IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M72 of 2019

BETWEEN:

CNY17
Appellant

and

Minister for Immigration and Border Protection
First Respondent

and

Immigration Assessment Authority
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet certification

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues arising in this appeal

2. In respect of review material,[1] not known by the referred applicant to be before the Second Respondent (the **Authority**),[2] and not relevant to the review task to be carried out by the Authority, whether there is a threshold of prejudice in the application of the test for apprehended bias. The Appellant says the answer is 'No'.

3. Whether the Secretary, when acting pursuant to s 473CB(1)(c) of the Act, must reach the requisite mental state acting reasonably and on a correct understanding of the law, and, if so, whether the Secretary's provision of review material in breach of that limitation vitiates the decision of the Authority, when the Authority does not provide the referred applicant with an opportunity to comment. The Appellant says the answers are 'Yes' and 'Yes'.

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1 See s 473BB of the *Migration Act 1958* (Cth) (the **Act**), definition of 'review material', and s 473CB.

2 See ss 473CC and 473DB of the Act; s 473BB of the Act, definition of 'referred applicant'.

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4. Whether the Authority must provide the referred applicant with an opportunity to comment on material which the Secretary decided to give to the Authority pursuant to s 473CB(1)(c) of the Act, where that material is prejudicial and its presence before the Authority is not known to the referred applicant. The Appellant says the answer is 'Yes'.

Part III: Notice under *Judiciary Act 1903* (Cth), s 78B

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations of decisions below

6. The decision at first instance is *CNY17 v Minister for Immigration and Border Protection* [2017] FCCA 2731. The decision on appeal is *CNY17 v Minister for Immigration and Border Protection* [2018] FCAFC 159.

Part V: Summary of relevant facts

7. The Appellant arrived in Australia in August 2013.[3] He was detained in immigration detention on Christmas Island,[4] and was not permitted to apply for a visa because of the bar in s 46A of the Act.

8. On 20 March 2015, the Appellant broke a window whilst in immigration detention (**March 2015 Incident**), and was charged with damaging Commonwealth property. The charge was ultimately resolved by the Appellant pleading guilty, being convicted but released without sentence being passed, on condition that he be of good behaviour for six months and pay reparation of $820.60.[5] No other facts were before the Authority or the courts below as to the circumstances of the March 2015 Incident, nor did the Authority or the courts below have, e.g., any sentencing remarks.[6]

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3 *CNY17 v Minister for Immigration and Border Protection* [2018] FCAFC 159 (***CNY17***) at [78] (Moshinsky J) (**CAB 82**). The exact date was 13 August 2013: **ABFM 92** (Protection visa application).

4 *CNY17* at [83] (Moshinsky J) (**CAB 84**).

5 *CNY17* at [89], [97] (Moshinsky J) (**CAB 84-85, 87**); **ABFM 134-135**. Although the delegate's decision, and the judgments of Moshinsky J and Thawley J below, refer to restitution, what was ordered, consistently with s 21B of the *Crimes Act 1914* (Cth), was reparation. See **ABFM 48**, reproducing the Prosecution Report. *Cf* Magistrates Court of Western Australia's Notice of Conviction, **ABFM 27-30**.

6 *CNY17* at [32] (Mortimer J) (**CAB 72**).

9. On 29 September 2015, the First Respondent (the **Minister**) lifted the s 46A bar in respect of the Appellant.[7] The Appellant remained in immigration detention.

10. The Appellant was involved in a second incident, related to protests which took place following the death of a fellow detainee at the Christmas Island Immigration Detention Centre (**November 2015 Incident**). These protests occurred on 8 and 9 November 2015.[8] The Appellant was charged, as described by himself in his eventual visa application, with 'SPITTING AT A DETENTION OFFICER & BREAKING A WINDOW'.[9] No other facts were before either the Authority or the courts below as to the November 2015 Incident—there was no identification of the charge(s), no summary of alleged facts, no information as to how the Appellant pleaded to the charges (if he did at all) or indeed whether the prosecution even proceeded with the charge(s), nor anything else.[10]

11. On 16 September 2016, the Appellant lodged his application for a protection visa.[11] By this date, the charge that was the subject of the March 2015 Incident had been resolved.[12] In the form for his visa application, the Appellant disclosed his conviction arising from the March 2015 Incident.[13] The matter of the charge(s) the subject of the November 2015 Incident was still pending, and he disclosed this fact too.[14] There was little more for him to say. All the application form had space for, was for him to identify the charge(s).[15]

12. On 14 March 2017, a delegate of the Minister refused the Appellant's visa application.[16]

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7 *CNY17* at [35] (Mortimer J), [170] (Thawley J) (**CAB 72, 111**).

