IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 04 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00396 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN:	**DWN066**	Appellant
AND:	**THE REPUBLIC OF NAURU**	Respondent

Before: Brady J

Date of Hearing: 20 October 2022

Date of Judgment: 6 December 2022

CITATION: *DWN066 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 Tribunal breached a duty to act on the basis of the most up-to-date information available – Whether error in law – No apprehended bias by Tribunal - Tribunal followed principles of procedural fairness and did not breach its duty – 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 13 April 2019 (**Second Tribunal Decision**). The Tribunal affirmed a decision of the Secretary of Justice and Border Control (**the Secretary**) dated 19 May 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 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 Second 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 relies upon three grounds of appeal:

   (a) the Second Tribunal Decision was affected by a reasonable apprehension of bias. 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.

FACTUAL BACKGROUND

4. The Appellant is a national of Pakistan. He claims to be a Sunni Muslim of Pashtun ethnicity. He was born in a village [D] in the Khyber Pakhtunkhwa (**KPK**) province of Pakistan and claims never to have lived outside that home village until he left Pakistan. He attended school until year 10. He married in 2008 and then began driving a taxi owned by his father. He and his father own a house and land in D, a village of about 25,000 people.

5. The Appellant departed Pakistan in June 2013 and travelled to Thailand. From there, he travelled by boat to Australia via Indonesia. He arrived on Christmas Island in August 2013 after his boat was intercepted. He was then transferred to Nauru pursuant to a memorandum of agreement between the Republic of Nauru and the Commonwealth of Australia in September 2013.

THE APPELLANT'S CLAIMS

6. In broad terms, the Appellant claims to fear harm from the Taliban in Pakistan because the Appellant took his wife to vote in the 2013 elections in defiance of a Taliban order that women not vote. He further claims feared harm from the Taliban because he ignored an order from the Taliban to present himself at a Taliban base after the election.

7. The Appellant also claimed that he was at risk of harm because he had himself voted and because he had opposed the Taliban by voting for a candidate from the Pakistan Muslim League – Nawaz (**PML-N**).

8. The Appellant claimed that the Taliban came to his village prior to the 2013 election and announced at a local mosque that women should not vote. He said that the Taliban ordered that no matter who a woman supports, she could not vote as it is against Islam.

9. On polling day, the Appellant claims that he took his wife and mother to vote. The polling station was a local school. He stated that he drove his wife and mother in his taxi, dropped them at the separate female voting area and then went to vote himself in the male area. He stated that there were many people at the polling station and that a huge number of people went to vote that day. There were a number of different polling stations in [D].

10. The Appellant claims that the Taliban went to his home a few days after the election demanding that he present himself to their base. He claims that informants had told the Taliban that he had taken his wife to vote.

11. The Appellant was not at home at the time of the claimed visit from the Taliban. He claims that he received a phone call from his father whilst he was driving his taxi telling him to go home immediately. When he returned home, his father informed him that the Taliban had come to the house and demanded that he attend at their base nearby and that, if he did not attend, his fate would be his and his father's responsibility.

12. The Appellant contends that he did not go to the Taliban base as he had been directed to do. He claims that he remained in hiding in their home until 5 June 2013, when the Appellant travelled to Lahore. Shortly thereafter, he left Pakistan.

13. The Appellant stated in his initial written statement that in addition to these matters, he also voted in defiance of a Taliban order not to vote and that he would be imputed with an anti-Taliban political opinion because he voted for the PML-N candidate in the election.[1] However, at his hearing before the Tribunal in July 2014, the Appellant said that who he had voted for at that election was "not an issue".[2]

PROCEDURAL HISTORY

Initial Application for Refugee Status Determination

14. On 8 December 2013, 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 an RSD interview on 15 January 2014.

15. On 19 May 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]

First Refugee Status Review Tribunal

16. The Appellant lodged a Review Application with the Tribunal dated 22 May 2014.[5]

17. On 20 July 2014, the Appellant's solicitors filed comprehensive submissions and further evidence with the Tribunal.[6]

18. On 25 July 2014, the Appellant appeared in a hearing before the Tribunal (**First Panel**), represented by his Claims Assistance Providers (**CAPs**) representative.[7] The First Panel was comprised of:

    (a) Member Hearn MacKinnon (who presided);

    (b) Member Boddison; and

    (c) Member Fisher.

19. On 26 September 2014, 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**).[8] The detail of

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1 Book of Documents (**BD**) 43 (all references are to page numbers with paragraph numbers in square brackets)
2 BD 172
3 BD 17-47
4 BD 49-58
5 BD 61
6 BD.65-133
7 Transcript of hearing at BD 135-165
8 BD 167-172

the First Tribunal Decision is considered further below. For present purposes, it is sufficient to note in summary:

(a) The First Panel did not accept that the Taliban visited the Appellant's home and demanded that he report to their base within three days. The First Tribunal did not accept that the Appellant's wife and mother were the only women who voted in D and therefore did not accept that the Appellant was targeted for allowing his wife to vote.[9]

(b) The First Panel did not accept that the Taliban demanded that the Appellant present himself at their base yet did not return to the Appellant's home to find him when he did not attend and did not take any action against the Appellant's father when he did not attend.[10] The First Tribunal found that the Appellant remained living in the family home for three months after taking his wife and mother to vote without coming to any harm, leading the First Tribunal to conclude that he was not being sought by the Taliban.[11] This finding was later challenged on appeal in the High Court because the First Tribunal made an error in relation to the date of the election: it took place in May 2013 and not March 2013, which greatly reduced the time that he claimed to have spent in his home before fleeing Pakistan[12]

(c) The First Panel did not accept that there was a reasonable possibility that the Appellant would be harmed on return to D because he defied the Taliban by taking his wife and mother to vote and by not attending at a Taliban base.[13]

(d) The First Panel found that the Appellant himself did not vote in defiance of a Taliban order.[14]

First Appeal to Supreme Court

20. On 11 November 2014, the Appellant filed a notice of appeal to the Supreme Court from the First Tribunal Decision.[15]

21. After a hearing on 17 March 2016, this Court delivered judgment on the appeal on 31 March 2017[16] affirming the decision of First Tribunal Decision.[17]

