IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 01 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00401 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN:	**HFM045**	Appellant
AND:	**REPUBLIC OF NAURU**	Respondent

Before: Brady J

Dates of Hearing: 19 October 2022

Date of Judgment: 6 December 2022

CITATION: *HFM045 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – Whether Tribunal decision is tainted by apprehended bias due to the history of constitution and reconstitution of the Tribunal – Whether Tribunal failed to consider important evidence on review – Whether error in law – No apprehended bias by Tribunal - Tribunal followed principles of procedural fairness – Appeal Dismissed*

APPEARANCES:

Appellant: F. Batten

Respondent: T. Reilly

JUDGMENT

INTRODUCTION

1. The Appellant appeals from a decision of the Refugee Status Tribunal (**Tribunal**) made on 18 March 2019 (**Second Tribunal Decision**). The Tribunal affirmed a decision of the Secretary of Justice and Border Control (**the Secretary**) dated 12 September 2014 not to recognise the Appellant as a refugee and that he is not owed complementary protection under the *Refugees Convention Act* 2012 (**the Act**). The Second Tribunal Decision is the second such decision of the Tribunal after the High Court of Australia (**High Court**) remitted the matter to the Tribunal for reconsideration.

2. By section 44(1) of the Act, this Court may make either of the two following orders:

   (a) an order affirming the Tribunal Decision; or

   (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of this Court.

GROUNDS OF APPEAL

3. By his Amended Notice of Appeal, the Appellant relied upon three grounds of appeal:

   (a) the Second Tribunal Decision was affected by a reasonable apprehension of bias. As is apparent form the course of argument, the apprehended bias is said to arise from the history of constitution and re-constitution of the Tribunal, as explained further below;

   (b) the Tribunal failed to consider "important evidence in the review" and thereby failed to comply with the rules of procedural fairness; and

   (c) the Tribunal failed to comply with a contended duty to act on the basis of the most up-to-date information available.

4. At the hearing, the Appellant abandoned the third ground of the Amended Notice of Appeal. Only the first wo grounds need be considered in this judgment.

FACTUAL BACKGROUND

5. The Appellant is a Nepali citizen. He has spent most of his life in the Jhapa district of Nepal and is a member of the Chhetri caste.

6. The Appellant departed Nepal in May 2013 and arranged through a people smuggler to travel to Australia. He arrived at Christmas Island in September 2013 and was transferred to Nauru in November 2013 under the regional processing arrangements between Australia and Nauru.

THE APPELLANT'S CLAIMS

7. In broad terms, the Appellant claims to fear harm from Maoist rebels and the Maoist ruling party in Nepal. He stated his opposition to the communist ideals of the Maoist Party. He contended that he had a political profile as the president of the local committee of the Rastriya Prajatantra Party (Nepal) (**RPP(N)**). He occupied that position for about 10 or 11 months in 2008.[1] Thereafter, he ceased to hold an office in the RRP(N), but he continued to be a supporter of that party.

8. The Appellant contends that the Maoist Party was violently opposed to the activities of the RRP(N) because of the RRP(N)'s pro-royalist views and its objective to return Nepal to a Hindu state.

9. The Appellant described Mongols as having attempted to eliminate the Chhetris in his home district of Jhapa.[2] He claimed to have been physically assaulted in 2012 by Mongols and to have his livestock stolen by them. The Appellant said that he was unable to seek the assistance of the police because the police were controlled by the Maoist Party. He claimed that he could not move to another district as Mongols target and harm members of the Chhetri caste throughout Nepal.

PROCEDURAL HISTORY

Initial Application for Refugee Status Determination

10. On 29 January 2014, the Appellant made an application for refugee status determination (**RSD**) to the Republic, in order to be recognised as a refugee or a person owed complementary protection.[3] The Appellant attended a Transfer Interview on 23 November 2013 in Nauru and a RSD interview on 8 April 2014.

11. On 12 September 2014, the Secretary decided that the Appellant was not recognised as a refugee in accordance with Part 2 of the Act and that he was not a person to whom Nauru owed protection obligations under the Refugee Convention.[4]

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1 Book of Documents (**BD**) 202 at [10] (all references are to page numbers with paragraph numbers in square brackets)
2 BD 202 at [10]
3 BD 3-52
4 BD 53 - 74

First Refugee Status Review Tribunal

12. The Appellant lodged a Review Application with the Tribunal dated 1 October 2014.[5]

13. On 2 December 2014, the Appellant appeared in a hearing before the Tribunal (**First Panel**), represented by his Claims Assistance Providers (**CAPs**) representative.[6] The First Panel was comprised of:

    (a) Member Fisher (presiding member);

    (b) Member Zelinka; and

    (c) Member McIntosh.

14. On 16 January 2015, the First Panel made a decision affirming the determination of the Secretary that the Appellant was not recognised as a refugee and was not owed complementary protection under the Act (**First Tribunal Decision**).[7] In summary:

    (a) The First Panel found that the Appellant was an "unreliable witness in terms of his movements in and out of Nepal".[8]

    (b) The First Panel drew the conclusion that the Appellant was able to travel to India at will and to find employment there.[9] That is, he did not "flee" Nepal because of his particular political opinions but made economic decisions to go and work in India.[10]

    (c) The First Panel was not satisfied that the Appellant was harmed or targeted by reason of his political opinion but that he was able to leave Nepal whenever he felt it was expeditious to do so.[11]

    (d) The Appellant contended that when the Maoists entered his village, they began to demand "donations" and to ask people to join them. The Appellant decided to leave his village and go to India at this point. The First Panel rejected all of the Appellant's evidence that the Maoists had attempted to follow up with him with regard to non-payment of the "donation", as being "implausible ... and self-serving".[12]

    (e) The First Panel also rejected the first basis for the donation story, that the Appellant had receive a threatening letter from the Kirat Janabadi Workers Party (**KJWP**). The Appellant's story was found to be "inconsistent, implausible and fabricated to assist his claims".[13]

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5 BD 77
6 Transcript of hearing at BD 113-164
7 BD 165-176
8 BD 171 at [31]
9 BD 171 at [31]
10 BD 171 at [31]
11 BD 171 at [32]
12 BD 174 at [40]
13 BD 171 at [41]

(f) The First Panel was not satisfied that serious harm had befallen the Appellant in the past by reason of his political opinion, his race or religion or any other Convention reason.[14]

(g) The First Tribunal was not satisfied that the Appellant was owed complementary protection as it was not satisfied that he had suffered harm in the past or that he was likely to suffer harm in the future.[15]

First Appeal to Supreme Court

15. On 7 April 2016, the Appellant filed an amended notice of appeal to the Supreme Court from the First Tribunal Decision.[16]

16. After a hearing on 16 and 19 April 2016, this Court (Crulci J) delivered judgment on the appeal on 22 February 2017.[17] The Supreme Court affirmed the First Tribunal Decision.[18]

Appeal to High Court

17. The Appellant filed an appeal from the decision of this Court to the High Court. At that time, the High Court was the Court which heard appeals from single-judge decisions of this Court. The High Court (Bell, Keane and Nettle JJ) allowed the appeal on 15 November 2017,[19] ordered that the First Tribunal Decision be set aside and the matter was remitted to the Tribunal for determination according to law.

18. In summary, the High Court concluded that the Tribunal had failed to put the Appellant on notice of the significance of certain evidence that it came to rely upon as to the reported level of representation of Chhetris in the Nepalese army. That amounted to a failure of procedural fairness.

Second Refugee Status Review Tribunal Hearing

19. In accordance with the High Court's orders, the Appellant's application was remitted to the Tribunal for further consideration.

20. The Appellant filed further written submissions with the Tribunal on 12 February 2018.[20]

21. The Appellant appeared before the Tribunal on 22 February 2018 (**Second Tribunal Hearing**). On that occasion, the Tribunal (**Second Panel**) was constituted by:

(a) Member Hearn-MacKinnon (presiding member);

(b) Member Zelinka; and

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14 BD 175 at [45]
15 BD 176 at [49]
16 BD 179-181
17 *HFM045 v The Republic* [2017] NRSC 12
18 BD 196 at [69]
19 *HFM045 v The Republic of Nauru* [2017] HCA 50; 350 ALR 34
20 BD 219-238

(c) Member Mullins.

