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 REPLY

Part I: Internet certification

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

Part II: Reply

The Minister's identification of issues

2. The Minister, in his written submissions, contends for a 'central issue of principle'[1] which does not arise in this appeal (unless the Minister first seeks the leave of this Court to file a notice of contention out of time, and that leave is granted).

3. The Minister accepted below the correctness of *AMA16*.[2] Unsurprisingly (and rightly so), the court below proceeded on the basis that *AMA16* correctly stated relevant principles.[3]

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1 Submissions of the First Respondent dated 2 August 2019 (**MS**) at [2].

2 Appellant's Submissions dated 5 July 2019 (**AS**) at [24]; *CNY17* at [4] (Mortimer J), [122] (Moshinsky J) (**CAB 67, 96**). *Cf* MS, both generally and expressly at [39], n 31.

3 AS at [25]; *CNY17* at [4]-[5] (Mortimer J); [126] (Moshinsky J) (**CAB 67, 97**).

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Further, and consistent with how the Minister chose to conduct his case, whether *AMA16* was distinguishable on the facts was precisely how Moshinsky J decided the appeal.[4]

4. Drafting a notice of contention, for the purpose of seeking this Court's leave to rely upon it, will force the Minister to identify how, precisely, he contends that the court below 'erroneously decided or failed to decide some matter of fact or law',[5] a matter which is far from evident at this point.

Errors in the submissions by the Minister

5. There are several errors in the Minister's submissions.

6. *First*, that the documents were objectively irrelevant to the IAA's task was a finding of the court below.[6] The Minister mischaracterises this fact, by seeking to portray the matter as a submission by the Appellant.[7] The finding of the court below that the documents were objectively irrelevant, which is not otherwise impugned by the Minister, is especially significant to Ground 4.

7. *Second*, the Minister is wrong in floating the suggestion[8] that it was the Appellant's 'disclosure' which 'prompted the Department to seek updates on the criminal charges from the Commonwealth Director of Public Prosecutions', and that the 'Prosecution Report was provided in response'.[9] The true position is that such material was sought (by the Department, according to the Minister) before the Appellant's application for a protection visa was even lodged.[10] This especially matters for the assessment of whether there was a reasonable apprehension of bias.

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4 *CNY17* at [131] (Moshinsky J) (**CAB 96**); *cf* at [12] (Mortimer J) (**CAB 67**).

5 *High Court Rules 2004* (Cth), r 42.08.5, and Form 27.

6 *CNY17* at [62] (Mortimer J); [132] (Moshinsky J); [157], [159] (Thawley J) (**CAB 78, 99, 107**).

7 MS at [48].

8 There is no evidence as to what prompted the obtaining of, nor as to who obtained, the documents for the purpose of assessing the Appellant's application for a protection visa. If indeed it was 'the Department', rather than the delegate pursuant to s 56 of the Act, that decided to obtain documents and make them part of the material before the delegate, there was no authority to do so.

9 MS at [11].

10 The material from the Director of Public Prosecutions as cited by the Minister was provided to the Department on 24 March 2016: **ABFM 45-49**. The visa application was made on 16 September 2016. Indeed, all of the prejudicial material predated the visa application.

8. *Third*, the court below made findings as to the nature of the review material.[11] This was a separate and anterior issue to the majority, in separate judgments, concluding that those findings did not mean the material was 'sufficiently' prejudicial.[12] It is impermissible for the Minister to take issue with the correctness of those findings.[13]

9. *Fourth* and relatedly, and contrary to the Minister's submissions,[14] it is demonstrably not the case that 'significant' parts of the prejudicial material were already before the IAA by reason of the Appellant's visa application form. Not least of all, much of the prejudicial information was in the form of Departmental opinion, not even known by the Appellant to exist and not the subject of any question in his visa application form.[15]

10. *Fifth,* the Minister's assertion that the Appellant 'appears to accept' that the November 2015 Incident 'also involved rioting' is unequivocally wrong. There has never been any such concession. And the fact that the Minister considers this conclusion ('rioting') to be open, on the basis of the commentary by the Department given to the IAA by the Secretary, emphasises, rather than detracts from, apprehended bias.[16]

'Background' still must be relevant

11. It is no answer to the Appellant's case[17] for the Minister to assert that the prejudicial material was considered relevant as 'background'.[18] The question necessarily presented by such attempted characterisation, is: background to what? How would (or should)[19] or could or might[20] the IAA possibly 'ultimately consider [the "background" prejudicial material] to be relevant'[21]?