8 *CNY17* at [86] (Moshinsky J) (**CAB 84**). In his application for a protection visa, the Appellant had given a date of 'NOVEMBER 2015 (approx.)': **ABFM 102**. In the Extraneous Material (see [17] of these submissions), it is said 'Under AFP investigation for CI riot 09/11/2015': **ABFM 15**.

9 *CNY17* at [54]-[55] (Mortimer J) (**CAB 76**).

10 *CNY17* at [86] (Moshinsky J) (**CAB 84**).

11 *CNY17* at [90] (Moshinsky J) (**CAB 85**); **ABFM 70-115** (Forms and attachment), **116-119** (Statement).

12 It was resolved in 26 February 2016: *CNY17* at [89] (Moshinsky J) (**CAB 84**). Although the decision of the delegate of the Minister referred to the conviction having occurred on 26 February 2016 (**ABFM 134**), the sources for the detail recorded in his Honour's finding were various pages of the Extraneous Material (defined at [17] below): see **ABFM 28-30, 32, 48**.

13 **ABFM 102**.

14 Ibid.

15 Ibid.

16 *CNY17* at [93] (Moshinsky J) (**CAB 86**); **ABFM 120-123** (Letter to the Appellant, attaching decision record), **124-140** (Reasons for the decision, with attachments).

13. The delegate's reasons include the following statements:[17]

> [*Relevantly to s 36(2)(a) of the Act*]
>
> EXCEPTION TO THE MEANING OF A REFUGEE – subsection 5H(2) of the Act
>
> Are there serious reasons for considering the applicant has committed acts set out in paragraphs 5H(2)(a), (b) or (c) of the Act?
>
> Information held by the Department indicates that on 26 February 2016 the applicant was convicted of intentionally destroying or damaging property belonging to the Commonwealth or any public authority under the Commonwealth. As a result of this conviction the applicant was placed on a 6 month good behaviour bond and also required to pay restitution of $820.60 to the Commonwealth and a security of $500.00.
>
> As I am not satisfied [the Appellant] is a refugee, as defined by s5H(1) of the Act, an assessment in relation to s5H(2) of the Act has not been made.
>
> …
>
> [*Relevantly to s 36(2)(aa) of the Act*]
>
> As I am not satisfied [the Appellant] is a person in respect of whom Australia has protection obligations an assessment in relation to s36(2C) has not been made. Refer to discussion under Exception to the Meaning of a Refugee – subsection 5H(2) of the Act above.

14. There was no evidence before the courts below as to what the delegate was referring to when he wrote of '[i]nformation held by the Department'—whether that was a reference to the Appellant's own visa application form, or something else. Given the level of detail, an inference may be open that the delegate was referring to one of the documents that form part of the Extraneous Material (defined at [17] below).

15. The relevance of the passages from the delegate's decision quoted above is this. If the delegate had refused to grant to the Appellant a protection visa by relying on s 5H(2), or on s 36(2C)(a) or (b), the decision would not have been a fast track decision,[18] with the

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17 **ABFM 134-135**. See also *CNY17* at [97] (Moshinsky J).

18 See s 5(1) of the Act, definition of 'fast track decision'.

consequence that review of the decision would not have been by the Authority,[19] but instead by the Administrative Appeals Tribunal.[20]

16. Possibly on 23 March 2017, the Minister[21] referred the decision of the delegate, refusing the Appellant's application for a protection visa, to the Authority.

17. Possibly also on 23 March 2017, the Secretary[22] gave to the Authority the review material, which included various pages that are critical for this appeal (**the Extraneous Material**).[23] Included were various internal Departmental documents. Those documents contained:

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19 See s 473BB of the Act, definition of 'fast track reviewable decision', and s 473CA, providing for the duty of the Minister to refer fast track reviewable decisions to the Authority.

20 See s 500(1)(c) of the Act.

21 Or one of the Minister's delegates. Although s 473CA mandated referral of the delegate's decision to the Authority, there is no record of either the date on which the referral was made or the person who made the referral.

In a letter to the Appellant dated 23 March 2017, the Authority stated that the 'matter was referred to the [Authority] on 23 March 2017': **ABFM 147**. However, in the letter to the Appellant dated 14 March 2017, which enclosed the decision record, a person who identified himself only as 'Gregory' stated: 'The Department has referred this decision to the [Authority] for review under Part 7AA': **ABFM 121.**

22 Or one of the Secretary's delegates. There is no record of the decision as to what to include in the review material, mandated by s 473CB, and no record of the date on which the decision was made nor of the person who made it.

23 **ABFM 5-67**. *CNY17* at [101]-[102], [133], [135] (Moshinsky J) (**CAB 88-89, 99-100**).

