be the case having regard to the plain terms of s 473CB. It is notable that this provision requires the Secretary to focus on whether he or she considers particular material to be relevant to the review at the time when the decision is referred to the IAA and not on the broader question whether material **might** be relevant to the review. Moreover, it was the IAA's statutory obligation under s 473DB to consider the "review material". It was, of course, open to the IAA in arriving at its own decision on the referral to take a different view from the Secretary as to the relevance of the material, but its statement of reasons is entirely silent on that matter. As noted above, given the highly prejudicial nature of the material, the fair-minded lay observer, acting reasonably, might apprehend that the IAA may have been affected by the material, even subconsciously.

(ii) *Crowley* distinguishable

79 *Crowley* concerned the operation of the Professional Services Review Committee (the **Committee**) under the *Health Insurance Act 1973* (Cth). Under that legislation, the Director could make an investigative and/or adjudicative referral to the Committee of any concern that a medical practitioner may have engaged in an inappropriate practice. Included in the material attached to an adjudicative referral to the Committee in this case was information relating to the previous counselling and disqualification by the Committee of the appellant practitioner for over-servicing in respect of a period earlier than the period the subject of the adjudicative referral. The appellant described the additional material as "irrelevant and extremely prejudicial". He challenged the primary judge's rejection of his claims that:

(a) the Committee could not consider the additional material;

(b) the adjudicative referral was invalid because it contained the additional material; and

(c) possession of the additional material might have meant that there was apprehended bias on the part of the Committee.

80 On appeal, having regard to the relevant statutory provisions of the *Health Insurance Act*, the Full Court held as follows:

(a) It was a matter for the Committee to decide what material it should rely on and the Committee might consider that the history of the practitioner's earlier professional conduct could be relevant.

(b) It was for the Director to determine the content of the referred material within the framework of relevant provisions of the *Health Insurance Act* and the Director did not breach any express statutory provision in including the additional material in the referred material.

(c) Assuming, contrary to the finding at (a) above, that the additional material was not appropriate for consideration by the Committee, there was in any event no apprehended bias. Justice Dowsett (with whom Madgwick and Finkelstein JJ agreed) said at [36]:

> … A fair-minded observer would not perceive bias merely because the Committee knew of such previous dealings between the Commission and the appellant. The Committee would inevitably know that the investigative and adjudicative referrals leading to its own deliberations were, in effect, instigated as a result of the Commission having such concerns. That it had previously had similar concerns about other conduct could hardly take the matter any further. The appellant will no doubt have an opportunity to be heard on the matter. He will almost

> certainly receive assurances similar to those referred to in *Holmes v Mercado*. Our society relies upon courts and tribunals to determine factual matters by weighing evidence, often rejecting or discounting some of it. There is no justification for the view that a professional tribunal such as the Committee is unable or unwilling to set aside material which, for one reason or another, is not proper for its consideration. I am confident that a fair-minded observer would share that view.

81 The relevant circumstances here are far removed from those in *Crowley*. It is sufficient to highlight the following fundamental differences. First, in performing its functions in respect of an adjudicative referral, the Committee in *Crowley* acted as an adjudicator and conducted an adversarial hearing at which the affected practitioner was entitled to be present and be heard. That is very different from the limited review process associated with the IAA, which is properly characterised as inquisitorial in nature and in which the affected individual has limited rights of participation.

82 Secondly, there was no equivalent express statutory provision in the *Health Insurance Act* to ss 473CB and 473DB of the Act, which respectively oblige the Secretary to consider at the time the IAA referral is made what material is relevant to the review and the IAA to consider that material in conducting its review.

(c) IAA's power to disclose the Departmental communications to the first respondent

83 At the hearing there was some discussion concerning the options available to the IAA when it was provided by the Secretary with material, such as the Departmental communications, which were plainly irrelevant and highly prejudicial. In particular, there was discussion as to whether it was open to the IAA to disclose the relevant material to the referral applicant and invite a response. The Minister contended that the only source of power for the IAA to take that course was to be found in s 473DC, which relates to the obtaining of "new information". The Minister submitted that there no implied power of disclosure in s 473FA notwithstanding the express reference in that provision to "bias".

84 It is unnecessary to resolve these complex issues here, including how such a disclosure and any response by the referred applicant could be regarded as "new information" within the meaning of ss 473DC and 473DD. That is because no such disclosure was in fact made by the IAA. On the evidence before the Court, the IAA took no steps to involve the first respondent in its decision-making concerning the Departmental communications. In these circumstances, the IAA exposed itself to the risk that, on a judicial review, apprehended bias might be established.

