IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 13 of 2018
Supreme Court Refugee Appeal Case No. 30 of 2017

BETWEEN

SOS 011

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

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

DATE OF HEARING: **5 July 2023**

DATE OF JUDGMENT: **30 March 2025**

CITATION:	**SOS 011 v The Republic of Nauru**
KEYWORDS:	Refugee; apprehension of bias; acquiescence; waiver;
LEGISLATION:	s 22 and 44 Refugees Convention Act 2012
CASES CITED:	Bohills v Friedman (2001) 65 ALD 626; Johnson v Johnson (2000) 201 CLR 488; Goktas v Government Insurance Office of New South Wales (1993) 31 NSWLR 684; Michael Wilson & Partners Ltd **v** Nicholls and others (2011) 282 ALR 685; Locabail (UK) v Bayfield Properties Ltd [2000] 1 ALLER 65; CNY 17 v Minister for Immigration and Border protection (2019) 94 ALJR 140; Vakauta v Kelly (1989) 87 ALR 633; MZZMG v Minister for Immigration and Border Protection and Another [2015] FCAFC 134; R v Magistrates' Court at Lilydale; Ex parte Ciccone [1973] VR 122; RPS v R (2000) 168 ALR 729; CNY 17 v Minister for Immigration and Border Protection (2019) 268 CLR 76;
APPEARANCES:	
COUNSEL FOR the Appellant:	**NM Wood SC**
COUNSEL FOR the Respondent:	**HPT Bevan SC**

JUDGMENT

1. This is an appeal against the Supreme Court judgment delivered on 19 April 2018, affirming the decision of the Refugee Status Review Tribunal (second Tribunal) made on 06 May 2017.

2. The Appellant in this matter made an application on 30 January 2014 for Refugee Status Determination to be recognized as a refugee or as a person to whom the Republic of Nauru owes complimentary protection under its international obligations. On 29 September 2014, the Secretary for Justice and Border Control (Secretary) decided that the Appellant is not a refugee and is not owed complementary protection. The Appellant made an application to the Tribunal (first Tribunal) for review of the Secretary's decision. On 15 March 2015 the first Tribunal affirmed the determination by the Secretary. Aggrieved by the first Tribunal decision, the Appellant appealed to the Supreme Court. On 14 November 2016 the Supreme Court remitted the matter back to the Tribunal for reconsideration by consent. The Supreme Court made the following orders:

> "Upon hearing Amicus curiae for the Appellant and Counsel for the respondents Ms S. Vohra and upon consideration of the proposed consent orders filed by the parties I make the following orders:
>
> 1. The decision of the Refugee Status Review Tribunal (the Tribunal) dated 15 March 2015 be remitted to the Tribunal for reconsideration in accordance with the following directions:
>
> (a) The Tribunal determine the appellant's claim that he owed complementary protection because he would face harm on account of generalized sectarian and political violence in the context of complementary protection.
>
> (b) The tribunal's determination that the appellant, at the time of the decision, did not have a well-founded fear of being persecuted for any Convention reason, is not affected by legal error.
>
> 2. There be no order as to costs."

3. Consequently, the second Tribunal was constituted to hear the matter. However, Wendy Boddison, who had presided the first Tribunal, was again the

Presiding member of the second Tribunal. The remaining two members were newly appointed and had not participated in the first Tribunal proceedings.

4. On 06 February 2017 the Presiding member Wendy Boddison sent an email to the Appellant's legal representatives informing that she, Alison Murphy and Sean Baker would be the members of the second Tribunal. Subsequently, the Appellant was invited to appear before the second Tribunal on 02 March 2017 by the notice dated 09 February 2017. The Appellant filed his statement dated 24 February 2017 and the Appellant's solicitor filed the submissions on 26 February 2017.

5. The Appellant appeared before the second Tribunal on 02 March 2017 and the second Tribunal explained to him that the reconsideration would be limited to the issue of complimentary protection. The Appellant was represented by his solicitor Mr Usman Bhatti during the proceedings before the second Tribunal. It appears, that on that day, the proceedings were adjourned twice to allow the Appellant to seek advice from the solicitor and once to allow for a break. On 22 March 2017 the solicitor for the Appellant filed further written submissions before the second Tribunal.

