IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 2 of 2018

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00387, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

VEA 026 Appellant

AND

THE REPUBLIC Respondent

Before: Justice Freckelton

Appellant: Ms C. Mellis
Respondent: Mr H. Bevan

Date of Hearing: 16 April 2018
Date of Judgment: 19 April 2018

CATCHWORDS

Appeal – natural justice – apprehension of bias – waiver - reconstitution of Tribunal - doctrine of necessity – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 ("the Act") which provides that:

> *(1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.*
>
> *(2) The parties to the appeal are the Appellant and the Republic.*
>
> ...

2. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

> *"Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ..."*

3. Under s 3 of the Act, complementary protection is defined as "protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations."

4. The determinations open to this Court are defined in s 44(1) of the Act:

> *(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.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its first decision on 22 May 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 31 October 2014, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

6. On 30 October 2015 the Appellant filed a Notice of Appeal with this Court and Khan J made orders on 11 September 2017, remitting the matter to the Tribunal for reconsideration.

7. On 9 February 2017 the Appellant was invited to appear before the second Tribunal to give evidence and present arguments. On 14 December 2017, the second Tribunal delivered its decision again affirming the decision of the Secretary.

8. The Appellant filed a Notice of Appeal with this Court on 26 January 2018 an Amended Notice of Appeal on 16 March 2018.

BACKGROUND

9. The Appellant is a Bangladeshi male of Bengali ethnicity and Sunni Muslim religion from the Chandpur district of Chittagong Province, Bangladesh. He is married and has one child. He also has three brothers and one sister who remain in Bangladesh. The Appellant completed schooling up to year eight, and then began working for his father who was a road works contractor. He worked in Malaysia on a valid work permit from 2009 to 2013, with the exception of a brief visit back to Bangladesh.

10. The Appellant claims a risk of harm upon return to Bangladesh arising from his membership of the Bangladesh Nationalist Party ("BNL"), and resultant harm from Awami League ("AL") members or supporters. He further claims that he will be harmed because he will be returning as a failed asylum seeker.

11. The Appellant travelled from Malaysia to Indonesia in July 2013, and then from Indonesia to Australia in November 2013. He was transferred to Nauru on 18 November 2013.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

12. The Appellant attended a Refugee Status Determination ("RSD") interview on 13 May 2014. The Secretary summarised the material claims advanced at that Interview as follows:

    - *In 2004 the Applicant joined the Bangladesh Nationalist Party and, after two years of membership, he assumed responsibility for organising monthly and quarterly meetings and gatherings.*
    - *In 2007 the Applicant organised BNP supporters to attend a meeting attended by Nural Huda, the BNP leader for the Motlab Thana area.*
    - *Following this meeting, while the Applicant was travelling home by motorbike, he was threatened by 10 to 12 members of the Awami League to cease his support for BNP and to join their party.*
    - *During the parliamentary elections held in 2008, the Applicant was returning home from a BNP meeting and was threatened again by seven or eight AL supporters.*
    - *In January 2009, after the AL came to power, the Applicant was stopped and threatened by 10 to 15 AL members in the bazaar.*
    - *That same day, while the Applicant was returning home from the bazaar, he was kicked of [sic] his motorbike and beaten by AL members.*
    - *The Applicant left Bangladesh and travelled illegally to Malaysia in January 2009. While in Malaysia he obtained a valid work visa.*
    - *The Applicant returned to Bangladesh in March 2012 for one month to visit his wife, staying with his uncle in Chittagong.*
    - *In April 2012 the Applicant left Bangladesh and returned to Malaysia. His Malaysian visa expired in July 2013 and his visa renewal was refused.*[1]

13. Upon questioning as to his involvement in the BNP from 2004, the Appellant said that he replaced his father's position in the party after his father retired.[2]

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[1] Book of Documents ("BD") 46.
[2] BD 47.

