IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 12 of 2018
Supreme Court Refugee Appeal Case No. 02 of 2018

BETWEEN

VEA 026

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 May 2025**

CITATION:	**VEA 026 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; 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 14 December 2017.

2. The Appellant in this matter made an application on 27 February 2014 for Refugee Status Determination, seeking to be recognized as a refugee or as a

person to whom the Republic of Nauru owes complimentary protection under its international obligations. On 31 October 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 22 May 2015 the first Tribunal affirmed the determination by the Secretary. Aggrieved by the first Tribunal decision, the Appellant appealed to the Supreme Court. On 11 September 2017 the Supreme Court remitted the matter back to the Tribunal for reconsideration, by consent. The Supreme Court order reads as follows:

> "The Court having heard Mr Bhatti, McKenzie friend for the appellant, and Mr Walker, counsel for the Respondent, it is ORDERED that:
>
> 1. Pursuant to s 72 of the Civil procedure Act 1972 (Nr), the orders of the Registrar made on 17 June 2015 and 25 September 2015, purporting to extend time pursuant to s 43 of the Refugees Convention Act 2012 (Nr), are vacated.
> 2. Pursuant to s 43(5) of the Refugees Convention Act 2012 (Nr), the period in s 43(3) of the Refugees Convention Act 2012 (Nr) is extended to 30 October 2015.
> 3. The notice of appeal purportedly filed on behalf of the Appellant on 30 October 2015 is to be taken to have been validly filed on that date.
> 4. The Court orders that the matter be remitted to the Tribunal for reconsideration in accordance with the direction that:
>
> a. The Tribunal is required to afford the Appellant procedural fairness with respect to the information set out at paragraph [17] of its written statement."

3. Accordingly, on 23 October 2017 an invitation to appear before the second Tribunal on 10 November 2017 was sent to the solicitor of the Appellant. On 08 November 2017 the solicitor for the Appellant filed submissions along with the Appellant's statement of claims.

4. On 10 November 2017 the hearing before the second Tribunal commenced. The Tribunal comprised presiding member Ms Hearn MacKinnon, Ms S. Zelinka and Mr A. Mullin. Notably, Mr A. Mullin was a member of the first Tribunal as well. At the very outset of the proceedings before the second Tribunal on 10 November 2017, the Presiding member raised this issue with the Appellant as follows:

> "Now, you might recall that Mr Mullin was one of the tribunal members before, when your case was being heard before. Okay. So I want to make sure you understand that the tribunal is reconsidering your case fairly and bringing new eyes to all of your evidence and considering your new evidence. Our new decision about your case is a combined decision. Okay? So you have new members, new people looking at your case. All right?"

5. The Appellant was represented by solicitor Mr Walid Babakarkhil. The proceedings before the second Tribunal on 10 November 2017 were adjourned five times, consisting of four breaks and one adjournment to allow the Appellant to consult with his solicitor. On 14 November 2017 the solicitor for the Appellant filed post hearing submissions. On 14 December 2017 the second Tribunal delivered its decision affirming the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Refugees Act.

6. On 26 January 2018 the Appellant received that decision of the second Tribunal and on the same day a Notice of Appeal was filed to appeal the decision to the Supreme Court. Subsequently an Amended Notice of Appeal was filed on 16 March 2018 with the following ground:

> "The Tribunal erred a point of law by failing to reconstitute itself entirely on the remittal of the first Tribunal's decision by the Supreme Court of Nauru. This failure created an apprehension of bias and did not comply

with the rules of natural justice in breach of the common law and s 22 of the Act."

7. On 19 April 2018 the Supreme Court delivered its judgment affirming the decision of the second Tribunal. The Supreme Court stated at para [61] 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:

> "[69] 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."

8. Being aggrieved by the said judgment the Appellant filed a notice of appeal on 23 October 2018. Subsequently an amended notice of appeal was filed on 12 October 2022 with the following grounds of appeal:
   (1) The primary judge erred by failing to find that the Refugee Status Review Tribunal (the Tribunal) erred on a point of law by failing to reconstitute itself entirely on the remittal of the first Tribunal's decision by the Supreme Court of Nauru. The failure created an apprehension of bias and did not comply with the rules of natural justice in breach of the common law and s 22 of the Act.
   (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.

9. When the present appeal was taken up for hearing before this Court, the parties made submissions in this matter and in Refugee Appeal No. 13 of 2018 together, as both appeals involve common legal principles.

