IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 72 OF 2019**

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **CNY17**
Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT

PART I FORM OF SUBMISSIONS

1. We certify that these submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The central issue of principle in the case is whether apprehended bias can vitiate an administrative decision in circumstances where the decision-maker is given potentially prejudicial, ultimately irrelevant material but is required by the relevant statute to consider that material. The first respondent submits that, as a matter of principle, no reasonable apprehension of bias arises in such circumstances.

3. The first respondent also submits that the material in issue in the present case was not such as to give rise to a reasonable apprehension of bias in any event. The key points in that material were necessarily before the Immigration Assessment Authority (**IAA**) as a result of having been disclosed by the appellant; and the material (even taken as a

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whole) was not such as would lead a reasonable lay observer to fear that the IAA would be diverted from deciding the issues before it on their merits.

4. The first respondent does not accept that decision below raises a concern about whether there is a separate "threshold" of prejudice in the sense of a minimum level of prejudice for bias to be made out (compare the appellant's submission (**AS**) at [2]). The "level" of prejudice in the material was relevant to the question of whether the material before the IAA might give rise to a fear in the mind of the reasonable fair-minded observer that the IAA might not decide the case on a neutral evaluation of the merits.

5. The procedural fairness question raised in the notice of appeal and identified at AS [4] does not add to the issues in the case. Properly understood, it is merely a potential mechanism to avoid an apprehension of bias in some circumstances. It appears to be put in that way by the appellant. In any event, there is no basis to assert a requirement on the part of the IAA to seek comments, either as a part of the bias enquiry or the hearing rule. The statutory framework stands contrary to such a suggestion.

6. In respect of the proper approach to the Secretary's duty, under s 473CB(1)(c) of the *Migration Act 1958* (Cth) (**Act**), the first respondent submits that it is not the role of the Secretary to form a final view about the relevance of material to the case – that is a matter for the IAA as the decision-maker. Further, it will rarely, if ever, be an error under s 473CB(1)(c) for the Secretary to provide *more* material than is required, as distinct from *omitting* material that might be relevant. Certainly, in the present case, no error in the IAA decision could follow independently from the Secretary's decision under s 473CB(1)(c).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

7. Notice under s 78B of the Judiciary Act 1903 (Cth) is not required.

PART IV FACTS

8. In large part, the facts as set out by the appellant can be accepted, though the first respondent highlights some further detail.

9. The first respondent accepts what is said at AS [7]-[13], though there is some additional detail in the form the appellant completed that is relevant.

9.1. In completing the form, the appellant disclosed that he had been found guilty or convicted of an offence for breaking a window, and that there may be "further updates" on the case.

9.2. He also disclosed that after the death of his friend on Christmas Island, he had been charged with another offence for spitting at an officer and breaking a window.[1] His form also disclosed that he had been living for a period at a prison.[2]

10. The appellant appears to accept that the November incident (the spitting incident) also involved rioting or "protests" on Christmas Island, which information was also before the delegate and IAA (see AS [10]).

11. It appears from the documents in the Appellant's Book of Further Materials (**ABFM**) that the appellant's disclosure prompted the Department to seek updates on the criminal charges from the Commonwealth Director of Public Prosecutions. The Prosecution Report was provided in response.[3] The information in that document was referred to by the delegate, who said:[4]

> Information held by the Department indicates that on 26 February 2016 the applicant was convicted of intentionally destroying or damaging property belonging to the Commonwealth or any public authority under the Commonwealth. As a result of this conviction the applicant was placed on a 6 month good behaviour bond and also required to pay restitution of $820.60 to the Commonwealth and a security of $500.00.

12. That information did not ultimately play a role in the delegate's decision to refuse the protection visa, because of his primary finding that the appellant was not owed protection obligations.

13. The first respondent accepts the facts set out at AS [16], and also accepts that a range of documents, largely originating within the Department, were provided to the IAA with the review material. The first respondent does not accept the summary of these documents at AS [17]. This is discussed in the context of argument at [41] below.

14. The first respondent accepts that the Departmental documents were not at any stage in the review provided to the appellant. However, as will be discussed, significant parts of

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1 ABFM 102.
2 ABFM 112.
3 ABFM 45-46 and 48-49.
4 ABFM 134-135.

the material in those documents replicated or arose directly from information supplied by the appellant.

