HIGH COURT OF AUSTRALIA

13 December 2019

CNY17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR
[2019] HCA 50

Today the High Court, by majority, allowed an appeal from the Full Court of the Federal Court of Australia concerning whether a decision of the Immigration Assessment Authority ("the IAA") was infected by apprehended bias. The majority held that the decision was infected by apprehended bias because the IAA considered material provided by the Secretary of the Department of Immigration and Border Protection ("the Secretary") which was irrelevant to the review and prejudicial to the appellant.

The appellant applied for a safe haven enterprise visa in September 2016. In his application form, the appellant disclosed a conviction for damaging Commonwealth property while in immigration detention on Christmas Island, and noted pending charges for "spitting at a guard & breaking a window" during protests on Christmas Island.

The appellant's visa application was refused. The decision to refuse the visa was automatically referred to the IAA for review. When a decision is referred to the IAA, s 473CB of the *Migration Act 1958* (Cth) requires the Secretary to give certain "review material" to the IAA. This includes any material held by the Secretary which the Secretary considers to be "relevant to the review". Section 473DB requires the IAA to conduct its review by considering the review material provided by the Secretary.

The Secretary gave review material to the IAA to consider in reviewing the decision to refuse the appellant's visa application. This included material which was not relevant to the review ("the extraneous material"). The extraneous material contained factual assertions about the appellant. These included, among other things, assertions that the appellant had a history of aggressive or challenging behaviour, had been involved in many incidents while in detention, was the subject of unspecified investigations, and had been refused bridging visas on a number of occasions. The appellant had never seen the documents containing these assertions. He was not given an opportunity to respond to them.

The IAA affirmed the decision to refuse the appellant's visa application. The IAA said in its reasons that it had considered the information provided by the Secretary, but did not make particular reference to the extraneous material. The appellant argued that the decision of the IAA should be quashed, because a fair-minded lay observer might have thought, in light of the extraneous material, that the IAA might not have brought an impartial mind to the question of whether the appellant was entitled to a visa. That argument was rejected by the Federal Circuit Court of Australia and by a majority of the Full Court of the Federal Court of Australia.

A majority of the High Court held that the provision of the extraneous material to the IAA gave rise to a reasonable apprehension of bias. The IAA was required to consider the review material provided by the Secretary, which included the extraneous material, and said that it had done so. A fair-minded lay observer might think that consideration of the extraneous material might lead the IAA to have a bias against the appellant, possibly by thinking, consciously or subconsciously, that the appellant was not a fit person to hold a visa or that he would be a danger to the community. This might lead the IAA to make a decision otherwise than on the merits of the appellant's

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au

application. The IAA's decision was therefore quashed and the matter remitted to a differently constituted IAA.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*