There is no record of what was given to the Authority, distinguishing as well what documents were before the delegate when he made the decision under s 65 (see s 473DC(1)(a) and s 5(1), definition of 'new information'), and what documents were not before the delegate. (A document titled 'Referrals to the Immigration Assessment Authority (IAA) and Disclosure Checklist', undated (the **Referrals and Disclosure Checklist**), does not make clear what was given to the Authority or when, nor does it show which of the documents given to the Authority had been before the delegate when he made the decision under s 65.)

In the letter to the Appellant dated 23 March 2017, which notified him of the referral, the Authority stated: 'The Department of Immigration and Border Protection (the department) has provided us with all documents they consider relevant to your case. This includes any material that you provided to the departmental officer before they decided to refuse you a protection visa. The [Authority] will proceed to make a decision on your case on the basis of the information sent to us by the department, unless we decide to consider new information': **ABFM 147**.

In the letter to the Appellant dated 14 March 2017, which enclosed the decision record, 'Gregory' stated: 'The Department has provided the following information to the IAA: • the attached decision record • any material you gave to the Department before the refusal decision was made • any other material the Department considers to be relevant to the review • your contact details for the purpose of receiving documents': **ABFM 122**. A date of 14 March 2017 by which there had already been a decision by the Secretary as to what would be given to the Authority, and actual giving of those materials, appears unlikely, having regard to the Referrals and Disclosure Checklist.

a. assertions from Departmental officers that the Appellant had 'a history of aggressive and/or challenging behaviour when engaging with the department', and had been involved in 'many incidents while in detention', without any identification of what the alleged history, behaviour or incidents were;[24]

b. statements from Departmental officers that the Appellant was under 'investigation' for participation in a 'riot',[25] and that the 'Superintendent from ABF ha[d] recommended' that he be detained in a correctional facility rather than immigration detention during such investigation;[26]

c. statements that 'ABF' expressly told Departmental officers 'not to engage' with the Appellant, for some unexplained reason relating to the Appellant's transfer to 'a country prison';[27]

d. statements that the Appellant had been 'of interest' to 'Det Intel', that he had been of interest to the 'National Security Monitoring Section' even after ceasing to be 'of interest' to 'Det Intel', and that he was subject of other unspecified 'on-going investigations';[28]

e. statements that the Appellant had 'been considered on several occasions for release from detention as the holder of a Bridging E visa' with the implicit representation that on each occasion the result of that consideration was negative, because he had 'been involved in many incidents while in detention'.[29]

18. These internal Departmental documents were never in the Appellant's possession. Self-evidently, these documents could not have been, and were not, provided by the Appellant as part of his visa application.[30] The Appellant was never told of the existence of these documents, nor of the matters stated in them, nor that they had been provided to the

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24 *CNY17* at [44], [48] (Mortimer J) (**CAB 74**); **ABFM 15**, **55, 57**.

25 *CNY17* at [36], [42] (Mortimer J) (**CAB 73**); **ABFM 58**. As to 'riot', see also **ABFM 15, 35, 37, 42, 46, 58**.

26 *CNY17* at [39]-[40], [49] (Mortimer J) (**CAB 73-75**); **ABFM 35, 58**. See also *CNY17* at [33]-[34] (Mortimer J) (**CAB 72**).

27 **ABFM 6**.

28 *CNY17* at [35], [51]-[52] (Mortimer J) (**CAB 72, 75**); **ABFM 15, 56**.

29 *CNY17* at [48]-[49] (Mortimer J) (**CAB 74**); **ABFM 55, 57**.

30 If they had been provided by the Appellant, the Secretary would have been under a duty to give them to the Authority by reason of s 473CB(1)(b) of the Act.

Authority. It is unknown whether these documents (or some of them) were before the delegate at the time when he refused the Appellant's application for a protection visa.[31] It is unknown, if they were, how the delegate had obtained them.[32] These 'unknowns' do not affect the Appellant's case. They do, however, highlight the 'administrative obscurity of the process' which has been put into effect in respect of Pt 7AA of the Act, which 'tend[s] to undermine confidence in institutional decision-making processes'.[33]

19. The Extraneous Material was not relevant to the task which the Authority was required to undertake, and each of the judges in the court below accepted this was so.[34] Each of the judges also accepted that the Extraneous Material was prejudicial.[35]

10 20. On 12 May 2017, the Authority affirmed the delegate's refusal to grant a protection visa.[36] In its reasons, the Authority said it had 'had regard to the material referred by the Secretary under s.473CB' of the Act.[37] Were it not for this statement, 'the administrative obscurity of the process would be complete',[38] and, but for the Minister's admission in the judicial review proceeding as to what had been given by the Secretary to the Authority,[39] the Appellant would not have known the extent of the material which was considered by the Authority.