22. Member Zelinka had also sat on the First Panel. The other two members of the Second Panel were different to the members of the First Panel.

23. Member Zelinka had a very limited role in the questioning of the Appellant during the Second Tribunal Hearing. Her questions were generally limited to no more than a small handful of short questions.

24. At the start of the hearing, the presiding Member Hearn MacKinnon noted that it was a re-hearing of the Appellant's case. She said:[21]

> "MS HEARN MACKINNON: ... "So, [Appellant], as you know, the tribunal previously decided that you were not a refugee and not owed protection, but the Supreme Court[22] remitted your application back to the tribunal, because it found that the tribunal made an error in the way it made its decision. So the tribunal is reviewing your case again. Well, it's the same review. It's still ongoing. And the tribunal can have regard to all of the evidence that you previously provided in your written statements, in your previous interviews and at your previous hearing. Okay.
>
> And the tribunal will, of course, have regard to any further evidence that you wish to provide today. So because we already have a lot of evidence from you, we're not going to take you through all of your claims again, but we will ask you specific questions, and we will raise issues with you.
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> ...
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> One thing I did forget to mention is that you might recall that Ms Zelinka was on the first tribunal that decided your case.
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> [THE APPELLANT]: Yes, I understand. Yes, the first time, yes.
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> MS HEARN MACKINNON: However you have two new members deciding – you know, look at your case afresh.
>
> [THE APPELLANT]: Mmm
>
> MS HEARN MACKINNON: ... And the decision of the tribunal is a combined decision and we will of course bring fresh eyes to your current evidence and your new evidence today. Okay. Thank you."

Events after the Second Tribunal Hearing

25. The Appellant's solicitor wrote to Member Hearn MacKinnon on 20 May 2018 requesting an update as to when the next Tribunal sitting would be.[23] By email on 4 June 2018,[24] Member Hearn MacKinnon responded, relevantly advising as follows:

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21 BD 241 at lines 22 ff

22 This reference was in error. The matter was remitted to the Tribunal by the High Court.

23 BD 309. This request was made in the context that the solicitors were also acting in other Nauru refugee cases which were yet to be heard by the Tribunal.

"Dear Jess

My apologies for the delay in replying. I am hoping to send a tribunal to Nauru in June or July subject to resourcing. I will advise as soon as I can confirm. I am very conscious of the delay.

I also want to inform you that, following on from the judgment of the Supreme Court of Nauru SOS011 I have de-constituted the following remitted cases as the Tribunal in each case comprised a member of the original Tribunal.

...

HFM045 ...

I understand that the further delay may cause some concern for the applicants however the court made clear its view of the obligation of the Tribunal in relation to constitution. I will endeavour to reconstitute these cases as a matter of priority.

..."

26. The reference in that email to "*SOS011*" is a reference to the decision of this Court in *SOS011 v Republic*[25] (***SOS011***). In *SOS011*, Freckelton J considered a case where the Tribunal's original decision had been set aside and the matter was remitted to the Tribunal for further consideration. The further consideration was undertaken by a second tribunal, differently constituted, but where one of the members of the original tribunal also sat on the subsequent tribunal. There was an appeal to the Supreme Court from the second tribunal's decision on the basis that the second tribunal was affected by apprehended bias.

27. His Honour held[26] 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."

28. *SOS011* and another case delivered the same day by Freckelton J, *VEA026 v Republic*[27] (***VEA026***), are considered further below.

29. On 9 November 2018, the Tribunal wrote to the Appellant's solicitor inviting the Appellant to appear before the Tribunal on a third occasion on 22 November 2018.[28] The letter did not state who would comprise the Tribunal on this occasion.

30. On 21 November 2018, further written submissions were filed on behalf of the Appellant.[29] In those submissions, CAPs said, *inter alia*:

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24 BD 309
25 [2018] NRSC 22
26 At [75]
27 [2018] NRSC 19
28 BD 311

"[The Appellant] instructs that he is very frustrated and exhausted by the entire refugee status determination process and will not attend his Tribunal Hearing as he does not feel he is mentally capable of attending nor of contributing meaningfully to it. He does not request an adjournment. [The Appellant] has instructed for the Tribunal to make a decision on the papers." [sic]

31. On 23 November 2018, the Tribunal undertook a hearing in another refugee matter which had been remitted to the Tribunal for reconsideration. As a result of that hearing, it became apparent to the Appellant's solicitor that although there had been a "reconstitution" of the Tribunal in that matter, even in its reconstituted form it included members who had previously sat in the matter with the member who was subject to apprehended bias.

32. As a result of that concern, on 24 November 2018 the Appellant's solicitor emailed Member Hearn MacKinnon – who was by that time the Tribunal's Principal Member.[30] Relevantly, that email said:

"Dear Principal Member

I refer to the Tribunal matters of HFM045 … and [redacted]

As you are aware, these applicants have been provided with new hearings because the Supreme Court of Nauru found in *VEA 026 v Republic* and *SOS 011 v Republic* that Tribunal Panels hearing remitted matters are affected by the apprehension of bias if one Member of the Panel has also been part of the Panel on the applicant's previous hearing.

We support the decision of the Tribunal to offer the above applicants new hearings with a reconstituted Tribunal. However, we submit that the hearing provided to [redacted] on [redacted] was affected by the apprehension of bias because of: (1) how the Tribunal was constituted; and (2) how the Tribunal elected to conduct the hearing. Each of these issues are outlined further below.

Firstly, as the Tribunal acknowledged, [redacted] hearing on [redacted] was affected by the apprehension of bias because Member Zelinka sat on his (pre-remittal) hearing on [redacted] and also sat on the Panel on [redacted]. You and Member Mullin also sat on the [redacted] Panel, which would have included discussions with Member Zelinka and yet you and Member Mullin also sat on the Panel on [redacted].

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

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29 BD 313 - 316

30 BD p.379-380

[redacted] hearing, their participation in the [redacted] hearing and the making of a RSD decision in relation to [redacted] is a breach of the bias rule.

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

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

33. By that email, the Appellant's solicitor placed the Tribunal on notice that he considered that any "reconstitution" of the Tribunal for the purposes of deciding the Appellant's case must be a complete reconstitution. In other words, the Appellant had made plain his position that any Tribunal proceeding to determine his matter should contain none of the same members who sat on the First Panel, nor either of those members who sat on the Second Panel with Member Zelinka. The Appellant's solicitor also expressed the view that the Tribunal could not have regard to "material collected at the pre-reconstitution hearings" being used by the reconstituted Tribunal.

34. Member Hearn MacKinnon responded by email dated 25 November 2018. By that time, her name had changed so that she was known as Principal Member Condoleon. Without any disrespect intended, for the sake of consistency and so as to better comprehend these reasons, I shall continue to refer to her as Member Hearn MacKinnon.

35. Member Hearn MacKinnon's response was relevantly in these terms:

"... Regarding [redacted].

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

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

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

hearing so is able to identify any aspect of the evidence he provided at that hearing which he wishes to address.

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

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

Second Tribunal Decision

36. After the Appellant's refusal to attend the proposed third hearing before the Tribunal, the Second Tribunal Decision was delivered on 18 March 2019. The Second Tribunal Decision was made by:

(a) Member Hearn-MacKinnon;

(b) Member Pinto; and

(c) Member Mullin.

I shall refer to this as **the Third Panel**. Members Hearn MacKinnon and Mullin were also members of the Second Panel. However, Member Zelinka had been removed from the Third Panel and replaced with Member Pinto.

37. After dealing with some introductory matters, the Second Tribunal Decision considered the issues of apprehended bias raised by the Appellant. At [11]-[16], the Third Panel explained the process of reconstitution of the panel for the purposes of hearing the matter at [15]-[16]:

> "The Tribunal does not accept the representative's submission that the hearing in February 2018 was affected by apprehended bias. A hearing is an evidence gathering exercise not involving any findings. The Tribunal has carefully reviewed all of the evidence provided by the applicant in the course of the review, including at the hearing in February 2018, and listened to the hearing recordings. Section 20 of the Act empowers a reconstituted Tribunal to have regard to any record of the proceeding made by the Tribunal as previously constituted. The applicant has had the opportunity to provide detailed evidence in support of his claims. The applicant was invited to attend a further hearing to provide new evidence and to correct or clarify any evidence already provided but chose not to attend.
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> The Tribunal is satisfied the applicant was invited, pursuant to s.40 of the Act, to appear before it and that he has requested a decision be made on the evidence before it. Having regard to the matters discussed above, the Tribunal has proceeded to make a decision on the review without taking further action to allow or enable him to appear before it."