14. The Secretary did not accept the following claims to be credible:

- The Appellant's father occupied any official position in the BNP;
- The Appellant inherited his father's position in the BNP in 2004 after his father retired;
- The Appellant was an actively involved BNP member responsible for organising meetings and recruiting new members from 2004 to 2009;
- The Appellant was threatened and/or beaten by AL supporters between 2008 and 2009, causing him to depart for Malaysia;
- On his return to Bangladesh in March 2012 he was located by and targeted by AL members.[3]

15. These adverse findings were the result of the Secretary's assessment that the Appellant's responses to questioning regarding his level of involvement with the BNP and harm from AL members were evasive and vague. The Appellant demonstrated an overall lack of knowledge about BNP policies, membership and organisational structure, as well as the outcome of the 2008 election. The Appellant was also unable to recall any meetings he organised while a member of his local BNP branch between 2004 and 2008, the purpose of those meetings, and who attended. Further, the Appellant was unable to recall his father's position in the BNP.

16. The Secretary further noted that the Appellant's evidence was that he was able to vote in the 2008 election without encountering any harm. His return to Bangladesh for a month in 2012 was also inconsistent with his claim to fear harm from AL members. Given the Appellant had a valid work permit for Malaysia at the time, it was unclear why he would return to Bangladesh if he genuinely feared harm at the hands of the AL.[4]

17. However, the Secretary did consider the Appellant to be "generally supportive" of the BNP, and that he votes for the party.[5] The Secretary noted country information on historical and ongoing political instability in Bangladesh;[6] reports indicated that it is leaders or high profile members of opposition parties who are targeted, as opposed to ordinary members or supporters. Given the Appellant was not such a leader or high profile member, he would not come to the adverse attention of the authorities.[7]

18. The Secretary concluded that, as the Appellant's fear of harm was not well-founded, he was not a refugee within the meaning of the Convention.[8] On the same basis that the Secretary found the Appellant not to be a refugee, the Secretary was also not satisfied that the Appellant would be subject to harm upon return to Bangladesh that would warrant complementary protection.[9]

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[3] BD 49.
[4] Ibid.
[5] BD 49.
[6] BD 50 – 51.
[7] BD 52.
[8] Ibid.
[9] BD 53.

FIRST REVIEW BY THE REFUGEE STATUS REVIEW TRIBUNAL

19. On 20 March 2015, the Appellant appeared before the first Tribunal. The Appellant reiterated his claims with respect to his involvement with the BNP from 2004, his attack in 2007 by AL members, BNP policies, membership and organisation, the 2008 election, his attack after the 2008 election, his departure to Malaysia in 2009, and return to Bangladesh in March 2012 to visit his wife. The Appellant also put before the Tribunal a second statement dated 26 February 2015, in which the Appellant elaborated upon his role with the local BNP, and said he had difficulty speaking about the 2008 election in his RSD Interview because he was so angry about how it was rigged.

20. In relation to the line of questioning relating to a caretaker government being in power at the time of the Appellant's alleged political activity in support of the BNP, the Tribunal said:

> *"It was put to the applicant that the caretaker government was in power in Bangladesh between 2006 and 2008 during the time some of the alleged attacks occurred – and this suggests that his political activity during this period did not occur. During the period of caretaker government a state of emergency was implemented which curbed political activity. Although this was partially lifted in 2007 it was only to allow political parties to discuss electoral reforms (Human Rights Watch, World Report 2008: Bangladesh Events of 2007; http://hrw.org/world-report-2008/bangladesh). The caretaker government took steps to reorganise the police and the party faithful were recruited into the police force (ibid). It was put to the applicant that he would have been able to seek assistance from the police during this period."*[10]

21. The first Tribunal, like the Secretary, was concerned about the Appellant's lack of knowledge of the BNP or the outcome of the 2008 election,[11] that he gave conflicting evidence about his role,[12], and the plausibility of the Appellant's claim that AL supporters were able to contact him during his one month visit to Bangladesh in 2011.[13] Noting that the Appellant was able to vote in the 2008 election without difficulty, and was not involved in political activity before his departure in 2009, the Tribunal did not accept the Appellant was attacked by AL supporters after the election, and did not otherwise suffer harm because of his political opinion.[14]

22. The Tribunal also considered that, in light of that the Appellant was only found to be a low-level supporter of the BNP, his return to Bangladesh would not arouse the attention of the authorities.[15]

23. The Tribunal concluded that the Appellant had no well-founded fear of harm upon return to Bangladesh on the basis of his political opinion, or being a failed

