

On appeal from the Full Federal Court

BETWEEN:

CNY17
Appellant

10

**AND: MINISTER FOR IMMIGRATION AND
BORDER PROTECTION AND ANOTHER**
Respondents

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I CERTIFICATION

20 1. We certify that this outline is in a form suitable for publication on the internet.

PART II OUTLINE OF ARGUMENT

GROUND 1 AND 2 OF THE NOTICE OF APPEAL – APPREHENDED BIAS

30 2. Given the express obligation of the IAA to consider the “review material” under s 473DB, for the IAA to have that material before it does not constitute a departure from any standard of decision making implicitly required by the statute.

Isbester (2015) 255 CLR 135 at [21]; *Webb* (1981) 181 CLR 41 at 74
RWS at [27]-[28]

40 3. For the appellant to establish a reasonable apprehension of bias, therefore, he must establish that some of the material complained of was not provided by the Secretary as part of the “review material”; ie, it was not provided under s 473CB (cf Ground 4). But the material complained of was provided in pursuance of the Secretary’s obligations under that section.

3.1. To the extent that that material repeated information disclosed in the Appellant’s visa application, otherwise provided by him, or contained in the decision of the delegate, it came within s 473CB(1)(a) or (b) (or alternatively could not in itself give rise to any apprehension of a departure from the proper course of decision making).

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3.2. To the extent that the material constituted further information about the Appellant's background and conduct, it was within s 473CB(1)(c).

3.2.1. There is no challenge to the finding of the majority below that the absence of a subjective belief in the relevance of the material was not established (CAB 99 [133], 102 [149], 104 [152]).

3.2.2. Information concerning the Appellant and his conduct was capable of being regarded by the Secretary as relevant to the review as background or context; or as potentially relevant to credibility (or suggesting issues the IAA might wish to explore in that regard).

3.2.3. The term "relevant" in s 473CB(1)(c) must be read broadly, so as not to require the Secretary to second-guess the IAA's consideration of what material is before it.

RWS [31], [33], [57]-[58]

4. If the material provided by the Secretary is properly regarded as "extraneous" and "inadmissible", the next step is to identify the connection between that material and the feared deviation from neutral determination of the issues on their merits (including the reasonableness of any apprehension raised by that connection). That identification proceeds by reference to a hypothetical fair minded observer who is aware of the statutory framework and the factual context.

Isbester at [21]-[23], [57]-[59]

RWS [35]-[40]

5. Putting aside repetition of facts that were already before the IAA (concerning incidents in relation to which the Appellant had faced charges), the material complained of was adverse to the Appellant only in that it suggested he was aggressive and/or challenging in his dealings with the Department and he had been involved in unspecified "incidents" in detention.

RWS [41]

ABFM 15, 35, 55-57

6. For the IAA to have this material would not cause any fair minded observer to fear that it might not determine the issues before it neutrally, in the light of the following:

6.1. the nature and functions of the IAA;

6.2. the specific issues with which it is required to deal;

6.3. its obligation to give reasons for its decisions (s 473EA(1); *AMA16* (2017) 254 FCR 534 at [74]).

Reasons below at [155], [161]-[163] (CAB 106-109)

RWS [37], [39], [42]

GROUND 3 – PROCEDURAL FAIRNESS OR REQUIREMENT TO SEEK COMMENTS

7. In Part 7AA of the Act, s 473DA limits the operation of the natural justice hearing rule.

BVD17 v Minister for Immigration [2019] HCA 34 at [31], [33]

8. In the circumstances of the present case, there was no requirement for the IAA to give the applicant an opportunity to comment on review material of which he was not aware.

RWS [50]

9. Further, if the material before the IAA was properly irrelevant to the review, as the appellant alleges, then no obligation to seek comments on that material could arise as an aspect of the hearing rule.

RWS [48], [51]

GROUND 4 – THE SECRETARY’S DECISION TO PROVIDE THE REVIEW MATERIAL

10. See [3] above.

11. Further:

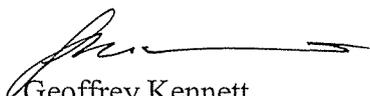
11.1. Section 473CB(1) specifies the minimum for provision of material to the IAA by the Secretary. Provision of additional information is not a breach of any limitation.

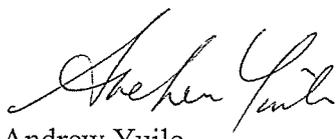
RWS [59]-[61]

11.2. Nor does provision of additional information in itself vitiate the decision of the IAA.

RWS [62]-[63]

Dated: 16 October 2019


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