15. As alluded to at AS [18], there is a lack of evidence as to precisely what material was before the delegate when he made his decision (as distinct from material that was only provided later with the review material). The point was not in issue in the Federal Circuit Court. When it arose in the Full Court, the first respondent sought to clarify the situation by adducing fresh evidence, but the appellant resisted that course and the evidence was ultimately not accepted.[5] In any event, the first respondent submits that, to the extent the point is relevant, the appellant bore the onus; and that an inference is available from the existing documents that all of the material complained about was before the delegate. At no point prior to the hearing in the Full Court did the appellant suggest differently.

16. The first respondent accepts that the material now complained about was not ultimately relevant to the decision of the IAA, and that the IAA had regard to the material as disclosed in its decision.[6] The first respondent does not accept that the material was prejudicial or, to the extent it was, that it was prejudicial to the extent that, in all of the circumstances, it might lead a fair-minded lay observer to think that the IAA might not consider the matter on the merits of the case.

PART V ARGUMENT

17. The first respondent submits that an understanding of the specific statutory context of this case, as well as its unique facts, is critical to its proper disposition.

The statutory scheme

18. To apply for a protection visa, the applicant was required to complete and submit an application.[7] The application form included a requirement to disclose criminal charges pending and any offences for which the applicant had been found guilty. As discussed above, the applicant duly completed that form.[8] It follows that, at least to some extent,

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5 At [112]-[115] CAB 94; [138] CAB 100-101 (Moshinsky J).

6 At [2], CAB 7.

7 Section 45 of the Act, with s 46(4) and regulation 2.07 and Schedule 1 of the *Migration Regulations 1994* (Cth).

8 See ABFM 102.

the statutory scheme presupposes that an applicant will provide information about themselves that might be described as prejudicial. This is material that will be before both the Minister (or his delegate) making the initial decision, and the IAA.

19. In making his decision, the delegate was required to take into account all of the information in the application form.[9]

20. The appellant was a "fast track applicant" within the meaning of s 5(1) of the Act. Accordingly, the refusal of his application was a "fast track decision"[10] and, in this case, a "fast track reviewable decision".[11] The refusal was required to be referred to the IAA "as soon as reasonably practicable after the decision is made".[12] This operates as a mechanism designed to result in automatic review of the delegate's decision.[13]

21. Aspects of the statutory scheme applicable to the IAA's decision-making were discussed in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*.[14] The following matters are worth highlighting for the purposes of this case.

22. By s 473CB of the Act, the Secretary was required to give to the IAA "review material". The material was to be given at the same time as the referral or as soon as reasonably practicable thereafter.[15] The content of what the Secretary had to provide as part of the review material is important in this case. Section 473CB(1) relevantly required the Secretary to give the IAA:

> (a) a statement that:
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> (i) sets out the findings of fact made by the person who made the decision; and
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> (ii) refers to the evidence on which those findings were based; and
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> (iii) gives the reasons for the decision;
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> (b) material provided by the referred applicant to the person making the decision before the decision was made;
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> (c) any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;

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9 Section 54 of the Act.

10 Section 5(1) of the Act.

11 Section 473BB of the Act.

12 Section 473CA of the Act.

13 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 at [15] (Gageler, Keane and Nettle JJ).

14 (2018) 353 ALR 600, at [6]-[38].

15 Section 473CB(2).

23. Section 473DB(1) provides that, subject to Part 7AA, the IAA "must review a fast track reviewable decision referred to it under section 473CA **by considering the review material provided to the Authority under s 473CB**" (emphasis added), without accepting or requesting new information and without interviewing the referred applicant. As discussed by this Court in *Plaintiff M174*, Part 7AA also allows for the IAA to get "new information" in certain circumstances and provided certain requirements are met.[16]

Grounds of appeal

24. Although the argument of the appellant is not structured by reference to the grounds advanced in the Notice of Appeal, there is value in dealing separately with the broad arguments raised by those grounds. The first respondent will deal first with the argument about apprehended bias (grounds 1 and 2), then with the procedural fairness argument (ground 3), then with the argument about the decision of the Secretary under s 473CB(1)(c) (ground 4), to the extent it has not already been dealt with by grounds 1 and 2. It is not apparent that ground 5 adds anything to grounds 1 and 2, and it will not separately be addressed.