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11 *CNY17* at [30]-[57] (Mortimer J, more detailed findings), [102] (Moshinsky J) (both accepted by Thawley J at [159]) (**CAB 71-77, 88-89, 108**). See also AS at [17].

12 In any event, this approach is wrong because it impermissibly requires inquiry into the state of mind of the decision-maker: AS at [44]-[47].

13 MS at [41].

14 MS at [14].

15 See AS at [17](a), (c)-(e). The visa application form begins at **ABFM 70**.

16 And see *CNY17* at [42]-[43] (Mortimer J) (**CAB 73**).

17 AS at [31], [37].

18 MS at [57].

19 MS at [43].

20 MS at [57].

21 MS at [43]; to similar effect, at [57] ('might think to be relevant').

12. The authorities cited by the Minister do not assist him.

13. In both *Tankey v Adams*[22] and *Holmes v Mercado*,[23] the Full Court of the Federal Court did not accept that the prejudicial information was irrelevant.

14. In *Minister for Immigration and Border Protection v CQZ15*,[24] the Full Court of the Federal Court simply said that material which had been before the decision-maker may be 'relevant, in the broad sense, for the purposes of judicial review'. *Cummeragunja Local Aboriginal Land Council v Nicholson (No 2)*[25] is to similar effect.

15. As a backstop, the Minister relies on the proposition that 'there is no reason to think that judicial officers have a monopoly' on the ability to set aside irrelevant material.[26]

10 16. Accepting no monopoly, it does not gainsay apprehended bias, in the particular statutory context of Part 7AA of the Act and for the reasons given in *AMA16* (accepted by the court below).

17. Cases such as *Holmes v Mercado*[27] confirm rather than deny apprehended bias by prejudicial information. In that case, the review committee disavowed any reliance on the information in circumstances where Mr Mercado knew that the materials existed and was able to make submissions about the fact of their inclusion as part of the 'referred matter'. In this case, the IAA was both statutorily required to consider the material, and expressly said that it did so. *Crowley v Holmes*[28] also does not assist the Minister. In refusing relief (declarations that the referral was invalid) ahead of a decision being made by the review
20 committee, the Full Court of the Federal Court observed that Mr Crowley would no doubt be afforded an opportunity to be heard. The context of Part 7AA is different.

18. All of which comes back to the proper understanding of *Webb*.[29] One of the four 'distinct, though sometimes overlapping, main categories' of apprehended bias is 'disqualification by extraneous information'. Relevantly, this category was explained by Justice Deane as

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22 (2000) 104 FCR 152 at [126].

23 (2000) 111 FCR 160 at [53]-[57], [60].

24 (2017) 253 FCR 1 at [64].

25 [2017] NSWSC 1248 at [64]-[65].

26 MS at [40].

27 (2000) 111 FCR 160.

28 (2003) 132 FCR 114.

29 *Webb v The Queen* (1994) 181 CLR 41 at 74.

'knowledge of some prejudicial but inadmissible fact or circumstance'. It does not require, as cumulative conditions, that material be separately both extraneous and inadmissible.[30] If information is extraneous, it is inadmissible for the same reason.[31] And where it is also prejudicial, like in the present case, there will be apprehension of bias.

Ground 5

19. It is unclear why the Minister asserts that it is 'not apparent that ground 5 adds anything to grounds 1 and 2'.[32]

20. The Secretary's action vitiated the IAA's purported exercise of jurisdiction, regardless of whether there was a reasonable apprehension of bias.[33]

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30 *Cf* MS at [27], [30]-[33].

31 See *Holmes v Mercado* (2000) 11 FCR 160 at [53]-[54].

32 MS at [24].

33 See AS at [30]-[39].

List of statutes referred to in the Appellant's written submissions and reply (pursuant to Practice Direction No 1 of 2019)

1. *Migration Act 1958* (Cth), s 5(1) (definition of 'fast track decision'), s 36, Pt 7AA, s 500 (as of 12 May 2017).

2. *High Court Rules 2004* (Cth), r 42.08.5 (as of 29 May 2019).