IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 07 of 2022
Supreme Court Refugee Appeal Case No. 01 of 2019

BETWEEN

HFM 045

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **4 July 2023**

DATE OF JUDGMENT: **27 June 2024**

CITATION: **HFM 045 v The Republic of Nauru**

KEYWORDS:	Refugee; reconstitution of Tribunal; apprehension of bias; procedural fairness
LEGISLATION:	Section 20 of the Refugee Convention Act 2012
CASES CITED:	SOS 011 v Republic [2018] NRSC 22; QYFM v Minister for Immigration, Citizenship, Migrant Services, and Multicultural Affairs [2023] HCA 15; Re Refugee Review Tribunal, Ex parte H [2001] HCA 28; Minister for Multicultural Affairs v Jia [2001] HCA 17; Ebnar v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337
APPEARANCES:	
COUNSEL FOR the Appellant:	**NM Wood SC**
COUNSEL FOR the Respondent:	**HPT Bevan**
APPEAL	**Allowed**

JUDGMENT

1. This is an appeal against the Supreme Court judgment delivered on 6 December 2022, affirming the decision of the Refugee Status Tribunal (Tribunal) made on 18 March 2019. The appellant in this appeal is a Nepali citizen who arrived at Christmas Island in September 2013 and was transferred to Nauru in November 2013.

2. On 29 January 2014, the appellant made an application for Refugee Status Determination to be recognized as a refugee or as a person to whom the Republic of Nauru owes complementary protection under its international obligations. On 12 September 2014, the Secretary for Justice and Border Control decided that the

appellant is not a refugee and that the Republic of Nauru does not owe complementary protection obligations under the Refugee Convention. Later, the appellant made an application to the Tribunal. For convenience, we will refer to it as the first panel. On 16 January 2015, the first panel of the Tribunal affirmed the determination by the Secretary. Being aggrieved by this decision, the appellant appealed to the Supreme Court, and on 22 February 2017, the Supreme Court affirmed the decision of the first panel. The appellant then filed an appeal to the High Court of Australia against the Supreme Court decision. On 15 November 2017, the High Court of Australia set aside the order of the Supreme Court and remitted the matter back to the Tribunal for determination.

3. Accordingly, the following members were appointed for the second Tribunal hearing (second panel)

    i. Principal member Condoleon (nee Hearn-Mackinnon)
    ii. Member Zelinka
    iii. Member Mullins

4. Notably, member Zelinka had sat on the first panel with two other members. On 4 June 2018, the Principal Member Condoleon (nee Hearn-Mackinnon) informed the appellant's solicitor that, following the judgment of the Supreme Court of Nauru in SOS 011 v Republic [2018] NRSC 22, the second panel was de-constituted because one member from the first panel was included in the second panel. The reason for the de-constitution of the second panel was based on the reasoning by Freketlon J in SOS 011 v Republic (supra), where his Honour expounded that "...a fair-minded lay observer might reasonably apprehend that the tribunal member shared between the first and second Tribunal might not bring an impartial and unprejudiced mind to the resolution of the questions the tribunal was required to decide."

5. On 21 November 2018, written submissions were filed on behalf of the appellant for the hearing before the third panel of the Tribunal. By that time, the appellant

had decided not to attend the Tribunal hearing due to frustration and because he did not feel mentally capable. However, no adjournment had been requested, and the appellant asked in the written submissions for the third panel to make a decision on the papers in his absence.

6. Subsequently, the solicitor for the appellant came to know that the third panel reconstituted to hear the application included the two members who had sat with member Zelinka in the second panel, along with a new member to replace member Zelinka. Consequently, on 24 November 2018, the appellant's solicitor wrote to the principal member, Condoleon (nee Hearn-MacKinnon), objecting to the inclusion of those two members from the second panel in the third panel, based on apprehension of bias. The appellant's solicitor requested that the third panel be completely reconstituted with new members. Additionally, the appellant's solicitors indicated to the Tribunal that the material collected at the pre-reconstitution hearings should not be regarded. The email sent by the appellant's solicitor was as follows:

> "Dear Principal Member
>
> I refer to the Tribunal matters of HFM045 ... and [redacted]
>
> As you are aware, these applicants have been provided with new hearings because the Supreme Court of Nauru found in *VEA 026 v Republic* and *SOS 011 v Republic* that Tribunal Panels hearing remitted matters are affected by the apprehension of bias if one Member of the Panel has also been part of the Panel on the applicant's previous hearing.
>
> We support the decision of the Tribunal to offer the above applicants new hearings with a reconstituted Tribunal. However, we submit that the hearing provided to [redacted] on [redacted] was affected by the apprehension of bias because of: (1) how the Tribunal was constituted; and (2) how the Tribunal elected to conduct the hearing. Each of these issues are outlined further below.
>
> Firstly, as the Tribunal acknowledged, [redacted] hearing on [redacted] was affected by the apprehension of bias because Member Zelinka sat on his (pre-remittal) hearing on [redacted] and also sat on the Panel on [redacted]. You and

Member Mullin also sat on the [redacted] Panel, which would have included discussions with Member Zelinka and yet you and Member Mullin also sat on the Panel on [redacted].

The Supreme Court decisions in the above cases make it clear that the way the Tribunal was constituted on [redacted] was insufficient to overcome the apprehension of bias. The presence of one Member on a Panel who may appear to be biased is sufficient to taint the findings of the other Members (the 'rotten apple principle'). It follows therefore that, as Members Hearn-MacKinnon and Mullin collaborated with Member Zelinka in relation to the [redacted] hearing, their participation in the [redacted] hearing and the making of a RSD decision in relation to [redacted] is a breach of the bias rule.

Secondly, the Tribunal did not provide [redacted] with a new hearing but rather indicated that it intends to rely on material gathered from the tainted [redacted] hearing, including presumably, questions asked by Member Zelinka. This further compounds the conclusion that would be drawn by a fair-minded observer that the reconstituted Tribunal may be biased.

Consequently, on behalf of applicants [redacted] HFM045 and [redacted], please be advised that we do not consent to one or more Members who were present on earlier Panels sitting again on these reconstituted Panels, nor do we consent to material collected at the pre-reconstitution hearings being used in making our client's refugee determination decisions. We submit that the hearing provided to [redacted] on [redacted] was affected by the apprehension of bias and the remaining hearings, if conducted in the same manner as set out above, will similarly be." [sic]

7. On 25 November 2018, the Principal Member, Condoleon (nee Hearn-Mackinnon), wrote to the solicitor of the appellant, refusing to completely reconstitute the third panel as she did not agree that the third panel was affected by apprehended bias. Her email was as follows:

> "... Regarding [redacted].

We do not agree with your view that the hearing in February 2018 was affected by comprehended bias.

Nor do we accept that the Tribunal as currently constituted cannot refer to or rely on evidence provided by [redacted] at the hearing in [redacted]. On this point we also refer to subsection 20(12) of the Refugees Convention Act which empowers the Tribunal as reconstituted to have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.

However, in order to address your concerns, the Tribunal will offer [redacted] another hearing at [redacted] at which point he will have another opportunity to add or clarify the evidence he has provided thus far in the review. I note that [redacted] was provided with a copy of the transcript of the [redacted] hearing so is able to identify any aspect of the evidence he provided at that hearing which he wishes to address.

In relation to the other matters, we intend to proceed with the hearing with the Tribunal as currently constituted for the reasons set out above.

We also note that any reconstitution of these reviews would involve a delay of several months before they could be re-listed for hearing which the applicants may not desire and which may not be in their best interests given mental health issues as outlined in your submissions."

8. As earlier noted, the appellant refused to attend the second tribunal hearing before the third panel. Accordingly, on 18 March 2019, the decision of the third panel, comprised of Condoleon (nee Hearn-Mackinnon), Pinto, and Mullins, was made. The third panel again affirmed the determination of the Secretary. Furthermore, the third panel dealt with the objection raised on behalf of the appellant regarding the apprehension of bias as follows:

"The Tribunal does not accept the representative's submission that the hearing in February 2018 was affected by apprehended bias. A hearing is an evidence gathering exercise not involving any findings. The Tribunal has carefully reviewed all of the evidence provided by the applicant in the course of the review, including at the hearing in February 2018, and listened to the hearing recordings. Section 20 of the Act empowers a reconstituted Tribunal to have regard to any record of the proceeding made by the Tribunal as previously constituted. The applicant has had the opportunity to provide detailed evidence in support of his claims. The applicant was invited to attend a further hearing to provide new evidence and to correct or clarify any evidence already provided but chose not to attend.