Grounds 1 and 2 – apprehended bias

25. Neither party asks this Court to reconsider the test for apprehended bias. The parties accept that the question is whether the fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question to be decided.[17] This case turns on the application of that test and the role of the statute and the appellant's actions in considering whether bias arises.

26. Apprehended bias does not arise in a vacuum. The statute provides the framework for the assessment of bias, in a number of respects.[18] As Spiegelman CJ has said, "The

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16 Sections 473DC and 473DD of the Act. See also *Plaintiff M174* (2018) 353 ALR 600 at [23]-[34].

17 Court below at [124] CAB 97 (Moshinsky J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Isbester v Knox City Council* (2015) 255 CLR 135 at [21]-[23] (Kiefel, Bell, Keane and Nettle JJ). See also *Re Refugee Tribunal; Ex parte H* (2001) 179 ALR 425 at [28] (Gleeson CJ, Gummow and Gaudron JJ).

18 See Court below at [22] CAB 70 (Mortimer J); [124] CAB 97 (Moshinsky J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at [27]-[28] (Gleeson CJ, McHugh, Gummow and Hayne JJ); [56]-[62] (Kirby J); *Builders' Registration Board of Queensland v Rauber* (1983) 47 ALR 55 at 57-58 (Murphy J), 65 (Wilson and Dawson JJ), 71-72 (Brennan J), 79-80 (Deane J).

statute must be part of the assessment from the outset and not treated as some kind of qualification of a prima facie approach."[19]

27. The statutory scheme takes on particular importance in this case having regard to the broad taxonomy of apprehended bias (described by this Court as a convenient frame of reference[20]) set out by Deane J in *Webb v R.*[21] Relevantly for this case, Deane J's fourth category was "disqualification by extraneous information", which arises "where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias." In the context of this case, this formulation draws attention to:

27.1. what is the "extraneous information"; and

27.2. whether that information is "inadmissible".

28. In the context of the fourth category, these questions should be seen as part of the first step to be taken in applying the bias rule.[22] That is, as part of identifying what it is that might lead a decision-maker to decide a case other than on its factual and legal merits, the Court should identify what material is said to give rise to an apprehension of bias in the particular case and whether, in the statutory and common law context, the relevant material is "extraneous" and "inadmissible". If it is, then the Court proceeds to the second step, to ask whether there is a logical connection between the relevant material and the feared deviation from the merits. But if the material is properly before the decision-maker – and *a fortiori* if the statute positively requires it to be considered – there can be no reasonable apprehension that advertence to the material might cause a departure from required standards of decision-making.

29. This approach accords with authorities in which apprehended bias has been said to arise from the receipt of extraneous material. The question as to "admissibility", whether under the common law or as prescribed by statute, has been considered at least implicitly in the authorities about the receipt of extraneous information. For example, in *Re JRL; ex parte CJL*,[23] relied upon by the appellant, all members of the Court considered the legislative provisions governing the role of the court counsellor who had

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19 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at [6].

20 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

21 (1994) 181 CLR 41 at 74.

22 *Isbester* (2015) 255 CLR 155 at [21] (Kiefel, Keane, Bell and Nettle JJ); see also Gageler J at [59].

23 (1986) 161 CLR 342.

approached the Judge,[24] and noted that she had gone beyond her statutory remit. Gibbs CJ said at 349 that there was nothing in the relevant provisions "to entitle the court counsellor to interfere in the judicial process or to entitle a judge to receive a private communication from a court counsellor". Mason J said at 355 that the counsellor's actions were "not authorized by the Act or the Rules". Brennan J said at 369 that "in the absence of any statutory provision authorizing the counsellor to approach the judge, it was improper for her" to take the action she did. The counsellor's actions were (at 370) "incompatible with the intention of Parliament".

30. The material given to the Court, initially in secret, was material that the court counsellor was not authorised to give. The material given by the counsellor was outside of her statutory role and "inadmissible" in the relevant sense.[25]

31. Turning then to the facts of the present case, the assertedly prejudicial material was all material that the IAA was *required* by s 473DB(1) to consider. It consisted of material:

    31.1. given to the Department by the appellant as part of the application process, therefore coming within s 473CB(1)(b);

    31.2. set out in the decision of the delegate, therefore within s 473CB(1)(a); and

    31.3. otherwise provided by the Secretary pursuant to s 473CB(1)(c).