Appeal to High Court

22. The Appellant filed an appeal from the decision of this Court to the High Court on 13 April 2017. At that time, the High Court was the Court to which appeals from this Court were heard. Leave was given to file an amended notice of appeal[18] containing four grounds of appeal, being that this Court erred in:

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9 BD 171 at [24]
10 BD 171 at [24]
11 BD 171 at [24]
12 Ground 1 of Amended Notice of Appeal to High Court BD p.194
13 BD 171 at [25]
14 BD 172 at [28]
15 BD 175
16 BD 179-192; *DWN 066 v The Republic* [2017] NRSC 23
17 BD 192 at [40]
18 BD 194-195

(a) failing to find that the First Panel made a decision for which there was no evidence, namely that the Appellant had been hiding in his house for 3 months rather than 20 days;

(b) failing to find that the First Panel failed to perform its statutory task by failing to consider relevant evidence and independent country information that the election had happened in May 2013 and not March 2013;

(c) failing to find that the Fist Panel failed to comply with the requirements of natural justice for the reasons set out in sub-paragraphs (a) and (b); and

(d) failing to find that the First Panel erred in failing to consider the Appellant's claim to be entitled to complementary protection.

23. The High Court[19] made orders by consent on 18 August 2017[20] that:

(a) the appeal to the Supreme Court from the First Tribunal Decision be allowed;

(b) the orders of the Supreme Court be set aside and in their place it was ordered that the matter be remitted to the Tribunal; and

(c) the Republic pay the Appellant's costs in a fixed sum.

Second Refugee Status Review Tribunal Hearing

24. Pursuant to the High Court's orders, the Appellant's application was remitted to the Tribunal for further consideration.

25. The Tribunal's Registrar wrote to the Appellant via his CAPs representative on 23 October 2017 inviting the Appellant to appear before the Tribunal on 7 November 2017. That letter did not state who would comprise the Tribunal for the purposes of the November 2017 hearing.

26. By a further written statement dated 2 November 2017, the Appellant provided further evidence to the Tribunal.

27. The Appellant appeared before the Tribunal on 7 and 8 November 2017 (**Second Tribunal Hearing**). On that occasion, the Tribunal (**Second Panel**) was constituted by:

(a) Member Hearn MacKinnon (presiding member);

(b) Member Zelinka; and

(c) Member Mullin.

28. The presiding member of the Second Panel (Member Hearn MacKinnon) was the same presiding member as sat on the First Panel. The other two members of the Second Panel were different to the members of the First Panel.

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19 Nettle and Gordon JJ

20 BD 193

29. Member Hearn MacKinnon presided and took an active part in the Second Tribunal Hearing.

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

> "MS HEARN MACKINNON: ... "So, [Appellant], we're here today because the Supreme Court of Nauru said that the tribunal that made the first decision on your case made some mistakes in its decision, and the court sent your case back to the tribunal to be reconsidered. Okay. So that's what we're doing today. We are reconsidering your case from the beginning. Now, you might remember that I was on the first tribunal that hearing [sic] your case. You don't remember? So I heard your case the first time.
>
> THE INTERPRETER: That's a long time ago and I can't remember.
>
> MS HEARN MACKINNON: Okay. Well, I just want to say to you that we are going to reconsider your evidence again fairly and we are going to put any issues in your case to you fairly, and the tribunal's decision is not my decision. It's a combined decision. Okay. So you've got two new members considering your evidence. Okay. All right. So all of the written statements that you already provided and the evidence that you gave at your RSD interview and to the first tribunal are all – are all matters that we can take into account. Okay. So we have all of that evidence that we've read and listened to. But today we're going to ask you some more questions to clarify some parts of your evidence and get some further evidence from you."

31. Further relevant detail of the Second Tribunal Hearing[22] is considered below.

Events after the Second Tribunal Hearing

32. The Appellant's solicitors provided further detailed written submissions as well as further evidence, including a psychiatric report, on 1 December 2017.[23]

33. By email dated 21 December 2017, Member Hearn MacKinnon acknowledged the further material provided on behalf of the Appellant and invited the Appellant to provide any further information he wished about his prognosis should he return to Pakistan and whether he would be able to access the necessary treatment there.[24]

34. The Appellant's solicitors responded with further submissions in response to the Tribunal's request on 19 January 2018.[25]

35. 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.[26] By email on 4 June 2018, Member Hearn MacKinnon responded, relevantly advising as follows:

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21 BD 214 at lines 26 to 45
22 BD 213-337
23 BD 339-366
24 BD 367
25 BD 369

"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 in *SOS 011* I have de-constituted the following remitted cases as the Tribunal in each case comprised a member of the original Tribunal.

...

DWN066 ...

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.

..."

36. The reference in that email to "*SOS011*" is a reference to the decision of this Court in *SOS011 v Republic*[27] (***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.

37. His Honour held[28] 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."

38. *SOS011* and another case delivered the same day by Freckelton J, *VEA026 v Republic*[29] (***VEA026***), are considered further below.

39. 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 3 December 2018.[30] The letter did not state who would comprise the tribunal on this occasion.

40. 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

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26 BD 375. 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.

27 [2018] NRSC 22

28 *SOS011 v Republic* [2018] NRSC 22, [75]

29 [2018] NRSC 19

30 BD 377

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 apprehend bias.

41. 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.[31] Relevantly, that email said:

> "Dear Principal Member
>
> I refer to the Tribunal matters of [redacted] and DWN 066 …
>
> 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 19 February 2018 Panel, which would have included discussions with Member Zelinka and yet you and Member Mullin also sat on the Panel on 23 November 2018.
>
> The Supreme Court decisions in the above cases make it clear that the way the Tribunal was constituted on [redacted] was insufficient to overcome the apprehension of bias. The presence of one Member on a Panel who may appear to be biased is sufficient to taint the findings of the other Members (the 'rotten apple principle'). It follows therefore that, as Members Hearn-MacKinnon and Mullin collaborated with Member Zelinka in relation to the [redacted] hearing, their participation in the [redacted] hearing and the making of a RSD decision in relation to [redacted] is a breach of the bias rule.
>
> Secondly, the Tribunal did not provide [redacted] with a new hearing but rather indicated that it intends to rely on material gathered from the tainted [redacted] hearing, including presumably, questions asked by Member Zelinka. This further compounds the conclusion that would be drawn by a fair-minded observer that the reconstituted Tribunal may be biased.

