FEDERAL COURT OF AUSTRALIA

CKV16 v Minister for Immigration and Border Protection [2019] FCA 342

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| Appeal from: | *CKV16 v Minister for Immigration & Anor* [2018] FCCA 1449  |
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| File number: |  |
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| Judge: | **BESANKO J** |
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| Date of judgment: | 14 March 2019 |
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| Catchwords: | **MIGRATION** — where a delegate of the Minister for Immigration and Border Protection refused to grant the appellant a Safe Haven Enterprise visa — where the Immigration Assessment Authority affirmed the decision of the delegate — where Authority not satisfied that the appellant would face a real chance of harm by reason of having provided assistance to Syrian refugees in Lebanon — where the Federal Circuit Court of Australia dismissed the appellant’s application for judicial review of the decision of the Authority**PRACTICE AND PROCEDURE** — application for leave to raise new grounds of appeal not raised before the Federal Circuit Court — consideration of the principles governing an application for leave to raise new grounds — where new ground relates to allegation of apprehended bias and is fundamental to the proper execution of the procedure laid down in the *Migration Act 1958* (Cth) **ADMINISTRATIVE LAW** — whether Federal Circuit Court erred in failing to find that the decision of the Authority was affected by jurisdictional error by reason of apprehended bias — where the delegate had before him information from Victorian police about an investigation regarding the appellant’s possible involvement in an offence of attempting to pervert the course of justice — where the Authority had before it the same information by reason of s 473CB of the *Migration Act 1958* (Cth) — where the Authority made no reference to the information in its decision — consideration of the principles governing apprehended bias in the context of administrative proceedings — whether a fair-minded lay observer, acting reasonably, might apprehend that the Authority might have been affected by the information — whether it is necessary for information to be highly prejudicial in order for apprehended bias to arise, or whether it is sufficient that the information is adverse or prejudicial — where the first respondent conceded that the information was irrelevant — where the credit of the appellant was a key consideration  |
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| Legislation: | *Migration Act 1958* (Cth) ss 473CA, 473CB, 473CC, 473DB  |
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| Cases cited: | *Chan v Minister for Immigration and Border Protection* [2018] FCA 1323*CNY17 v Minister for Immigration and Border Protection* [2018] FCAFC 159*Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135*Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136; (2017) 254 FCR 534*Webb v The Queen* (1994) 181 CLR 41  |
|  |  |
| Date of hearing: | 15 November 2018 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 31 |
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| Counsel for the Appellant: | Ms G A Costello with Ms J Katsivas |
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| Solicitor for the Appellant: | Bardo Lawyers |
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| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | DLA Piper Australia |
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| Counsel for the Second Respondent: | The Second Respondent entered a Submitting Notice, save as to costs |

ORDERS

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|  | VID 759 of 2018 |
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| BETWEEN: | CKV16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | BESANKO J |
| DATE OF ORDER: | 14 march 2019 |

THE COURT ORDERS THAT:

1. The appellant be granted leave to raise the grounds in the Notice of Appeal filed on 26 June 2018.
2. The appeal be allowed with respect to Order 1 made by the Federal Circuit Court on 7 June 2018 and that order be set aside and in lieu thereof, the following orders be made:
	1. A writ in the nature of certiorari be issued to quash the decision of the second respondent, Immigration Assessment Authority, IAA reference “IAA16/00305” dated 15 August 2016.
	2. A writ in the nature of mandamus be issued directing the second respondent differently constituted to reconsider and determine the matter according to law.
3. The first respondent pay the appellant’s costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

# Introduction

1. This is an appeal from orders made by the Federal Circuit Court of Australia. On 7 June 2018, the Federal Circuit Court made an order dismissing the appellant’s application for judicial review of a decision of the Immigration Assessment Authority (the IAA) under Pt 7AA of the *Migration Act 1958* (Cth) (the Act). The Federal Circuit Court also made an order that the appellant pay the first respondent’s costs fixed in the sum of $16,000.
2. There are two proposed grounds of appeal, neither of which relate to the grounds of judicial review considered by the Federal Circuit Court.