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[10] BD 130 at [17].
[11] BD 132 at [29].
[12] Ibid at [28]-[30].
[13] BD 133 at [34].
[14] Ibid at [33], [35].
[15] BD 134 at [37]-[38].

asylum-seeker, and therefore did not fall within the Convention definition of refugee.[16] As there was no reasonable possibility of harm of the relevant kind befalling the Appellant upon return, the Tribunal further concluded that the Appellant was not owed complementary protection.[17]

FIRST APPEAL TO THIS COURT

24. The Appellant first appealed to this Court by way of a Notice of Appeal filed on 30 October 2015, although that Notice filed outside the period provided for in s 43(3) of the Act. Khan J made orders granting an extension of time so to validate the Notice, and ordered that the matter be remitted to the Tribunal for reconsideration in accordance with the direction that the Tribunal afford the Appellant procedural fairness with respect to the information set out at [17] of its written statement.[18]

SECOND REVIEW BY THE REFUGEE STATUS REVIEW TRIBUNAL

25. The Appellant appeared before the second Tribunal on 10 November 2017. The Tribunal was constituted by Ms Hearn Mackinnon, Ms Zelinka, and Mr Mullin. The Appellant gave evidence before the second Tribunal that was largely consistent with that he gave to the first Tribunal.

26. The second Tribunal accepted the Appellant's claims as presented at the first hearing regarding his membership of the BNP in 2004, being accosted in January 2009 by AL supporters, being pushed off his motor bike on the evening of the same day, and his travel to and employment in Malaysia.[19] However, the Tribunal did not accept that the Appellant had any political profile that would result in him coming to the adverse attention of the authorities, noting that the Appellant's role with the BNP was limited to informing party members of meetings that occurred three or four times a year. The Appellant voted in the 2008 election without encountering any harm.[20] During five years of membership of the BNP, AL supporters had only asked the Appellant to join the AL and jeered at the Appellant on two occasions. The Tribunal was of the view that an incident in which the Appellant was pushed off a motor bike was an opportunistic incident that resulted in no serious harm.[21] The Tribunal found that the Appellant had suffered no persecutory harm in the past because of his support for the BNP, and would not so suffer in the reasonably foreseeable future, given the evidence did not suggest he would resume political activities at any higher level than he had in the past upon return.[22]

27. The Tribunal also considered the Appellant's claims with respect to returning as a failed asylum-seeker, without a passport or a National Identification Card ("NIC"). On the basis of country information on the treatment of persons who

[16] BD 134 at [39].
[17] Ibid at [43].
[18] See BD 139.
[19] BD 237 at [33].
[20] BD 241 at [46].
[21] Ibid at [44], [47].
[22] BD 242 at [51].

departed Bangladesh unlawfully, or of returning failed asylum seekers, and that the Appellant was able to return to Bangladesh in 2012 without questioning as to his previous unlawful departure in 2009, the Tribunal did not consider that any harm would befall the Appellant for these reasons.[23] There was also no evidence that the authorities have identified or targeted any BNP members through the process of obtaining NICs.[24] Therefore, the Tribunal also found there was no reasonable possibility of the Appellant facing harm upon return because of his lack of a NIC.

28. The Tribunal did not accept that the Appellant had a well-founded fear of persecution in Bangladesh because of his political opinion, membership of the particular social group of failed asylum seekers, or unlawful departure, and the Appellant was not granted refugee status.[25] As there was no reasonable possibility of the Appellant suffering harm for any of the reasons that would constitute a breach of Nauru's international obligations or otherwise, the Appellant was also not granted complementary protection.[26]

THIS APPEAL

29. The Appellant's Amended Notice of Appeal asserts that:

> *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. 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.*

30. The first Tribunal was constituted of Mr Paul Fisher, Ms Kerry Bolan and Mr Andrew Mullin. The second Tribunal was constituted of Ms Rea Hearn Mackinnon, Ms Sue Zelinka and Mr Mullin.