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31 BD 379-380

Consequently, on behalf of applicants [redacted] and DWN 066, 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)

42. By that email, the Appellant's solicitor indicated to the Tribunal before the anticipated hearing involving the Appellant on 3 December 2018 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's position was that any Tribunal proceeding to determine his matter should contain *none* of the same members who sat on the First Tribunal, nor either of those two members who sat on the Second Panel with Member Hearn MacKinnon. 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.

43. 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 in these reasons to refer to her as Member Hearn MacKinnon.

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

"Dear Bernie

Thank you for your email below.

Regarding [redacted].

We do not agree with your view that the hearing in [redacted] 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."

45. The Appellant's solicitors submitted further written submissions and evidence on 30 November 2018.[32] That included evidence as to the state of mental health of the Appellant.

Third Tribunal Hearing

46. On 3 December 2018, the Appellant attended a third hearing before the Tribunal (**Third Tribunal Hearing**).[33] On this occasion the Tribunal **(Third Panel)** was constituted by:

    (a) Member Toohey (presiding member);

    (b) Member Zelinka; and

    (c) Member Mullin.

47. Member Toohey was new to the Third Panel.

48. Both Members Zelinka and Mullin were previously members of the Second Panel which conducted the Second Tribunal Hearing.

49. Member Hearn MacKinnon who was on both the First and Second Panels was not a member of the Third Panel.

50. Ms Howell represented the Appellant at the Third Tribunal Hearing. At the Third Tribunal Hearing, Member Toohey, after dealing with preliminary matters, raised the fact of the reconstitution of the panel. The transcript of the Third Tribunal Hearing[34] reveals the following exchanges:

> "MS TOOHEY: ...As you know, you had a hearing back in 2014. I think it was, and the tribunal decided back then that you were not a refugee. That was back then. And then the Supreme Court of Nauru said the tribunal had made a mistake in how it decided your case and told the tribunal to make a new decision. So then in November of last year, there was a new tribunal and it heard your case.
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> THE INTERPRETER: Yes.
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> MS TOOHEY: And at that time, Sue Zelinka and Andrew Mullin were on the tribunal and also Rea McKinnon [sic] was on the tribunal. And she had been on the tribunal that made the first decision about your case.
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> THE INTERPRETER: What her name, sorry?

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32 BD pp.381-428
33 BD pp.429-457
34 BD pp.431-433

MS TOOHEY: Rea McKinnon [sic].

THE INTERPRETER: Yes

MS TOOHEY: Now, I can see, because I have read the transcript of that hearing that the members did discuss that with you at the time, that Ms McKinnon [sic] had already been on your case. And at that time, there was no objection to her sitting on your case again. But after the hearing was finished, the tribunal decided that it would be better if Ms McKinnon [sic] was not on the new case, because she had already heard your first case. So I'm the new person coming in her place. Now ---

MS HOWELL: Would I just ---

MS TOOHEY: Yes

MS HOWELL: Before we continue, could I just say something in response to ---

MS TOOHEY: Yes.

MS HOWELL: Yes. Thank you. So we just wanted to say that as we have informed the tribunal by way of email that we're of the view that ---

MS TOOHEY: Can I just stop you there. I will come to it.

MS HOWELL: Yes.

MS TOOHEY: I'm very ---

MS HOWELL: Okay.

MS TOOHEY: --- mindful of that submission.

MS HOWELL: Okay.

MS TOOHEY: But I just wanted to finish this part. All right? So in November, the tribunal had a hearing and took a lot of evidence and finished the hearing and we don't intend to ask you about all of that all over again. So as I said, I wasn't at the hearing before. But I have read all of the transcript of what was said at that hearing. And this is why we are going to do this afternoon. I want to summarise your claims as I've understand [sic] them, now that I've had a chance to read what was said before. And I will come to you Ms Howell.

MS HOWELL: Mmmm

MS TOOHEY: And a copy of this transcript has been provided to your legal representative. Can I just check, have your lawyers discussed the transcript with you?

THE INTERPRETER: Yes.

MS TOOHEY: Okay. So, I'm going to ask you in a minute if there's anything else you want to tell us about your case.

THE INTERPRETER: Okay.

MS TOOHEY: Anything that you want to correct that was said in November last year, and questions that you think the tribunal should have asked you last year, but didn't ask you? And I will ask Ms Howell the same. All right. Now, before we go further, we will what it is that Ms Howell wanted to say. [sic]

MS HOWELL: Thanks ---

MS TOOHEY: Ms Howell.

MS HOWELL: Thank you. So we just wanted to say that we're of the view that the hearing provided to [the Appellant] on 7 and 8 November last year was affected by apprehended bias because of the way the tribunal was constituted. And we believe that the tribunal implicitly acknowledged this by offering [the Appellant] another hearing today, which is the point you covered earlier. And so we submit that as a result of the members from the November 2017 hearing being present on the panel today, this hearing too is tainted by the apprehension of bias. And we further submit that the tribunal decision to provide a truncated hearing today rather than a full hearing compounds this apprehension.

MS TOOHEY: All right.

MS HOWELL: But [the Appellant] has agreed to participate in this hearing today on the understanding that our objection is in this regard to be placed on the record.

...

MS TOOHEY: Yes. All right. Just to respond briefly to what Ms Howell has said, I think you're aware of the tribunal's position that it doesn't agree that the hearing in November was itself affected by bias by the presence of Ms McKinnon [sic] and the reconstitution is not an acknowledgment that it was affected by apprehended bias.

THE INTERPRETER: Can you repeat that, please.

MS TOOHEY: By offering a new hearing it's not – or by offering a hearing with a new member, the tribunal is not acknowledging that the hearing in November last year was affected by bias. The reconstitution of the tribunal seemed, in the end, the prudent way to proceed. And just in relation to the comment that this is a truncated hearing today —

MS ZELINKA: A shorter.

MS TOOHEY: ---a shorter hearing today, let me just say that this hearing today takes account of all of the evidence and submissions that [the Appellant]

has made from the commencement of his application, all the way through to today and that includes the hearing held over two afternoons in November last year at the end of which the tribunal had not reached a decision and hasn't reached a decision as of today. That today is, in effect, a continuation of the hearing and an opportunity to discuss the things that I indicated to [the Appellant]. ..."

