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

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APPELLANT'S OUTLINE OF ORAL ARGUMENT

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Part I: Internet certification

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

Part II: Propositions

(I) Materials were irrelevant and prejudicial, and the Authority had regard to them

2. The Authority had regard to the extraneous materials: Reasons at [2] (CAB 7). The Minister accepts this to be so: RS [16].

3. The Court below found that the materials given to the Authority were not relevant to its review task: AS [19]. (Even by his proposed Notice of Contention, the Minister does not dispute this.)

4. The Court below found that the materials were prejudicial: AS [19]. The Minister's disputes this (RS [16]), and disputes (RS [16], [41]) the Appellant's description of the materials which is found at AS [17].

5. Consideration of those materials shows why the Minister's contentions should not be accepted.

(II) The statutory context and apprehended bias

6. Ordinarily conditioning the exercise of a statutory power, are the two standard incidents of procedural fairness (or 'twin pillars' – Kanda at 337):

   - Isbester at [55] (Gageler J, quoting ABT v Bond).

7. BVD17 holds that s 473DA(1) precludes implications that are related to the hearing rule.

8. However, the implication of 'absence of the actuality or appearance of disqualifying bias', conditioning the exercise of the power in s 473CC, is not affected.

9. The content of the bias rule 'accommodates to the particular statutory framework, as well as to the particular factual context of a particular exercise of the power'.

   - Isbester at [55] (Gageler J). See also Stollery at 519 (Barwick CJ).

   - Content of the rule, Appellant contends (AS [56]), includes the ability to comment on prejudicial information not known by the referred applicant to have been provided to the Authority – as a 'safety valve' (see eg Re JRL; Ex parte CJL).

   - Sections 473DC-DE, contemplating circumstances where the Authority will invite comment, support the proposition that the 'twin pillar' rule's content will include at least these kinds of obligations: AS [56]; see eg Plaintiff M174 at [71] (Gordon J).

(III) Test for apprehended bias, and its application

10. Required two steps (Ebner; Isbester):

    a. *identification* of what is is said may lead the decision-maker to decide the case other than on its merits – provision by the Secretary of irrelevant and prejudicial material from the Minister's department (Webb categories 3 and 4 – see Mortimer J at [6] (CAB 65-6);

    b. *connection* between the identified matter and feared deviation – effect on the Authority, even if only subconscious, in respect of whether the Appellant should be believed.

        - In protection visa applications, the central issue (almost invariably) is credibility: see eg Re RRT; Ex parte H at [34].
        - Mortimer J at [68] (CAB 80): in respect of a core aspect of his claim, that he was stateless, the Authority considered him 'not trustworthy in his evidence'.
        - Connection b/w the matter and feared deviation is obvious – like in Isbester at [49]. And see Webb at 53 (Mason CJ and McHugh J): 'free of prejudice'.

11. The (irrelevant) material is either prejudicial, or it is not.

12. *Reasonableness* of the asserted apprehension – looks at the abstraction of the '*fair-minded* lay person': (Re RRT; Ex parte H at [28]). Gageler J in Isbester was not stating anything different to the plurality in Ebner at [8], or departing from the plurality in Isbester.

13. Test is: 'hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the [*interest, or conduct, or association, or extraneous information, or combination* – Webb at 74] which is said to give rise to apprehension of bias': Ex parte H at [28]. (See also Isbester at [23] (plurality), at [57] (Gageler J, citing Ex parte H).

14. Reasonableness of apprehension is determined by an '*objective* test of possibility': Ex parte H at [28]-[29]; Isbester at [59] (Gageler J). It is not an inquiry into the actual state of mind of the decision-maker: see eg Webb at 71-2 (Deane J); Re JRL; Ex parte CJL at 356 (Mason J); Ebner at [7]; Isbester at [61] (Gageler J); See also Ex parte H at [28].

15. Enquiring into the mind is, in effect, what Moshinsky J and Thawley J did do: AS [45]-[47].

16. Relevant to ascribe to the 'lay person', so as to make him/her 'properly informed' (apart from the matters already covered in the two steps), are the following:

    a. knowledge of statutory scheme, at least that material gets to the Authority only pursuant to s 473CB(1), incl (c) (whether or not in error), and that 'primary rule' is on the papers;

    b. Appellant does not know of existence of materials, and has never had an opportunity to comment upon them including before the delegate (if the delegate had them).

17. The 'lay person' would not consider that the prejudicial material travels no further than what the Appellant had said in the application (or is only 'background'), nor would it conclude that it might not have had an effect on the Authority, even if only subconscious.

(IV) Breach of s 473CB(1)(c) by the Secretary, and its effect on the Authority's jurisdiction

18. The implied condition for the valid exercise of the Secretary's power in s 473CB(1)(c), is that the required state of mind be formed reasonably and on a correct understanding of the law: AS [31], and in the context of Part 7AA, EMJ17 v Minister at [41(3)], [42(3)] (Thawley J).

19. Here, on a correct understanding of the law, the material could never have been considered relevant: AS [37]. Attaching a label of 'background' does not alter the conclusion: AR [11].

10 20. The authorities from s 418 do not translate: AS [36]; EMJ17 v Minister; EVS17 v Minister.

21. The Authority did not disclaim having regard to the material, nor did it say it put them out of mind (as to which, see Applicant VEAL). The Authority did not provide an opportunity to the Appellant to know of existence and make submissions (which may have been, there should be another decision-maker – as in Webb). Whether he could be believed in his claims, was a central issue. Materiality of effect of the Secretary's breach on the Authority is satisfied.

(V) Minister's application for leave to file and rely on Notice of Contention

22. Leave should be refused because:

a. the Court below cannot have erred as alleged ('failed to decide'), as the issue was not one presented for its decision – the Minister accepted the contrary proposition to that which he
20 now seeks to agitate, by accepting the correctness of AMA16 but seeking to distinguish on the facts: CAB 65 [4] and 67 [12] (Mortimer J), 96 [122] and 99 [131] (Moshinsky J);

b. no explanation at all has been offered for non-compliance with the Rules;

c. no submissions so far, or any indication of argument – at the highest RS [28], however there the assumption is that the material is 'properly before the decision-maker';

d. allowing the Minister such indulgences, would only encourage a repeat of this conduct.

Dated: 15 October 2019

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