# Background

1. The appellant is a national of Lebanon. On 28 September 2015, he applied for a Safe Haven Enterprise Visa. On 14 June 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the appellant the visa.
2. The IAA summarised the appellant’s claim for protection as follows:
* He is a national of Lebanon and an ethnic Arab Sunni Muslim. He resided in northern Lebanon’s Akkar District.
* He and his cousin became involved in assisting Syrian refugees. As a consequence of this, Hizballah came to his house and asked his mother about him on multiple occasions. She always said that she did not know where he was. He remained in hiding and departed Lebanon in March 2013. He departed lawfully from Beirut’s international airport on his own passport. Hizballah continue to come to the family home searching for him.
* He fears that if he returns to Lebanon he will be tortured and killed by Hizballah.
* He cannot rely on the Lebanese government for protection because it is controlled by Hizballah.
* Hizballah have a very big network and will find him wherever he goes in Lebanon.
1. The delegate said that he had a number of significant concerns about the credibility of the appellant’s claims to fear harm from Hizballah and that, considered cumulatively, the concerns that he held led him to find that the appellant was not a reliable witness. The delegate found that the appellant’s account of events on which his central protection claims were based was false. The delegate said that, in light of his findings that the appellant was an unreliable witness, and in the absence of independent information to suggest or indicate that the appellant’s circumstances were such as to cause him to be given an adverse profile by Hizballah, he did not accept that Hizballah agents or members continued to visit the appellant’s house several years after his departure and harass his mother daily as the appellant had claimed.
2. It is apparent from the delegate’s reasons that he was aware of the fact that the appellant had been convicted of a serious crime in Australia. He considered whether the appellant would suffer serious or significant harm upon his return to Lebanon by reason of that fact. He did so despite the fact that the matter had not been raised by the appellant in his written claims or during the protection visa interview. The delegate found that there was nothing in the available information which suggested that the appellant would face a real risk of significant harm during encounters with Lebanese authorities upon his return in connection with his conviction in Australia.
3. As I have said, the delegate’s decision was made on 14 June 2016. It appears that the Department was aware that the appellant had been convicted of a serious crime. There are two emails dated 28 January 2016 in the Court Book and I reproduce below the body of each of the two emails:

As you can see from the below email, yesterday [name of the appellant and boat identification] received an outcome in relation to his criminal matters. He has been convicted of assault of a child under 16 yrs and Indecent assault with a child under 16 yrs. A fine has been imposed of $2500.00 and he has been placed on the Sex Offender Register for 8 years. Is it appropriate for your team to progress this case or is this a case for CCRS?

…

I sent an email to you this morning regarding [name of the appellant] as his criminal case was finalised yesterday. However, Vic Police contacted the ABF today as they now wish to speak to him on 03/02/16 to investigate his involvement in a criminal offence. The offence in question is Attempt to Pervert the Course of Justice, which relates the victim to the matters he appeared at Melbourne Magistrates Court for yesterday. Three people have been charged in relation to making contact with the victim and attempting to get her to change her evidence, and they now wish to interview [name of the appellant] in relation to this matter. Once Vic Police advise if they wish to charge or pursue [name of the appellant] in relation to this matter I will let you know.

1. Although it is not entirely clear, the delegate’s reference to a serious crime is a reference to the offence referred to in the first of the two emails.
2. The delegate’s decision was a fast track reviewable decision within Pt 7AA of the Act and it was referred to the IAA. The IAA delivered its decision on 15 August 2016 and the decision was to affirm the delegate’s decision not to grant the referred applicant a protection visa. In the IAA’s reasons, it said that it had regard to the material given to it by the Secretary under s 473CB of the Act. There is no suggestion that there was new information within Subdiv 3, Div 3 of Pt 7AA of the Act.
3. The IAA said that it was willing to accept that over the two or three months leading up to the appellant’s departure in March 2013, he assisted his cousin in delivering food, beverages and gas to Syrian refugees. It accepted that he made deliveries of this kind to Syrian refugees being accommodated in Akkar and also to the Akkar border area for arriving Syrian refugees and also for shipment into Syria. The IAA said that it found it implausible that Hizballah would pursue him in the manner he claimed, making regular visits to his home over a period of two weeks before his departure in March 2013 and continuing to do so up to the present day. The IAA said that it did not accept that the appellant had been pursued by Hizballah at all. It considered that the vague and inconsistent evidence provided by the appellant seriously undermined the credibility of his claim to have been pursued by Hizballah and it did not accept that he had ever been of interest to Hizballah. The IAA concluded that it was not satisfied that the appellant would face a real chance of harm on the basis of his previous activities in providing assistance to Syrian refugees.
4. In [28], the IAA referred to the appellant’s conviction for indecent assault. The IAA said:

I note that on 27 January 2016 the applicant was convicted at a Melbourne Magistrates’ Court of the indecent assault of a child under 16 years. He was fined $2500.00 and placed on the Sex Offender Register requiring him to report to police for 8 years. The applicant does not claim to fear harm on this basis and there is no information before me to indicate that the applicant would be harmed for this reason upon return to Lebanon. I am not satisfied that the applicant would face a real chance of harm on this basis.

1. There is no reference in the IAA’s reasons to the fact that the police were proposing to interview the appellant in relation to a possible offence of attempting to pervert the course of justice. I was informed by counsel for the first respondent that there was nothing in the Department’s file to indicate whether the police interviewed the appellant or took any other action with respect to the matter.
2. The appellant sought judicial review of the IAA’s decision. The grounds of his application related to the assistance which he was or was not given by an interpreter during a hearing before the delegate. The issues involved the adducing of a considerable body of evidence which explains the quantum of the costs order (i.e., $16,000). His application was, as I have said, dismissed by the Federal Circuit Court (*CKV16 v Minister for Immigration & Anor* [2018] FCCA 1449).

# The Appeal to this Court

1. On 26 June 2018, the appellant filed a Notice of Appeal which contained the following grounds:

1. The Federal Circuit Court erred in failing to find that the decision of the IAA was affected by jurisdictional error in that a reasonable observer could reasonably apprehend bias on the part of the IAA.

Particulars

a) The delegate had before him information from a third party, namely information from Victoria Police regarding an investigation with a view to potential future charges (the ‘**adverse information**’), which was relevant to the appellant's credit.

b) The IAA had before it the same adverse information, which was given to the IAA by the Secretary as part of the “review material” under s473CB.

c) The IAA was obliged to consider the adverse material under s473D8(1) because it was part of the “review material”.

d) The IAA in its decision record did not disavow reliance on the adverse information.

e) A fair-minded lay observer who was aware that the IAA had before it the adverse information, did not disclose to the appellant that it had the adverse information and made a decision adverse to the appellant might reasonably apprehend that the IAA had not brought a fair, impartial and independent mind to the determination of the matter on its merit.

2. The Federal Circuit Court erred in failing to find that the decision of the IAA was affected by jurisdictional error in that the IAA’s failure to exercise, or failure to consider exercising, its power to get new information under s473DC of the *Migration Act* was unreasonable.

Particulars

a) The delegate had before him information from a third party, namely information from Victoria Police regarding an investigation with a view to potential future charges (the ‘**adverse information**’), which was relevant to the appellant’s credit and which was not put to the appellant, contrary to s57 of the *Migration Act*.

b) The IAA had before it the same adverse information.

c) The IAA did not exercise its discretionary power under s473DC of the *Migration Act* to get new information from the appellant, by interview or otherwise, including his response to the adverse information.

d) The IAA decision record provides no evidence that the IAA considered whether to exercise its discretion under s473DC and gives no reasons for the failure to exercise that discretion.

e) The failure of the IAA to exercise, or consider exercising, its power under s473DC in the circumstances was unreasonable.