The Tribunal is satisfied the applicant was invited, pursuant to s.40 of the Act, to appear before it and that he has requested a decision be made on the evidence before it. Having regard to the matters discussed above, the Tribunal has proceeded to make a decision on the review without taking further action to allow or enable him to appear before it."

9. Being aggrieved by the determination of the Tribunal, the appellant appealed to the Supreme Court on two grounds: apprehended bias and failure to consider evidence. On 6 December 2022, the Supreme Court dismissed the appeal.

10. On 22 December 2022, the appellant filed a notice of appeal against the Supreme Court decision to the Nauru Court of Appeal with the following grounds of appeal:

"The primary judged erred by failing to find that:

i. The decision of the Tribunal did not comply with the requirements of natural justice because there is a reasonable apprehension of bias affecting the decision.
ii. The Tribunal failed to consider important evidence in the review and thereby failed to comply with the requirements of natural justice.
iii. The Tribunal failed to comply with the obligation to act on the basis of the most up to-date information available."

11. Subsequently, the parties filed submissions, and the appeal was taken up for hearing on 4 July 2023. The appellant's counsel informed the court that only the first ground of appeal would be advanced and that the second and third grounds of appeal were abandoned.

12. The appellant reinforced the argument on apprehension of bias based on the recent High Court of Australia decision in QYFM v Minister for Immigration, Citizenship, Migrant Services, and Multicultural Affairs [2023] HCA 15. In that case, the High Court dealt with a situation involving allegations of apprehended bias against one of the judges on the three-member panel of the Full Court of the Federal Court of Australia. This judge had previously appeared as counsel against the appellant in different proceedings. The High Court of Australia held that "his Honour's appearance as counsel against the appellant in his earlier conviction appeal was sufficient to give rise to a reasonable apprehension on the part of a fair-minded lay observer of the possibility that his Honour had formed and retained an attitude to the appellant incompatible with the degree of neutrality required dispassionately to resolve issues in a subsequent proceeding to which the appellant was a party".

13. The High Court further stated that a reasonable apprehension of bias attributed to one member of the panel extends to the entire panel. This was expounded by Kiefel CJ and Gageler J as follows:

> "57. Once it is accepted that absence of bias is inherent in the exercise of judicial power and that the jurisdiction of a multi-member court is to be exercised by all of the judges who constitute the court for the hearing and determination of a matter, it becomes apparent that bias on the part of any one of those judges deprives the court as so constituted of jurisdiction to proceed with the hearing and determination of that matter. Where bias on the part of an individual judge is established, that is the end of the jurisdictional inquiry. No numerical exercise is involved. It is not a question of counting apples in a barrel. Nor is it

to the point to inquire into whether the outcome of the exercise of jurisdiction by the court as so constituted would or could have been different if the judge was not biased or if the biased judge did not participate.

58. That jurisdictional consequence of bias on the part of any of its members has an important practical dimension for a multi-member court. Each member of the court has an individual duty to give effect to his or her own true view of the facts and applicable law. In the discharge of that duty, however, members of the court can properly be expected to confer together in private in order to obtain the benefit of each other's views and to agree where they can. For the public to be able to have confidence in the outcome of such a closed deliberative process, the public must be confident that each participant in the process is free from bias. The process and the outcome would be tainted were a biased judge "in the room."

14. The appellant contended that member Zelinka, who was part of the first panel, was involved with the second panel while being affected by apprehension of bias. Referring to the High Court decision in QYFM [supra], which established that the bias of one member can taint the entire panel, the appellant argued that the entire second panel was compromised due to Zelinka's involvement. Therefore, when the third panel was reconstituted, the appellant contended that it should have been composed entirely of new members, instead of including two members from the second panel.