51. After the Third Tribunal Hearing, the Appellant's solicitor filed further submissions and evidence on 6 February 2019.[35]

Second Tribunal Decision

52. The Second Tribunal Decision was delivered on 13 April 2019 by the members of the Third Panel.

53. After dealing with some introductory matters, the Second Tribunal Decision proceeded to consider the issues of apprehended bias raised by the Appellant. At [11]-[14], the Third Panel summarised the effect of *SOS011* and *VEA026*. It then proceeded to explain the process of reconstitution of the panel for the purposes of hearing the matter at [15]-[19]:

> "15. In view of the Court's comments in *SOS011* and *VEA026*, the Tribunal considered it prudent that it be reconstituted for the purposes of the present review and the applicant be offered a further hearing. We will refer to this as "the reconstituted Tribunal". None of the members of the reconstituted Tribunal played any part in the first review. However, two members had sat on the Tribunal at the first part of the remittal hearing on 7 and 8 December 2017.
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> 16. The reconstituted Tribunal scheduled a further hearing for 3 December 2018. We will refer to this as the "second part of the remittal hearing".
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> 17. In written submissions before the hearing, the applicant's legal representative submitted that the first part of the remittal hearing "would have included discussions" with the member who had sat on the first review; it followed that, as the members on the reconstituted Tribunal "collaborated" with that member, their participation in the reconstituted Tribunal gave rise to an apprehension of bias and would be a breach of natural justice. In effect, it was submitted that the Tribunal should be "deconstituted" and constituted again with members who had played no part in the proceedings to date.
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> 18. The applicant's legal representative further submitted that the Tribunal could not rely on "material gathered" at the first part of the remittal hearing because that "material" was "tainted" because it would "presumably" include "questions asked by [the member who had presided on the first review]". It was submitted that this "further compounds the conclusion that would be drawn by a fair-minded observer that the reconstituted Tribunal may be biased". The representative concluded that she did not "consent to material collected at the pre-reconstitution hearings being used in making our clients' refugee determination decisions".

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35 BD pp.461-502

> 19. The applicant attended the second part of the remittal hearing on 3 December 2018 with his legal representative. At the commencement of the hearing, the applicant's legal representative maintained that the Tribunal as constituted for the first part of the remittal hearing was "affected by apprehended bias" which, it was submitted, the Tribunal had "implicitly acknowledged" by reconstituting itself after that hearing. Further, because two members of the reconstituted Tribunal were present at that hearing, the reconstituted hearing was also affected. Further, that the decision to hold a "truncated hearing today rather than a full hearing" compounded that apprehension. That said, the applicant was willing to proceed on the understanding that the submissions were on the record."

54. After observing that the relevant test for apprehended bias was whether "a fair-minded observer might reasonably apprehend that the tribunal member might not bring an impartial and unprejudiced mind to the resolution of the questions the member if required to decide",[36] the Tribunal noted that *SOS011* and *VEA026* both involved a case where a member of the Tribunal which had previously determined the same matter was involved in determining the matter a second time.[37]

55. Starting at [21], the Tribunal set out its reasoning on the arguments as to apprehended bias:

> "21. [...] In this case, the Tribunal understands the allegation to be that the questioning at the first part of the remittal hearing, which included questions by the former presiding member, "tainted" the evidence given by the applicant at that hearing and, further, that the other members "collaborated" in their discussions with her.
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> 22. Tribunal acknowledges that an applicant's responses to questions at a hearing may be conditioned by the questions themselves, and that the members at the first part of the remittal hearing may have approached questions differently. However, from the transcript of that hearing, it can be seen that the Tribunal covered similar ground, and asked similar questions, as the present Tribunal, and the applicant's legal representative has not cited any instances of questions apparently affected by bias. To be quite sure, the Presiding Member at the second part of the remittal hearing in December 2018 took care to confirm and clarify the applicant's claims and evidence with him before proceeding with the second part of the remittal hearing (see paragraph 95 and following below).
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> 23. In this case, the Tribunal does not accept that a fair-minded lay observer would apprehend that the members of the reconstituted Tribunal would be influenced by any discussions that two of them had at the first part of the remittal hearing with a member who had been involved in the first review, or that they "collaborated" with that member, and would be unable or unlikely to bring their own minds to the decision at hand.

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36 BD 506-507 at [20]

37 BD 507 at [20]

> 24. Nor does the Tribunal accept that "use of material collected at the pre-reconstitution hearings" would give rise to an apprehension of bias. (The Tribunal understands "hearings" to include the hearing in 2014 in the first review, as well as the first part of the remittal hearing). It is not clear what "use" of the material means. The evidence (or "material") before the Tribunal comprises all of the oral and written evidence submitted by the applicant to the Secretary and the Tribunal, and evidence gathered by the Tribunal through its own inquiries, throughout the course of the application. It does not include any findings made by the first Tribunal."

56. Having disposed of the arguments as to apprehended bias, the Third Panel considered the claims and evidence over the course of a further 163 paragraphs. In relation to the Appellant's primary claims, the Tribunal did not accept that the Taliban came to the Appellant's father's door several days after the election and instructed his father to bring the Appellant to them.[38] It was found improbable that they would have referred to the Appellant's "offence" but made no mention of his father's similar "offence".[39]

57. The Tribunal also did not accept that the Taliban had told the Appellant's father to present the Appellant at their stronghold within three days or they would kill him. Despite threatening that he would be killed if his father did not comply, the Taliban did not return when his father failed to deliver him to their base within three days. It is improbable that they would issue such a threat and then take no action to follow it up.[40]

58. The Tribunal did not accept the Appellant's explanation that the Taliban were keeping an eye on his house and driving past from time to time and could have been relying on local informers.[41]

59. The Tribunal did not accept that the Taliban came to the Appellant's father's house and demanded that he present his son within three days for allowing women to vote.[42] The Tribunal also rejected the Appellant's account of what followed.[43]

60. The Tribunal was also not satisfied that the Appellant was targeted because he took his mother and wife to vote at the 2013 election, or that he was personally targeted for having voted for a particular candidate in the 2013 election.[44]