6. The Appellant or his solicitor did not raise any issue with regard to the same Presiding member constituting the second Tribunal in the initial submissions or during the proceedings before the second Tribunal. Nevertheless, in paragraph 23 of the submissions filed after the hearing was concluded, it was stated "Further we respectfully submit that applying the credibility findings of the First Tribunal in the Tribunal's assessment of Mr ...[redacted] complementary protection claims would be an error of law as the Tribunal would be taking into account irrelevant considerations," with the following footnote added at the end:

> "In this regard, we also respectfully and cautiously raise our concern to the Tribunal that whether Deputy Principal Member Boddison who

heard and decided Mr...[redacted] appeal matter at the Frist Tribunal Hearing could objectively re-consider the evidence before the Tribunal with a fresh eye and an open mind."

7. On 06 May 2017 the second Tribunal delivered its decision. The second Tribunal affirmed the determination of the Secretary that the Appellant is not owed complimentary protection under the Refugees Convention Act 2012 (Refugees Act).

8. Being aggrieved by the said decision, the Appellant again appealed to the Supreme Court. The following ground of appeal was advanced in the Supreme Court by the Appellant:

> "The Tribunal erred in law by its failure to reconstitute itself entirely on the remittal of the first Tribunal's decision by the Supreme Court of Nauru. This failure amounted to an apprehension of bias amounting to a breach of the rules of natural justice at common law and s 22 of the Act."

9. On 19 April 2018 the Supreme Court delivered its judgment affirming the decision of the second Tribunal. The Supreme Court stated at para [75] of the judgment that, "I find 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". However, the Supreme Court concluded that:

> "[83] In these circumstances, the Appellant should be regarded as fully aware of the circumstances and to have made a forensic decision not to raise the issue. This means that he has waived his right to object on this ground later."

10. The Appellant now seeks to appeal the decision of the Supreme court and the Amended Notice of Appeal filed on 11 July 2022 sets out the following grounds of appeal:

> "[1] The Supreme Court erred by failing to find that the decision of the Refugee Status Review Tribunal (the Tribunal) was affected by apprehended bias in breach of the rules of natural justice at common law and s 22 of the Act on the basis that the appellant "should be regarded" as having made "a forensic decision" not to raise a concern as to the constitution of the Tribunal and to have "waived his right to object on this ground later". In particular:
>
> a. the Court by finding in effect that the appellant had failed to sufficiently clearly raise a concern about the constitution of the Tribunal; and
>
> b. the Court by finding in effect that, insofar as the appellant raised such a concern, he raised it at a stage when he was precluded from objecting.
>
> [2] The Supreme Court had no power under section 44(1)(a) of the Act to affirm the decision of the Tribunal in circumstances where the Court found that the decision had not been lawfully made.
>
> [3] Alternatively to 2, in deciding whether to affirm the decision of the Tribunal under section 44(1)(a) of the Act in circumstances where the Supreme Court found that the decision was affected by apprehended bias, the Court unduly confined its exercise of discretion to the binary question of whether the appellant "waived" objecting to the constitution of the Tribunal and/or failed to consider submissions by the appellant bearing on whether the Court should revise the decision of the Tribunal on the ground of apprehended bias.
>
> [4] Further or alternatively to 3, the Supreme Court's reasons for judgment are inadequate to assess whether it considered the submissions referred to in 3."

11. When the present appeal was taken up for hearing before this Court, the parties made submissions in this matter and in Refugee Appeal No. 12 of 2018 together, as both appeals involve common legal principles.

Ground one

12. As it was earlier noted the Supreme Court concluded 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 required to decide.

13. The Appellant argued that the Supreme Court erred when it was concluded that the Appellant had "made a forensic decision not to raise the issue" of possible apprehended bias. Further it was asserted that the foot note was sufficient to consider that the Appellant raised an issue with regard to apprehension of bias. The Appellant submitted that it was "respectfully and cautiously" raised as the Appellant did not wish to offend or alienate a Tribunal member since the Appellant was in a "vulnerable" position. Also, the Appellant argued that it was wrong for the Supreme Court to decide that it was not raised in a timely manner. It was submitted that a claim of bias need not be made on the spot, and it is a difficult forensic decision that lawyers should be able to make with time for reflection.