Part VI: Argument

21. In *AMA16*,[40] the Full Court of the Federal Court held that a fair-minded lay observer might apprehend that the Authority might not have brought an impartial mind to the review, in

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31 In the court below, the Minister sought to file, as fresh evidence, an affidavit directed to this issue, but leave was not given: *CNY17* at [112]-[115], [138] (Moshinsky J) (**CAB 94**, **100**).

32 Having regard to Subdiv AB of Div 3 of Part 2 of the Act, s 56 would appear to be the only available power by which the delegate might have obtained them (if he did).

33 *CQR17 v Minister for Immigration and Border Protection* [2019] FCAFC 61 (***CQR17***) at [9] (Jagot J, Reeves J agreeing at [5]).

34 *CNY17* at [62], [66] (Mortimer J); [132] (Moshinsky J); [159], [162]-[166] (Thawley J) (**CAB 78-79, 99, 108-109**).

35 *CNY17* at [58] (Mortimer J); [136] (Moshinsky J); [159]-[161], [169]-[171] (Thawley J) (**CAB 77, 100, 108, 111-112**).

36 Authority's Decision and Reasons (**CAB 5-26**).

37 Authority's Decision and Reasons at [2] (**CAB 7**).

38 *CQR17* at [9] (Jagot J, Reeves J agreeing at [5]).

39 An admission by the Minister is typically how Pt 7AA cases have proceeded. See, e.g., *AMA16 v Minister for Immigration and Border Protection* (2017) 317 FLR 141 at [29]; *CQR17* at [9].

40 *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 (***AMA16***).

circumstances where the Authority had been provided with certain review material by the Secretary pursuant to s 473CB(1)(c) of the Act, such material being prejudicial to the referred applicant, unknown to him to have been given to the Authority, and irrelevant to the issues the Authority was to decide. The extraneous material was, broadly, information about the referred applicant having been charged with indecent assault.[41]

22. As Justice Griffiths explained, a fair-minded lay observer would be aware of the scheme in Pt 7AA, including the effect of s 473DB that the review 'focuses on the review material provided by the Secretary to the [Authority]'[42] because (in relation to the part of the review material provided pursuant to s 473CB(1)(c)) it was considered by the Secretary to be relevant.[43] However, the material was objectively irrelevant to the Authority's review task.[44] Being aware of the scheme in Pt 7AA, the observer, acting reasonably, would not dismiss the possibility that the Authority may have been affected by the material, even if only in a subconscious manner.[45] The subconscious effect was the consideration which, his Honour explained, connected the nature of the prejudicial material with the fear that the Authority might not decide the matter on its merits,[46] as required by *Ebner*.[47]

23. Justices Dowsett and Charlesworth agreed with Justice Griffiths, in separate judgments.[48]

24. In the present case, the Minister has accepted the correctness of *AMA16*. However, in the courts below the Minister sought to distinguish that decision on the facts, by characterising the Extraneous Material as 'background' and not as prejudicial as the material in *AMA16*.[49] This characterisation fastened on the fact that in his application for a visa the Appellant had disclosed, truthfully and as required by the application forms, the March 2015 Incident and the conviction, and the November 2015 Incident.

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41 *AMA16* at [29] (Griffiths J).

42 *AMA16* at [17], [19], [65], [73] (Griffiths J).

43 *AMA16* at [78] (Griffiths J), see also [4] (Dowsett J).

44 *AMA16* at [83], [86] (Griffiths J). See also [99] (Charlesworth J).

45 *AMA16* at [75] (Griffiths J).

46 Ibid.

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

48 *AMA16* at [1] (Dowsett J), [97] (Charlesworth J).

49 *CNY17* at [12] (Mortimer J), [122], [136] (Moshinsky J) (**CAB 67, 96, 100**).

25. Each of the judges below proceeded on the basis that *AMA16* correctly stated the law[50] (although the analysis which each of them did was by reference to the three steps identified by Justice Gageler in *Isbester*[51]). However, Justices Moshinsky and Thawley departed from *AMA16* by also requiring consideration, somehow as part of the *Ebner* / *Isbester* test for apprehended bias, of how prejudicial the material should be adjudged to be.[52]

26. Justice Mortimer, in the minority, rejected the proposition that there is a threshold to be reached before objectively irrelevant material given by the Secretary to the Authority, which is prejudicial to the interests of the referred applicant, might cause the fair-minded lay observer to apprehend that the Authority might not have brought an impartial mind to the review. Her Honour considered, correctly the Appellant contends, that *AMA16* did not require adjudging 'how prejudicial', before the law accepts that the Authority might be affected in its review task, consciously or subconsciously.[53]

27. It is convenient to consider some matters about Pt 7AA, before turning to the majority's reasoning on apprehended bias, and why, the Appellant contends, it demonstrates error.

