HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA **M53/2022**

MELBOURNE REGISTRY

BETWEEN:

QYFM

Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

First Respondent

Administrative Appeals Tribunal

Second Respondent

APPELLANT'S NOTE ON COMPARATIVE CASE LAW

PART I – CERTIFICATION

1. This note is in a form suitable for publication on the internet.

PART II – SUBMISSIONS

2. This note responds to the First Respondent's note dated 20 January 2023 (**RN**) concerning the identification of United States (**US**) and Canadian authorities.

3. During argument, Gageler J asked "within the mass of American case law, can we find a useful discussion of the principles applicable in the marginal case … ?"[1] The Chief Justice then asked, "could you provide a note directed to the question posed by Justice Gageler with respect to the United States authorities and the Canadian authorities, looking for that sort of statement of how one approaches the question in the marginal area".[2]

4. The Appellant's short answer is that those authorities do not assist in providing a clear statement of a "general rule"[3] for resolution of the present case, or cases in any margin in which the present case sits. The closest statement in the US authorities is in ***Williams v Pennsylvania***,[4] relied on by the Appellant, where the majority said that "there is an

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1 *QYFM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2022] HCATrans 217 (13 December 2022) at lines 2585–2588.

2 *QYFM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2022] HCATrans 217 (13 December 2022) at lines 2630–2634.

3 RN, [3]. See *Jenkins v Bordenkircher* 611 F 2d 162 (1979) at 166–167; *Jenkins v Bordenkircher* (1980) 446 US 943; *R v Goodpipe* (2018) SKQB 189 at [12].

4 136 S.Ct. 1899 (2016).

impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case".[5] That the earlier involvement need not be in the present proceeding is shown by the facts of *Williams*. However, that statement does not fill in the rule for determining what would constitute "significant, personal involvement", or what would be a "critical decision regarding the defendant's case". As Thomas J observed in dissent, there was no "single case" in which Chief Justice Castille acted as both prosecutor and adjudicator.[6] However, the dispositive principle proposed by the Appellant, where the personal involvement as prosecutor secured a conviction that then directly gave rise to the subsequent proceeding, is consistent with both the approach and the holding of the majority in *Williams*.

5. The Minister, not having identified any rule that might assist this Court in adjudicating the present matter, proceeds in RN to further develop the argument made at the hearing, by analogy to US and Canadian cases. The Appellant submits that this mode of reasoning would not assist the Court in determining the present matter, because of differences in the content and context of the dispositive test applied in those jurisdictions.

6. In the US, the dispositive test is drawn either from constitutional considerations or statute.

7. As to constitutional considerations, the dispositive test, cited and applied in *Williams* at 1905 ("whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." ' ") was derived from ***Caperton*** *v A.T. Massey Coal Co*.[7] As the majority explained in *Williams* (at 1903), *Caperton* held that recusal was required where "the likelihood of bias on the part of the judge ' "is too high to be constitutionally tolerable." ' ").[8] That is a demanding test. The Supreme Court has repeatedly reiterated that "most matters relating to judicial disqualification [do] not rise to a constitutional level".[9] Thus the

5 136 S.Ct. 1899 (2016) at 1905.
6 136 S.Ct. 1899 (2016) at 1916.
7 129 S.Ct. 2252 (2009).
8 See, more recently, *Rippo v Baker* 137 S.Ct. 905 (2017) at 907; *Isom v Arkansas* 140 S.Ct. 342 (2019) at 343.
9 *Caperton* 129 S.Ct. 2252 (2009) at 2259, quoting *FTC v Cement Institute* 333 US 683 (1948).

US Constitution requires recusal only in an "extraordinary situation",[10] such as pertained in *Caperton* and *Williams*.

8. Below the high constitutional bar sit a variety of statutory provisions governing disqualification or recusal for apprehended bias, including, in particular, 28 USC §455. These turn on their own text, context and purpose.

9. As Edelman J observed during argument, the context in which these principles have been developed and applied includes a criminal justice system that operates, at least in relation to procedure, in some fundamentally different ways to the criminal justice system in Australia.[11]

10 10. Thus, the US dispositive tests, arising in a different constitutional and statutory context, are not sufficiently similar to the test described in ***Ebner*** *v Official Trustee in Bankruptcy*,[12] as applied in *Isbester v Knox City Council*,[13] to provide a secure foundation for analogical reasoning of the kind the Minister invites.