14. In addition, the Appellant submitted that even if the issue was raised on 02 March 2017 at the hearing it would not have been practically possible for the Republic to make a different arrangement to constitute the Tribunal as only the Deputy Principle Boddison was in Nauru. We do not see it as a valid argument as what would have happened is a hypothetical scenario and if an issue was raised with regard to the constitution of the panel at the beginning, it was up to the Republic to take appropriate action.

15. Be that as it may, the Respondent submitted that the foot note does not amount to a formal and explicit objection. It was submitted that the Appellant having known the circumstances that gave rise to disqualification but acquiesced without raising the issue explicitly, is likely to be held that the Appellant has waived the objection. Further, the Respondent submitted that the issue must be raised at the earliest possible opportunity. The Respondent also asserted that even if a formal objection or application for disqualification is not made, it is necessary to make that point clearly. The Respondent's submissions state that although there is no precise mechanism for the point to be made, in all circumstances of a case one must be able to judge that such a point was made.

16. We have considered as to how the Supreme Court dealt with this issue. The learned Judge dissected the matters to be determined into three questions as follows:

> "[55] There are three matters to be determined in this case in response to the claim by the Appellant that he has been denied procedural fairness:
>
> (a) whether a fair-minded observer would reasonably conclude that the second Tribunal as reconstituted may be biased;
>
> (b) if so, whether the Appellant waived his procedural rights by electing not to seek the recusal of the member of the Tribunal who had sat on both the first and second Tribunals; and
>
> (c) if there is a breach of the bias rule and there has been no waiver, whether the doctrine of necessity permitted the Tribunal to sit as it did."

17. The learned Judge of the Supreme Court considered several authorities [Re McCroy; Ex parte Rivett (1895) 21 VLR 3; Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1985) 60 ALJR 181; Vakauta v Kelly (1989) 167 CLR 568] to discuss how and when an issue relating to bias should be raised and how failure to raise it would amount to a

waiver. Having discussed the principles enunciated in those authorities His Honour concluded:

> "[82] However, at no stage did the Appellant or his legal representatives seek that the presiding member in common between the two panels of the Tribunal recuse herself for ostensible bias. The closest that the legal representatives came to canvassing this was in a footnote in submissions filed on 22 March 2017 where they stated in very tentative terms: "we also respectfully and cautiously raise our concern to the Tribunal that whether Deputy principal Member Boddison who heard and decided [SOS 011]'s appeal matter at the First Tribunal Hearing could objectively re-consider the evidence before the Tribunal with a fresh eye and an open mind". This fails a considerable distance short of either a submission that the presiding member should recuse herself for ostensible bias or for an argument advanced in a suitably timely fashion.
>
> [83] In these circumstances, the Appellant should be regarded as fully aware of the circumstances and to have made a forensic decision not to raise the issue. This means that he has waived his right to object on this ground later."

18. As it was earlier noted prior to the commencement of the proceedings in the second Tribunal, the presiding member had sent the following email on 06 February 2017 to the legal representatives of the Appellant indicating the formation of the panel.

> "I have attached a draft roster for this sitting. Could you let me know if you believe there should be any changes.
> Please note the group meeting is on Sunday and he later start on Monday 27.2.
> The members are myself and:
> Alison Murphey…

Sean Baker.."

19. Therefore, it appears that almost one month prior to the second Tribunal hearing, the composition of the panel had been made known to the Appellant, although there is no requirement under the Refugee Act to inform the parties of the names of the panel. The Appellant's counsel submitted that there is no proof the Appellant's solicitor received the said email. However, according to the submissions made by the Respondent, the intended recipient of the email was the solicitor representing the Appellant, and, in the normal course of business, that appears to be the standard method of communication employed by the Tribunal with the parties.