15. The respondent argued that QYFM [supra] is not relevant to this Refugee Status Tribunal because QYFM [supra] discussed procedures related to judicial power, which do not automatically apply to administrative tribunals. The respondent relied on the High Court of Australia's decision in Re Refugee Review Tribunal; Ex parte H [2001] HCA 28, where it was stated in paragraph 5:

> "It was held in *Re Refugee Review Tribunal; Ex parte Aala* that administrative decisions may be reviewed in this Court for failure to observe the rules of natural justice ((2000) 75 ALJR 52; 176 ALR 219). Further, it was accepted

in *Minister for Immigration and Multicultural Affairs v Jia* that such a failure would extend to cases in which apprehended bias is established ([2001] HCA 17 at [95], [105], [106]). However, the rule with respect to apprehended bias, as it has developed in relation to the judicial process, is not based solely on the concept of natural justice. Its development is also referable to the need to maintain confidence in the judicial process (Johnson *v Johnson* (2000) 74 ALJR 1380 at 1382 [12]). Thus, the rule as to apprehended bias, when applied outside the judicial system, must take account of the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings (*Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 at [181], [187]). Moreover – and on this the parties are in substantial agreement – regard must be had to the statutory provisions, if any, applicable to the proceedings in question, the nature of the inquiries to be made and the particular subject-matter with which the decision is concerned."(citations interpolated)

16. The respondent highlighted that when applying the rule regarding apprehended bias outside the judicial system, it is essential to consider the unique nature of the body or tribunal in question and the distinct characteristics of its proceedings. However, it should be noted that what the Respondent has relied on relates to a different context as per the decision in Minister for Immigration and Multicultural Affairs v Jia [2001] HCA 17 where it was stated at paragraph 187:

> "In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision-makers, however, may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed, as I have already pointed out, the notion of an "expert" tribunal assumes that this will be done. Conferring power on a Minister may well indicate that a

particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject. It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker".

17. Furthermore, the respondent relied on Section 20 of the Refugee Convention Act 2012 to support the argument that the procedure related to the Tribunal is different from that of a court. This section outlines how the reconstitution process should be carried out as follows:

"**Reconstitution if necessary**

(1) The principal member may reconstitute the Tribunal if:
   (a) one or more of the 3 members who constitute the Tribunal for the purpose of a particular review:
      (i) Stops being a member; or
      (ii) For any reason, is not available for the purpose of the review at the place where the review is being conducted; or
   (b) the principal Member thinks the reconstitution is in the interests of achieving efficient conduct of the review.

(2) The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.

18. The respondent argued that, unlike a court, this provision enables partial or complete reconstitution of the Tribunal while a review remains undetermined. It was also contended that the Tribunal can continue and complete the review, and may consider any record of the proceedings of the review made by the Tribunal as previously constituted.

19. However, it should be noted that Section 20(1)(b) provides that if the principal member believes that reconstitution is in the interest of achieving the efficient conduct of the review, the Tribunal can be reconstituted. Therefore, it is clear that a Tribunal can be reconstituted not only when a member is no longer available but also in the interest of achieving efficient conduct of the review. Ensuring the efficient conduct of the review inherently includes guaranteeing the fairness of the procedure. Furthermore, it appears that considering the proceedings of the previous Tribunal is not mandatory under this provision.

20. Be that as it may, we have considered the decision of the Supreme Court where the learned judge correctly discussed the principles relating to apprehension of bias. Accordingly, the test to be applied in cases of apprehension of bias was discussed in relation to the decision in Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337:

> "51. At 344-345 of Ebner, Gleeson CJ, McHugh, Gummow and Hayne JJ said:
>
> > Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide (R v Watson; Ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; Re Lunsk; Ex parte Shaw (1980) 55 ALJR 12; 32 ALR 47; Livesey v NSW Bar Association [1983] HCA 17; (1983) 151 CLR 288; Re JRL; Ex parte CJL [1986] HCA 39; (1986) 161 CLR 342; Vakanuta v Kelly [1989] HCA 44; (1989) 167 CLR 568; Webb v The Queen [1994] HCA 30; (1994) 181 CLR 41; Johnson v Johnson (2000) 201 CLR 488). That principle gives effect to the requirement that justice should both be done and be seen to be done (RA v Sussex Justices; Ex parte McCarthy [1923] EWHC KB 1; [1924] 1 KB 256 at 259, per Lord Hewart