61. The Tribunal concluded that it was not satisfied that there was any reasonable possibility that the Appellant would suffer persecution at the hands of the Taliban in [D] or elsewhere in Pakistan for reason of his actions during the 2013 election.[45]

62. The Tribunal was not satisfied that there was a reasonable possibility the Appellant would suffer hardship amounting to persecution from the Pakistani authorities now or in the reasonably foreseeable future for reason of his being a 'failed asylum seeker'.[46]

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38 BD 524 at [115]
39 BD 524 at [115]
40 BD 524 at [116].
41 BD 524-525 at [117]
42 BD 525 at [119]
43 BD 525 at [119]
44 BD 525 at [121]
45 BD 526 at [123]
46 BD 532 at [162]

It also was not satisfied that the Appellant is a person who is owed complementary protection.[47]

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

FIRST GROUND OF APPEAL - APPREHENDED BIAS

Summary of the Appellant's Submissions

64. The Appellant submits that Member Hearn MacKinnon'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]."

65. The Appellant argues that Member Hearn MacKinnon 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[48] that:

> "It is very likely that Member [Hearn MacKinnon] brought her thoughts and opinions to bear in this process, potentially influencing or affecting the thinking of Members Zelinka 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 Zelinka and Mullin might have been influenced by Member [Hearn MacKinnon's] views of the case.
>
> When the Tribunal reconstituted to the Third [Panel], there remained the possibility that Members Zelinka and Mullin retained in their minds whatever influence Member [Hearn MacKinnon] might have had upon them (including as to whether the appellant is a witness of truth). The lay observer would be aware that Member [Hearn MacKinnon] 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 decision by the Tribunal, including

Summary of the Respondent's Submissions

66. The Respondent submits that there can be no *reasonable* apprehension of bias in this case. There is no evidence that any member of the Third Panel expressed clear views about either a question of fact which constitutes a live and significant issue in the case, or about the credit of a significant witness. Nor could there be a reasonable fear that any member of the Third Panel was so prejudiced in favour or a conclusion already formed that he or she would not alter that conclusion irrespective of the evidence or arguments presented.

67. It does not follow that any perceived prejudice on the part of Member Hearn MacKinnon can be imputed to the Third Panel, merely because it was aware of Member Hearn MacKinnon's thoughts and opinions. In other words, it cannot be suggested that any view expressed by Member Hearn MacKinnon could hold sway over the members of the Third Panel such that they would be so committed to

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47 BD 537 at [184]

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

Member Hearn MacKinnon's view that their minds were incapable of alteration, whatever the evidence or arguments presented.

Legal Principles

68. The discussion of the legal principles in this part of the judgment is shared with a discussion of the same principles in *HFM045 v Republic* where the same ground of appeal was raised and which I delivered on the same day as this judgment.

69. 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*[49] (**Ebner**).

70. 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 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."

71. This passage encapsulates the so-called "double might" test of apprehended bias: that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the relevant question. The test is an objective one.[50] It is the Court's view of the public view, not the court's own view, which is determinative.[51] 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.[52]

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

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49 (2000) 205 CLR 337

50 *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]

51 *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

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

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

73. 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.[54] Similarly, if the matter is already decided, no attempt need be made to inquire into the actual thought processes of the relevant Tribunal Member.[55]

74. The apprehension of bias principle involves the application of two steps before making the ultimate determination:[56]

(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.

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

76. 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.[57]

77. In *CNY17 v Minister for Immigration and Border Protection and Anor*,[58]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.
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> 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

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54 *Ebner* at 345 [7]

55 *Ebner* at 345 [7]

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

57 *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

58 (2019) 268 CLR 76 at [18]-[19]

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)."

78. In *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship,*[59] 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.

79. 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. 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].
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> 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."

80. 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*

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[59] [2013] FCAFC 80

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].

81. 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*[60] 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.
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> ... 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. ..."

82. 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.[61] 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.

83. In considering the test in application to a multi-member tribunal, Gageler J said in *Isbester v Knox City Council* (2015) 255 CLR 135 at 155 [58] 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])

84. 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

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60 [2001] HCA 17, 205 CLR 507 at 531-532

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

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])."

85. 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*.[62] 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 principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning.
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> 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-

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62 (1983) 151 CLR 288

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."

86. In that case, two of the judges of the New South Wales Court of Appeal 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".[63] His Honour concluded that "clearly the plaintiff has not told this Court the truth".[64] Reynolds J had expressed a similarly unfavourable view of the plaintiff as a witness.

87. The High Court said at 298 [16] and [18]:

> "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)
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> ...
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> 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

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63 *Livesey* at 295 [10]

64 *Livesey* at 295 [10]

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]

88. 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.

89. 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.

90. 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.

91. 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."

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

93. 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.

94. 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[65] 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.

95. 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 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.
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> 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]]:
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> > "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

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

> 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))

96. 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 charge 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.

97. That council officer thereafter arranged for a panel of three Council delegates, including her, 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.

98. 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.

99. 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)

100. 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.

101. His Honour held that there was "overwhelming evidence of ostensible bias against Mr Connolly with respect to matters that his Commission had to consider".[66] 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.

102. Thomas J found as a primary matter that the relevant regulations did not permit Dr Ryan to complete the Inquiry on his own.[67] 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.

103. 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 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."

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

105. The final case relied upon by Ms Batten is the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Harirchian v Health Ombudsman*.[68] 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.

106. 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

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66 At 373
67 At 390
68 [2020] QCAT 392

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.[69]

107. 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.

108. 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.[70]

109. 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. 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

110. 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.

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

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

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

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

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69 At [7].

70 At [25]

112. 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*,[71] 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 Hearn MacKinnon might by affected individually; and secondly, an articulation of how Member Hearn MacKinnon'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.

113. As to the first of those two elements, the Respondent disputes that Member Hearn MacKinnon was herself a person affected by apprehended bias as a result of having been part of the First Panel which made the First Tribunal Decision. The Respondent submits that the First Tribunal Decision did not involve the First Panel rejecting the credit of the Appellant. Mr Reilly for the Respondent relied upon *Smith v New South Wales Bar Association*[72] to underscore the difference between rejection of a person's evidence and a finding that he or she lied.