20. On 09 February 2017 a notice was issued to the Appellant inviting him to appear before the second Tribunal. Admittedly, the notice does not require to state the composition of the panel. Subsequently the Appellants representative filed submissions on 26 February 2017. But the Appellant did not raise any issue with regard to the Deputy principal Boddison presiding the second panel in the submissions. The hearing took place on 02 March 2017 and obviously the Appellant and his solicitor came to know that the Deputy Principal who presided the first Tribunal was presiding the second Tribunal as well.

21. This matter was discussed in the Supreme Court judgment and the learned judge stated that :

> [82] The Appellant and his legal representatives were aware that the second Tribunal included the presiding member from the first Tribunal and that the decision by the first Tribunal had not been quashed. They were also aware that the case that they were advancing incorporated an assessment by the second Tribunal of the Appellant's credibility.

22. Although it is not required to raise issues with regard to bias on the spot, it appears that the proceedings had been adjourned three times to allow the

Appellant to take advice from his solicitor and to allow a break. Nothing explains as to why even during those three adjournments the Appellant or the solicitor considered this issue and raised it during the proceedings. If more time was required for a forensic decision to raise this issue, there was no explanation as to why the Appellant could not at least indicate to the second Tribunal of their intention to object to the formation of the panel in a timely manner. The Appellant's solicitor filed submissions on 22 March 2017 and even in the submissions this issue was not raised in a substantive manner. Instead, as it was earlier noted a footnote briefly stated that they raise concern whether Deputy Principal Boddison who heard and decided the matter in the first Tribunal hearing could objectively re-consider the evidence before the Tribunal with a fresh eye and an open mind.

23. It appears that the Appellant had sufficient knowledge about the composition of the panel prior to the commencement of the second Tribunal as a result of the email sent on 06 February 2017. Moreover, there had been ample opportunity for the Appellant and his legal representative to become fully aware of the circumstances, particularly, in relation to the formation of the panel from the very outset of the proceedings before the second Tribunal. It should be noted that in this case the issue involving apprehension of bias did not emerge through other evidence, subsequent conduct of the Tribunal members or a fact that came to light at a later stage. Rather, the constitution of the panel was clearly evident and could be readily comprehended merely by observing the panel from the very beginning.

24. It is also a well-established standard that a claim for apprehension of bias should be made at the earliest possible opportunity. The rationale behind a timely objection is that it minimizes undue inconvenience to the other parties and prevents unnecessary disruption to the proceedings. However, earliest possible opportunity does not necessarily mean that a party must raise the claim at the very outset of the proceedings as the issue giving rise to the claim of bias may sometimes come to light at a later stage of the proceedings

depending on the circumstances of the case. Therefore, whether a claim has been made in a timely manner must be assessed based on the circumstances of each case. If the circumstances giving rise to a claim of bias were known from the inception of the proceedings, it would be unfair to raise it at a later stage, although in another case the effect of bias may become obvious only when the judgment is delivered. However, we are of the opinion that given the circumstances in this case, if an objection was to be made in respect of the composition of the panel, it should fairly have been raised at the very beginning rather than delaying it just before the decision is pronounced. Most importantly, the Appellant was represented by a solicitor and making an informed forensic decision to raise such an objection would have been much easier than if it were the case of an unrepresented party. In those circumstances the timely raising of a claim in this case would be considered to be at the very outset.

25. There is no argument that the presence of a member who sat on both panels could give rise to apprehension of bias. But the issue is whether a brief reference to this made only in a footnote to the written submissions after the conclusion of the hearing constitutes a reasonable and appropriate manner of raising such an issue. The principle of waiver by acquiescence in relation to the bias rule is well established. Courts have time and again held that where a party is aware of circumstances giving rise to apprehended bias, it is the duty of that party to raise that issue at the earliest possible opportunity. A failure to do so, particularly where the party remains silent despite being fully aware of the relevant circumstances, such as the fact that one member was common to both panels, may amount to acquiescence. In that instance the party may be considered to have waived their right to object on the ground of apprehended bias. In Bohills v Friedman (2001) 65 ALD 626 Gray J stated the following while referring to Callinan J in Johnson v Johnson (2000) 201 CLR 488 and Kirby P (as he then was) in Goktas v Government Insurance Office of New South Wales (1993) 31 NSWLR 684 :