Ground one

10. The Appellant contended that the Supreme Court erred in concluding that the Appellant had "made a forensic decision not to raise the issue". The Appellant's counsel submitted that the evidence does not support that the Appellant was aware of his right to raise the issue and made a positive, forensic decision not to raise it.

11. It appears that the first time that the Appellant came to know about the constitution of the second Tribunal was on 10 November 2017 when the proceedings commenced. The Respondent too does not dispute that the Appellant came to know of the constitution of the second Tribunal on the first day of the proceedings. As per the proceedings before the second Tribunal the presiding member stated:

> "So Mr. [redacted], we're here today because the Supreme Court of Nauru made a decision that the tribunal had made an error in the way it considered your case previously. Okay. And the mistake was that the tribunal failed to put a certain piece of information to you. So the court sent your case back to the tribunal to be reconsidered, which is what

we're doing today. So we have before us all of the evidence that you have previously provided in written statements and in your RSD interview and at the tribunal hearing, and we can have regard to all of that evidence as well as new evidence that you're going to provide today, Okay?

Now you might recall that Mr Mullin was one of the tribunal members before, when your case was being heard before. Okay. So I want to make sure you understand that the tribunal is reconsidering your case fairly and bringing new eyes to all of your evidence and considering your new evidence. Our new decision about your case is a combined decision. Okay? So you have new members, new people looking at your case. All right ?"

12. When the presiding member explained that one member from the original Tribunal was present alongside two new members, it appears that the Appellant was represented by his solicitor, with an interpreter also present to assist. To fully comprehend the Appellant's argument on the first ground of appeal, it is necessary to consider the remainder of the exchange between the second Tribunal and the Appellant, so that the matter may be assessed within its proper context and circumstances.

"MS HEARN MACKINNON: Okay. Good. So please let us know if you don't understand the questions. Its important we know if you haven't understood. Our interpreter's role is to interpret what we say, but its not his role to explain to you what we mean. Please let us know if you have any trouble understanding our interpreter. Can you understand the interpreter?
THE INTERPRETER: ...
MS HEARN MACKINNON: Good. Mr Interpreter, are you able to understand Mr [redacted] ?
THE INTERPRETER: Yes. So far so good.

MS HEARN MACKINNON: Okay. Good. When you are giving your evidence, say a few things, then stop and let your interpreter interpret what you've said. Okay. And our interpreter might signal to you to stop, anyway, when ... okay. Everything we discuss today is confidential, and our interpreter also took an oath not to disclose anything – actually, made an affirmation. Same thing.

THE INTERPRETER: Affirmation.

MS HEARN MACKINNON: All right. Now, do you have any questions for us today about the hearing and what's going to happen?

THE WITNESS: No."

13. The Appellant contends that the Tribunal foreclosed the opportunity to raise an issue with regard to the constitution of the panel based on apprehension of bias. It was submitted that when the Presiding member stated that "the tribunal is reconsidering your case fairly and bringing new eyes to all of your evidence and considering your new evidence" the Appellant had no full or free choice to raise the issue of apprehended bias. The Appellant's counsel argued that by that statement of the Presiding member, she had already formed a view that it was appropriate to conduct the proceedings with a member from the previous panel thereby rendering it futile to raise the issue by the Appellant.

14. The Appellant submitted that the second Tribunal did not act in accordance with the principles of natural justice as required by section 22(b) of the Refugee Act for the following reasons:

    (1) First, the Tribunal's statement is inconsistent with the right to raise a complaint of apprehended bias. The Tribunal did not qualify its statement in any way, to ensure that the Appellant was aware that he still had the right to raise the issue of apprehended bias.

    (2) Secondly, the Tribunal told the Appellant – incorrectly- that the process would be fair. The Tribunal could not make the process fair by stating it would be fair, the process had to be fair.

(3) Thirdly, the Tribunal foreclosed any complaint of unfairness. The Tribunal's process was presented to the Appellant as a fait accompli. The Presiding Member had determined that Mr Mullins would be part of the second Tribunal, fully aware of his involvement on the first Tribunal. Despite the composition of the Tribunal, the Tribunal told the Appellant it would be considering the case "fairly and bringing new eyes"

15. The Respondent submitted that by making that statement the Tribunal did not say anything inconsistent with the rule against bias. Also, it was asserted that the Appellant was represented by a solicitor and regardless of what the Presiding Member said, at least the legal representative should have raised the issue.

