HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **QYFM**
Appellant

AND:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S NOTE ON COMPARATIVE CASE LAW

1. This note is in a form suitable for publication on the internet.

2. During the hearing on 13 December 2022, the Court asked the First Respondent to provide a note: (1) identifying any United States (**US**) and Canadian cases that usefully analyse the principles applicable in "marginal" cases raising questions of disqualification arising from a judge's participation in a prosecutorial role in prior proceedings (particularly concerning the "degree of connection" between proceedings that might give rise to an apprehension of bias); and (2) comparing the approach adopted by Australian courts.[1]

3. Recognising that care is required when drawing upon cases concerning legal tests and provisions not applicable in Australia, the discussion below focusses on factors that may inform the application of the Australian principles, without descending into the detail of the different legal contexts in which those factors were applied (which otherwise would require discussion of, for example, US federal and State disqualification statutes[2] and due process principles,[3] and Canada's apprehended bias test[4]).

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1 *QFYM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2022] HCATrans 217 (13 December 2022) at lines 2545-2547, 2585-2588, 2630-2641.
2 See, eg, 28 USC §455, esp para (a), requiring disqualification "in any proceeding in which [a justice's] impartiality might reasonably be questioned".
3 See *Williams v Pennsylvania* (2016) 579 US 1 at 8-9.
4 See *Wewaykum Indian Band v Canada* [2003] 2 SCR 259 at [60].

(a) Multi-factorial approach

4. There is no general rule in the US or Canada that a judge who has previously prosecuted an accused is automatically disqualified from hearing a case involving them.[5] Instead, much like the Australian approach, courts in both countries apply what could be described as a multi-factorial approach that is directed to assessing whether a judge's prior prosecutorial role gives rise to a reasonable apprehension of bias or lack of impartiality. That involves considering all relevant facts and circumstances relating to the prior prosecution, the instant proceeding and the connection (if any) between them.

5. The fact specific nature of the inquiry[6] means that the cases do not attempt any comprehensive identification of the relevant factors. Nor do they attempt to state a test for the "degree of connection"[7] that must exist for disqualification to be required between the proceedings in which a person is now to act as a judge and previous proceedings in which they were a prosecutor. They do, however, clearly reflect the importance of such a connection existing (usually in a fairly direct way) before disqualification will be warranted. In that way, they make plain that the courts of both countries see no inherent incompatibility between the simple fact of having prosecuted a person in the past and acting as a judge in a subsequent proceeding involving that person.

(b) Unrelated proceedings

6. Consistently with the approach adopted by Australian courts in cases such as ***McCreed*** *v The Queen*[8] and ***Muldoon*** *v The Queen*,[9] US and Canadian courts have repeatedly held that a judge is not disqualified from sitting simply by reason of having previously prosecuted an accused for unrelated criminal offences.[10] Like the Australian authorities,[11] in considering whether disqualification is warranted, in addition to emphasising the lack

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5 See, eg, ***Jenkins*** *v Bordenkircher* 611 F 2d 162 at 166 (1979), certiorari denied *Jenkins v Bordenkircher* (1980) 446 US 943; *Isom v Arkansas* (2019) 140 S Ct 342 at 343 (Sotomayor J); *R v* ***Goodpipe*** (2018) SKQB 189 at [12]-[16].

6 See also *Wewaykum Indian Band v Canada* [2003] 2 SCR 259 at [77], the Supreme Court of Canada observing that the application of the reasonable apprehension of bias test is "highly fact-specific" and that "[t]here are no shortcuts".

7 As per *QFYM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2022] HCATrans 217 (13 December 2022) at lines 2545-2546.

8 (2003) 27 WAR 554.

9 (2008) 192 A Crim R 105. See also *Eastman v Chief Executive Officer of the Department of Justice and Community Safety (No 2)* [2010] ACTSC 13 at [39] (Refshauge J).

10 See, eg, *Jenkins* (1979) 611 F2d 162 at 167; *Mustafoski v State* (1994) 867 P2d 824 at 832; *Goodpipe* (2018) SKQB 189 at [13]-[16] and the authorities cited. See also Zitter, "Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case" (2001) 85 *American Law Reports* 5th 471 at §7[a].

11 See, esp, *Muldoon* (2008) 192 A Crim R 105 at [26]-[27] (Hodgson JA, James and Price JJ agreeing); *McCreed* (2003) 27 WAR 554 at [17] (Steytler J, Malcolm CJ agreeing).

of relationship between proceedings (usually in cases where the subsequent proceeding is itself a criminal proceeding), courts frequently have regard to:

6.1. the fact that judges could ordinarily be expected to compartmentalize previous prosecutorial experience[12] such that, for example, absent some evidence of hostility or prejudgment, it would not be assumed that a judge would not be able to give a defendant a fair hearing solely because they previously prosecuted a defendant on unrelated charges;[13]

6.2. the length of time between the proceedings[14] (a factor likewise given particular emphasis in some Australian authorities[15]); and