"[35] Accepting that it is possible for a party to a proceeding to waive the opportunity to argue that the court or tribunal should be disqualified on the ground of apprehended bias, the question must arise as to what amounts to a waiver. As appears from the facts of *Vakauta*, silence can amount to a waiver. In the light of more recent authorities, whether it will do so may depend on the forensic circumstances. It is clear from *Vakauta* that it is unnecessary for a party to invite the judge, or the member or members of the tribunal, to disqualify himself, herself or themselves. The taking of an objection is sufficient to preserve the right to challenge an unfavourable decision at a later date on the ground of apprehended bias. The rationale of the rule is that an objection will give the court or tribunal an opportunity to correct any misapprehension, or to take the view that it should not continue to deal with the case. Whether an objection has been taken must depend on the particular circumstances of a case. In determining whether an objection has been taken, it is legitimate to bear in mind the factors to which Kirby P (as his Honour then was) and Callinan J referred."

26. Unlike in judicial proceedings, particularly in proceedings before a Tribunal of this nature, it is important that any issue relating to bias be raised in a reasonable manner that affords the Tribunal an opportunity to respond as well. Subtle or indirect references by way of a foot note made at the last minute, particularly where the relevant circumstances were already known, cannot be considered sufficient even though a formal objection or application for disqualification may not be strictly necessary. It becomes more relevant where the Appellant was legally represented and had a reasonable opportunity to raise the issue earlier. In such circumstances, we are of the view that the contention of the Appellant that they did not acquiesce in the right to object is not tenable.

27. This position is clearer in view of the following authorities. In Michael Wilson & Partners Ltd v Nicholls and others (2011) 282 ALR 685 the result of acquiescence to raise the objection was discussed as follows:

> [76] It is well established that a party to civil proceedings may waive an objection to a judge who would otherwise be disqualified on the ground of actual bias or reasonable apprehension of bias. (It may well be that the principle extends (2011) 282 ALR 685 at 702 to criminal proceedings but that issue need not be considered.) If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification but acquiesces in the proceedings by not taking objection, it will likely be held that the party has waived the objection.

28. In Locabail (UK) v Bayfield Properties Ltd [2000] 1 ALLER 65 the court clarified that a party who is aware of circumstances giving rise to a potential appearance of bias, and who fails to object at the earliest opportunity, may be taken to have waived their right to object. It was stated that waiver must be clear, unequivocal and made with full knowledge of the relevant facts. Where appropriate disclosure has been made by the judge, and no objection is raised, the party is generally precluded from later asserting a complaint of bias. Such conduct amounts to acquiescence, and courts will not permit parties to remain silent, proceed with the hearing and only raise the issue of bias after receiving an unfavourable outcome. This was highlighted as follows in Locabail (supra):

> "[68] In our judgment, Mrs Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. In the event they did nothing. In doing nothing they were treating the disclosure as being of no importance. The

hearing then continued for a further seven days, judgment was reserved, the Hans House appeal was heard, judgment was reserved, and judgment in both cases was given three and half months later. During all this period Mrs Emmanuel and her lawyers did nothing about the disclosure that had been made on 28 October. They only sprang into action and began complaining about bias after learning from the deputy judge's judgment that Mrs Emmanuel had lost."

29. It was discussed in CNY 17 v Minister for Immigration and Border protection (2019) 94 ALJR 140 that the bias rule, being part of procedural fairness, is about ensuring a fair process, not just a fair outcome. If a party becomes aware of circumstances that might give rise to a reasonable apprehension of bias, the party must raise the objection immediately. Failure to do so may be treated as waiver. It was further stated that:

> "[72] Put in different terms, a remedy for apprehended bias should be sought (and, if appropriate, made) at the earliest possible time. There is no utility in allowing a flawed process to run to its conclusion."

