IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 30 of 2017

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T16/00357, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

SOS 011 Appellant

AND

THE REPUBLIC Respondent

Before:	Justice Freckelton
Appellant:	Ms C Melis
Respondent:	Mr H Bevan
Date of Hearing:	16 April 2018
Date of Judgment:	19 April 2018

CATCHWORDS

Appeal – natural justice – procedural fairness - apprehension of bias – waiver - reconstitution of Tribunal - doctrine of necessity – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 ("the Act") which provides that:

> *(1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.*
>
> *(2) The parties to the appeal are the Appellant and the Republic.*
>
> ...

2. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

> *"Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ..."*

3. Under s 3 of the Act, complementary protection is defined to mean "protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations".

4. The determinations open to this Court are defined in s 44(1) of the Act:

> *(a) an order affirming the decision of the Tribunal;*
> *(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its first decision in respect of the Appellant on 15 March 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 26 September 2014, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

6. On 14 November 2016 Crulci J made orders remitting the matter to the Tribunal for reconsideration.

7. On 9 February 2017 the Appellant was invited to appear before the second Tribunal to give evidence and present arguments. He did so. On 6 May 2017, the second Tribunal delivered its decision again affirming the decision of the Secretary.

8. The Appellant filed a Notice of Appeal with this Court on 2 August 2017, and an Amended Notice of Appeal on 22 January 2018.

BACKGROUND

9. The Appellant is a Pakistani male of Pashtun ethnicity and Sunni Muslim religion from Quetta, Balochistan, Pakistan. He is married and has six children who remain with his parents in Quetta, along with most of his other 13 siblings. The Appellant's father owned a grocery store in Quetta and also owns other properties he rented out. The Appellant worked in his father's grocery store until he set up his own store at about 17 years of age.

10. The Appellant claims a fear of harm on the basis of an imputed anti-Taliban political opinion.

11. The Appellant fled Pakistan in August 2013, and travelled to Australia via Thailand, Malaysia, and Indonesia. The Appellant was taken to Christmas Island and transferred to Nauru for the purposes of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

12. The Appellant attended a Refugee Status Determination ("RSD") interview on 12 April 2014. The Secretary said that, at that interview, the Appellant claimed to have received a threatening phone call from the Taliban on 1 December 2003, demanding that he participate in jihad or pay them money. The Appellant refused and the Taliban threatened to kill him. From this point until 17 December 2003, he continued to receive threatening phone calls. He went to the police but they refused to file a report, and said he should pay the Taliban if he wanted to protect himself.

13. On 21 December 2003, there were two explosions close to his shop. A number of people were injured and the shop was severely damaged. Two days after the explosions, the Taliban called him and claimed responsibility for the explosions. The Taliban continued to threaten the Appellant, and he left Quetta, but returned briefly in 2006 to get married. He then moved to Karachi. During this period he continued to receive threatening phone calls from the Taliban demanding his money and support. The Appellant's father paid the Taliban on two occasions so they would not harm the Appellant. While living in Karachi, the Muttahida Qaumi Movement ("MQM") would come to his grocery store approximately once a month and threaten the Appellant. The Appellant would pay the MQM in fear of his life. In 2010, the Appellant returned to Quetta.

14. The Appellant said that he continued to receive threatening phone calls from the Taliban, and the Baloch Liberation Army ("BLA") then began extorting money from him, and threatened to kill him if he did not pay. The Appellant paid the BLA on two occasions. In addition, in 2012, the Lashkar-e-Jhangvi ("LeJ") and Sepah-e-Sahaba also began threatening him and demanded money. He received approximately six phone calls from these groups, who were working together. He believes that he was targeted because he is a Pashtun and imputed with wealth.

15. In 2012, the Appellant claimed also to have been abducted by the Taliban, held for six days, and assaulted. He said that his father paid them money and he was released. In January 2013, the BLA contacted the Appellant and demanded that

he give them money or he would kill him. In March 2013, the Appellant told the LeJ and Sepah-e-Sahaba that he would not pay them, but the militants told the Appellant they would find him and kill him. In April 2013, he claimed that the Taliban called him and said he must give them money. The Appellant again refused to support them and they threatened to harm him. The Appellant feared for his life and fled Pakistan in August 2013.

16. The Secretary accepted the following elements of the Appellant's material claims as credible:

- The Appellant is a Sunni Pashtun from Quetta, Balochistan;
- The Appellant has been employed as a grocery salesman;
- An explosion near the Appellant's store in 2003 destroyed the store and the goods inside it;
- When the Appellant moved to Karachi from 2006 to 2010 he was extorted on a regular basis.