10 6.3. the circumstances of the proceedings, including the relative seriousness of the charges faced in the subsequent proceeding;[16] whether the offending involved is the same or similar to that involved in the previous proceeding[17] (although, as in *Muldoon* and *R v Garrett*[18], the fact that similar offending is involved would not alone ordinarily result in disqualification[19]); and whether the prior proceeding involved entry of a guilty plea such that no trial was conducted.[20]

7. An illustration of the application of those principles in a (somewhat) analogous case is *United States v Outler*,[21] where the subsequent judicial role involved issuing a search warrant (rather than presiding over a criminal prosecution). The Court emphasised matters such as the "almost three years" between the prosecutorial function and the

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12 See, eg, *R v Walker* (1968) 3 CCC 254 at 256; *City of Montreal v Singh* (2018) QCCM 16 at [13]-[15].

13 See, eg, *Jenkins* (1979) 611 F2d 162 at 166; *Commonwealth of Pennsylvania v Darush* (1983) 459 A2d 727 at 731.

14 See, eg, *R v Walker* (1968) 3 CCC 254 at 256 (magistrate acted as Crown Prosecutor "some years ago"); *R v Moosomin* (2008) SKCA 168 at [20] (previous prosecution disposed of "some three and a half years" earlier); *Jenkins* (1979) 611 F2d 162 at 166 (previous prosecutorial contact occurred "between five and thirteen years before the trial"). See also *R v Di Giuseppe* [2005] OJ No 4046 at [28].

15 See, eg, *R v Pinkstone* (2001) 125 A Crim R 44 at [71] (Roberts-Smith J); *McCreed* (2003) 27 WAR 554 at [2] (Malcolm CJ), [18] (Steytler J), [45] (Miller J); *Muldoon* (2008) 192 A Crim R 105 at [26(7)], [28] (Hodgson JA), James and Price JJ agreeing).

16 See, eg, *Jenkins* (1979) 611 F2d 162 at 166 (referring to charges of "an entirely different magnitude"); *Goines v State* (1998) 708 So 2d 656 at [4] (referring to "grave" and important sentence); *Goodpipe* (2018) SKQB 189 at [22] (referring to seriousness of offence and sentence).

17 See, eg, *People v Smith* (1986) 120 AD 2d 753 at [2] (recusal required in a drug-related conviction where the judge had, on two prior occasions, prosecuted the defendant on drug-related charges); *Goines v State* (1998) 708 So 2d 656 at [4] (disqualification required where previous prosecution and instant trial where for drug charges).

18 (1988) 50 SASR 392.

19 See, eg, *Goodpipe* (2018) SKQB 189 at [22]; *R v Walker* (1968) 63 WWR 381; *People v Curkendall* (2004) 12 AD 3d 710; *Government of the Virgin Islands v Briggs* (1983) 19 VI 390.

20 See, eg, *R v Moosomin,* 2008 SKCA 168 at [20]; *Goodpipe* (2018) SKQB 189 at [19].

21 (1981) 659 F2d 1306 at 1312, certiorari denied: *Outler v United States* (1982) 455 US 950.

commencement of a second investigation which led to the issue of search warrant, the fact that the search warrant "was based on information gathered exclusively during the second investigation" such that there was clearly no connection between the proceedings, and that, "[a]bsent other factors, there [was] no reason to believe [the] Magistrate … did not act impartiality".[22]

(c) Subsequent related proceedings

8. The US cases that address the circumstances in which disqualification might be warranted because a judge is to preside over a case that is in some way related to, or a consequence of, a conviction obtained in a proceeding in which they had a prosecutorial role tend to concern circumstances that are far removed from the present case. In particular, we have not identified any US or Canadian case in which it has been held (or even suggested) that a prior prosecutorial role prevents a judge from participating in subsequent judicial review proceedings.

9. The absence of such cases is not surprising, as the US cases in which disqualification has been held to be required involve a fairly direct relationship between a prior prosecutorial role and subsequent judicial proceedings. They concern, for example:

9.1. disqualification of a judge who prosecuted an accused from hearing an appeal from the very conviction or sentence obtained in that prosecution,[23] or a post-conviction proceeding impugning that very conviction or sentence[24] (being circumstances where "[t]he functions of a zealous advocate and a neutral adjudicator inherently contradict one another"[25]); or

9.2. a criminal case and civil case arising out of the very same facts and controversy, such that "participation as prosecutor in the criminal case … makes the later civil case a 'proceeding in which … his impartiality might reasonably be questioned'".[26]

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22 *United States v Outler* (1981) 659 F2d 1306 at 1312.

23 Expressly addressed in statutes such as 28 USC §455(b)(3), by requiring disqualification where a justice has "served in governmental employment and in such capacity participated as counsel … concerning the proceeding", "proceeding" being defined in §455(d)(1) to include "pretrial, trial, appellate review, or other stages of litigation".