114. Whilst the First Panel did not adopt the language of "credit' in its reasons, it rejected the Appellant's claim that the Taliban visited the Appellant's home and demanded that he report to their base. In doing so, the First Panel squarely rejected the Appellant's essential contentions about his feared persecution. The First Panel (and, by necessary extension, Member Hearn MacKinnon) expressed clear views about a question of fact which constituted a live and significant issue in the re-hearing.[73] Indeed, it was a central question in the resolution of the Appellant's claims.

115. I also consider that the findings of the First Panel, whilst not couched in the language of the Appellant's credit, necessarily involved a finding adverse to the credit of the Appellant given the central nature of his allegations and the findings that were made.

116. For those reasons, I consider that a fair-minded lay observer might reasonably apprehend that Member Hearn MacKinnon might not have brought an impartial mind to the resolution of the very same factual question which the First Panel had resolved in the First Tribunal Decision, which was an essential matter, on any re-hearing.

117. The second element is then to articulate any logical connection between Member Hearn MacKinnon's apprehended bias and the feared deviation from the course of deciding the matter on its merits by Members Zelinka and Mullin as part of the Third Panel which made the Second Tribunal Decision.

118. 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 Hearn MacKinnon 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

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71 (2015) 255 CLR 135 at 155 [58]

72 [1992] HCA 36; 176 CLR 256 at [38]

73 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294

Tribunal Hearing. She remained part of the Second Panel for a period of some months for what she herself described as a "combined decision";

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

119. 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 Hearn MacKinnon 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.

120. Knowing those facts, the Respondent submits, a fair-minded lay observer could not reasonably apprehend that Members Zelinka 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".[74] The Respondent contends that the contended prejudice cannot be imputed to the Third Panel merely because it was aware of Member Hearn MacKinnon'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.

121. 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.[75] 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

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

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

conclusion that an entirely new panel could not have been put in place shortly after the decisions in *SOS 011* and *VEA 026* were handed down. Inconvenience does not equate to necessity.[76]

122. It is then necessary to consider how, if at all, Member Hearn MacKinnon'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 Hearn MacKinnon's participation in the Second Tribunal Hearing; and

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

123. I have carefully reviewed the transcript of the Second Tribunal Hearing. There is nothing in that hearing to suggest that Member Hearn MacKinnon acted in any way so as to expose any prejudgment on her part, nor was there any element of unfairness in the nature of her questioning of the Appellant. I do not consider that her 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 Zelinka and Mullin might not bring an impartial mind to the ultimate resolution of the application.

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

125. However, to use the language of "persuasion" is not, to my mind, a useful approach to the resolution of the issue. Members Zelinka 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.

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

127. 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 Zelinka'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.

128. 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 Zelinka and Mullin) might not bring an impartial mind to the resolution of the Appellant's application.

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

129. 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 Hearn MacKinnon 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 meet the test for apprehended bias in respect of Members Zelinka and Mullin. The Appellant has not established that a fair-minded lay observer might reasonably apprehend that Members Zelinka 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 Hearn MacKinnon and may have been aware of her views.

(b) The Second Tribunal Decision was handed down on 13 April 2019; around 12 months after Member Hearn MacKinnon ceased being a member of the Second Panel. The Second Tribunal Decision followed a Third Tribunal Hearing in December 2018. The lengthy period between the cessation of Member Hearn MacKinnon'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 much more detailed than, the First Tribunal Decision. That is not consistent with the idea that the Third Panel was impermissibly infected with the views of Member Hearn MacKinnon as expressed in the First Tribunal Decision.

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

131. *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.

132. *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 Hearn MacKinnon'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.

133. *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.

134. *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.

135. The involvement of Member Hearn MacKinnon in the ultimate decision appealed from here is qualitatively and quantitatively different to the facts in *Curruthers*. Member Hearn MacKinnon had no involvement in the matter for about 12 months before the Second Tribunal Decision, during which time there had been a separate hearing before the Third Panel. 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 Hearn MacKinnon'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.

136. Finally, the decision of the QCAT in *Harirchian* was a determination of the QCAT itself whether it should continue to hear a 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*.

137. 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 Hearn MacKinnon 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.

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

SECOND GROUND OF APPEAL – FAILURE TO CONSIDER EVIDENCE

139. 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.

140. The Appellant contends that the Tribunal erred when it held at [116] that "[a]ccording to [the Appellant's] evidence, despite threatening he would be killed if his father did not comply, the Taliban did not return when his father failed to deliver him to their base within three days."

141. The Appellant says that this conclusion was incorrect in light of his evidence at the Second Tribunal Hearing. The Appellant contends that his evidence was that the Taliban did in fact come to his house whilst he was hiding there and asked where he was.

142. The Appellant also calls attention to the finding at [122] that "[e]ven though his father failed to hand him over, they did not come to the house again, and there is no

evidence that they have shown any interest in him in nearly six years since he left [D]" The Appellant contends this finding was erroneous based on the evidence which he gave at the Second Tribunal Hearing.

Legal principles

143. The Appellant relies upon the decision of this Court in *TOX093 and TOX094 v Republic.*[77] In those cases, Crulci J held at [48] that an erroneous factual finding (for which the appellant is not responsible) which played a material part in the Tribunal's reasoning and which was sufficiently material as to be described as "the basis", or "the probable basis", of the decision, was an error which was susceptible to review by this Court from a decision of the Tribunal.

144. The Respondent draws attention to the decision of the Federal Court of Australia in *Minister for Immigration and Citizenship v SZRKT.*[78] In that case, Robertson J noted that if a tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by an applicant and bases its conclusion in whole or in part upon the claim so misconstrued, its error is tantamount to a failure to consider the claim and on that basis the factual error can constitute jurisdictional error.

The Appellant's Evidence

145. In his initial statement in support of his application, the Appellant said:[79]

> "When I was living in [D] I was working throughout my area as a taxi driver. On approximately 13 March 2013 I was driving my taxi when I received a phone call from my father asking me to come home immediately. I returned home and my father told me that the Taliban had come to ask about me. The Taliban told my father that I had to attend their base at [ST] and that if I did not come then it is mine and my father's responsibility as to my fate.
>
> It was clear to me that the Taliban informants had seen me voting along with my wife and that they were after me. Others in my area who had received threats and refused to comply with Taliban demands had been slaughtered by the Taliban. I became very scared that if I went to their base the Taliban would carry out their threats and kill me. After the Taliban threatened me and my father I remained inside the house in hiding.
>
> On 16 May my maternal uncle came to my home whilst I was hiding there and took my passport so he could make arrangements for me to leave the country. I knew that when the Taliban issue a warning they carry through on their threats. He took my passport to arrange a visa so I could leave Pakistan and survive."