31. Upon the commencement of the hearing, Ms Hearn Mackinnon explained to the Appellant:

> *"So, [VEA 026], 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 the new evidence that you're going to provide today. Okay?*
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> *Now, you might recall that Mr Mullin was one 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*

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[23] BD 245 at [60]-[61].
[24] Ibid at [62].
[25] BD 247 at [68].
[26] Ibid at [72].

combined decision. Okay? So you have new members, new people looking at your case. All right."[27]

32. The Appellant responded, through the interpreter, by indicating that he understood this.[28]

33. Upon the conclusion of the hearing, Ms Mackinnon reiterated, "... I want to stress to you that we haven't made up our mind about your case and we will very carefully consider all of the evidence that we have and the further submissions that are going to be provided."[29]

34. The Appellant has submitted that such a disclaimer cannot avoid the reasonable apprehension of bias.[30]

35. While the Appellant accepts that, in this case, the Tribunal effectively reassessed all the Appellant's claims and evidence afresh, this does not detract from the fact that some negative credibility findings were made by the first Tribunal and a member who sat on the first Tribunal also sat on the second Tribunal. There is a real issue, according to the Appellant, as to whether Mr Mullin may be regarded by a fair-minded and reasonably well-informed observer to be unable to bring an impartial and unprejudiced mind to the view.[31]

36. The Appellant relied upon the same legal principles in relation to the test for apprehended bias, the "rotten apple" principle, and the concept of waiver, as it asserted in *SOS 011 v Republic of Nauru*.

37. The Republic also repeated and adopted its submissions in *SOS 011 v Republic of Nauru*.

38. The Respondent submitted that a fair-minded lay observer fully apprised of the all circumstances set out hereunder would not apprehend any bias on the part of the Tribunal:

    (a) the statutory framework governing the Tribunal and its functions in the conduct of reviews, including on remittal;
    (b) the practical constraints on the Tribunal in terms of the availability of members and travel to Nauru;
    (c) the constitution of the first Tribunal and the first decision including the adverse credibility findings;
    (d) the decision of the Supreme Court, including the orders for remittal and accompanying directions;
    (e) the next available sitting periods of the Tribunal and its constituent members in each period;

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[27] BD 156 at ln 40 – BD 157 at ln 9.
[28] BD 157 at 11.
[29] BD 224 at ln 228 – 30.
[30] Appellant's Submissions at [10].
[31] Ibid at [16].

(f) the Appellant's attitude to the scope of the remittal and his position that the second Tribunal was required to consider his claims afresh and was not bound by the earlier Tribunal's credibility findings;
(g) the constitution of the second Tribunal, including that one member was the same as the first Tribunal;
(h) the opening and closing remarks of the presiding member at the hearing;
(i) the practical circumstances confronting applicants, including the Appellant, in Nauru.[32]

39. The Respondent submitted that, while the first Tribunal made adverse findings on the Appellant's key claims because of the matters set out above, the first Tribunal did not make any adverse findings on the Appellant's credibility.[33] The Appellant was also aware that one of the Tribunal members sitting on the second review hearing also sat on the first review, and the Appellant did not object to this or make any application that he disqualify himself.[34]

40. The Respondent also submitted that Spigelman CJ explicitly rejected the "rotten apple" argument advanced by the Appellant in *McGovern v Ku-Ring-Gai Council* ("*McGovern*") by Spigelman CJ. The evidence in this case also, the Respondent argued, does not support the application of the test, noting Ms Hearn Mcakinnon's statements upon commencement and conclusion of the hearing that the Tribunal would "bring new eyes".[35] This being the case, the allegation of a reasonable apprehension of bias cannot be made out.

CONSIDERATION

41. 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:

(1) whether a fair-minded observer would reasonably conclude that the second Tribunal as reconstituted may be biased;
(2) 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
(3) 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.

42. The bias rule has a flexible quality that differs according to the circumstances in which it is exercised. It is affected by the nature of the decision to be made as well as its statutory context, what is involved in making the decision, as well as the identity of the decision-maker.[36]

43. The test for whether a tribunal member is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably

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[32] Respondent's Submissions at [28].
[33] Ibid at [11].
[34] Ibid at [19].
[35] Ibid at [33].
[36] *Isbester v Knox City Council* [2015] HCA 20; (2015) LGERA 263 at 269 [23] per Kiefel, Bell, Keane and Nettle JJ.

apprehend that the tribunal member might not bring an impartial and unprejudiced mind to the resolution of the questions the member is required to decide.[37]