30. The Appellant relied on Vakauta v Kelly (1989) 87 ALR 633 where the Court decided that a formal application for disqualification does not preclude a party from raising apprehended bias on appeal. At page 633 Brennan, Deane and Gaudron JJ stated:

> "If the above comments made by the learned trial judge in the course of the trial had stood alone, we would have been of the view that the appellant, having taken no clearly stated objection to them at the time and having stood by until the contents of his Honour's judgment were known, could not now found upon them in order to have that judgment set aside on the grounds of a reasonable apprehension of bias. The statements which the learned trial judge had made about his preconceived views of Dr Lawson were, however, effectively revived by what his Honour said in his reserved judgment. The appellant's failure

to object to the comments made in the course of the trial cannot, in our view, properly be seen as a waiver of any right to complain if comments made about Dr Lawson in the judgment itself would, in the context of those earlier comments, have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer.

31. However, it should be noted that the circumstance of the instant case differs from those in Vakauta (supra). There could be instances where raising an objection may be futile given the nature of the proceedings or the specific circumstances giving rise to the apprehension of bias. However, in the instant case, the Appellant has provided no reasonable explanation for his failure to raise an objection other than mentioning that he did not wish to offend the Tribunal given his vulnerable position. We do not consider it as a valid reason for not making the objection in an appropriate manner.

32. We have considered the submissions made by both parties. For the reasons discussed above, we are of the opinion that the footnote in the submissions filed by the Appellant's solicitor cannot be considered as an adequate objection raised by the Appellant at the earliest opportunity. In view of the earlier discussion, it is very clear that the Appellant failed to sufficiently and clearly raise the issue in a timely manner. Therefore, we do not find any error in the findings of the Supreme Court in respect of Ground one.

33. In the circumstances the first ground of appeal fails.

Ground two

34. The Appellant claims in the second ground of appeal that 'the Supreme Court had no power under section 44(1)(a) of the Refugees Act to affirm the decision of the Tribunal in circumstances where the Court found that the decision had not been lawfully made'.

35. The Appellant argued that there is a difference between:

a) Exercising a judicial discretion to withhold relief including on the basis of acquiescence by a party with error by the decision maker (a non-exercise of power); and

b) On the other hand, positively exercising power under section 44(1)(a) of the Refugees Act to affirm the decision of the Tribunal.

36. Section 44 of the Refugees Convention Act 2012 states:

> **44 Decision by Supreme Court on appeal**
>
> (1) In deciding an appeal, the Supreme Court may make either of the following orders:
>
> (a) an order affirming the decision of the Tribunal;
> (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.
>
> (2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:
>
> (a) an order declaring the rights of a party or of the parties;
> (b) an order quashing or staying the decision of the Tribunal.

37. The Appellant submitted that the court has a discretion to withhold relief due to acquiescence, but it should not affirm the decision of the Tribunal. The Appellant asserted that it was an error when the learned Judge exercised power under section 44(1)(a) of the Refugees Act to affirm the decision. The Appellant argued that, since the section reads "the Supreme Court may make either of the following orders", it implies that the Supreme Court may also choose to make neither. However, the Respondent argued that in absence of an error the learned judge was correct in affirming the decision of the Tribunal.

38. We do not find any merit in this argument. We are not inclined to accept that the decision of the Tribunal was unlawfully made. The mere fact that the Supreme Court found the presence of apprehended bias does not necessarily

render the decision unlawful, because the Supreme Court decided that the Appellant had waived the right to raise the point through acquiescence.

39. In Vakauta v Kelly (supra) Dawson J said at 577: "Although justice must manifestly be seen to be done, where a party, being aware of his right to object, waives that right, there will be little danger of the appearance of injustice." We are of the opinion that, based on the finding of waiver resulting from a forensic decision not to raise the issue despite being fully aware of the circumstances, the hearing was conducted in accordance with the principles of natural justice as stipulated in section 22(b) of the Refugees Act. Accordingly, and contrary to the Appellant's claim, the affirmation of the decision discloses no legal error.