32. Regardless of the character of the information received, the IAA was required to consider it under the statutory scheme. The first respondent submits that this immediately takes the material outside of the fourth category in *Webb* – it was not at any stage "inadmissible" so far as the IAA was concerned.

33. Two further matters are relevant to this point. First, as will be discussed later, even material not strictly relevant to a decision of an administrative decision-maker might still be relevant in the broad sense of forming part of the background.[26] Material of that kind would not be inadmissible.

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24 At 348-349 (Gibbs CJ); 353-355 (Mason J); 363-364 (Wilson J); 369-370 (Brennan J); 372-373 (Dawson J).

25 See also *Kirkland v Tippett* [2000] TASSC 94 at [19].

26 For example, *Tankey v Adams* (2000) 104 FCR 152 at [124] and [126]

34. Secondly, simply because the IAA had to *consider* the information given to it, that did not mean that the IAA had to (or did) *take it into account.*[27] It was for the IAA, as the decision-maker, to decide what material was and was not relevant to the issues it had to decide. But in the context of the statutory scheme, the fair-minded lay observer would not have apprehended bias from the consideration of material as required by the statute.

35. To the extent that any of the material given to the IAA was outside s 473CB(1)(b) or (c), and truly extraneous and inadmissible, the second step of the bias test requires the Court to consider whether the material could logically cause a decision-maker to deviate from a neutral evaluation of the merits of the case. The first respondent submits that the majority below was correct to hold that it would not.

36. *First*, it was appropriate for the Court to consider how prejudicial the material was.[28] Contrary to the appellant's argument, this was not to import a threshold or additional standard into the bias test. Rather, it was a component considered by the Court in determining whether the fair-minded observer would apprehend that the IAA might depart from the merits of the case.[29] The less prejudicial the material, the less strong the basis for any perceived risk of deviation from the merits of the case. Indeed, the same may be said of relevance: the less relevant the material, the less apparent the connection between the material and an apprehension of bias.

37. *Secondly*, and similarly, the majority did not, as asserted by the appellant, create a legal abstraction enquiring into the mind of the IAA. Rather, their Honours were engaged in the task of assessing how the material, assessed against the statutory and factual context of the case (which the fair-minded observer was taken to know), might lead to a view that the case might be decided other than on its merits. That entailed understanding the role of the IAA and the decision-makers within it, just as courts reviewing accusations of bias against judicial decision-makers have always taken account of the fact that the decision-maker is a judge, with all of the implications of that role.[30] The attribution of

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27 Court below at [135] CAB100 (Moshinsky J). See also *O'Sullivan v Medical Tribunal of New South Wales* [2009] NSWCA 374 at [33]; and, in a different context, *Director of Public Prosecutions (Cth) v Kamal* (2011) 248 FLR 64 at [67]-[68] (Martin CJ); [206] and [208] (Buss JA).

28 See *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29 at 34; *O'Sullivan* [2008] NSWCA 374 at [24].

29 The reasons of Thawley J at [170] CAB 111-112, for example, show this was precisely what the majority were doing.

30 As, for example, in *Re JRL* (1986) 161 CLR 342 at 347 (Gibbs CJ), 350 (Mason J), 364 (Wilson J), 373 (Dawson J); *Amoe* (1991) 66 ALJR 29 at 34; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 102.

relevant knowledge to the fair-minded observer, and consideration of the materials, were necessary to the task being performed by the Court below.

38. *Thirdly*, to assert, as the appellant appears to do, that bias arises merely because prejudicial information made its way into the hands of the IAA, (i) fails to grapple properly with the second step of the application of the bias test; and (ii) fails to take account of the fact that irrelevant and potentially prejudicial information is often placed before decision-makers.

39. In respect of the first proposition, the appellant's submissions proceed on the basis that an unstated "affect" of the prejudicial material on the IAA, possibly subconsciously, is enough to show that the IAA might not bring an impartial mind to the decision. That is insufficient.[31] The question is, why would the material bear on the mind of the decision-maker? Mortimer J sought to grapple with the point at [66] in greater detail. However, the first respondent submits that the reasoning of the majority on this point should be preferred (at [135], [156], [162]-[163], [173]). On evaluation of the material (see further [41] below), there was no reason to connect the material in the hands of the IAA to a fear that the case might not be decided neutrally on the merits.