38. Having disposed of the arguments as to apprehended bias, the Third Panel considered the Appellant's claims and evidence over the course of a further 56 paragraphs.

39. In summary, the Third Panel:

(a) found that there were aspects of the Appellant's evidence as to his claims to have suffered harm from his political activism which raised concerns about his credibility;[31]

(b) found that the Appellant had given inconsistent and notably vague evidence about the harm he claims to have suffered at the hands of Maoists and their affiliates;[32]

(c) noted that in none of his statements or oral evidence since his arrival in Nauru, including in his two appearances before the Tribunal, had he offered any significant detail about incidents in which he claims to have suffered harm or been threatened;[33]

(d) noted the Appellant's revelation at the February 2018 hearing of his having been tortured by Limbu people and left for dead in 2008 or early 2009. However, the Appellant's disparity in the dates of this event cannot be explained by simple confusion;[34]

(e) found that the Appellant had at various points in the RSD process given conflicting accounts of having fled his home to escape harm from Maoists;[35]

(f) found that it was unreasonable to expect the Appellant to be able to remember the exact dates of travel that may have occurred so long ago. However, the discrepancies in his claims about alleged visits to India to save his life went beyond minor or marginal differences. The Tribunal was not satisfied that his claim to have fled to India on various occasions to escape harm from Maoists or allied groups was credible;[36]

(g) was not satisfied that any weight could be placed on the Appellant's contention that he had received a letter of demand from the KJWP and it was not satisfied that the Appellant ever received any such letter and did not accept the Appellant's claim that he left Nepal for such a reason;[37]

(h) was not satisfied that the Appellant was targeted for harm by the loss of his livestock by Limbu people in the way that the Appellant contended.[38]

40. In relation to past harm, the Third Panel summarised its findings at [45] in these terms:

41. "Based on the evidence the applicant has provided, the Tribunal is unable to be satisfied that he has been targeted or harmed because of his political opinion by Maoists and their affiliates or groups directed or influenced by Maoists, including

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31 BD 331 at [35]
32 BD 331 at [36]
33 BD 332 at [37]
34 BD 332 at [38]
35 BD 333 at [39]
36 BD 334 at [40]
37 BD 335 at [42]
38 BD 335 at [44]

groups based on the Limbu people who are said to have opposed him, in part at least, because of his Chhetri caste. Nor is the Tribunal satisfied as to the credibility of his explanation that he was able to avoid harm by going into hiding within Nepal or by crossing into India. The Tribunal is not satisfied that he left Nepal in 2013 because of a fear of harm from these or any other sources."At [60] the Tribunal summarised its conclusion in relation to future harm as follows:

> "Having considered the applicant's claims, individually and cumulatively, the Tribunal is not satisfied there is a reasonable possibility that he would suffer serious harm on return to Nepal for the Convention reasons of his political opinion, his ethnicity or caste or his religion. The Tribunal is not satisfied that he has a well-founded fear or persecution in Nepal and is not satisfied that he is a refugee."

42. Finally, at [71] the Tribunal reached its conclusion about complementary protection under the Convention. It was not satisfied that the Appellant would face a reasonable possibility of harm which would render Nauru in breach of its international obligations by returning him to Nepal. The Tribunal was not satisfied that the Appellant was owed complementary protection.

43. Further consideration is given below to other aspects of the Second Tribunal Decision relevant to the particular grounds of appeal.

FIRST GROUND OF APPEAL - APPREHENDED BIAS

The Appellant's Submissions

44. The Appellant submits that Member Zelinka's involvement on the First and Second Panels "tainted [the process of the Second Tribunal Hearing] with an apprehension of bias because of her participation in the decision of the First [Panel]."

45. The Appellant argues that Member Zelinka was likely to have been involved in a "deliberative process" with Members Zelinka and Mullin whilst she was still on the Second Panel. The Appellant contends in his written submissions[39] that:

> "It is very likely that Member Zelinka brought her thoughts and opinions to bear in this process, potentially influencing or affecting the thinking of Members [Hearn MacKinnon] or Mullin or both. The lay observer would know this, and – at least – would be left with the impression that there was a possibility that Members [Hearn MacKinnon] and Mullin might have been influenced by Member [Hearn MacKinnon's] views of the case.
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> When the Tribunal reconstituted to the Third [Panel], there remained the possibility that Members [Hearn MacKinnon] and Mullin retained in their minds whatever influence Member Zellinka might have had upon them (including as to whether the appellant is a witness of truth). The lay observer would be aware that Member Zelinka had already formed a serious adverse view about the appellant's credibility as a witness of truth. The need for the appearance of a fair hearing required that she not be involved in any way in a

39 At [13]-[14], emphasis in the original

decision by the Tribunal, including by not influencing other members." [emphasis in the original]

The Respondent's Submissions

46. The Respondent submits that when the objective facts are understood, there is no *reasonable* apprehension of bias. There is no evidence that any member of the Third Panel expressed clear views about a question of fact that constitutes a live and significant issue in the proceedings. Nor, the Republic submits, could there be a reasonable fear – let alone a firmly established fear – that any member of the Third Tribunal was so prejudiced in favour of a conclusion already formed that he or she would not alter that conclusion irrespective of the evidence or arguments presented.

47. The Respondent contends that the Appellant's submissions as to the likelihood of Member Zelinka having brought her own thoughts and opinions to bear in the process of the Second Panel is no more than conjecture which does not change the fact that the Second Tribunal did not reach a final decision and necessarily did not reach any concluded view on the merits of the Appellant's case.

48. It does not follow that even if Member Zelinka was so prejudiced in favour of the conclusions set out in the First Tribunal Decision that she would not alter them irrespective of what arguments were put to her, that this "perceived prejudice" could be attributed to the other members of the Second Panel merely because they may have been aware of Member Zelinka's opinions. If that were the case, then the fact that the First Tribunal Decision was before the Third Panel would, itself, be sufficient to give rise to an apprehension of bias.

Legal Principles

49. The discussion of the legal principles in this part of the judgment is shared with a discussion of the same principles in *DWN 066 v Republic* where the same ground of appeal was raised and which I delivered on the same day as this judgment.

50. The starting point for consideration of the test to be applied in cases of apprehended bias is the decision of the High Court in *Ebner v Official Trustee in Bankruptcy*[40] **(Ebner)**.

51. At 344-345 of *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lunsk; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakanuta v Kelly* (1989) 167

40 (2000) 205 CLR 337

CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488). That principle gives effect to the requirement that justice should both be done and be seen to be done (*RA v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ), a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle."

52. This passage encapsulates the so-called "double might" test of apprehended bias: that a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the relevant question. The test is an objective one.[41] It is the Court's view of the public view, not the court's own view, which is determinative.[42] The question of what a fair-minded lay observer might reasonably think is largely a factual one, albeit one which must be considered in the legal, statutory and factual contexts in which the decision is made.[43]

53. This approach to the test for apprehended bias has been adopted by this Court.[44]

54. As the Court in *Ebner* made clear, the application of the apprehended bias principle does not ask this Court to make a prediction as to how the relevant judicial officer (or in this case, Tribunal member) will in fact approach the matter. The question is one of *possibility* (real and not remote), not probability.[45] Similarly, if the matter is already decided, no attempt need be made to inquire into the actual thought processes of the relevant Tribunal Member.[46]

55. The apprehension of bias principle involves the application of two steps before making the ultimate determination:[47]

    (a) first, it requires the identification of what *might* lead the relevant Tribunal Member to decide a case other than on its legal and factual merits; and

    (b) second, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the matter on its merits.