40. Therefore, the second ground of appeal fails.

Ground three

41. The third ground of appeal reads: Alternatively to 2, in deciding whether to affirm the decision of the Tribunal under section 44(1)(a) of the Act in circumstances where the Supreme Court found that the decision was affected by apprehended bias, the Court unduly confined its exercise of discretion to the binary question of whether the appellant "waived" objecting to the constitution of the Tribunal and/or failed to consider submissions by the appellant bearing on whether the Court should revise the decision of the Tribunal on the ground of apprehended bias.

42. The Appellant's counsel argued that when a court holds that a party waived or acquiesced to object on grounds of apprehension of bias, it does not necessarily mean that there was no apprehension of bias. Rather, the counsel argued that the correct interpretation is that although apprehended may have existed, the court should exercise its discretion to refuse or grant relief if the party knowingly chose not to raise the objection at the appropriate time. The Appellant counsel further quoted the below passage from MZZMG v Minister

for Immigration and Border Protection and Another [2015] FCAFC 134 to support his contention:

> "[68] We have concluded that no ground of appeal should succeed. Had we been persuaded of jurisdictional error, the question whether we should, in the exercise of the Court's discretion, grant relief, would have arisen. The Minister submitted that the appellant's acquiescence in the procedure by which the Tribunal held a joint review hearing and foreshadowed that it would exclude each of the brothers at some stage during the joint hearing was sufficient basis for the Court to decline to grant relief, even if persuaded the Tribunal had exceeded jurisdiction.
> In our opinion, at the level of general principle, it will be a rare case where a decision of an administrative tribunal found to be without, or in excess, of that tribunal's jurisdiction is allowed to stand, and to affect the rights of a person, for reasons based on discretionary considerations such as delay or "acquiescence" in a process before the tribunal which the Court has found to be unlawful. In Re Refugee Review Tribunal; Ex parte Aala (200) 204 CLR 82 at [55] – [62], Gaudron and Gummow JJ explained why relief would seldom be refused where jurisdictional error is established. Given we have not upheld any ground of appeal, it is unnecessary to express a concluded view on the Minister's submissions."

43. Furthermore, the Appellant's counsel relied on R v Magistrates' Court at Lilydale; Ex parte Ciccone [1973] VR 122 where an appeal was heard in a Magistrates' court against a determination by the Housing Commission that a particular house was unfit for human habitation. During the proceedings the Magistrate did an inspection tour of the premises in a car driven by a person who was later called as a witness for the Commission, with counsel for the Commission also present in the vehicle. Although the Appellant's counsel was aware of these circumstances, no objection was raised at the time to the Magistrate continuing to hear the matter, and the proceedings continued until

judgment was delivered dismissing the appeal. On application for a writ of certiorari, the court held that the Magistrate's conduct could give rise to a reasonable apprehension of bias, thereby amounting to a breach of natural justice. However, certiorari was refused on the basis that the Appellant despite being fully aware of the relevant facts failed to object during the hearing and instead actively participated throughout.

44. Referring the R v Magistrates' Court at Lilydale (supra) the Appellants counsel contended that when dealing with a case like the instant appeal, the court must adopt a two-step approach. First, the court must determine whether apprehended bias existed. If it did, this indicates a potential unfairness in the proceedings. Secondly, the court must consider whether despite the presence of bias, the Appellant should be denied relief if he failed to raise the objection at the appropriate time. The counsel relied on the following passage of that judgment at page 135 to emphasize that it is not about denying the existence of bias but about the court exercising its discretion to refuse or grant relief where a party has through silence or inaction waived the right to complain and argued that such cases require the court to assess the broader interest of justice:

> "Looking at all circumstances, I think that even if the evidence does not establish a case of "lying by" or "nursing a point" (and I think it does not), it would be wrong to allow the applicant – his advisers having chosen not to go on with the hearing up to judgment, before the magistrate – to raise this point now. I do not think they should be allowed thus to eat their cake and have it, to approbate and reprobate. In the circumstances, I think that the applicant is not now entitled to ask this Court to quash the order."