146. There was nothing in that statement about the Taliban returning to his house after their initial statements to his father.

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77 [2017] NRSC 80

78 [2013] FCA 317 at [111]-[113]

79 BD42 – 43 at [14]-[16]

147. In a statement in support of his application made on 26 May 2014, the Appellant said at [8]-[9]:[80]

> "After I learnt of the Taliban's threat to my father I made arrangements to travel back into the village secretly in another car. I remained in hiding at home until I left the village to flee Pakistan.
>
> Whilst I was hiding at home, my father told anyone who asked after me that I was still away; that I had not returned home. Whilst I was in hiding my extended family helped me to make arrangements to flee Pakistan."

148. Although there is some ambiguity about precisely who asked after him, there was nothing expressly to suggest that the Taliban themselves returned to his house.

149. During the First Tribunal hearing, it was put to the Appellant that when he did not report to the Taliban's base, the Taliban would come back to his home to speak directly to his father or to look for him. His response was:[81]

> "Well during this time they were patrolling and they were coming and they were looking for me, and even people were asking about – from my father "Where is he?" so my father was telling them "Even now I don't have – I don't – I can't trace him where he is. He has not returned back to home." During that time they were keep coming and looking and patrolling the area." [sic]

150. The Appellant's evidence at the Second Tribunal Hearing as to the question of whether the Talban returned to his father's house is set out over a number of pages of transcript.[82] I have carefully considered the whole of the transcript of that hearing. The passages quoted below must be understood in their context within the whole hearings.

151. During the course of the Second Tribunal Hearing, the following exchanges are of particular relevance:

> "(e) After Member Zelika asked the Appellant why the Taliban never came back to his house and knocked on the door and asked, "where is your son?", the Appellant responded:[83]
>
> > INTERPRETER: Whatever – what the Taliban – the Taliban is not like that to always drive around to see what the people – staying and watching everyone. What they do, they're going – because they're living in the mountains. They have their own base. They are not coming – they haven't got any telescope to see as what we're doing. Because in each area they have their own gossip. And their own gossip – when they find out the person came in or get out from their house they see that and report it to the Taliban."

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80 BD 99 - 100
81 BD 154 at lines 33-37
82 See especially BD 262 - 267
83 BD 263 at lines 20-26

(f) The Appellant and Tribunal engaged in the following exchange:[84]

> MS HEARN MACKINNON: Okay. And in your past statements and evidence, you said that the Taliban were patrolling and looking for – patrolling your house and looking for you. Is that correct?
>
> INTERPRETER: Because always the Talibans is not like that to just knock on each door. "Where is this person?" What they do, they – they are, like – they are using their own power and asking everyone and looking everywhere to find that person.
>
> MS HEARN MACKINNON: Okay. So they were asking people in the villages where you were. Is that correct?
>
> INTERPRETER: But one thing I would – another things I would like to tell you because there – there – we have the gossip.
>
> MS HEARN MACKINNON Yes, I ...
>
> INTERPRETER: So the – the Talibans gossip in our village.
>
> MS HEARN MACKINON: Yes
>
> INTERPRETER: They – they don't know it. They are very far away from there. From this gossip, they will report to them because this person is there ---
>
> MS HEARN MACKINNON: Sure.
>
> INTERPREETER: --- you can come and catch them.
>
> MS HEARN MACKINNON: But did you or your father ever see the Taliban again around your house, anywhere near your house?
>
> INTERPRETER: Yes, because it's a main road. Every day, they were going and coming.
>
> MS HEARN MACKINNON: Did you ever see them watching you house?
>
> INTERPRETER: Yes. Yes, they were watching. Yes. Why not
>
> MS HEARN MACKINNON: But how do you know they were watching. Did you see them watching?

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[84] BD 264 line 23 to BD267 line 41

INTERPRETER: Yes, because I was – I didn't see them inside, because my father is always – he was outside and watching.

MS HEARN MACKINNON: Yes.

INTERPRETER: And when they are crossing and they are – when they are coming back, because my father was seeing them. They were going and coming.

MS HEARN MACKINNON: But they were going and – does your – could your father tell were they just travelling past your house on the road or where they coming ---

MS ZELINKA: Stopped outside your house.

MS HEARN MACKINNON: Yes, were they ---

MS ZELINKA: And looking.

MS HEARN MACKINNON: Had they come to the house to look at the house to look for you?

INTERPRETER: What happened, because the car was all crossing, they were not stopping and asking you "Where is your son?" because they – they have their intelligence, or the ---

MS HEARN MACKINNON: Okay.

INTERPRETER: --- spy in the village. They coming and sitting with you, and talking with you, "Where is your son?" So a few of them asking me father, "Where is your son?"

...

MS HEARN MACKINNON: And so the Taliban never came back to the house in that time [when the Appellant stayed at his home]. Is that right? The Taliban – just did the Taliban ever come back to your house?

INTERPRETER: What happened, that's all one came and checked my – threaten my father.

MS HEARN MACKINNON: Yes. Yes.

INTERPRETER: What happened then, what they do? They are watching from ... a little bit distance ... but they have their own spy and send it to – sent it to my dad and sitting with him and talk to them ... "Where is your son?"

MS HEARN MACKINNON: That's right. So that was my next question. Did people come to the house and, you know, visit the house while you were hiding there and talk to your father?

INTERPRETER: Yes, they were asking. Yes. Yes, they were coming to – to my dad and asking "Where is your son?" My father said "Because I don't know where is my son, how come I will tell you where is he?"

...

MS HEARN MACKINNON: And why do you think the people who were coming to visit were Taliban spies and not just villagers who were wondering ---

MR MULLIN: Stickybeaks.

MS HEARN MACKINNON: --- where you were?