CJ), a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

52. This passage encapsulates the so-called "double might" test of apprehended bias: that a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the relevant question. The test is an objective one. It is the Court's view of the public view, not the court's own view, which is determinative. The question of what a fair-minded lay observer might reasonably think is largely a factual one, albeit one which must be considered in the legal, statutory and factual contexts in which the decision is made."

21. The learned judge considered the application of the "double might test" in paragraph 93 of the judgment as follows:

"It is then necessary to articulate the logical connection between those matters and the feared deviation from the course of deciding the Appellant's matter on its merits. Consistent with the approach of Gageler J in *Isbester*, when considering this second analytical step in the context of a multi-member tribunal, the step should itself be divided into two elements: firstly, an articulation of how Member Zelinka might be affected individually; and secondly, an articulation of how Member Zelinka's apprehended bias (if any) might in turn affect the ultimate resolution of the Appellant's claim by the Third Panel, of which she was not a member".

22. In the Supreme Court, the learned judge correctly found that "a fair-minded lay observer might reasonably apprehend that Member Zelinka might not have brought an impartial mind to the resolution of the same factual questions on any re-hearing." Regarding the third panel, the learned judge held that "the appellant has not demonstrated that a fair-minded lay observer might reasonably apprehend that the members of the third panel (particularly Members Hearn-MacKinnon and

Mullins) might not bring an impartial mind to the resolution of the appellant's application."

23. We agree with the appellant's submissions that it is impossible and unnecessary to establish through evidence the deliberations that took place between Member Zelinka and the other two members of the third panel. The outcome of a proceeding does not necessarily need to be affected to assess apprehension of bias. The test involves considering what might occur in the mind of a layperson, who is neither overly suspicious nor complacent. We do not believe that applying the reasoning in QYFM(supra) constitutes an overextension of the principle of apprehension of bias to an administrative tribunal. Nevertheless, determinations related to refugee status should be administered with utmost caution and care, as reiterated on numerous occasions by this Court. In refugee status determinations, the highest standards of fairness must not only be applied but must also be seen to be applied.

24. The solicitor for the appellant raised the objection regarding the formation of the third panel only by replacing Member Zelinka, at the first available opportunity. In view of the reasoning in QYFM (supra), we are satisfied that the circumstances in this case, when objectively examined, would give rise to a reasonable apprehension on the part of a fair-minded lay observer that the third panel might not bring an impartial mind to the deliberative process of the Tribunal. This is due to the fact that the other two members of the second panel, who also formed the third panel, were tainted by their engagement in the second panel with Member Zelinka.

25. However, it should be noted that at the time the learned judge of the Supreme Court delivered the judgment, his Honour did not have the privilege to consider the reasoning of QYFM [supra]. The development of the standard of fairness is meant to guarantee the rights of the parties, and we are of the view that such fairness should be applied not only to judicial determinations but also to administrative tribunals, without distinction. Furthermore, we do not see any obstacle in doing so in view of the statutory procedures relating to the

reconstitution of the Refugee Status Review Tribunal. At the end of the day, the paramount duty of a tribunal or a court is to ensure that the rights of individuals are protected and that procedural fairness is afforded in the highest form.

26. As such, we are of the view that, in those circumstances, the failure to conclude that a fair-minded lay observer might think that the other members of the second panel might not bring impartial minds to their role on the third panel is an error of law.

27. Accordingly, the appeal is allowed.

28. The judgment of the Supreme Court dated 06 December 2022 is set aside. The matter is remitted back to the Tribunal for redetermination by a new panel.

Dated this 27 June 2024

Justice Rangajeeva Wimalasena

President

NAURU COURT OF APPEAL

Justice Sir Albert Palmer

I agree

Justice of Appeal

Justice Colin Makail

I agree

Justice of Appeal