56. Having identified those matters, the Court can then proceed to apply the so-called "double might" test.

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41 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 302; *Isbester v Knox City Council* (2015) 255 CLR 135 at 155 [59] per Gageler J; *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 983 at 990 [28]

42 *CNY17 v Minister for Immigration and Border Protection and Anor* (2019) 268 CLR 76 at [21]; *Webb v R* (1994) 181 CLR 41 at 52

43 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20]

44 *SOS011 v Republic of Nauru* [2018] NRSC 22 at [57]; *YAU010 v Republic of Nauru* [2017] NRSC 42 at [70]

45 *Ebner* at 345 [7]

46 *Ebner* at 345 [7]

47 *Ebner* at 345 [8]; See also *CNY17 v Minister for Immigration and Border Protection and Anor* (2019) 268 CLR 76 at [21]

57. The hypothetical fair-minded observer, when assessing possible bias, is to be taken to be aware of the nature of the decision and the context in which it was made, as well as to have knowledge of the circumstances leading to the decision.[48]

58. In *CNY17 v Minister for Immigration and Border Protection and Anor*,[49] Kiefel CJ and Gageler J said:

> "The purpose of combining the "double might" (*Islam v Minister for Immigration and Citizenship* (2009) 51 AAR 147, [32]) with the construct of the hypothetical "fair-minded lay observer" is to stress that the bias rule is concerned as much to preserve the public appearance of "independence and impartiality" (cf *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [7]; 75 ALJR 277) on the part of the Authority as it is to preserve the actuality. The requisite independence is decisional independence, most importantly from influence by the Secretary or the Minister. The requisite impartiality is objectivity in the finding of facts, in the exercise of procedural discretions, and in the application of the applicable legislated criteria for the grant or refusal of a protection visa.
>
> The purpose of combining the *"fair-mindedness"* of the hypothetical lay observer with the *"reasonableness"* of that observer's apprehension is to stress that the appearance or non-appearance of independence and impartiality on the part of the Authority falls to be determined from the perspective of a member of the public who is *"neither complacent nor unduly sensitive or suspicious"* (*Johnson v Johnson* (2000) 201 CLR 488, [53]; 74 ALJR 1380). Together they emphasise that *"the confidence with which the [Authority] and its decisions ought to be regarded and received may be undermined, as much as may confidence in the courts of law, by a suspicion of bias reasonably – and not fancifully – entertained by responsible minds"* (*R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553; 43 ALJR 150)."

59. In *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship,*[50] the Full Federal Court of Australia considered a case where apprehended bias was said to arise from the manner of questioning of the appellant during a hearing before the Australian Refugee Review Tribunal.

60. In respect of the apprehended bias test, Chief Justice Allsop observed at [2] and [3] as follows:

> "The question whether or not an administrative tribunal has conducted itself in a way that displays apprehended bias is assessed by reference to the hypothetical construct of the informed fair-minded observer. There was no debate as to the proper formulation of the relevant test. Nor could there be, governed, as it is, by High Court authority. The words "fair-minded", however, should be recognized for the central part they play in the assessment.

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48 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23] per Gageler J; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68]; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519

49 (2019) 268 CLR 76 at [18]-[19]

50 [2013] FCAFC 80

> Apprehended bias, if found, is an aspect of a lack of procedural fairness. 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 the maintenance of confidence in the administrative process, and judicial review of it. The relevant enquiry is directed not to the correctness of the outcome, but to the apparent fairness of the process (the process being part of the exercise of power, integral to the legitimacy of the outcome): *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88 at 97 [19]; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638 at [209]; and *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40; (2002) 115 FCR 561 at 583 [84].
>
> Of course, context is vital to the assessment, albeit hypothetically constructed. It is, in the end, an assessment (through the construct of the fair-minded observer) of the behaviour of a person or persons in a position to exercise power over another, and whether that other person was treated in a way that gave rise to the appearance of unfairness being present in the exercise of state power."

61. Where the denial of procedural fairness relied upon is an alleged reasonable apprehension of bias on the part of the decision-maker, such an apprehension must be "*firmly established*": *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J; *SZRUI v Minister for Immigration Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [22]. It is not sufficient if a reasonable bystander "*has a vague sense of unease or disquiet*": *Jones v Australian Competition and Consumer Commission*[2002] FCA 1054 at [100], 76 ALD 424 at 441 per Weinberg J; *SZRUI* at [22].

62. Where a challenge is made to allege that there has been a pre-determination by the tribunal of the fate of the claim, more must be shown than a mere disposition to a particular view. Instead, it is necessary to show that a decision-maker's mind was not open to persuasion. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*[51] Gleeson CJ and Gummow J observed:

> " ...Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.
>
> ... The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion. ..."

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[51] [2001] HCA 17, 205 CLR 507 at 531-532

63. When focussing on a multi-member decision-making panel, it has been said that the test for appearance of disqualifying bias might more usefully be stated in a form that focuses on the overall integrity of the decision-making process.[52] The test in that alternative form might be stated as whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits.

64. In considering the test in application to a multi-member tribunal, Gageler J said in *Isbester v Knox City Council*[53] that:

> "...What must ultimately be involved is "an assessment (through the construct of the fair-minded observer) of the behaviour of a person or persons in a position to exercise power over another, and whether that other person was treated in a way that gave rise to the appearance of unfairness being present in the exercise of state power" (referring to *SZRUI* at [3])

65. His Honour noted the two-stage test identified above and continued at 156 [60]:

> "Where the factor identified at the first analytical step concerns one person who is a participant in a multi-stage decision-making process or in a multi-member decision-making body, the second analytical step can be seen to divide into two elements: articulation of how the identified factor might affect that person individually, and articulation of how that effect on that person individually might in turn affect the ultimate resolution of the question within the overall process of decision-making. It has accordingly been emphasised that, if an appearance of disqualifying bias is hypothesised to have resulted from conduct or circumstances of a person who is not the ultimate decision-maker, "then the part played by that other person in relation to the decision will be important" (quoting *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 448 [22])." [emphasis added]

66. The High Court dealt with the apprehended bias principle in circumstances where a matter is being reheard in *Livesey v New South Wales Bar Association*.[54] At 293-4 [7]-[8] the Court said:

> "7. It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *Reg. v. Watson; Ex parte Armstrong* (1976) 136 CLR 248, at pp 258-263. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this Court (see, e.g., *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155, at p 158 ; *Reg. v. Shaw; Ex parte Shaw* (1980) 55 ALJR 12, at pp 14, 16) and in the Supreme Court of New South Wales (see, e.g., *Barton v. Walker* (1979) 2 NSWLR 740, at pp 748-749. Although statements of the

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52 *Isbester v Knox City Council* (2015) 255 CLR 135 at 155 [58]

53 (2015) 255 CLR 135 at 155 [58]

54 (1983) 151 CLR 288

principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning.

8. In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Aickin J. in *Shaw* (1980) 55 ALJR, at p 16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge or judges who constituted the court from which the appeal is brought."

67. In that case, two of the judges of the New South Wales Court of Appeal[55] had made clear in earlier proceedings that each of them was strongly of the view that a witness in the case lacked both credit and credibility as a witness. The President had previously expressed the view that much of the witness's evidence was "tailored by a sharp mind to meet the difficult implications which arise from admitted facts, rather than to recollect and tell the Court frankly what occurred".[56] His Honour concluded that "clearly the plaintiff has not told this Court the truth".[57] Reynolds J had expressed a similarly unfavourable view of the plaintiff as a witness.

68. The High Court said at 298 [16]-[17]:

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55 The President and Reynolds J

56 *Livesey* at 295 [10]

57 *Livesey* at 295 [10]

"16. It was submitted on behalf of the Association that a reasonable observer would be aware of the ability of any judge of the Court of Appeal to put from his mind evidence heard and findings made in a previous case and to decide the case at bar impartially and fairly on the evidence led in that particular case. As we have already indicated however, we do not consider that a case such as the present is to be resolved by reference to the ability of the members of a particular court or the public confidence in the integrity of the judiciary. What is in issue in the present case is the appearance and not the actuality of bias by reason of prejudgment. The reasonable observer is to be presumed to approach the matter on the basis that ordinarily a judge will so act 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; nor is the reasonable observer presumed to have any personal knowledge of the character or ability of the members of the relevant court (see *Hannam v. Bradford Corporation* (1970) 1 WLR 937, at p 949; (1970) 2 All ER 690, at p 700 ; *Reg. v. Liverpool City Justices; Ex parte Topping* (1983) 1 WLR 119, at p 123; (1983) 1 All ER 490, at p 494). (at p 299)

...