44. The test is objective and remains the contemporary yardstick.[38]

45. The issue is one of important principle because if public confidence in the administration of justice is to be maintained, the perspective of fair-minded and informed members of the public should not be ignored.[39]

46. The assessment involves consideration of whether the decision-maker's role may give rise to an appearance of unfairness. As Allsop CJ observed in *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship*: "The rules to assess whether apprehended bias was present form part of the body of principles, rooted in fairness, and directed to the necessity for executive power to be exercised fairly and to appear to be exercised fairly, in support of confidence in the administrative process, and judicial review of it."[40]

47. The evaluation in this instance needs to take place conscious of the importance of the decision being made by the Tribunal and its potential consequences. As the plurality observed in *Epeabaka*:

> "*The Tribunal enjoys very considerable power over individuals who come within its jurisdiction. In the nature of that jurisdiction, its exercise will sometimes affect the welfare, and even the lives, of the persons involved and possibly those associated with them. The requirements of natural justice in a particular case may vary in accordance with considerations such as the functions and independence of the relevant decision-maker and the importance of the decisions that person makes. By such criteria, members of the Tribunal are, and are expected to be, persons who approach their functions free from disqualifying bias.*"[41]

The plurality went on to express the gravest of concern if procedures adopted by the Tribunal, which is comparable to the Tribunal in Nauru, appeared to be "irretrievably biased", either to the parties or to the ordinary, reasonable member of the community.[42]

48. A comparable point was made by Bingham LJ in *Secretary of State for the Home Department v Thirukumar*: "It is, however, plain that asylum decisions are of such moment that only the highest standards of fairness will suffice."[43] Thus, any

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[37] See *Livesey v New South Wales Bar Association* ("*Livesey*") (1983) 151 CLR 288 at 293-294; *Webb v The Queen* ("*Webb*") (1994) 181 CLR 41; *Johnson* at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Isbester v Knox City Council* [2015] HCA 20; (2015) LGERA 263 at 276 [58] per Gageler J; *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [3].

[38] See eg *British American Tobacco Australia Services Ltd v Laurie* ("*British American Tobacco*") (2011) 242 CLR 283 at 306-307 [47]-[48] per French CJ; *McGovern v Ku-Rin-Ggai Council* ("*McGovern*") (2008) 72 NSWLR 505 at [4] per Spigelman CJ

[39] *Webb* at 52 per Mason CJ and McHugh J.

[40] [2013] FCAFC 80 at [2]-[3].

[41] [2001] HCA 23 at [64].

[42] Ibid.

[43] [1989] EWCA Civ 12 at [46].

significant infraction of the principles of procedural fairness may require appellate intervention.

49. In circumstances where a finding as to credibility has been made in a first set of proceedings, the hypothetical observer may well form a view that the tribunal member will not approach their task a second time with an open mind. As the learned authors, Aronson and Groves, observed in their 5th edition of *Judicial Review of Administrative Action*[44], this will generally occur where the first tribunal has made findings as to the credibility of, for instance, an applicant for refugee status:

> *"The High Court has accepted that courts empowered to order that a decision be remitted to a differently constituted decision-maker should not exercise that power automatically but rather where it is appropriate "in the interests of justice." This protean test is usually satisfied when the first decision-maker has made a finding of credibility, indicated a preference for the evidence of one witness, failed to provide procedural fairness to a party or engaged in some form of conduct or finding that might lead the hypothetical observer to conclude that the original decision-maker might not approach the remitted matter with an open mind."*[45]

50. Although in some respects it is anomalous, it has been held that the test applies to tribunals that hold their hearings in private, such as the Tribunal in Nauru. As Gleeson CJ, Gaudron and Gummow JJ observed in *Re Refugee Review Tribunal; Ex parte H*:

> *"There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as is the case with the Tribunal, proceedings are held in private.*
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> *Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias."* [46]

51. The fictional observer is not to be assumed to have a detailed knowledge of the law or of the character or ability of the tribunal member.[47] The assessment should be undertaken in the context of ordinary tribunal practice and the hypothetical lay observer will be assumed to be properly informed as to the nature of the proceedings, the matters in issue and any conduct the subject of complaint.[48]

52. Kirby J in *Johnson v Johnson*[49] usefully summarised the attributes of the fictitious bystander:

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[44] Thomson Reuters, 2013, at [9.280].
[45] Applied by Murphy J in *MZZXM v Minister for Immigration and Border Protection* [2016] FCA 405 at [119]-[120].
[46] [2001] HCA 28 at [27]-[28]
[47] *Johnson* at 493 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[48] See *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45 at [37] per Rares and Jagot JJ; *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 per Gleeson CJ, Gaudron and Gummow JJ.
[49] (2000) 201 CLR 488 at 508 [53].