40. In respect of the second proposition, both judicial and administrative decision-makers routinely have inadmissible and potentially prejudicial material placed before them. And such decision-makers routinely set that material aside as not relevant to the case before them.[32] It should not be assumed that an administrative decision-maker is unable to set irrelevant material aside – there is no reason to think that judicial officers have a monopoly on that capacity.[33] It was well within the capacity of the IAA in this case to consider, but set aside, the material complained about.

41. *Fourthly*, the majority below was correct to find that the additional information given by the Secretary to the IAA in this case would not give rise to a concern in the mind of the fair-minded observer that the IAA might not approach the case on its merits. Considering the material in the order it appears in the ABFM:

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31 To the extent that the appellant relies on the reasons of Griffith J in *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at [75], it is respectfully submitted that his Honour was wrong.

32 *Amoe* (1991) 66 ALJR 29 at 34.

33 *O'Sullivan* [2008] NSWCA 374 at [31]; *AMA16* (2017) 254 FCR 534 at [5] (Dowsett J); *Holmes v Mercado* (2000) 111 FCR 160 at [63]; *Crowley v Holmes* (2003) 132 FCR 114 at [36].

41.1. The statement in ABFM 6 about "not engaging" with the appellant was not a statement specifically about the appellant, but about all detainees then at Casuarina Prison. There was no express reason given, but it appears to relate to the intention to move some of the detainees to a country prison. It is difficult to see how this general statement could impact the decision-making of the IAA.

41.2. At ABFM 14-15, there appears a chronology relating to the appellant. As raised by the appellant in these proceedings, the chronology notes:

41.2.1. The appellant was "no longer of interest to Det Intel", which seems to be positive in character.

41.2.2. The appellant had been interviewed by the National Security Monitoring Section. However, the mere fact of an interview with that section does not say anything about the content of the interview or the reason for it. In the context of the document, there was no reason a fair-minded observer would infer from it anything that would lead to an apprehension of bias.[34]

41.2.3. There had been an incident at the detention centre – which was plainly the incident referred to by the appellant himself where he spat at a guard after the death of his friend[35] – after which he was transferred to Casuarina Prison. This was before the IAA from the appellant's material.

41.2.4. There were ongoing investigations into the riot (or "incident" as described by the appellant in submissions). It was not stated that the appellant himself was under investigation.[36]

41.2.5. The appellant had a history of aggressive and/or challenging behaviour when engaging with the Department, possibly due to his frustration at being held in detention and/or his mental health issues. As Moshinsky J noted, the appellant's mental health issues were before the IAA in the

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34 See Moshinsky J at [170] CAB 111-112.

35 At ABFM 102.

36 See also ABFM 35, 58.

appellant's own material.[37] Beyond that, in context, the majority below were correct to hold that this was not material that would lead a fair-minded observer to apprehend that the IAA might not decide the matter neutrally.

41.3. At ABFM 35 (and 58), there is a reference to the appellant still being in prison, and the Superintendent ABF recommending that he remain there "until AFP finalise their investigation into the Christmas Island riot". It is not clear why that recommendation was made, but the document does not suggest it was based on any perception that the appellant was a threat. Rather, it conveys the sense that his return might in some way impinge on the investigation.

41.4. In several places, the material refers to the fact that the applicant was facing criminal charges in respect of his participation in a riot.[38] The comments went no further than to note the charges and, in brief, the circumstances to which they related. This was something that the appellant had himself already disclosed.

41.5. At ABFM 57, in the context of the Department's history of considering bridging visas for the appellant, there was a reference to the appellant being involved in several incidents. However, contrary to the appellant's submission at [17(e)], nothing prejudicial can be inferred from this. There is no suggestion that he was rejected for a bridging visa because of the incidents.

42. The first respondent submits that, to the extent that this information went beyond what had been supplied by the appellant), it could not have caused a fair-minded lay observer to think the IAA might not decide the case on the merits.

43. *Fifthly,* there is no reason to elevate the import of the material because of the source of that material – in this case the Secretary. As will be discussed further in Ground 3, it was not the role of the Secretary to determine what the IAA would (or should) ultimately consider to be relevant. Section 473CB is part of the mechanism for the automatic referral of fast track reviewable decisions to the IAA.[39] Its function is to ensure that all relevant material held by the Department is before the IAA, which may then take its own view as to the relevance of material given to it (and may of course

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37 At [168] CAB 110-111.

