HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M53/2022
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN: **QYFM**

Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Respondent

Administrative Appeals Tribunal

Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: **This outline is in a form suitable for publication on the internet**

Part II: Outline of propositions the Appellant intends to advance

Ground 2

1 *The observer.* Justice must be done and be seen to be done: ***Charisteas*** *v Charisteas* (2021) 393 ALR 389 at [21] 393. This requires a judiciary that is independent and impartial and is seen to be independent and impartial; whether the court is seen to be independent and impartial requires a viewpoint from the public whose confidence must be maintained: *Charisteas* at [21] 395. The observer maintains that viewpoint.

2 *The salient facts.* The observer's focus is the performance by Bromwich J of two roles: (1) appearing, as Commonwealth Director of Public Prosecutions (**DPP**), in the Victorian Court of Appeal (**VSCA**) on 12 August 2014; (2) sitting, as a member of the Full Court below, on 17 August 2021. The salient facts are in the Core Appeal Book, the Appellant's Book of Further Materials and the Chronology.

3 The observer would understand that: the prosecution had been instituted and conducted by the DPP (without knowing whether this was Bromwich J) (*Director of Public Prosecutions Act 1983* (Cth) (**DPP Act**), s 6(1)(a)); the trial had been carried on by the DPP, by junior counsel (DPP Act, s 15(1)(a)(i) and (e)); the jury delivered a guilty verdict, and QYFM was sentenced by the County Court to 10 years' imprisonment, with a non-parole period of 7 years; this enlivened the power to cancel his visa under the *Migration Act 1958* (Cth) (**Migration Act**), s 501(3), (6) and (7); and on 24 May 2014, Priest JA had given leave to appeal because he was attracted to one of the grounds.

4 On 12 August 2014, in the VSCA, the observer would see the DPP appear in person for the Crown (DPP Act, s 15(1)(c)), with junior counsel who conducted the trial, and make oral submissions, following which the appeal was dismissed. The observer would be left with the impression that the DPP stepped in, in person, to successfully advocate dismissal of the appeal, from the conviction obtained on prosecution by the Office of the DPP.

5 On 11 December 2014, s 501 of the Migration Act was amended: the Executive had to cancel QYFM's visa, as the consequence of his conviction and sentence, unless the cancellation was revoked. The Executive, and the Administrative Appeals Tribunal on review, refused to revoke the cancellation. He sought judicial review, which "secures a basic element of the rule of law": *Plaintiff S157/2002 v Cth* (2003) 211 CLR 476 at [5]. Having secured legal representation, he appealed on new grounds of jurisdictional error.

6 On 17 August 2021, Bromwich J sat on the appeal as a member of the Full Court.

7 *Incompatibility of roles*. The causal connection between the two proceedings is such that the Full Court could not be seen by the public to be independent, with Bromwich J sitting. As DPP, his Honour performed the prosecutorial function of the Executive, in maintaining the conviction obtained on prosecution by his Office, which resulted in the visa cancellation. As Federal Court judge, he was called on to supervise the legality of the decision by the Executive to not revoke that cancellation. A rule precluding performance of incompatible roles does not give rise to the same concerns about abuse as more usual apparent-bias cases, because it turns on objective facts and is avoidable.

8 The maxim that a person cannot judge their own cause, or be party to it (***Dickason*** *v Edwards* (1910) 10 CLR 243 at 259.6), ensures the court is and appears to be independent: ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [60], [62]. The law developed separate principles of apprehended bias. The two categories overlapped. In ***Dimes*** *v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759, Lord Campbell (at 793) extended the maxim beyond "judge and party" to apply "to a cause in which [the judge] has an interest". *Dimes* required automatic disqualification for pecuniary interest (*Dickason* at 259), until *Ebner*, where pecuniary interest was re-categorised as requiring apprehended-bias evaluation. *Ebner* rejected the extension of the maxim from "party" to "interest", leaving the "party" category where there was "incompatibility" of roles.

9 ***Isbester*** *v Knox City Council* (2015) 255 CLR 135 involved role incompatibility requiring a special application of the *Ebner* test, in which the second step was answered by a presumption: *Isbester* at [49]. This effected a confluence between the impartiality concerns of apprehended bias and the independence concerns of role incompatibility.

10 Where prosecutor and defendant in the first proceeding are judge and party in the second, and the second has arisen from the outcome of the first, the judge must be disqualified. That proposition is consistent with *Isbester* and *Williams v Pennsylvania* (2016) 136 S. Ct. 1899, and with the outcome of *Eastman v Chief Executive Officer of the Department of Justice and Community Safety (No 2)* [2010] ACTSC 13. It is also consistent with the outcome where there was no connection between the two proceedings, including *McCreed v The Queen* (2003) 27 WAR 554; *R v Garrett* (1988) 50 SASR 392.

11 *Perception and recollection*. This Court must determine ground 2 for itself: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, [68]. For the reasons in the Appellant's written submissions at [59]-[60], Bromwich J's recollection or perception should be given no or little weight.

Ground 1

12 The appeal below was required by ss 14, 24 and 25 of the *Federal Court of Australia Act 1976* (Cth) to be heard and decided by the Full Court, constituted by three judges sitting together. The Full Court could not be constituted in a way that did not ensure the fact and appearance of independence and impartiality: *Ebner* at [79]-[82], [116]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29]. If the circumstances precluded Bromwich J from sitting, that affected the authority of the Full Court, which therefore had a duty to determine the question: *Re Nash (No 2)* (2017) 263 CLR 443 at 450; *R v Federal Court of Australia Ex p WA National Football League* (1979) 143 CLR 190 at 215-216. If the authority of the Full Court is affected where role incompatibility exists for one of its members, then the Full Court must decide, not the individual member. There is no compelling policy reason against that legal conclusion; if anything, the policy arguments favour it.

13 December 2022

Emrys Nekvapil

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