> *"Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstance. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by a single isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."* [citations omitted][50]

53. The reasonable observer "is to be presumed to approach the matter on the basis that ordinarily a judge will act so as to ensure both the appearance and the substance of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of prejudgment or bias."[51] The same might be said of a tribunal member.

54. The making of an earlier decision by a tribunal member may provide reasonable grounds to apprehend that the tribunal member may not look critically at the first decision, or treat the additional information which touched on the grounds for that earlier decision with the degree of objectivity required.[52]

55. If the Tribunal "as a whole is affected by the actuality or appearance" of prejudgment, the Tribunal will be precluded from embarking upon an inquiry but "If the Tribunal as a whole is not so affected but some of its members are, those members will, subject again to the possible operation of the rule of necessity, be disqualified."[53]

56. The potential of a person with prior involvement in a decision to contaminate others or at least to be so regarded has been recognised by the appellate courts.[54]

57. In this matter the Tribunal recorded that it raised "credibility issues" with the Appellant at the hearing.[55] It identified that he displayed a "lack of knowledge

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[50] Applied by French CJ in *British American Tobacco* at 306-307 [46].
[51] *Livesey* at 299.
[52] See *Gabrielsen v Nurses Board of South Australia* ("*Gabrielsen*") [2006] SASC 199 at [49] per Duggan J.
[53] *Laws v Australian Broadcasting Tribunal* ("*Laws*") (1990) 170 CLR 70 at 91 per Deane J. See too *McGovern* at [47]-[48]; *Gabrielsen* at [55] per Duggan J.
[54] See eg *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.
[55] BD 132 at [27].

about the 2008 election results",[56] and described aspects of his account as "lacking in the level of detail that would be expected of someone" with the profile he claimed,[57] and other parts as implausible"[58]. Substantively, these were adverse findings in respect of the Appellant's credibility and resulted in it not accepting that he had the political profile that he claimed in support of his claim for refugee status.

58. On 11 September 2017 Khan J of this Court made orders remitting the decision to the Tribunal for reconsideration in accordance with a direction that the (second) Tribunal was required to afford the Appellant procedural fairness "with respect to the information set out in paragraph [17] of its written statement", namely with respect to particular country information.[59]

59. At its next sitting the Tribunal constituted itself with the Principal Member, Ms Zelinka and Mr Mullin, who had been part of the first Tribunal. There was some uncertainty as to the scope of the hearing to be conducted by the second Tribunal and submissions were filed on behalf of the Appellant urging that application of the findings by the first Tribunal "would be an error of law" as they would arise "from a flawed credibility assessment."[60]

60. In my view the decision by the second Tribunal to reconstitute itself with a member from the first Tribunal was imprudent, constituted undesirable practice likely to detract from confidence in the independence of the second Tribunal's decision-making, and was in error on the basis that that member had already reached clear views as to the Appellant's credibility. The functioning of the shared member would arouse reasonable concerns in a fair-minded lay observer about the influence that he might wield on the analysis of the material before the Tribunal.

61. In light of the seriousness of the decision and the centrality of a 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.

Waiver

62. As long ago as 1895, Hood J in *Re McCrory; Ex parte Rivett* identified that it is incumbent upon a party who has a concern about whether the bias rule would be breached to do so to raise that concern promptly:

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[56] Ibid at [29].
[57] BD 132 at [30].
[58] BD 133 at [33]-[34].
[59] BD 139.
[60] BD 153 at [11].