1. There was no challenge in the Notice of Appeal to the Federal Circuit Court’s treatment of the grounds of judicial review raised before it. Neither of the grounds now raised have anything to do with the grounds of judicial review before the Federal Circuit Court.
2. Shortly before the hearing before this Court, the appellant filed an interlocutory application in which it sought leave to rely on “grounds of appeal based on arguments not raised below”. Those are the grounds of appeal set out above. The application by the appellant was supported by an affidavit from the appellant’s solicitor. The appellant was represented by counsel and solicitors before the Federal Circuit Court. It seems that following the decision of the Federal Circuit Court, the appellant sought different legal representation. His new legal representatives “identified” the two grounds set out in the Notice of Appeal.
3. In the first respondent’s outline of written submissions, he contended that the appellant should not be granted leave to raise the new grounds of appeal and, among other arguments, that it should not be concluded that the evidence about the appellant being interviewed in relation to an offence of attempting to pervert the course of justice was irrelevant.
4. It seems that the first respondent reconsidered his position shortly before the hearing of the appeal and at one point it appeared that he would concede the appeal. However, as it turned out, that was not the case. The first respondent did concede the following matters: (1) in light of the strength of the argument in proposed Ground 1, he did not oppose leave to advance that ground; (2) that the evidence about the appellant being interviewed in relation to an offence of attempting to pervert the course of justice was irrelevant; and (3) that I was bound to reject an argument that the appellant’s apprehended bias argument could not succeed unless the Secretary’s decision under s 473CB(1) of the Act that the emails were relevant to the review was invalid. The argument was that if the Secretary’s decision was valid, it could not be said that the IAA’s decision was affected by apprehended bias because of the obligation on the IAA to consider the review matter, including the material which the Secretary considered relevant to the review (s 473DB). I will not go through all of the steps of the argument because I am bound to reject it by reason of the decision of the Full Court of this Court in *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136; (2017) 254 FCR 534 (*AMA16*) (see also *CNY17 v Minister for Immigration and Border Protection* [2018] FCAFC 159 (*CNY17*)). In my opinion, that concession is a correct one (*AMA16* at [78], [89] per Griffiths J; at [99] per Charlesworth J).
5. That leaves me to consider the exercise described in proposed Ground 1e) which the first respondent did not concede. He agreed that it was open to me to reach a conclusion of apparent bias, but he did not concede it.
6. I will grant leave to the appellant to raise the two proposed grounds of appeal and I uphold Ground 1. It seems to me that if leave is justified in relation to Ground 1, then there is no reason not to grant leave in relation to Ground 2. Although the Court should not lightly allow an appellant to raise a new ground of appeal, particularly when the appellant had legal representation before the Court below and there is no suggestion of incompetence, the allegation of apprehended bias is fundamental to the proper execution of the procedure laid down in the Act, and it seems to me, the argument embodied in Ground 1 not only has merit, but should be upheld. There is no need for me to consider Ground 2 which the first respondent submitted should be rejected.
7. In *Webb v The Queen* (1994) 181 CLR 41 at 74, Deane J identified four categories of apprehended bias. The fourth category is disqualification by extraneous information and consists of cases “where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias”. In this case, the Court is considering apprehended bias in the context of administrative proceedings, not judicial proceedings (see *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 at [58]–[59] per Gageler J).
8. In the context of this case, two statutory provisions in Pt 7AA are of major importance. First, s 473CB of the Act sets out the material which the Secretary must provide to the IAA in respect of each fast track reviewable decision referred to the IAA under s 473CA and the time at which that must be done. Paragraph (c) provides that part of the material which must be given to the IAA by the Secretary is as follows:

(c) any other material that is in the Sectary’s possession or control as is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;

The material referred to in paragraph (c) is part of the review material. Secondly, s 473DB(1) provides that, subject to Pt 7AA, the IAA must review a fast track reviewable decision referred to it under s 473CA *by considering the review material provided to the Authority under s 473CB* without accepting or requesting any new information and without interviewing the referred applicant (emphasis added). The IAA’s obligation to review a fast track reviewable decision referred to it under s 473CA is contained in s 473CC(1).