18. Necessity and the extraordinary case (see, e.g., *Ex parte Lewin; Re Ward* (1964) NSWR 446, at p 447) make it impossible to lay down an inflexible rule; each case must be determined by reference to its particular circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting." [emphasis added]

69. My attention was drawn by Ms Batten, counsel for the Appellant, to a number of cases where the appearance of bias may have arisen in particular circumstances because of the involvement of a person in the decisional process, some of whom were not in fact the ultimate decision-makers.

70. Ms Batten referred to the decision of *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509. In that case, the Greyhound Racing Control Board conducted an inquiry as to whether the plaintiff, a greyhound owner, had engaged in conduct detrimental to the proper regulation and control of the sport. The manager of an association which conducted greyhound racing (Mr Smith) had asked the owner for an explanation for his conduct and reported the incident to the Board. At the Board's inquiry, the manager's report was read. The plaintiff was heard and withdrew whilst the board deliberated. The manager was present in the boardroom throughout the

deliberations of the board and the preparation of their decision, but he took no part in those deliberations.

71. The High Court held that the manager's presence during the deliberations and decision of the Board was inconsistent with the principles of natural justice, even though he did not participate in the deliberations or decision.

72. Barwick CJ concluded at 519:

> "The basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising tribunal. But, in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr. Smith in this board room, having regard to his personal connexion with the matter in hand, is not extravagant or far-fetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr. Smith had for influencing the decision of the Board might well have been used."

73. Gibbs and McTiernan JJ agreed with the Chief Justice's judgment.

74. Ms Batten also relies upon the decision of the High Court in *Hot Holdings Pty Ltd v Creasey* (2002) 210 CLR 438. In that case the Western Australian Minister for Mines was empowered under state legislation to grant an exploration licence for minerals. Five applications for licences for substantially the same area were lodged within minutes of each other. A mining warden determined that a ballot should be held to determine the priority of the five applicants. The warden reported to the Minister the results of the ballot and recommended that the application of the winner of the ballot be granted. As part of the determination process, certain departmental officers prepared a minute to be submitted to the Minister. Those departmental officers included one person who was peripherally involved in the preparation of the minute who had shares in a company which had entered into an option agreement with the recommended licence applicant and another departmental officer whose adult son also held shares in the optionee company. The Minister was not aware of the interests of those departmental officers.

75. The question for the Court was whether the involvement of the departmental officers with potential conflicts might invalidate the Minister's decision. The Court held[58] that a peripheral involvement in the preparation of the recommendation by officers who might have an interest in the outcome of the matter did not, in the circumstances of that case, invalidate the Minister's decision.

76. At [22]-[23], Gleeson CJ said:

> "22. Procedural unfairness can occur without any personal fault on the part of the decision-maker[5]. But if the form of unfairness alleged is the actuality or the appearance of disqualifying bias, and that is said to result from the

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58 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting

conduct or circumstances of a person other than the decision-maker, then the part played by that other person in relation to the decision will be important.

23. In *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, the Supreme Court of Canada set aside an administrative decision partly upon the ground that a subordinate of the decision-maker exhibited disqualifying bias. The decision concerned was a denial by an immigration officer of an application for exemption from a certain requirement. The officer who made the decision acted on the basis of a recommendation of a subordinate officer, who examined the case, made detailed notes and comments, and expressed opinions strongly adverse to the applicant. The notes and comments were found to give rise to an apprehension of racial and other forms of bias. L'Heureux-Dubé J, giving the opinion of the Court, said [at 849 [45]]:

> "Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J was correct to find that the notes of [the subordinate officer] cannot be considered to give rise to a reasonable apprehension of bias because it was [the superior officer] who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition ... the notes of [the subordinate officer] constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself."" (footnotes omitted and emphasis added))

77. In *Isbester v Knox City Council* (2015) 255 CLR 135, the High Court considered a case where a dog owner was charged in connection with an attack by her dog on another dog during the course of which a person's finger was injured. An officer of the Council decided that the charges should be laid, drafted the summonses and signed some of the charges. She gave instructions to the Council's lawyers to prosecute the charges and to negotiate pleas in the Magistrates Court.

78. That council officer thereafter arranged for a panel of three Council delegates, including herself, to conduct a hearing to determine whether to recommend that the dog be destroyed. The panel conducted the hearing, deliberated and recommended that the dog be destroyed. The officer in question fully participated in the decision-making of the panel.

79. The Court concluded that a fair-minded observer might reasonably apprehend that the relevant council officer might not have brought an impartial mind to the decision to be made by the Council's panel. The decision of the panel was quashed.

80. At [22]-[23], Kiefel CJ, Bell, Keane and Nettle JJ said:

> "It was observed in *Ebner* that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.
>
> How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision." (footnotes omitted)

81. In *Curruthers v Connelly* [1998] 1 Qd.R. 339, Thomas J of the Queensland Supreme Court restrained two commissioners (Mr Connolly and Dr Ryan) appointed under the *Commissions of Inquiry Act* 1950 (Qld) from proceedings further with their inquiry into the future role, powers and operations of the (then) Criminal Justice Commission in Queensland.

82. His Honour held that there was "overwhelming evidence of ostensible bias against Mr Connolly with respect to matters that his Commission had to consider".[59] Mr Connolly was disqualified. No such findings of bias were made against Dr Ryan. The question was then whether Dr Ryan could continue the inquiry alone, without the involvement of Mr Connolly.

83. Thomas J found as a primary matter that the relevant regulations did not permit Dr Ryan to complete the Inquiry on his own.[60] However, in case he was wrong about that, his Honour went on to consider whether Dr Ryan was disqualified under the principles in *Stollery v The Greyhound Racing Control Board* (1972) 128 CLR 509, as noted above.

84. After considering the relevant case-law, Thomas J said at 392-393:

> "Finally [counsel for the Attorney General] submitted that if Mr Connolly is precluded from continuing with the Inquiry, there is no basis for an apprehension that the deliberating tribunal would be biased.
>
> On this important last matter, it is reasonable to think that extensive consultations and deliberations have been occurring throughout the nine months during which the Inquiry has been running. On most issues it is

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59 At 373

60 At 390

> impossible to know what work has been done by each, or how much each may have influenced the other. This is not to imply a lack of independence on the part of Dr Ryan on a personal level, but rather to note that there has been a joint process occurring during which the two men concerned have had the opportunity of exercising their powers of persuasion upon one another. It would be natural that they should attempt to work as a team. Their conclusions may be provisional at this stage on many matters, but it is reasonable to think that many such conclusions would have been formulated with the benefit or burden of joint discussion. It would seem to be an almost impossible task at this stage for anyone to unscramble whatever provisional conclusions presently exist and start afresh."

85. Accordingly, through his association with Mr Connolly, Dr Ryan was disqualified from completing the inquiry.

86. The final case relied upon by Ms Batten is the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Harirchian v Health Ombudsman* [2020] QCAT 392. Although that case is of a Tribunal only and is not binding on this Court or even of significant persuasive value, it features some factual similarities to the case before me.

87. There, Dr Harirchian had applied to QCAT for a review of a decision by the Health Ombudsman. The proceedings came on for hearing before QCAT, which was comprised of the Deputy President, Judge Allen QC together with the assistance of three assessors as required by the relevant legislation. During a break in the hearing, two law students who were in the Tribunal hearing room for the hearing – which was held in public - had a conversation with one of the assessors. The assessor asked the students the reason for their presence during the hearing and expressed the opinion that the case was "boring" and that it was "quite clear what the outcome would be". The assessor expressed the view that no one would continue to seek treatment from a doctor if they knew he had been convicted of the same offences as Dr Harirchian had been convicted.[61]

88. Dr Harirchian brought an application to the Tribunal that the assessor be disqualified on the basis of apprehended bias and that the proceedings be reheard before another properly constituted Tribunal.