28. Part 7AA is designed to result in automatic review of a fast track reviewable decision, following a decision of the Minister to refuse a visa application made by a fast track review applicant: s 473CA. One aspect of this automatic review is that the Secretary is permitted to provide to the Authority, as part of the review material, 'any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review': s 473CB(1)(c).[54]

29. Another characteristic of the Pt 7AA review is the 'primary requirement that, subject to the Part, the Authority is to review a fast track reviewable decision referred to it under s 473CA by considering the review material provided to the Authority under s 473CB without accepting or requesting new information without interviewing the referred applicant', with some exceptions.[55]

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50 *CNY17* at [13] (Mortimer J), [126]-[131] (Moshinsky J), [152] (Thawley J) (**CAB 67, 97-99, 104**).

51 *Isbester v Knox City Council* (2015) 255 CLR 135 ***(Isbester)*** at [59]. See *CNY17* at [10]-[11] (Mortimer J), [124] (Moshinsky J), [153] (Thawley J) (**CAB 67, 96-97, 104**).

52 *CNY17* at [134]-[136] (Moshinsky J), [169]-[171] (Thawley J) (**CAB 99-100, 111-112**).

53 *CNY17* at [18]-[20], [66], [71] (Mortimer J) (**CAB 69**, **79**, **81**).

54 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 (***Plaintiff M174***) at [15].

55 *Plaintiff M174* at [22].

30. The Secretary is not just a mere officer of the Department—he is the only person empowered to make the determination of what is to go to the Authority as 'relevant'. Subject to other information that satisfies the 'new information' provisions, the review material which is given by the Secretary to the Authority will be the subject-matter of the review: s 473DB(1).

31. The Secretary's duty in s 473CB(1) (coupled with the power, including selecting material under par (c)) must be performed reasonably, on a correct understanding of the law.[56]

32. Part 7AA also expressly and exhaustively states the requirements of the common law hearing rule, and it preserves the bias rule: ss 473DA, 473FA(1).[57]

10 33. While there is 'no general requirement' for the Authority to give to the referred applicant any part of the review material that was before the delegate at the time of making the decision under s 65, '[t]here is, however, nothing in Pt 7AA to preclude the Authority' from doing so 'in the context of exercising the power conferred by s 473DC(3) to invite the giving of new information'.[58] *A fortiori*, if there is a part of the review material which was not before the delegate at the time of decision, or before the Authority unbeknownst to the referred applicant. As well, 's 473DA(2) is not addressed to what might be required of the Authority in particular circumstances in order to exercise that power reasonably'.[59]

34. All of these things arise from the terms of Pt 7AA. They are characteristics of the fast track review process of which a fair-minded lay observer would be aware.[60]

20 35. Some further matters should be noted. First, there is no direct way contemplated by the Act for a referred applicant to challenge a decision by the Secretary of what will constitute the review material. Indeed, while nothing in the Act precludes the Secretary, or for that matter the Authority, from telling a referred applicant what the documents comprising the review material are (in particular, what documents were given pursuant to s 473CB(1)(c)),

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56 *R v Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430. More recently, see e.g. *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57]. The proposition has been specifically applied to Pt 7AA: see e.g. *EMJ17 v Minister for Immigration and Border Protection* [2018] FCA 1462 (***EMJ17***) at [41(3)], [42(2)] (Thawley J).

57 *AMA16* at [17]-[18] (Griffiths J, Dowsett J agreeing at [1] and Charlesworth J agreeing at [97]).

58 *Plaintiff M174* at [26].

59 Ibid.

60 *Isbester* at [23] (Kiefel, Bell, Keane and Nettle JJ), [57] (Gageler J). See also *AMA16* at [65] (Griffiths J); *CNY17* at [24]-[29], [61] (Mortimer J), [125] (Moshinsky J), [153(5)], [175] (Thawley J) (**CAB 70-71, 97, 105, 113**).

the practice is to tell nothing.[61] There is a 'primary requirement',[62] and if the Authority's decision is to affirm the Minister's decision, the referred applicant will know of the existence of any documents given by the Secretary under s 473CB(1)(c) only when the Minister files a court book, as he is invariably ordered to do by the Federal Circuit Court after an application for judicial review is filed.