16. For convenience of reference section 22 of the Refugee Act is reproduced below:

"Way of operating

The Tribunal:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to the principles of natural justice and the substantial merits of the case."

17. We have considered the Appellant's argument regarding the statement made by the Presiding Member that the proceedings would be conducted "fairly and bringing new eyes." Upon reviewing the full exchange, it is evident that the Tribunal clearly informed the Appellant about the composition of the second Tribunal. The use of those words cannot reasonably be interpreted as an expression of a determination to preclude the Appellant from raising the issue of apprehended bias arising from the presence of a member from the first Tribunal. When assessed in the context of the entire exchange, it appears that the second Tribunal had merely assured that the Appellant would receive a fair hearing, which is a fundamental obligation of the Tribunal.

18. This interpretation is further supported by the fact that the Presiding Member invited the Appellant to ask any questions, stating, "Do you have any questions for us today about the hearing and what's going to happen?" This invitation was made immediately following the explanation of the panel's composition and the assurance that the hearing would be conducted fairly.

19. Although counsel for the Appellant contends that the Tribunal effectively foreclosed the opportunity to raise the issue of apprehended bias, there is no evidence to suggest that the Tribunal prevented the Appellant from doing so. The circumstances would have been different had the Tribunal stated that, because it would ensure a fair hearing, the Appellant was precluded from raising concerns about apprehended bias. However, it is not the case here.

20. On the contrary, the Tribunal explicitly invited to raise any question and, most importantly, the Appellant was represented by a solicitor. In these circumstances, it is clear that the Appellant had sufficient opportunity to raise the matter, had he chosen to do so. We are therefore not persuaded that the Appellant was deprived of the opportunity to raise the issue of apprehended bias.

21. The learned Judge of the Supreme Court made the following finding on the issue of apprehended bias:

> "[61] In light of the seriousness of the decision and the centrality of the finding of credibility to the Tribunal's decision-making, although the remitted scope of the hearing was limited, 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.

22. Furthermore, His Honour went on to say in respect of the issue of waiver as follows:

> [67] The Appellant and his legal representatives were aware that the second Tribunal included a 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.
>
> [68] However, at no stage did the Appellant or his legal representatives seek that the member in common between the two panels of the Tribunal recuse himself for ostensible bias. No argument of any kind was raised that he should not participate in the decision.
>
> [69] 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."

23. It is 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 waiting until the outcome of the case. 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.

24. 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."

25. In the instant appeal, the Presiding Member informed the Appellant that the panel is constituted with a member from the first Tribunal. However, the Appellant, while being represented by a solicitor did not raise an issue of apprehended bias at that moment or at any other stage of the proceedings before the decision. It was only after receiving an unfavourable decision from the second Tribunal that the Appellant asserted the Tribunal had failed to comply with the rules of natural justice, in breach of both the common law and section 22 of the Refugee Act, by not fully reconstituting the panel to avoid an apprehension of bias.

26. 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."

27. 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."

28. 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.

29. 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 was fully aware that a member from the first Tribunal was in the second Tribunal too. 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. As earlier stated, we are not inclined to accept that the second Tribunal foreclosed the Appellant's opportunity to raise the issue as well.

30. As such we do not find any error in His Honour's conclusion that the Appellant should be regarded to have a forensic decision not to raise the issue. There has been no non-compliance with the rules of natural justice in breach of the common law and section 22 of the Refugee Act.

31. In the circumstances, the first ground of appeal fails.

Ground two

32. 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'.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. Therefore, the second ground of appeal fails.

Ground three

39. 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.

40. 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."

41. 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.

42. 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."

43. 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."

44. 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."

45. 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.

46. 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.

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

Ground four

48. 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.

49. 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.

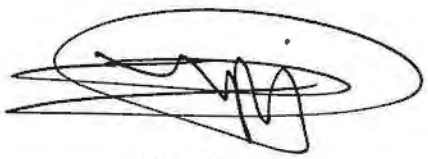
50. We have considered the judgment of the Supreme Court. We cannot accept that the learned Judge narrowly focused on the issue of waiver only. It appears that the judgment adequately discusses the legal principles involved and has identified the issues to be resolved. Therefore, we are not of the view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

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

52. 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