89. Judge Allen QC concluded that a fair-minded observer might reasonably apprehend that the assessor might not have brought an impartial mind to the hearing of the competing arguments in the matter.[62]

90. His Honour then turned to the question of whether such a finding ought to lead to the discharge of the balance of the Tribunal as constituted. At [26] his Honour said:

> "As to whether a reasonable apprehension of bias of the assessor would lead to a reasonable apprehension of bias of the Tribunal, it is true that a fair-minded observer would consider the limited role of the assessor as an adviser rather than decision-maker. However, the role of the assessor is an important one.

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61 At [7]

62 At [25]

> The provisions of the [Health Ombudsman] Act reflect the importance of the reality and appearance of impartiality of assessors. The principle behind the reasonable apprehension of bias test is that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Although the matter was a finely balanced one, I concluded that the circumstances were such as to give rise to a reasonable apprehension of bias of the Tribunal and that it was necessary that I recuse myself and that the matter be heard by a differently constituted Tribunal." (footnotes omitted)

Consideration

91. Applying the "two step" approach as set out in *Ebner*, it is necessary to identify firstly, what might lead the members of the Third Panel to decide a case other than on its legal and factual merits.

92. In this case, the facts that the Appellant relies upon as founding apprehended bias in the Third Panel are:

    (a) Member Zelinka's participation in the First Panel that made the First Tribunal Decision;

    (b) Member Zelinka's subsequent participation in the Second Panel with Members Hearn MacKinnon and Mullin, including her active participation in the Second Tribunal Hearing; and

    (c) The participation of Members Hearn MacKinnon and Mullin in the Third Panel which made the Second Tribunal Decision.

93. It is then necessary to articulate the logical connection between those matters and the feared deviation from the course of deciding the Appellant's matter on its merits. Consistent with the approach of Gageler J in *Isbester*,[63] when considering this second analytical step in the context of a multi-member tribunal, the step should itself be divided into two elements: firstly, an articulation of how Member Zelinka might be affected individually; and secondly, an articulation of how Member Zelinka's apprehended bias (if any) might in turn affect the ultimate resolution of the Appellant's claim by the Third Panel, of which she was not a member.

94. As to the first of those two elements, the Respondent accepts in this case that Member Zelinka was herself a person affected by apprehended bias consistent with the principles in *SOS011* as a result of having been part of the First Panel which made the First Tribunal Decision. The First Panel (including Member Zelinka) squarely rejected the Appellant's version of events and his credit in the First Tribunal Decision.

95. I consider that a fair-minded lay observer might reasonably apprehend that Member Zelinka might not have brought an impartial mind to the resolution of the same factual questions on any re-hearing.

96. The second element is then to articulate any logical connection between Member Zelinka's apprehended bias and the feared deviation from the course of deciding the

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63 (2015) 255 CLR 135 at 155 [58]

matter on its merits by Members Hearn MacKinnon and Mullin as part of the Third Panel which made the Second Tribunal Decision.

97. In summary, the Appellant argues that:

(d) given the decision is one which affects the welfare and life of the Appellant, it is necessary for this Court to adopt a scrupulous and rigorous examination of the relevant facts;

(e) Member Zelinka played a central role in the decision-making process leading to the Second Tribunal Decision, even though she was not a member of the Third Panel. She was physically present at the Second Tribunal Hearing. She remained part of the Second Panel for a period of about two months for what she herself described as a "combined decision";

(f) a reasonable person, unaware of what transpired during the two-month period between the Second Tribunal Hearing and the date of the removal of Member Zelinka from the Second Panel, would reasonably infer that Member Zelinka had an opportunity to exercise persuasion on Members Hearn MacKinnon and Mullin during that time; and

(g) the facts of this case are similar to those in *Stollery* and *Curruthers* where it is not possible to know the precise extent of the influence of Member Zelinka, but she clearly had the opportunity to be involved in discussions about the resolution of the Appellant's matter. In effect, it is impossible to "unscramble" the extent of her involvement in the decision-making process.

98. The Respondent submits that a fair-minded lay observer should be assumed to know various facts, including most relevantly:

(a) the members of the Third Panel knew that it was constituted to avoid any apprehension of bias due to the involvement of Member Zelinka in the Second Panel;

(b) the Appellant's mental health problems and need for mental health care;

(c) the Tribunal's concern about the adverse impact of further delays on the Appellant's mental health; and

(d) the practical circumstances confronting the Appellant in Nauru.

99. Knowing those facts, the Respondent submits, a fair-minded lay observer could not reasonably apprehend that Members Hearn MacKinnon and Mullin might not bring an impartial mind to the resolution of the matter. There is no evidence that any member of the Third Panel expressed any clear views either about a question of fact or about the credit of a significant witness. Nor could there be a reasonable fear – let alone a "firmly established" reasonable fear – that any member of the Third Panel was "so prejudiced in favour of a conclusion already formed that he or she [would] not alter that conclusion irrespective of the evidence or arguments presented to him or her".[64] The Respondent contends that the contended prejudice cannot be imputed to the Third

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64 Respondent's Written Submissions at [44], quoting *Laws* at 100

Panel merely because it was aware of Member Zelinka's thoughts and opinions. If that were so, then the fact that the First Tribunal Decision was before the Third Panel would itself be sufficient to give rise to apprehended bias.

100. The Respondent does not rely upon the principle of necessity. The so-called 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. [65] Accordingly, I do not give significant weight to the Respondent's submission relying upon the Appellant's mental health problems and concern about the impact of further delays in the determination of the matter. There is no evidence to support a conclusion that an entirely new panel could not have been put in place shortly after the decisions in *SOS011* and *VEA026* were handed down. Inconvenience does not equate to necessity.[66]

101. It is then necessary to consider how, if at all, Member Zelinka's involvement in the Second Panel might affect the resolution of the Appellant's claims by the Third Panel. There are two broad features which arise:

(a) Member Zelinka's participation in the Second Tribunal Hearing; and

(b) Member Zelinka's opportunity to persuade Members Hearn MacKinnon and Mullin during the period that they formed the Second Panel, which persuasion might continue into those members' participation in the Third Panel.

102. I have carefully reviewed the transcript of the Second Tribunal Hearing. Member Zelinka's participation in that hearing was minimal in nature. There is nothing in that hearing to suggest that Member Zelinka acted in any way as to expose any prejudgment on her part, nor was there any element of unfairness in the nature of her questioning of the Appellant. My attention was drawn to one passage where Member Zelinka may be thought to have made a potentially dismissive comment:[67]

> "MR MULLINS: Right. Sorry. So just to get it clear. You say there were two incidents with the Limbuwan where you may have suffered harm. There was the incident which caused you to leave the – the party which would have been, I suppose, in – early 2009. But there was an incident before that.
>
> THE INTERPRETER: Yes. Yes, there was another – that was with Maoist.
>
> MS HEARN MACKINNON: That's the incident he mentioned earlier with the Maoists b4efore he – he became president of the party.
>
> MS ZELINKA: Couldn't remember the date. Doesn't know when it was."

103. Member Zelinka's comment can be traced back to the Appellant's evidence a short time before that when he said that there was an incident when he managed to escape from his attackers but he was unable to remember what year that occurred.[68] In my

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65 See e.g. *SOS011* at [85]

66 *Jia Legeng* [2001] HCA 17 at [166]

67 BC 259 at lines 26 - 36

68 BD 257 at lines 24 - 30

view, nothing can properly be read into Member Zelinka's comment and it did not evidence bias in her own approach to the Second Hearing.

104. I do not consider that Member Zelinka's involvement in the Second Tribunal Hearing in any way could, of itself, have contributed to a view reached by a fair-minded lay observer who might reasonably apprehend that Members Hearn MacKinnon and Mullin might not bring an impartial mind to the ultimate resolution of the application.

105. That then leaves the Appellant's submission that Member Zelinka had the potential to persuade the other members of the Second Panel to her own views.

106. However, to use the language of "persuasion" is not, to my mind, a useful approach to the resolution of the issue. Members Hearn MacKinnon and Mullin could easily have been exposed to "persuasion" simply by reading the First Tribunal Decision. There could be no objection to them having read that earlier decision.