36. Second, the Full Court of the Federal Court has accepted, after the decision it made in this case, that 'the authorities which consider the effect of a breach of s 418(3) of the Act cannot readily be applied to s 473CB(1)'.[63] Thus, in *EVS17*, the Full Court held that the Authority's decision was vitiated because of the Secretary's error in the performance of the duty in s 473CB(1). While in that case the Secretary's error consisted in omitting to provide a document which was objectively relevant, as a matter of principle the position can be no different when the error consists of providing a document which is objectively irrelevant and prejudicial. The situation was explained by Justice Thawley in *EVS17* as not dissimilar to one of 'fraud on the tribunal'.[64]

37. In the present case, the Extraneous Material was objectively irrelevant to the Authority's review task, as each of the judges found.[65] On the correct understanding of the law, the person (be it the Secretary or his delegate) who made the decision as to what would be provided to the Authority (i.e., what would constitute the review material) could not have considered the Extraneous Material to be 'relevant'. The Authority only has jurisdiction to review a 'fast track reviewable decision', which is defined by reference to the definition of 'fast track decision', which in turn is defined as excluding decisions to refuse a visa under ss 501, 5H(2), 36(1C) or 36(2C).[66] The only adverse decision the Authority can make is to 'affirm the fast track reviewable decision'.[67] Material, e.g. in the nature of

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61 See nn 22, 23 above; *CQR17* at [5] (Reeves J), [8]-[9] (Jagot J).

62 *Plaintiff M174* at [22].

63 *EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20 (***EVS17***) at [31]. *Cf CNY17*, where the court reasoned by applying the principal authority on s 418(3) of the Act, *WAGP v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 413: at [149] (Moshinsky J, Mortimer J agreeing at [2] and Thawley J agreeing at [152]) (**CAB 102**, **64**, **104**).

64 *EMJ17* at [41(5)] (Thawley J). This decision was quoted with approval by the Full Court of the Federal Court in both *EVS17* and *CQR17*.

65 Above n 34.

66 Sections 473BB of the Act, definition of 'fast track reviewable decision'; s 5(1) of the Act, definition of 'fast track decision'.

67 Section 473CC(2)(a) of the Act.

criminal convictions, that might be relevant to those excluded 'refusal to grant a visa'[68] decisions cannot be relevant to the Authority's review task.[69]

38. Further and in any event, the documents in the Excluded Material are to be viewed, at best, as character assessments intended for purely internal purposes but mistakenly given to an independent body, and at worst, both in their cumulative effect and because of the positive decision of the Secretary to provide them, as character assassination.

39. Given the above, and the fact that the Authority did not give the Appellant an opportunity to comment on the Extraneous Material (as to which, see [56]-[57] below), this is a case where the Secretary's decision to provide objectively irrelevant material vitiated the Authority's decision on the review.

40. Before turning to apprehended bias, and also to the error of the Authority by its failure to provide to the Appellant an opportunity to comment on the Extraneous Material, further reference should be made to this Court's decision in *Plaintiff M174*.

41. In that case, this Court considered that a breach by a delegate of s 57(2) of the Act could impact on the validity of the Authority's decision on review if material which had been obtained without compliance with s 57(2) were included in the review material given by the Secretary to the Authority and: (i) that material was taken into consideration by the Authority; (ii) without the Authority first inviting the referred applicant to respond to that prejudicial material.[70] Two broad scenarios were identified, where relevant information within the meaning of s 57(1) could end up being included in review material: one where that information was not before the Minister or delegate at the time of decision under s 65, and one where it was before the Minister or delegate.[71] This Court identified two solutions, to address those two broad scenarios.[72] With respect, the two solutions presuppose that the Authority would know what had been, and what had not been, before the Minister or delegate at the time of decision under s 65.[73]

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68 *CNY17* at [56] (Mortimer J) (**CAB 76-77**).

69 See also *Migration Regulations 1994* (Cth), reg 4.43(3)(b) and (c).

70 *Plaintiff M174* at [71], read with [47] ('prejudicial adverse information').

71 *Plaintiff M174* at [48]-[49].

72 *Plaintiff M174* at [48]-[50].

73 This issue was identified in *CNY17* at [75] (Mortimer J) (**CAB 81**), after *Plaintiff M174* had been decided. See also, e.g. *EEM17 v Minister for Immigration and Border Protection* [2018] FCAFC 180 at [26].

42. Accepting that, in *Plaintiff M174*, this Court was addressing a scenario where the information in question was relevant to the issues for the Authority to consider (whether or not the Authority proposed to take it into account), nevertheless there are important points that carry over to the situation in this case, where the information in question is objectively irrelevant.

43. First, in this case the Authority stated that it had regard to the review material, as in fact it is mandated to by s 473DB(1) of the Act. Second, it is well-established that prejudicial material is capable of having a subconscious effect on a decision-maker, which is not negated by statements to the effect that, e.g., the material has been put out of the mind. Rather, to counteract the prejudice, even at a subconscious level, there is enlivened an obligation to extend an opportunity to respond.[74] Thirdly and relatedly, *Plaintiff M174* is consistent with the proposition that, assuming non-compliance with s 57(2) had resulted in prejudicial information being included by the Secretary in the review material, but also assuming that the Authority did not propose to rely on that information in its path to reasoning to an affirming of the delegate's decision, there may nonetheless still be the possibility of subconscious effect of that prejudicial information.

