CNY17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M72/2019)

Court appealed from:	Full Court, Federal Court of Australia [2018] FCAFC 159
Date of judgment:	21 September 2018
Special leave granted:	17 May 2019

The appellant, who is a Faili Kurd from Iraq, arrived in Australia by boat in August 2013 and was detained on Christmas Island. While in detention, the appellant broke a window and was charged with damaging Commonwealth property. He pleaded guilty and was convicted but released on condition that he be of good behaviour for six months and pay reparation. The appellant was involved in a second incident, as a result of which he was charged with spitting at a detention officer and breaking a window. He subsequently applied for a protection visa. His application was refused by a delegate of the first respondent.

The first respondent referred the decision to refuse the visa to the Immigration Assessment Authority ('the IAA'). Amongst the documents given to the IAA by the Secretary of the Department of Immigration and Border Protection ('the documents') were: internal Department emails and other material referring to the appellant having been charged for damaging Commonwealth property; references to the appellant having spent time in a prison; assertions that the appellant was involved in a 'riot', that he had 'a history of aggressive and/or challenging behaviour when engaging with the department', and that he had been involved in 'many incidents while in detention'; and an imputation that he was a national security risk. The IAA affirmed the delegate's refusal to grant a protection visa.

The appellant applied to the Federal Circuit Court for judicial review of the IAA's decision. He contended that, amongst other things, the decision was affected by apprehended bias by reason of the IAA receiving and considering prejudicial material contained in the documents. The Federal Circuit Court rejected this contention and dismissed the application for review.

The appellant's appeal to the Full Court of the Federal Court (Moshinsky and Thawley JJ, Mortimer J dissenting), was unsuccessful. The appellant submitted that, objectively, none of the documents could have had any relevance to whether the appellant's claims, as made in his application for a visa, engaged Australia's protection obligations. Accordingly, all of the documents came within what Deane J in *Webb v The Queen* (1994) 181 CLR 41 defined as the "fourth category" of disqualification by apprehended bias: "*disqualification by extraneous information ... [which] consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias*".

The majority of the Court found that much of the information that the appellant contended was prejudicial was before the IAA in any event, in the appellant's application for a visa and in the reasons of the delegate. While the documents

contained additional information about the appellant, they did not consider the additional information to provide a sufficient basis to conclude that a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made. The information broadly concerned the appellant's conduct while in immigration detention. This was irrelevant to the issues that the IAA had to determine. Although the IAA was required to consider the documents, the fair-minded lay observer would consider it likely that it would put the information aside as irrelevant to its task.

Mortimer J (dissenting) found that the impugned material was legally irrelevant, prejudicial and adverse to the appellant. A hypothetical lay observer might apprehend that the reading and consideration of that material by the IAA might cause the IAA to deviate from a neutral evaluation of the appellant's evidence and of his claims, because of the way that material fixed the appellant with certain characteristics, where those characteristics were capable of affecting both the ultimate question (if he should be granted a visa to be released into the Australian community) and questions along the way (whether he should be believed in what he said in support of his protection visa application).

The grounds of the appeal include:

- In considering apprehended bias, the Full Court erred in finding that materials, correctly found by the Full Court to be not relevant to the review which the IAA would be required to conduct, were not prejudicial, in circumstances where:
  (a) the information conveyed by those materials went beyond the facts disclosed to the first respondent by the appellant (as he was required to do, when he applied for the protection visa), including by going to the appellant's character as assessed by the officers of the Minister;
  (b) those materials were provided to the IAA by the Secretary; and
  (c) the *Migration Act 1958* (Cth) permits the fact of those materials being before the IAA to never be disclosed by any of the Minister, the Secretary or the IAA.