(d) Presumption of regularity

85 As noted above, the Minister contended that the FCCA ought to have applied a presumption of regularity and, consequently, found that the Departmental communications were provided lawfully to the IAA. Thus it was contended that, unless the judicial review applicant could demonstrate otherwise, it should be presumed that the preconditions to the lawful performance of the Secretary's duty under s 473CB(1)(c) existed. The Minister cited in support of this contention McHugh JA's judgment in *Minister for Natural Resources v New*

South Wales Aboriginal Land Council (1987) 9 NSWLR 154 and Beach J's judgment in *Singh v Minister for Immigration and Border Protection* [2014] FCA 955 at [56]-[57].

86 In my view, the presumption of regularity had no application in the particular circumstances here. That is because, assuming for the moment that the presumption was in principle potentially available, it was rebutted by the nature and contents of the very material to which the Minister says the presumption should attach. The particular information in the Departmental communications was, on its face, plainly irrelevant to the referral and was highly prejudicial to the first respondent. As noted above, on the basis of the materials before this Court, no issue was raised either before the delegate or the IAA concerning the first respondent's character. In these circumstances, it would appear strongly arguable that no person performing the Secretary's duty under s 473CB(1)(c) of the Act could reasonably consider, at the time the referral was being made, that the information was relevant to the IAA review. The Departmental communications should not have been provided to the IAA. There is no scope for the presumption of regularity to operate in these circumstances. Accordingly, the Minister's contention that the primary judge erred in concluding that there was no statutory warrant under s 473CB(1)(c) for the Secretary to provide the Departmental communications because of the presumption of regularity is rejected.

87 I might add that there is also a real issue as to whether the presumption of regularity has the breadth of operation which the Minister contended such that, absent the matters referred to immediately above, the presumption could apply to a provision such as s 473CB(1)(c) and the preconditions contained therein. It is unnecessary, however, to determine that issue here, particularly where the Court did not have the benefit of detailed submissions on the subject from the first respondent.

(e) The Secretary's state of mind

88 The first respondent undoubtedly carried the onus below of establishing a reviewable error. The primary judge's refusal to infer that the Secretary had considered the Departmental communications to be relevant in the absence of evidence from the Secretary as to his or her state of mind on the matter appears to reflect a view taken by the primary judge that the issue of the Secretary's state of mind was properly raised by the particulars to ground 2 of the final judicial review application. The primary judge seems to have proceeded on the basis that, where a person's state of mind is raised in a judicial review case, that person is in the best position to give evidence on the issue.

89 It was probably unnecessary for the primary judge to apply this reasoning in rejecting the Minister's contention that it should be inferred that the preconditions to the exercise of the power under s 473CB(1)(c) were met. That is because, as explained above, the presumption of regularity had no application in this case. Moreover, even if it had been presumed that the preconditions existed and the Departmental communications were lawfully provided to the IAA by the Secretary would not have the consequence that reasonable bias could not be established (see [78] above).

(f) "Correct or preferable decision"?

90 During the course of his oral address, the Minister's counsel described the IAA's task in performing its functions under Pt 7AA as to determine what is the

"correct or preferable decision". This phraseology aptly describes the decision-making function of the AAT (see, for example, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419; 24 ALR 577 at 589 per Bowen CJ and Deane J). But I have grave doubts that the phraseology is apt to describe the decision-making function of the IAA having regard to the significant differences between its function and powers and those of the AAT.

91 The function of the AAT is to determine what is the correct or preferable decision having regard to all the material before the AAT. That material may include material which was not before the primary decision-maker. In addition, the AAT is generally entitled to exercise all the powers that were available to the primary decision-maker and it is empowered to grant any of the forms of relief which are set out in s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).

92 That is to be contrasted with the position of the IAA. As noted above, the circumstances in which the IAA is entitled to have regard to material which is not included in the "review material" referred to it by the Secretary is severely limited by provisions in the Act concerning "new information". Furthermore, the IAA is not vested with a power to exercise all the powers that were available to the primary decision-maker. The IAA is confined by s 473CC(2) to either affirming the primary decision or remitting the decision for reconsideration in accordance with such directions or recommendations of the IAA as are permitted by regulation. These matters alone are sufficient to highlight the danger of describing the IAA's decision-making function in terms of having to determine what is the correct or preferable decision.