1. In *AMA16*,the Full Court of this Court dismissed an appeal by the Minister against a decision of the Federal Circuit Court to the effect that the IAA’s decision in that case was vitiated by apprehended bias. Griffiths J wrote the leading judgment. The issue of apprehended bias arose by reason of the fact that the IAA had been provided with extraneous and prejudicial information. That information was a Departmental email which stated that the applicant had been charged with assaulting a female in indecent circumstances while being aware that the person was not consenting.
2. Griffiths J noted that the IAA’s reasons were “simply silent” on the relevance or irrelevance of the Departmental email. His Honour said that this circumstance was to be viewed against a background of the plain fact that the Secretary had formed the subjective view that the document was relevant to the review because otherwise it would not have been included in the review material. His Honour said that in fulfilling its statutory function, the IAA must, subject to Pt 7AA, consider the review material provided to it under s 473CB of the Act. His Honour said that these matters were “properly attributable to the fair-minded lay observer” (at [73]).
3. His Honour referred to a submission by the Minister that the mere fact that the IAA was in possession of prejudicial material was insufficient, without more, to give rise to apprehended bias. His Honour said that he did not deal with that submission because the Secretary must have considered that the communications were relevant to the review when he referred the matter to the IAA, and the IAA must have known that to be the case. The IAA is taken to know of the terms of s 473CB(1) which in paragraph (c) refers to any other material considered by the Secretary to be relevant to the review. His Honour noted that the paragraph did not refer to material that the Secretary considered *might* be relevant to the review. His Honour said (at [78]):

… It was, of course, open to the IAA in arriving at its own decision on the referral to take a different view from the Secretary as to the relevance of the material, but its statement of reasons is entirely silent on that matter. As noted above, given the highly prejudicial nature of the material, the fair-minded lay observer, acting reasonably, might apprehend that the IAA may have been affected by the material even subconsciously.

1. As I have said previously, his Honour made it clear that his conclusion did not depend upon a conclusion that the Secretary had exceeded his or her power in giving the material to the IAA.
2. *AMA16* was discussed in *CNY17*. The Court applied the principles in *AMA16*, but the majority reached a different result on the facts.
3. The fact that Victorian police were investigating the appellant’s possible involvement in an offence of attempting to pervert the course of justice and were seeking to interview him was prejudicial information. The offence is a serious one, although it is not being said that he had been found guilty or was guilty of the offence. Furthermore, the information was provided in a context where the Secretary provided information to the IAA, which is not said by the appellant to be irrelevant, that the appellant had been convicted of indecent assault of a child. Nevertheless, it is not the case that the material must be *highly* prejudicial for apprehended bias to arise (*CNY17* at [137] per Moshinsky J); it is sufficient if it is adverse or prejudicial (emphasis added). The information meets that description and it is conceded by the first respondent (correctly, in my view) that the information was irrelevant. This is in a context in which the credit of the appellant was a key consideration. That is apparent from the nature of the claims he made and the delegate’s decision. Not without some hesitation, I have reached the conclusion that, in the circumstances, the fair-minded lay observer, acting reasonably, might apprehend that the IAA might have been affected by the material, even subconsciously.

# Conclusions

1. I will make an order granting the appellant leave to raise the grounds in the Notice of Appeal filed on 26 June 2018. I will set aside the substantive order made by the Federal Circuit Court, but not the order as to costs. In lieu of the first order made by the Federal Circuit Court on 7 June 2018, there should be the following orders:
2. A writ in the nature of certiorari be issued to quash the decision of the second respondent, Immigration Assessment Authority, IAA reference “IAA16/00305” dated 15 August 2016.
3. A writ in the nature of mandamus be issued directing the second respondent differently constituted to reconsider and determine the matter according to law.
4. Having regard to the fact that the appellant has not appealed against the Federal Circuit Court’s decision with respect to the grounds of judicial review advanced before that Court, it seems to me that the order as to costs made by the Federal Circuit Court should stand. I note that a similar course was followed by Yates J in *Chan v Minister for Immigration and Border Protection* [2018] FCA 1323 at [62].
5. The first respondent accepts that he must pay the appellant’s costs of the appeal. That, in any event, is the appropriate order.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 14 March 2019