24 *Overstreet v State* (2009) 17 So 3d 621 at [10]; *Holmes v State* (2007) 966 So 2d 858 at [11]. See also *Williams v Pennsylvania* (2016) 579 US 1.

25 *Overstreet v State* (2009) 17 So 3d 621 at [10].

26 *Rushing v City of Georgiana* (1978) Ala 361 So 2d 11 at 12-13. See also *Miller v State* (2012) 94 So 3d 1120 at [15]; *Barnes v State* (1904) 83 SW 1124 at 1125.

10. In *United States v Herrera-Valdez*,[27] the Court of Appeals Seventh Circuit held that "a reasonable, disinterested observer could assume bias from the fact that the judge presiding over the defendant's prosecution for illegal re-entry was the same person who ran the office that pursued, and succeeded in obtaining, the removal order that [was] the source of his current prosecution." However, in that case "the linchpin of Herrera-Valdez's case is his collateral attack against the removal order". In those circumstances, the Court emphasised that it would be "reasonable to perceive" that a judge "may consciously or unconsciously credit the government's arguments that a removal order is valid when that same judge headed the office that sought and succeeded in obtaining the removal order"; "[i]ndeed, a reasonable observer could conclude that [the judge] was adjudging the merits of a collateral attack against his own work product".

11. In *R v Goodpipe*,[28] the trial judge concluded that although he was not disqualified from presiding over Mr Goodpipe's trial for manslaughter by reason of previously prosecuting Mr Goodpipe for a robbery conviction, it was appropriate to recuse himself from sentencing "in the unique circumstances". That was because the Crown intended to make an application in the sentencing proceeding that would result in "extensive review of the offender's history, including the circumstances underlying previous convictions" to assess a pattern of conduct and predict the level of risk of future violent conduct.[29] Noting that "the circumstances of the offence for which [he] prosecuted Mr Goodpipe in 2003 would figure prominently in any such determination", Kalmakoff J considered that it may "strike a reasonable observer as problematic" if his own "words and representations to the court about Mr Goodpipe's conduct and level of risk in 2003 became evidence that [he] had to weigh and consider in adjudicating crucial matters related to his conduct and level of risk, in [a separate application], in 2018".

12. Those cases are broadly in accord with the Australian approach, where disqualification is required when the relationship between a prior role as prosecutor and a subsequent judicial role is such that the judge could reasonably be apprehended to have an interest in "the vindication of their opinion than an offence has occurred or that a particular penalty

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27 (2016) 826 F3d 912 at 919 (emphasis added). See also *United States v Simon* (2019) 937 F3d 820 at 827-828, distinguishing *Herrera-Valdez* on the basis that there was no possibility of adjudicating the merits of a collateral attack against the prior conviction in his sentencing proceeding.

28 (2018) SKQB 189 at [5].

29 *Goodpipe* (2018) SKQB 189 at [24]. For analogous cases in the US, see *Coleman v State* (2007) 986 So 2d 464. See also *Ryals v State*, 914 So 2d 285 at [11]-[12]; *United States v Smith* (2015) 775 F3d 879 at 881-882.

should be imposed",[30] or to have developed through their prosecutorial role a "frame of mind"[31] which, having regard to the issues in the subsequent proceeding, is incompatible with the degree of neutrality required to decide that proceeding.

13. There is a marked absence of cases that suggest that a reasonable apprehension of bias will exist in circumstances such as those raised by the present case, where a conviction indirectly relates to a subsequent proceeding in which the former prosecutor is to sit as a judge, but where there is no overlap of issues and no impugning of the judge's work or decisions as a prosecutor. Given the plethora of US disqualification cases, the apparent absence of cases of that kind is telling, particularly given the apparent breadth of provisions such as 28 USC §455(a), which is a "catch all" provision requiring recusal when a judge's "impartiality might reasonably be questioned". In practice, US courts have required disqualification only in "rare and extraordinary circumstances arising out of prior government employment" save in the circumstances specifically addressed in 28 USC §455(b)(3), which relevantly requires disqualification in circumstances where the judge served in governmental employment as counsel in "the proceeding" (which is broadly defined to include essentially all stages of litigation).[32]

14. In summary, the comparative case law suggests that the present appeal is far from a "marginal case", and that a reasonable observer would not apprehend that a judge might not bring an impartial mind to bear on the resolution of judicial review proceedings because of a prior role as a prosecutor years earlier in criminal proceedings turning on unrelated issues.

Dated: 20 January 2023

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30 ***Isbester*** *v Knox City Council* (2015) 255 CLR 135 at [46] (Kiefel, Bell, Keane and Nettle JJ).
31 *Isbester* (2015) 255 CLR 135 at [63] (Gageler J).
32 See, eg, *Baker & Hostetler LLP v US Dept of Commerce* (2006) 471 F 3d 1355 at 1358; *In re Hawsawi* (2020) 955 F3d 152 at 160. See also *Liteky v United States* (1994) 510 US 540 at 553.