> *"A litigant who knows (as the applicant did here) that there may be some objection to the constitution of the Bench is bound to mention it at once, in fairness both to the magistrate and to the other side, and even if the objection be a good one the litigant cannot otherwise be allowed to complain if with knowledge he remains silent."* [61]

63. A similar approach was enunciated in 1985 by the Australian High Court in *Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*:

> *"The law has, in the past, taken a strict view of the consequences of the failure of a party to object to the participation in proceedings by a member of a tribunal who is said to be biased. In some cases it has been held that a party entitled to object to the participation of an adjudicator, disqualified by interest or likelihood of bias, will be deemed to have waved that entitlement, if, being fully aware if the circumstances, he fails to object as soon as is reasonably practicable. In other cases it has been held that a party failing to take objection may be refused relief if he seeks a discretionary remedy."* [62]

64. The issue was re-examined in the 1989 decision of the High Court in *Vakauta v Kelly*.[63] Dawson J reviewed the authorities and held that "where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it."[64]

65. To similar effect in the same case, Brennan, Deane and Gaudron JJ held that where a judicial officer engages in conduct that is such as to convey to a reasonable and intelligent lay observer an impression of bias:

> *"... a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object."*[65]

66. In the same case, Toohey J concluded that:

> *"There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way the remarks will be viewed. It will then by for the judge to determine what course to adopt, in particular whether to stand down from the case. ... In any event objection must be taken: see Re McCrory; Ex parte Rivett. .., In the result, when a party is in a position*

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[61] (1895) 21 VLR 3 at 6.
[62] (1985) 60 ALJR 181 at 182.
[63] (1989) 167 CLR 568.
[64] Ibid at 579.
[65] Ibid at 572.

to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased."[66]

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.

The Rule of Necessity

70. Given my finding in relation to waiver, it is not strictly necessary to determine the assertion by the Respondent that the rule of necessity applies. However, for the sake of completeness, the following observations are made.

71. The rule of necessity operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions where, but for its operation, the discharge of such functions would be frustrated – to public or private detriment.[67] It permits a decision-maker to sit when no other decision-maker otherwise could do so.[68] However, the rule is not lightly invoked, given the importance of the absence of actual or apparent bias in decision-making. As Deane J observed in *Laws v Australian Broadcasting Tribunal*:

> *"There are, however, two prima facie qualifications of the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Second, when the rule does apply, it applies only the extent that necessity justifies."*[69]

72. It is apparent from the affidavits of Ms Mackinnon, the Principal Member of the Tribunal, dated 27 March 2018 and 12 April 2018, that although the Tribunal consisted of nine members, it would have been inconvenient and costly to

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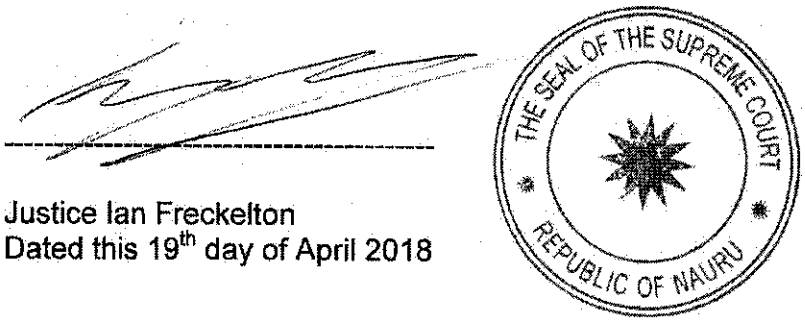
[66] Ibid at 587.
[67] See *Metropolitan Fire and Emergency Service Board v Churchill* [1998] VSC 51 per Gillard J.
[68] See *Dimes v Proprietors of Grand Junction Canal* (1952) 10 ER 301 at 313; see also *Dickason v Edwards* (1910) 10 CLR 243 at 259 per Isaacs J; *Builders Registration Board v Rauber* (1983) 57 ALJR 376 at 385-386, 392 per Brennan and Deane JJ. See too *R v Auctioneers and Agents Committee; Ex parte Amos* (1985) 2 Qd R 518.
[69] *Laws* at 96. See RRS Tracey, "The Doctrine of Necessity in Public Law" (1982) *Public Law* 628.

constitute the Tribunal with three new members.[70] However, these considerations are not such in this decision-making context as to qualify for the defence of necessity.

73. Pursuant to s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 19th day of April 2018

[70] There was no evidence that the cost would be "enormous" in the overall context or that it was be productive of substantial delay: see *Thellusson v Rendelesham* [1859] 11 ER 172 at 173.