38 ABFM 37, 42, 46

39 See *Plaintiff M174/2016* (2018) 353 ALR 600 at [15].

also seek further information, including from the applicant, through ss 473DC-473DF). Inclusion of a document in the review material therefore does not convey any official view as to its significance. This was accepted by Thawley J in the majority below at [176] and his Honour's analysis should be preferred by this Court. (Moshinsky J did not address the point; Mortimer J found to the contrary.)

44. The importance of the source of the information is not elevated because the primary rule for the IAA's review is to consider the matter based on the review material without any further information (under s 473DB(1)). If anything, this would tend to lead the Secretary to provide a broader range of information, to ensure that the IAA is comprehensively supplied with information, thus allowing for a greater prospect that review on the papers can take place.

45. Contrary to AS [53]-[54], the situation of the court counsellor in *Re JRL* is entirely different. The court counsellor was an officer of the court, tasked with the function of providing a report in the nature of an expert opinion that became evidence in the case. The function of the Secretary here, in contrast, is simply to provide a cache of documents as required by s 473CB(1), the contents of which may or may not be considered relevant to the review by the IAA.

46. *Sixthly*, and similarly, there was no reason in this case to impugn the Secretary's decision to provide the material, and the applicant has never sought directly to challenge the Secretary's decision. As will be contended in response to Ground 4, to the extent that the appellant relies on Federal Court authority to the effect that the IAA's decision can be vitiated by an error under s 473CB(1), all of those cases concerned a *failure* to provide critical information. That puts them immediately apart from the circumstances of this case, where the appellant argues that *too much* information was given. There is no question, in those circumstances, of a "fraud" on the IAA (cf AS [36]).

47. *Finally*, there was no reason, in this case, to find that the IAA was *required* to seek the appellant's comments on the material. This will be discussed further in response to Ground 3, but for present purposes it may be observed that, contrary to the submission at AS [56], there is no common law requirement to invite comment on allegedly prejudicial material. *Re JRL*, cited by the appellant, does not stand for that proposition. Some members of the Court in that case considered that the effect of receiving

extraneous, inadmissible material might be overcome by disclosing the fact and allowing for submissions to be made about the issue. That is as far as the point goes; and it is plainly not relevant if (as submitted above) the material in question is neither inadmissible nor prejudicial to any significant degree. In the present case, there was no call to seek comments, especially given that (as the appellant continuously asserts) the material was not ultimately relevant to the IAA's function.

Ground 3 – procedural fairness

48. The appellant's argument on this issue is in tension with the submissions on apprehended bias.[40] For the purposes of those grounds, the appellant contends that the material provided by the Secretary was "objectively irrelevant" and should never have been provided. However, that objective irrelevance would tend to obviate the need to seek the applicant's comments upon it. It would be sufficient for the IAA simply to set it aside – as the first respondent says it did on this occasion. Beyond that, the appellant's arguments must fail for the following reasons.

49. *First*, to the extent that this ground raises an argument that the extraneous and prejudicial character of the material necessitated the IAA seeking the applicant's comment, such an argument adds nothing to the bias argument. (That may also be discerned from the intertwined nature of the appellant's written submissions on these grounds.) It is, in essence, directed only to the idea that to avoid bias, the IAA should have sought the appellant's comments. For the reasons already given, there was no bias in the scheme and no necessity to seek comment.

50. *Secondly*, any suggestion of an obligation to seek comment is directly contrary to the statutory scheme. Section 473DA(1) states that Subdivision A of Division 3, together with ss 473GA and 473GB, codifies the IAA's natural justice obligations. This Court has already observed that the "primary rule" of the scheme is that the IAA will consider the review material without seeking further information or interviewing the applicant.[41] And while it may be accepted that ss 473DC, 473DD and 473DE "admit of exceptions" to that rule,[42]

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40 See, for example, Moshinsky J below at [141] CAB 141.

41 *Plaintiff M174* (2018) 353 ALR 600 at [22].

42 *Plaintiff M174* (2018) 353 ALR 600 at [22].

50.1. s 473DA(2), which is part of the statement of the natural justice hearing rule for fast track matters, provides that nothing in Part 7AA requires the IAA to *give* to a referred applicant any material that was before the Minister when the Minister made the initial refusal decision (as it can be inferred the allegedly prejudicial material was in this case); and

50.2. there is no suggestion in any authority that the language and structure of Part 7AA could impose a freestanding *obligation to seek comments* in respect of allegedly "prejudicial" information.