107. The question thus is not whether Member Zelinka had the potential to persuade the other members of the Second Panel. The question is properly framed as being whether Member Zelinka's participation as a member of the Second Panel might lead a fair-minded lay observer to think that Members Hearn MacKinnon and Mullin might not bring impartial and unprejudiced minds to the resolution of the Appellant's claims as part of the Third Panel.

108. In considering that question, it is not enough that a fair-minded lay observer might have a vague sense of unease or disquiet. Such a person is also not unduly sensitive or suspicious. Nor does the law require that Members Hearn MacKinnon's and Mullin's minds be "blank"; what was required was that their minds were open to reasonable persuasion by the Appellant by way of evidence and submissions.

109. I conclude that the Appellant has not demonstrated that a fair-minded lay observer might reasonably apprehend that the members of the Third Panel (and particularly Members Hearn MacKinnon and Mullin) might not bring an impartial mind to the resolution of the Appellant's application.

110. I have reached that conclusion for the following reasons:

(a) It is not possible or appropriate to speculate as to what might have passed between the members of the Second Panel before Member Zelinka ceased being a member of it. However, even accepting the reasonable possibility that the members of the Second Panel discussed the Appellant's claims and had the opportunity to seek to persuade one another of their respective views, that is not enough to meet the test for apprehended bias in respect of Members Hearn MacKinnon and Mullin. The Appellant has not established that a fair-minded lay observer might reasonably apprehend that Members Hearn MacKinnon's and Mullin's minds might not be impartial in the sense of being open to reasonable persuasion by the Appellant simply because they were on the Second Panel with Member Zelinka and may have been aware of her views.

(b) The Second Tribunal Decision was handed down on 18 March 2019; around 11 months after Member Zelinka ceased being a member of the Second Panel. The lengthy period between the cessation of Member Zelinka's involvement in

the decision-making process and the ultimate decision tells against a fair-minded lay observer forming the necessary reasonable apprehension to support a finding of apprehended bias.

(c) The reasoning in the Second Tribunal Decision is very different to, and more detailed in various respects, than in the First Tribunal Decision. That is not consistent with the idea that the Third Panel was impermissibly infected with the views of Member Zelinka as expressed in the First Tribunal Decision.

111. The cases relied upon by the Appellant are largely distinguishable on their facts.

112. *Stollery* involved facts where the person affected by ostensible bias was *actually present during the deliberations and decision-making of the relevant board*. The facts there demonstrated a much clearer opportunity for that person to influence the decision of the board.

113. *Hot Holdings Pty Ltd* involved a case where a departmental officer (who had an undeclared conflict) prepared a minute for the decision-making Minister. The Court held that a peripheral involvement in the preparation of the recommendation by officers who might have had an interest in the outcome of the matter did not, in the circumstances of that case, invalidate the Minister's decision. Similarly, here Member Zelinka's limited involvement in the ultimate decision the subject of this appeal does not, in my view, constitute an involvement that can be said to meet the *Ebner* test.

114. *Isbester* involved a case where the person affected by bias was *part of a panel of three persons who made the subject decision*. The facts are quite different to those before this Court.

115. *Curruthers* was a case involving a commission of inquiry conducted by two commissioners. When one commissioner was found to be affected by apprehended bias, the second commissioner was also disqualified. The commissioners had been working together closely on the commission for nine months. Their provisional conclusions on many matters were likely formulated with the benefit of joint discussions between the commissioners by the time of the disqualification application.

116. The involvement of Member Zelinka in the ultimate decision appealed from here is qualitatively and quantitatively different to the facts in *Curruthers*. Member Zelinka had no involvement in the matter for about 11 months before the Second Tribunal Decision. That is different to the commission of inquiry in *Curruthers* which involved very intense and daily interactions between the commissioners. That is to say, Member Zelinka's limited involvement in the decision-making process of the Third Panel is very different to the central role of Mr Connolly in the *Curruthers* case.

117. Finally, the decision of the QCAT in *Harirchian* was a determination of the QCAT itself whether it should continue to hear the matter. Such a determination has limited persuasive value in an appeal from a decision of the nature before this Court. The QCAT apparently erred on the side of caution in proceeding as it did, so as not to give rise to any possible ground of appeal. As the presiding member said, it was a "finely balanced" case. I find limited assistance from the determination in *Harirchian*.

118. As each of these cases demonstrates, the issue of apprehended bias is to be resolved by consideration of the particular facts before the Court. Each case is different on its facts. In this case, Member Zelinka had made previous findings adverse to the Appellant and she properly ought not to have been on the Second Panel. However, that fact alone was not such in this case as to disqualify the other members of the Second Panel from ultimately participating in determining the Appellant's application. There is no proper basis to conclude that a fair-minded lay observer might think that the other members of the Second Panel might not bring impartial minds to their role on the Third Panel in the sense that they would not be open to persuasion by the Appellant's evidence or submissions.

119. The Appellant has not made out Ground 1 of his appeal.

SECOND GROUND OF APPEAL – FAILURE TO CONSIDER EVIDENCE

120. The second ground of appeal is that the Tribunal failed to consider important evidence in the review, and thereby failed to comply with the rules of procedural fairness.

121. The Appellant contends that the Tribunal erred when it found[69] that in his RSD statement the Appellant spoke of being harassed and intimidated by Maoists from 2001 to 2006. The Tribunal found that he provided no further details of having been physically harmed by members of the Maoist party, but stated that in 2012 he was physically assaulted by Mongols over his Chhetri ethnicity. The Tribunal found that the Appellant gave no further details of this incident or of any injuries he might have suffered.

122. The Appellant contends that this last statement is factually incorrect as he did give details of that incident in his RSD interview.

123. The RSD interview is not in evidence in its complete terms before me. I gave leave to the Appellant to file and read an affidavit at the hearing by Kane Elder, the Appellant's solicitor, who deposed to having listened to the audio file of the RSD interview from the time stamp 54:13 to 58:05. The Republic did not object to or challenge the veracity of Mr Elder's evidence about the contents of the RSD interview.

124. Mr Elder gave evidence of the following passage from the RSD interview:

> "RSD OFFICER: When were you physically assaulted?
>
> INTERPRETER: It was at the end of 2012.
>
> RSD OFFICER: What happened?
>
> INTERPRETER: Yeah they collected donations, cash from us.
>
> RSD OFFICER: Who? Sorry who?
>
> INTERPRETER: Limbu.

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69 BD 331 at [36]

RSD OFFICER: Okay

INTERPRETER: And they forcefully gave us the membership of the group. Membership, they forced us to take the membership of the party.

RSD OFFICER: Go on.

INTERPRETER: Then they taught us to say "Limbu".

RSD OFFICER: And taught us to say?

INTERPRETER: Yeah Limbu. Limbu. Means that party or group.

RSD OFFICER: And what happened?

INTERPRETER: Okay. And then we went looking for the group which could support us. Take out points and theories and work on that. And meanwhile we got the other group, the Chhetri group, and then form then ... and then ... in the beginning of 2013 the activities, their activities, went to the climax, and they forced us to either take a membership or leave the, leave the village. Leave the area.

RSD OFFICER: And what did you do?

INTERPRETER: And then I was beaten by a group, there was some people in a group. It was night time. They did not tell me anything about their identity but I suspect they must be a Limbu one. They did some physical abuse and harm to me.

RSD OFFICER: Then what happened?

INTERPRETER: And then even after that the activities went on continuously. And then after that I couldn't stay there continuously so I left my village, but my wife was there in the house. I left her there in the house and then I left the village."

125. The Appellant contends that the Tribunal failed to take this passage into account and wrongly stated that there was no such evidence. The Appellant submits that this was important evidence in the review and the failure to consider the evidence amounts to a failure to comply with the rules of natural justice.

126. The Respondent submits that if this Court accepts that the Tribunal did not listen to the recording of the RSD interview, there is nothing in the Act which required the Tribunal to listen to it. In effect, there was no legal duty to do so. At the hearing before the Tribunal, the Appellant denied that anything happened.

127. The Appellant was asked by Mr Mullin in the Second Tribunal Hearing about his first statement that said that in 2012 he was physically assaulted by people of the Mongol race because of his Chherti background. The following passage ensued:[70]

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[70] BD 284 at lines 22 - 46

"MS HEARN MACKINNON: Did that happen?