INTERPRETER: But one thing is always the Talibans, they using their own trick to the people. That are not coming to see you and times knock the door. And always using their own gossips, the people who is working with them from their village. They know my father. Because if they come and my father will tell them because the Taliban, "My son is not at home". He – the Taliban using the gossips to come and sitting with my father and have a talking – they chat with them and then maybe father would say, "My son, he is inside the house." Because my son – because of that, my father never mention it to anyone." [sic]

The Second Tribunal Decision

152. The Second Tribunal Decision summarised the Appellant's evidence on this issue at [57]:[85]

> "The applicant claimed that subsequently, his father saw the Taliban in their distinctive vehicles from time to time, which was not unusual, as they had a camp somewhere in the mountains and would have to drive through the village to get to the main road. He claimed the Taliban sometimes drove around the villages just to show their power and remind the villagers that they were around. He gave evidence that Taliban cars did not stop at or near his house after they had spoken to his father. He claimed that they did not need to maintain watch over his house in order to see when or if he returned because they had a network of informers who could pass this information along. He claimed that, during the 20 days or so he was hiding at home, some villagers came to the house and, in the course of conversation, inquired as to his whereabouts and when his father went to the mosque, some of the men asked

[85] BD 514

after the applicant. He told the Tribunal that any of these persons might have been 'Taliban gossips'."

153. At [116]-[117] of the Second Tribunal Decision, the Tribunal said:[86]

> "The Tribunal also does not accept that the Taliban told the applicant's father to present the applicant at their stronghold within three days or they would kill him. According to his evidence, despite their threatening he would be killed if his father did not comply, the Taliban did not return when his father failed to deliver him to their base within three days. Given the Taliban's reputation for violence and intimidation, it is improbable that they would issue such a threat and then take no action to follow it up.
>
> The Tribunal does not accept the applicant's explanation that the Taliban were keeping an eye on his house and driving past from time to time, and could have been relying on local informers. His evidence was that friends or acquaintances of his father, or fellow worshippers at the local mosque, would from time to time come to the house and would ask sometimes ask after him [sic], and of any them could have been "Taliban gossips." Whilst not implausible that local people would act as informers for the Taliban, it is speculation to say that his father's friends and acquaintances who visited the home or asked after the applicant were acting as informers. ..."

154. At [122], the Tribunal said:

> "If the Taliban had any interest in the applicant, and if they did make some kind of threat against him, there is no evidence that they intended to carry out their threat. Even though his father failed to hand him over, they did not come to the house again, and there is no evidence that they have shown any interest in him in nearly six years since he left [D]. Other than inquiries after him from his father's friends and acquaintances, he does not claim that the Taliban have returned to the house or attempted to make contact with his family in any way since."

Consideration

155. Having regard to the totality of the Appellant's evidence before the Tribunal, the Appellant has not demonstrated that the Tribunal was plainly wrong in its understanding of his evidence or that the Tribunal failed to have regard to his evidence on this question. To the contrary, the Tribunal's summary of the Appellant's evidence at [57] of the Second Tribunal Decision in particular was an accurate statement of the effect of the Appellant's evidence.

156. The finding that the Taliban did not come to the house again was a factual finding open to the Tribunal on the basis of the evidence before it. The assessment of the evidence was a matter for the Tribunal, absent a clear error of the nature set out in *TOX093*.

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86 BD 524

157. Whilst there was a degree of vagueness about the Appellant's evidence on this question, there is no doubt that the totality of the evidence reasonably supports the Tribunal's conclusion that the Taliban did not return to his house, although other people did make inquiries of the Appellant and they could have been Taliban "gossips" or spies, as the Tribunal acknowledged.

158. The Appellant has failed to demonstrate that there was any factual error of the type described in *TOX093* such as to give rise to an error of law. The second ground of appeal therefore fails.

THIRD GROUND OF APPEAL – FAILURE TO USE MOST UP-TO-DATE INFORMATION

159. The third ground of appeal is that the Tribunal failed to comply with the duty to act on the basis of the most up-to-date information available.

160. The Appellant was given leave at the hearing to read an affidavit of Salmaaan Shah, the Appellant's solicitor. Mr Shah exhibited a copy of a Country Information Report on Pakistan from the Australian Department of Foreign Affairs and Trade (**DFAT**) dated 20 February 2019 (**2019 report**) which he obtained online. He deposed that DFAT periodically published such reports on its website (including in early 2019) for use by the public.

161. The 2019 Report is dated just under two months before the date of the Second Tribunal Decision.

162. The Appellant contends that rather than relying upon the most up-to-date information in the 2019 Report in its decision, the Tribunal instead relied upon an earlier report from DFAT dated 1 September 2017 (**2017 Report**). In doing so, the Appellant contends that the Tribunal made a reviewable error.

Legal principles

163. The Appellant relies upon the decision in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[87] to contend that the Tribunal was under an obligation to act on the basis of the most up-to-date information. Mason J said there that a decision-maker is required:

> "... to make his decision on the basis of material available to him at the time the decision is made. That principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker."

Consideration

164. There is nothing in *Peko-Wallsend*, nor in the scheme of the Act, that imposes on the Tribunal a continuing obligation to search out any and all further evidence during the course of their consideration of an application. Whilst it is true that the obligation

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[87] (1986) 162 CLR 24 at 45 per Mason J

rests on the Tribunal to act on the most up-to-date information *available to it*, that is different to imposing a requirement on the Tribunal to actively seek out further third-party information throughout the course of its consideration of a matter. Were that the case, the Tribunal would be effectively hamstrung in performing its function, being constantly obliged to obtain new information as it is brought into existence – whether by DFAT or other governmental entities such as the United States of America State Department - and, in accordance with its obligations of procedural fairness, to share that information with applicants and to give them an opportunity to respond to each piece of new and relevant information.

165. There is no such obligation upon the Tribunal imposed by the law or by the terms of the relevant legislative scheme.

166. In any event, the Appellant has not pointed to any actual or even potential prejudice to the Appellant through the Tribunal's use of the 2017 Report rather than the 2019 Report.

167. The third ground of appeal therefore fails.

CONCLUSION AND DISPOSITION OF THE APPEAL

168. For the reasons set out in this judgment, the Appellant has failed to make out each of his three grounds of appeal.

169. 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.

SUPREME COURT OF NAURU

JUSTICE MATTHEW BRADY

6 December 2022