51. *Thirdly,* the plurality in *Plaintiff M174* considered, at [27], a scenario where the review material contained information that was not before the Minister or delegate at the time of making the decision. It was said that such material would become new information if and when the IAA considered the material to be relevant. At that point, s 473DD would need to be met and obligations under 473DE might arise. In this case, the first respondent submits that the Court can infer that the departmental material was before the delegate and so the scenario is not apposite. In any event, the point contemplated by the plurality was never reached in this case. There is no suggestion in the decision that the IAA considered the material to be relevant and the appellant submits positively that it was not. In these circumstances, even if the material was otherwise capable of constituting "new information" (eg if it was not before the delegate who made the decision), no occasion arose for applying the test in s 473DD or for seeking comment under s 473DE.

52. *Fourthly,* the applicant's submissions in respect of s 57 at AS [43] do not assist the Court. The premise of the plurality's discussion in *Plaintiff M147* at [48]-[49], that the material not before the delegate was relevant, was fundamental. The material in this case was not relevant. For the same reasons, the references to *Applicant VEAL*[43] and *Re JRL* are inapposite. In *Re JRL*, as discussed, the danger was that the court counsellor's views were of relevance and comments made in the absence of the parties may have swayed the judge's mind. That is fundamentally different to this case, where the material was not relevant to the decision to be made. And in *Applicant VEAL*, although the Tribunal did ultimately set the material to one side, it was potentially directly

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43 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88)

relevant to the decision to be made and to the interests of the applicant, enlivening duties of procedural fairness.

53. Further, the practical outcome of the submissions at AS [43] is that the IAA would be required to seek comments from the applicant in every case where irrelevant but arguably prejudicial material was provided to it, even if the IAA agreed that the material was irrelevant. On the applicant's case, that would be the only way to cure the possibility of subconscious bias. For the reasons already given, that approach is counter to the statutory scheme in a number of respects.

54. *Fifthly*, insofar as the appellant seeks to rely on the Privy Council decision in *Kanda*,[44] the comments of the Board are not helpful in this case because their Lordships' primary concern was Mr Kanda's constitutional right to procedural fairness. There is nothing in that judgment supporting the existence of a common law "requirement" for an invitation to comment on prejudicial material in all circumstances – whether as a part of procedural fairness or bias. And in any event, any such requirement would be of no assistance given the extensive and restrictive statutory framework in this case.

Ground 4 – the decision of the Secretary under s 473CB(1)(c)

55. Four matters should be noted at the outset:

55.1. First, all members of the Full Court concluded that it was open to the Secretary to provide the information complained about to the IAA.[45]

55.2. Secondly, as noted by Mortimer J below (at [2] CAB 64), the appellant has never sought to impugn directly the decision of the Secretary to provide the materials to the IAA. The first respondent submits that Mortimer J was correct below when her Honour said that to attack this decision, the grounds would need to be differently formulated.

55.3. Thirdly, whether material was before the delegate who made the decision is not determinative of whether it properly comes within s 473CB(1)(c). That paragraph refers to material in the possession of the Secretary which he or she considers (at the time of referral) to be relevant.

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44 *Kanda v Government of Malaya* [1962] AC 322.

45 Moshinsky J at [133] CAB 99 and [149] CAB 102-103; Mortimer J (at [2] CAB 64) and Thawley J (at [152] CAB 104) both agreed with Moshinsky J.

55.4. Fourthly, as set out in [15] above, direct evidence was not led as to what material was before the delegate when he made his decision. The first respondent submits that an inference is available that all of the material complained about was before the delegate. That flows most obviously from the delegate's reasons at ABFM 134-135. Those comments disclose detail of one relevant incident that goes beyond what was provided by the applicant and accords with the material obtained by the Department. The inference is also supported by the fact that the material was sought by Departmental officers for the purpose of making the decision. There would be no value in the material if it were not provided to the decision-maker. The appellant bears the onus on this issue, if it matters, and that onus has not been met.

56. Two questions then arise: (i) was there a basis for impugning the Secretary's decision? And (ii) if so, what is the consequence for the IAA decision?