44. With respect to apprehended bias, the point of departure between the court below and the Full Court in *AMA16* is to be found in the conclusion (by the majority) that the Extraneous Material was not sufficiently prejudicial.[75] The question which then arises is where (or whether) that analysis (evaluating the degree of prejudice) could validly take place, in the application of test for apprehended bias in this particular statutory context.

45. According to Justice Moshinsky, parts of the Extraneous Material were not, 'without more', prejudicial, and 'the fair-minded lay observer would consider it likely that the Authority would put the information aside as irrelevant to its task'.[76]

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74 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (***Applicant VEAL***) at [5], [14]-[15], [18]-[19]. See also *Re JRL; ex parte CJL* (1986) 161 CLR 342 (***Re JRL***) at 351 (Mason J).

75 *CNY17* at [134]-[136] (Moshinsky J), [169]-[171] (Thawley J) (**CAB 99-100, 111-112**).
Justice Moshinsky also resolved the case by distinguishing it from *AMA16* (*CNY17* at [136]) (**CAB 100**). *Cf* e.g. *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [99] (Robertson J), explaining that apprehended bias should not be resolved by assessing whether facts in one case are more or less extreme than the facts of another. See also *CNY17* at [12]-[13] (Mortimer J) (**CAB 67**).

76 *CNY17* at [135] (Moshinsky J) (**CAB 99-100**).

46. Justice Thawley reasoned to similar effect to Justice Moshinsky, stating that parts were not 'sufficiently prejudicial'[77] and that 'a fair-minded observer would not conclude that a "Reviewer" … is (as an absolute proposition) unable to disregard irrelevant material'.[78]

47. Effectively, the majority construes a legal abstraction (the reasonable observer) which enquires into the state of mind of the decision-maker (the Authority), in particular as to whether it was subconsciously affected. This is despite decisions of this Court which have said, in other contexts, that such an enquiry is incorrect.[79]

48. Authority also demonstrates that it is immaterial that a reasonable observer knows that a third party (such as a court clerk who is also a member of the firm of solicitors for one party,[80] or the manager of the racing board[81]) takes no part in the deliberations of the case. The question is not 'what actually was done but … what might appear to be done'. Thus, even though in each of the cases of the court clerk and the manager of the racing board their opinions (actual states of mind) were irrelevant to the issue at hand, there was still a finding that bias might be apprehended.[82]

49. All of the above is but one way of stating that the fourth of the categories noted by Justice Deane in *Webb v The Queen*[83] includes cases of subconscious effect by extraneous prejudicial information. In apprehended bias, there can be no inquiry into an actual state of mind.[84]

50. Applying the principles to the particular statutory context of Pt 7AA, which gives effect to a unique scheme for merits review of administrative decisions, the result is that the provision by the Secretary to the Authority of objectively irrelevant, prejudicial material results in apprehended bias. There is nothing unusual about this result, especially once it is appreciated that the Authority has power to offer the referred applicant an opportunity to comment (as to which, see [56]-[57] below).[85]

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77 *CNY17* at [171] (Thawley J) (**CAB 112**).

78 *CNY17* at [162] (Thawley J) (**CAB 108**).

79 *Applicant VEAL* at [17]-[19], referring to *Kioa v West* (1985) 159 CLR 550 at 628-629 (Brennan J).

80 *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 258-259 (Lord Hewart LCJ).

81 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 518-519 (Barwick CJ).

82 Above nn 80-81.

83 (1994) 181 CLR 41 (***Webb***) at 74. See also *Ebner* at [24].

84 *Isbester* at [61]; *Ebner* at [7].

85 The issue was left open in *AMA16* given that, as in this case, no disclosure of the existence of the prejudicial material was made by the Authority, and no opportunity to comment was extended to

51. Before turning to the opportunity to comment, it is desirable to address the significance of the fact that it is the Secretary who provides the review material.

52. In *Webb*, Justice Deane also explained that the fourth category commonly overlaps with disqualification by association, such as 'where a judge is disqualified by reason of having heard some earlier case'.[86] Here, the overlap assists in properly applying the fair-minded reasonable observer test.