THE INTERPRETER: What is means by "physical"?

MR MULLINS: That somebody hit you or beat you or did something to your body.

THE INTERPETER: There were a lot of minor cases that happened, but it was not significant as happened in 2009. It was not that big.

MR MULLINS: Well, you were – so are you saying that there were other occasions on which you were physically assaulted? I'm sorry. Mr [Appellant].

[THE APPELLANT]: Yes, I'm sorry.

MR MULLINS: Did you say there were – are you saying now there were other occasions on which you were physically assaulted, that is, your body was harmed by people, apart from this 2008 incident?

MS CONNOR: No.

MR MULLINS: Sorry, 2009 incident.

THE INTERPRETER: Not any big and significant incidents, but there were some other minor. Not – the one in 2009 was a big incident; they thought I was – I am dead, so they left me."

128. The Respondent submitted that there was no erroneous finding, but if there was, it cannot be so significant as to rise to an error of the sort identified in *Minister for Immigration and Citizenship v SZRKT*.[71]

Legal principles

129. The Appellant relies upon the decision of the Full Federal Court of Australia in *AVQ15 v Minister for Immigration and Border Protection*.[72] The appellant there sought review of a decision of the Australian Refugee Review Tribunal to reject the appellant's application for a protection visa. The application was rejected on the basis that the Tribunal found inconsistencies in the appellant's evidence. The appellant's evidence consisted of a statutory declaration, a transcript of an interview conducted by the Department and the evidence he gave before the Tribunal. The appellant submitted that the Tribunal had failed to take account of the transcript of his interview with the Department and that therefore the Tribunal erred and should not have drawn an adverse inference from his failure to refer to the matters in his statutory declaration which was only a summary of his claims.

130. The Court[73] held at [26] that the Tribunal must give appropriate attention to all relevant material in making a finding of inconsistency which then underpins an adverse credibility assessment. That did not occur in *AVQ15* because the Tribunal

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71 [2013] FCA 317

72 (2018) 266 FCR 83

73 Kenny, Griffiths and Mortimer JJ

overlooked what the appellant had earlier told a Departmental officer and this material was highly relevant to the question whether the appellant had given inconsistent evidence in support of his case.

131. The Appellant also relied on the decision of Kerr J in the Federal Court of Australia decision of *CBY15 v Minister for Immigration and Border Protection*.[74] At [144], his Honour quoted the comments of Lee J in *SZTFQ v Minister for Immigration and Border Protection*[75] to the effect that decision-making is a complex mental process and disbelief of a litigant on one point might carry over to affect the decision-maker's disbelief of the same person on other points. In light of that recognition, Kerr J said at [45]:

> "Where a tribunal has not premised its findings on each of several circumstances being individually a reason for an adverse credibility finding, then as identified by Lee J in *SZTFQ* it would be incorrect to ask whether, assuming the tribunal had made only such findings as did not depend on legally erroneous foundations, its decision might have been set aside for legal unreasonableness. That is because to proceed in such a manner would be to act on an entirely different premise as had the tribunal."

132. In *Minister for Immigration and Citizenship vSZKRT* ,[76] Robertson J of the Federal Court of Australia considered a case where the Australian Refugee Review Tribunal had given no consideration to a document when it made adverse findings against the applicant. That document was "critically relevant corroborative evidence" of the applicant's claims.

133. After considering the cases that suggest there may be a distinction to be drawn between claims and evidence, his Honour went on to say at [111] –[113]:

> "In my opinion there is no clear distinction in each case between claims and evidence: see *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545 at [24], set out at [69] above. The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In my opinion the distinction between claims and evidence provides a tool of analysis but is not the discrimen itself. Further, it is important not to reason that because a failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and consequential) evidence will also not establish jurisdictional error.
>
> As the Full Court said in *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [77] whether the Tribunal is obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document. In my opinion, the relevant factors in relation to (corroborative) evidence include first, the cogency of the evidentiary material and, second, the place of that material in the assessment

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74 [2020] FCA 878
75 [2017] FCA 562 at [44]-[45]
76 [2013] FCA 317

of the applicant's claims. To the extent that the Minister's submissions involved the contention that it is always the case that these matters may be dealt with without reference to the Tribunal's reasons I do not agree.

In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, referred to in *MZXSA v Minister for Immigration and Citizenship* (2010) 117 ALD 441, [2010] FCAFC 123 at [83], the Full Court discussed extensively errors of fact and jurisdictional error in the Tribunal. The Court said at [63] that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error was tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. I do not regard that decision as stating or attempting to state exhaustively the circumstances in which error may or does go to jurisdiction." [emphasis added]

Consideration

134. I am unable to determine from the material before me whether the Tribunal listened to the recording of RSD interview which apparently occurred on 8 April 2014. There was no transcript of that interview in the material before the Tribunal. I note that the Tribunal did say at [15] that it had carefully reviewed all of the evidence including the "hearing recordings". It is not possible to discern from that statement however whether the Tribunal listened to the RSD interview recording or the reference to "hearing recordings" was a reference to the hearings before the Tribunal.

135. Despite that lack of clarity, there is evidence that the Tribunal had before it a detailed written summary of the evidence given by the Appellant in the RSD interview. That summary is found in the Secretary's written decision dated 12 September 2014.[77] At page 8 of that decision,[78] the Secretary records that the Appellant claimed that in 2012 he was physically assaulted by Mongols because he is a Chherti. He was told that he was not a native and he should leave the district or he would be killed. Mongols target and harm members of the Chhetri tribe throughout Nepal. The harassment by the Mongols peaked in 2013. The Mongols would collect donations from the Chhetri and tried to force them to join the Maoists. The Appellant continued to live in his district until 2013 when the pressure from the Mongols became too much.

136. In paragraph [19] of the Second Tribunal Decision, the Tribunal specifically referenced the Appellant's RSD application and his *RSD interview*. The Tribunal specifically noted in that same paragraph that the Appellant in his RSD Application and interview stated that in 2012 he was physically assaulted by people of the Mongol race because of his Chhetri background. He was told he was not a native and should

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77 BD 53 - 74

78 BD 60

leave the district or be killed. Mongol pressure forced him to relinquish his position as President of the RPPN local committee. The harassment peaked in 2013.

137. Whilst it is not possible to determine whether the Tribunal listened to the recording of the RSD Interview, it is apparent that they took into account the *effect* of the relevant evidence in that interview, as recorded in summary form at [19] of the Second Tribunal Decision.

138. There is nothing inconsistent between what is recorded at [19] of the Second Tribunal Decision and the statement in paragraph [36] of the same document to the effect that the Appellant gave "no further details of this [2012] incident or any of the injuries he might have suffered".

139. There is no evidence that he said anything in his RSD interview as to what injuries he might have suffered. He gave no substantive details of the incident beyond the minimal information set out in the affidavit of Mr Elder which I consider is accurately summarised in paragraph [19] of the Second Tribunal Decision.

140. Accordingly, I am not satisfied that the Tribunal's finding that the Appellant gave no further details of the 2012 incident or of any injuries he might have suffered involved a factual error on the part of the Tribunal. The Tribunal's factual finding on this question was open to it.

141. Even if my view that the factual finding was open to the Tribunal is wrong, I would not be satisfied in any event that any factual error was such as to amount to an error of law. The Tribunal properly considered the Appellant's claims. During the Second Tribunal Hearing, the Appellant described events other than the 2009 assault (apparently including the claimed 2012 assault) as "not that big" and "minor".[79] Certainly by the time of the Second Tribunal Hearing, it is plain enough that the Appellant did not seek to rely upon the events in 2012 as constituting a significant plank in his claims for feared harm.

142. Any failure by the Tribunal to consider the evidence of the RSD interview did not lead the Tribunal to fail to consider the Appellant's claims such as to constitute an error of law.

143. The second ground of appeal fails.

CONCLUSION AND DISPOSITION OF THE APPEAL

144. For the reasons set out in this judgment, I have found that the Appellant has failed to make out both of the two grounds of appeal that he pursued at the hearing.

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[79] BD 284

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

JUSTICE MATTHEW BRADY

6 December 2022