57. In respect of the *first* question, the starting point should be that any material that was before the original decision-maker could *prima facie* be considered relevant to a reviewer.[46] Even if material on a file (prejudicial or otherwise) might not obviously be relevant to the final decision, it is possible that such material could be considered relevant as matters of background.[47] This reflects the proposition that it is for the IAA, and not the Secretary, to decide the ultimate relevance of any material before it to its decision. The Secretary should not second guess or pre-empt the matters that the IAA might think to be relevant, but should leave it to the IAA to consider and deal with material provided as appropriate.

58. The statutory scheme strongly supports this broad view of "relevance" for the purposes of s 473CB(1)(c). Sections 473CA, 473CB and 473FA(1) (amongst others) emphasise speed and efficiency of the transfer of cases and materials, and of decision-making. In that context, it is understandable that a broader view of relevant documents might be taken. Even if the Court might now take a different view of the relevance of the

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46 *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1 at [64]; *Cummeragunja Local Aboriginal Land Council v Nicholson (No 2)* [2017] NSWSC 1248 at [64]-[65].

47 See, by way of example, *Holmes v Mercado* (2000) 111 FCR 160 at [54]-[57]; *Tankey v Adams* (2000) 104 FCR 152 at [124]; *Crowley v Holmes* (2003) 132 FCR 114 at [28], [32], [35]-[36].

materials, with the benefit of legal submissions, that is not a basis to impugn the Secretary's view.[48]

59. Further, as has been discussed, the primary rule is for the IAA to consider the materials provided by the Secretary and to give its decision on the papers. In that framework, in general, it is preferable for the IAA to have as much information before it as possible.

60. The Federal Court authorities cited by the appellant at AS [36], to the extent that they assist the Court, tend to support the proposition that the Secretary should take a broader, not a narrower view of relevance. In *EVS17 v Minister for Immigration and Border Protection*,[49] the issue was, as the appellant recognises, the omission of a document in the review material provided to the applicant. That makes it fundamentally different to the present case and of limited assistance to the Court.

61. Where relevant material is omitted, the ability of the IAA properly to carry out its review function may be stultified. (That proposition would remain subject to the need for any omission to be material.) But the same is not true of a situation where *additional* information is provided. The IAA can simply set the additional material to one side if it regards it as irrelevant or not probative (and if the material is mistakenly regarded as relevant, jurisdictional error is likely to follow). *EVS17* supports the view that, to avoid any risk of omitting a document that is relevant, a broad view of relevance should be taken for the purposes of s 473CB(1)(c).[50]

62. In respect of the *second* question, being the consequences for the IAA's decision, as has been noted, the IAA is required to consider the review material, but is not required to take any particular part of it into account. The relevance of material and the weight to be given to it (if any), is a decision for the IAA. Thus, even if the Secretary infringes s 473CB(1) by the *over-provision* of information, it is difficult to see how that error could have any impact on the validity of the decision of the IAA. This is to be distinguished from a case of *under-provision*, where it could be argued that non-

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48 See the Court below at [149] CAB 102-103 (Moshinsky J).

49 [2019] FCAFC 20. The same is true for *CQR17 v Minister for Immigration and Border Protection* [2019] FCAFC 61 and *EMJ17 v Minister for Immigration and Border Protection* [2018] FCA 1462.

50 This also follows, for example, from *CQR17 v Minister for Immigration and Border Protection* [2019] FCAFC 61 at [9] (Jagot J).

compliance by the Secretary with s 473CB(1) deprived the IAA of relevant information and thus prevented it from conducting a "review" within the meaning of Part 7AA.[51]

63. To the extent that the appellant seeks to say that the Secretary did not make the decision "on a correct view of the law", that concept does not add to the appellant's argument on this ground. It returns to a question of the potential relevance of material in the Secretary's possession or control, within the statutory scheme. The first respondent submits that, in that context, it was open to the Secretary to provide the information complained about, even if the IAA later considered it not to be relevant. To do so was not in breach of s 473CB(1)(c) and did not lead to jurisdictional error in the decision of the IAA.

PART VI TIME FOR ORAL ARGUMENT

It is estimated that 1.5 hours will be required for the presentation of the oral argument of the first respondent.

Dated: 2 August 2019

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[51] See, for example, *EMJ17 v Minister for Immigration and Border Protection* [2018] FCA 1462 at [41(5)]; *EVS17* [2019] FCAFC 20 at [35].