53. In *Re JRL*, Justice Mason observed that the reasonable observer might apprehend that counsellor's opinion, by reason of her position, would carry weight.[87] The counsellor had apparently informed the judge of her qualifications 'and thereby indicated that her opinion was that of a qualified expert'.[88] In addition, some form of participation by her in the process was contemplated by the statutory scheme.[89]

54. In this case, similar observations were made below about the way in which the prejudicial information might be viewed because of the status of the person providing it, as well as his statutory role in doing so. In particular, each of the judges accepted that the fair-minded lay observer would be attributed with the knowledge that the Extraneous Material was provided to the Authority with the imprimatur of the Secretary having considered it 'relevant' to the review, by reason of s 473CB(1)(c).[90]

55. It is only the Secretary who has any statutory warrant to provide material to the Authority. No other person has this capacity—not even the referred applicant, except by way of information that meets the gateway criteria in s 473DC, and even then, such information is not required to be considered.

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the referred applicant: see at [83]-[84] (Griffiths J), [100]-[101] (Charlesworth J, expressing some tentative views).

86 *Webb* at 74 n 29 (Deane J).

87 *Re JRL* at 357 (Mason J).

88 *Re JRL* at 356 (Mason J), see also 361 (Wilson J).

89 *Re JRL* at 353 (Mason J), albeit that the impugned instance of communication was 'not authorized': at 354-355.

90 *CNY17* at [64], [66] (Mortimer J); [133] (Moshinsky J); [174] (Thawley J) (**CAB 79**, **99**, **112**). Justice Thawley however erred by concluding that the reasonable observer would know that the Authority's 'role is not to assume' that material has any 'particular or special significance apart from its relevance to the review': [176] (**CAB 113**). Justice Moshinsky did not appear to address the significance of the fact that it was the Secretary who provided the Extraneous Material.

56. The prejudice could have been neutralised, consistently with what this Court has said in *Plaintiff M174*,[91] by the reasonable consideration of exercise of the power in s 473DC(3). Alternatively, or possibly in addition, since Pt 7AA contains no express provisions on the content of the bias rule, the way the Authority could have neutralised the prejudicial effect was and is shaped by the common law's requirement for invitation to comment.[92] The fact that, in the vast majority of cases, the opportunity to comment is discussed as part of the content of the hearing rule does not gainsay that it can also be part of the content of the bias rule.[93] In that regard, it is significant that there is nothing in Pt 7AA that precludes the provisions in Subdiv C of Div 3, including s 473DC, from informing the content of the bias rule.[94] Indeed, since the hearing and bias rules are the twin pillars of natural justice, the content of each may overlap.[95] And, as Justice Dawson said in *Re JRL*, 'it must also be possible to remove an apprehension of bias … which might otherwise arise out of the failure to hear a party'.[96]

57. Whichever way it is cast (by reference to s 473DC or to the common law), the key point is that if the Authority does nothing once in possession of that part of the review material provided to it by the Secretary which is prejudicial and objectively irrelevant (here, the Extraneous Material), the fair-minded lay observer might apprehend that the Authority might not bring an impartial mind to the ultimate decision.

58. For the above reasons, the appeal should be allowed. The fair-minded lay observer, cognisant of the way Pt 7AA works, including the role of the Secretary, might have apprehended that the Authority might not have brought an impartial mind in undertaking the review, by reason of the irrelevant, prejudicial material which it was mandated to consider. The Authority failed to address the prejudicial effect created by the Secretary's provision of the Extraneous Material (unbeknown to the Appellant), by not providing to the Appellant an opportunity to comment. The situation would simply not have occurred, had the Secretary acted reasonably, on a correct understanding of the law, in compiling the review material.

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91 *Plaintiff M174* at [71].

92 See e.g. *Re JRL* at 351 (Mason J).

93 In *Re JRL*, Chief Justice Gibbs (at 346, 349), Mason J (at 350) and Dawson J (at 371) applied *Kanda v Government of Malaya* [1962] AC 322 at 337, as part of their Honours' reasoning on apprehended bias. *Cf* the reasons of Wilson J (at 365).

94 *Cf.* s 473DA of the Act as to the hearing rule.

95 *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 540 at [46].

96 *Re JRL* at 372.

Part VII: Orders sought

59. The Appellant seeks the following orders:

1. Appeal allowed.

2. Orders 1 and 2 made by the Full Court on 21 September 2018 and order 1 made by the Full Court on 12 October 2018 be set aside.

3. In lieu of the orders made by the Full Court, there be orders that:

   a. The appeal to the Full Court be allowed, with costs.

   b. Orders 1 and 2 made by the Federal Circuit Court on 8 November 2017 be set aside.

10 c. In lieu of the orders made by the Federal Circuit Court, there be orders that:

      i. The decision of the Authority made on 12 May 2017 be quashed.

      ii. The Minister pay the costs of the Appellant in the Federal Circuit Court.

Part VIII: Time for oral argument

60. The Appellant estimates he will require 1 ¼ hours to present his argument.

Dated: 5 July 2019

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