45. Although the Appellant submitted that the Court must make a discretionary decision based on the overall interest of justice and not just follow a rigid rule like "if you didn't object, you lose." There is no reason to believe that was serious or gross bias that defeated overall interest of justice in this case. The

Appellant submitted that the bias rule is concerned with broader institutional values and public confidence in the decision making must be given due regard quoting Callinan J in RPS v R (2000) 168 ALR 729:

> "[95] To this last proposition also, however, there may be a qualification. Litigants, whether the State, corporations, or natural persons are not the only ones who have an interest in an impartial, and an apparently impartial, system of justice. Indeed it is also the interest of the public at large in such a system that dictates that a trial must not only be impartially conducted but also must be seen to be so. The whole rationale behind the apprehended bias rule is the need for public confidence in the judicial system: it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Or, as Deane J stated in *Webb v R* :
>
> > it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice."

46. Furthermore, the Appellant's counsel made submissions that its not only the individual who is affected by this process but the Republic too has a stake in it. The Appellant invited the Court to consider the following statement from CNY 17 v Minister for Immigration and Border Protection (2019) 268 CLR 76:

> "The Rule against bias for judicial and administrative decision-makers is of long standing. The public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias...
>
> ...
>
> As the rule applies to any decision which is the subject to the principles of procedural fairness, it applies "not only to the judicial system but also, by extension, to many other kind of decision- making and decision makers". The rule is concerned with public confidence in the

administration of justice. It is important to the quality of decisions being made and to the confidence and cooperativeness of individuals affected by those decisions. By enhancing the appearance and actuality of impartial decision-making, it fosters public confidence in decision-makers and their institutions."

47. The learned Judge has considered the circumstances of the case and was satisfied that the Appellant made a forensic decision not to raise a clear objection in a timely manner despite the fact there was presence of apprehended bias. The Appellant contended that the court must have regard to the broader interests of justice, particularly in the context of refugee matters, where the implications are far-reaching and engage international obligations, notably the principle of non-refoulement. Given the sensitivity and gravity of the rights involved in refugee claims, there is no dispute that such matters demand the utmost procedural fairness and adherence to the highest standards of natural justice. They cannot be equated with ordinary civil disputes between private parties.

48. However, in the present appeal, there is no material before us to suggest that these standards were compromised or that the broader interest of justice has been adversely affected. We do not find any reason to allege that His Honour overlooked or disregarded greater interest of justice in arriving at the conclusion. If the circumstances of a case do not require more than to consider what is relevant to the case, a party cannot expect a court to go on a voyage of discovery looking into issues that are even not relevant to an issue at hand. We are not inclined to accept this argument of the Appellant with regard to not exercising discretion. We do not see any relevance of that argument to the instant appeal. We are satisfied that the learned Judge of the Supreme Court has given due regard to all the circumstances when His Honour decided to affirm the decision of the Tribunal since the Appellant had waived the right to complain of bias. We see no reason to disagree with the conclusion reached by

the learned Judge of the Supreme Court that the Appellant made a forensic decision not to raise the issue despite being fully aware of the circumstances.

49. For the reason mentioned above ground three also fails.

Ground four

50. The fourth ground reads; Further or alternatively to 3, the Supreme Court's reasons for judgment are inadequate to assess whether it considered the submissions referred to in 3.

51. The Appellant submitted that the learned Judge of the Supreme Court did not provide adequate reasons for the Court to assess whether or not the submissions made by the Appellant were considered. The counsel for the Appellant submitted that His Honour did not consider the other arguments made by him in the Supreme Court and instead limited his Honour's discussion to whether there was waiver or not. The Respondent submitted that even if there is some inadequacy in his Honour's reasons it does not assist the Appellant.

52. We have considered the judgment of the Supreme Court. We cannot accept that the learned Judge narrowly focused on the issue of waiver only. It appears that the judgment adequately discusses the legal principles involved and has identified the issues to be resolved. Therefore, we are not of the view that a legal error is made out by the Appellant in this regard.

53. As such, the fourth ground has no merits.

54. Accordingly, for the aforementioned reasons the appeal is dismissed with costs.

Dated this 30 May 2025.

Justice Rangajeeva Wimalasena

President

Justice Sir Albert Palmer

Justice of Appeal

Justice Colin Makail

Justice of Appeal