11. In Canada, the test is "…what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[14] The underlined words demonstrate that this is a different, more demanding, test than that stated in *Ebner*, imposing a higher threshold more akin to that stated in *Reg v Gough*,[15] itself rejected
20 in *Webb v R*.[16] For that reason, it is not clear that *Wewaykum Indian Band v Canada*[17] would have been decided the same way in Australia, applying the *Ebner* test. Nor does that quite different factual case assist with the resolution of the present appeal.

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10 *Caperton* 129 S.Ct. 2252 (2009) at 2265. And see, eg, for a routine application of the test as applying only to extraordinary situations, *United States v. Richardson* 796 Fed. Appx. 795 (2019) (4th Cir) at [IIA].

11 *QYFM v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2022] HCATrans 217 (13 December 2022) at lines 2595–2599.

12 (2000) 205 CLR 337 at [6].

13 (2015) 255 CLR 135 at [47].

14 *Yukon Francophone School Board v Yukon* [2015] 2 SCR 282 at 295, quoting Grandpre J's dissent in *Committee for Justice and Liberty v National Energy Board* [1978] 1 S.C.R. 369 at 394 (emphasis added).

15 [1993] AC 646.

16 (1994) 181 CLR 41.

17 (2002) 2 SCR 259.

12. Finally, in each jurisdiction, the dispositive test is applied against a strong presumption of judicial impartiality,[18] which is inapposite to the test in *Ebner*, as recently applied in *Charisteas v Charisteas*,[19] and should not now be adopted by this Court.

13. Alternatively, to the extent that the Court does find some assistance in the US cases, there is some authority for the proposition that active engagement in "any way in the prosecution and conviction of [an] accused" is sufficient for disqualification in "any matter which involves that conviction".[20]

14. Similarly, where the subject matter giving rise to the controversy remains the same, certain courts in the US have required disqualification despite the related matters shifting between the civil and criminal jurisdictions,[21] or criminal and family (divorce) jurisdictions.[22]

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E NEKVAPIL SC
emrys@vicbar.com.au
+61 401 001 249

N BOYD-CAINE
nick.boyd.caine@vicbar.com.au
+61 466 121 632

C J FITZGERALD
chris.fitzgerald@vicbar.com.au
+61 447 832 023

Counsel for the Appellant

18 *Wewaykum Indian Band* (2002) 2 SCR 259 at [76]; *Williams v Pennsylvania* 136 S.Ct. 1899 (2016) at 1910 (Chief Justice Roberts, with Justice Alito, dissenting, quoting *Withrow v Larkin* 421 US 35 (1975)).

19 (2021) 393 ALR 389.

20 *Banana v State* (1994) 638 So 2d 1329; [1,2]; *Ryals v State* (2005) 914 So 2d 285, [9]; *Overstreet v State* (2009) 17 So.3d 621. The subsequent matters "involving" the conviction in those cases were motions for post-conviction relief. See also *Miller v State* (2010) 94 So 3d 1120 at 1124 (affirming the reasoning of the dissenting judge below: "The trial judge's error cannot be solely because the matter involved different cause numbers. Disqualifying prior participation occurs even in different cases if the underlying substantive matters in controversy were the same and involved the same parties. Disqualification due to participation in the same 'matter' includes matters like other proceedings, investigations and claims. It does not require the participation to be in the same case or cause number").

21 *Rushing v City of Georgiana* (1978) Ala 361 So 2d 11. The petitioner had previously been prosecuted by the judge (as circuit solicitor) for manslaughter of a person who had attempted to arrest the petitioner. The subsequent proceeding was a civil claim to recover damages for personal injuries allegedly incurred when the petitioner attempted to defend that same arrest. The Court found: "Even though the earlier case was a criminal prosecution…whereas the present case is a civil action…is the difference in the parties and the nature of the controversy material to the judge's relationship to both? We think not…": at 12.

22 *Barnes v State* (1904) 83 SW 1124.