The notice of contention

93 The first respondent's notice of contention was expressly stated to be on the basis that it arose only if the Court upheld one of the two grounds in the Minister's notice of appeal. The notice of contention raised eight grounds, which may be summarised as follows:

(a) the primary judge erred in finding that there was an issue before the Minister's delegate whether the first respondent's mother had moved to Qeshm Island for reasons unrelated to the Basij;

(b) the primary judge erred in not finding that the IAA fell into jurisdictional error because it had no power to affirm the primary decision on a matter that was not in issue at that level of decision-making;

(c) alternatively, if the matter was in issue, common law procedural fairness requirements obliged the IAA to identify it to the first respondent and provide him with an opportunity to comment;

(d) the primary judge erred in failing to find that the Secretary's decision was affected by jurisdictional error and that this infected the IAA's decision;

(e) alternatively, there was a denial of common law procedural fairness because the IAA did not provide the first respondent with an opportunity to deal with material that was relevant, credible and significant to the IAA's decision;

(f) alternatively, assuming that the Secretary's decision to give the Departmental communications to the IAA was supported by s 473CB(1)(c) of the Act, there was a reasonable apprehension of bias

by the IAA in circumstances where the IAA was prevented from giving notice to the first respondent of these prejudicial documents and seeking his comments;

(g) the primary judge erred in finding that the legal advice and related communications were relevant to the IAA's review; and

(h) additionally to ground 6, the primary judge erred in failing to find that the IAA's decision was vitiated by apprehended bias by reference to the legal advice and related communications which were provided to the IAA, which were objectively irrelevant and not disclosed to the first respondent for his comments.

94 Some of the grounds of the notice of contention raise important issues of statutory construction and, in particular, the extent to which the natural justice fair hearing rule has been ousted by s 473DA(1) of the Act. In circumstances where the Minister has failed to establish either of his two grounds of appeal, I consider it is unnecessary to determine any of the grounds in the notice of contention. The important and complex issues they raise should await a case in which they properly arise for determination and the Court has the benefit of full argument. Accordingly, the notice of contention should be dismissed.

Conclusion

95 For these reasons, the appeal should be dismissed. So should both the objection to competency and the notice of contention. The vast bulk of the case was directed to the Minister's notice of appeal. Accordingly, it is appropriate that the Minister pay the first respondent's costs.

96 As noted above, the first respondent did not cross-appeal against the orders made by the FCCA, which produces the anomaly described in [40] above. Assuming that the Secretary has not yet re-exercised the duty imposed by s 473CB(1)(c), it can be expected that the re-exercise will take into account these reasons for judgment.

Charlesworth J.

97 I have had the benefit of reading the draft reasons for judgment of Griffiths J. I agree that the appeal should be dismissed. I concur with his Honour's reasons, except as indicated below.

98 I prefer to express no opinion about whether the function of the IAA is to make what is the "correct or preferable decision". The outcome of this appeal does not turn on the merits of the Minister's submissions in relation to that issue. I would reserve the issue for consideration in matters where it assumes more importance.

99 In relation to the knowledge that is to be attributed to the fair-minded and appropriately informed lay observer, that knowledge would include the whole of the statutory framework, including the requirement that the Secretary provide to the IAA any material in the Secretary's possession or control that is considered by the Secretary to be relevant to the review in accordance with s 473CB(1)(c) of the Act. To my mind, the finding of apprehended bias does not depend on attribution to the fair-minded observer of any assumptions as to whether or not the Secretary erred in the performance of that statutory task. It was unnecessary for the primary judge to find that the Secretary had no statutory warrant to provide the IAA with the Departmental communications in order to conclude that the IAA's decision was affected by an apprehension of bias. Assuming the

Secretary subjectively considered the material to be relevant, that would not denude the material it of its objectively irrelevant and prejudicial character.

100 As to the question of the IAA's power to disclose the Departmental communications to the first respondent, as Griffiths J has observed, no such disclosure was made in the present case. I would add that it is not to be assumed that an apprehension of bias would have been avoided had disclosure been made. Generally speaking, upon learning that the reviewer is in possession of irrelevant and prejudicial material, a referred applicant may well raise and maintain an objection to the reviewer exercising any powers on the review on the ground of apprehended bias and may well seek to obtain orders restraining the anticipated exercise of the IAA's powers. Whether or not disclosure by the IAA of its possession of irrelevant and prejudicial material would avoid an apprehension of bias arising must depend on the facts of the particular case.

101 Relatedly, it is not correct to say that the first respondent was denied an opportunity to "deal with material that could not be dismissed as not relevant" as he contended before the primary judge and then by way of his notice of contention on this appeal. The information in the Departmental communications was simply not of that character: it was information that could, indeed should, be dismissed as *not* relevant. The most that can be said is that the first respondent had no opportunity to make before the IAA the submissions he later made on his application for judicial review in relation to the rule against apprehended bias. In my view, submissions to that effect would not constitute "new information" within the meaning of s 473DC of the Act. That provision is concerned with information bearing on the substantive merits of the decision under review and should not be read as circumscribing the IAA's discretion to invite and consider submissions concerning the IAA's procedures or the limits of its jurisdiction.

Orders accordingly

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Solicitors for the first respondent: *Victoria Legal Aid*.

WILLIAM THOMAS