17. However, the Secretary rejected the following elements of the Appellant's claims as credible:

- The Appellant was ever contacted, threatened or harmed by the Taliban;
- The Appellant was being targeted during the 2003 bomb blast;
- The Appellant was ever contacted by the LeJ or Sepah-e-Sahaba;
- The Appellant was extorted by the BLA or any other group during his time in Quetta.[1]

18. In rejecting the credibility of these claims, the Secretary considered it implausible that the Taliban would demand money from the Appellant over 15 times without asking for a figure as claimed; that the Taliban would plant a bomb outside the Appellant's shop and contact him three days later to advise the Appellant that he had been spared; that the Appellant would continue to receive threats from the Taliban between 2004 and 2006, given his profile and that he moved away from Quetta and changed his telephone number.[2] The Appellant's account of the Taliban demanding he participate in jihad was also inconsistent with country information that the Taliban recruit participants through large salaries, ideological means and protection.[3] The Secretary further questioned why the Appellant would return to Quetta in 2010 if he genuinely thought the Taliban were targeting him,[4] and the Appellant's omission of his alleged abduction by the Taliban in 2012 from his Transfer Interview.[5] In relation to the Appellant's claims with respect to the other militant groups, the Secretary considered it implausible that the Appellant have been subject to extortion from the Taliban, LeJ, Sepah-e-Sahaba, and the BLA simultaneously, and noted country information that the BLA was not involved in extortion.[6]

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[1] Book of Documents ("BD") 78.
[2] BD 75.
[3] BD 74.
[4] BD 76.
[5] BD 77.
[6] Ibid.

19. Having rejected the majority of the Appellant's material claims, the Secretary assessed the Appellant's risk of harm with respect to the surviving claims. The Secretary considered that country information did not suggest that a successful non-Baloch businessman of Pashtun ethnicity would be exposed to a reasonable possibility of harm if returned to Quetta. This was particularly so given that the Appellant had no profile with any Pakistani militant groups.[7]

20. The Secretary concluded that the Appellant's fear of harm was not well-founded, and the Appellant did not attract refugee status. On the basis of the same factual findings made with respect to the Appellant's Convention claims, the Secretary also found that Nauru did not owe the Appellant complementary protection.[8]

FIRST REVIEW BY THE REFUGEE STATUS REVIEW TRIBUNAL

21. The Appellant appeared at the hearing before the first Tribunal on 22 January 2015. On 18 January 2015, the Appellant submitted a new statement, in which he said that the main reason he feared harm from Pakistani militant groups was because his sisters are well-educated and work outside the home, including for non-government organisations.[9] However, he is the one targeted because he was heavily involved in the family business, his father is too old, and his sisters were unmarried.[10] The Appellant said that, since his departure from Pakistan, two of his brothers received phone calls from the Taliban referring to him.[11] The Appellant said this information was not disclosed at the Transfer Interview because it was conducted two weeks after his arrival in Nauru and he was "bewildered" and had difficulty concentrating.[12]

22. At the hearing, the Appellant also reiterated, and elaborated upon, his claims concerning the 2003 bombing, the threatening phone calls from the Taliban, his extortion in Karachi, and being abducted by the Taliban in 2012. The Tribunal accepted that there was a bomb blast in 2003 that damaged the Appellant's shop on the basis of country information and a police report lodged by the Appellant's older brother.[13] However, the Tribunal discounted the Appellant's claim to have been abducted by the Taliban in 2012.[14] As a consequence, the Tribunal said that if the threatening phone calls ever occurred, they did not result in harm.[15]

23. The Tribunal was not satisfied that the Appellant had been targeted for serious harm in the past by reason of his sisters' education and employment or for any other reason, and was not satisfied he would be so targeted in the reasonably foreseeable future.[16]

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[7] BD 79.
[8] BD 80.
[9] BD 154 at [16]-[19].
[10] BD 155 at [26].
[11] BD 160 at [71] – BD 161 at [73].
[12] BD 154 at [11].
[13] BD 221 at [47].
[14] Ibid at [48] – [49].
[15] BD 222 at [50].
[16] Ibid at [51].

24. With respect to the Appellant's claimed fear of harm due to his Pashtun race, and, in particular, being a "wealthy Pashtun", the Tribunal found that the evidence gave no indication that the Appellant was targeted because of his ethnicity, noting that the Appellant's shop was located in a Pashtun area, and many other shopkeepers in the vicinity were also targeted for extortion.[17] The Tribunal was also of the view that the group of "wealthy Pashtuns" constituted a cognisable entity that could be classed as a "particular social group".[18] The Tribunal dismissed the Appellant's claims on these bases, and found the Appellant was not a refugee under the Convention.[19]

25. In the written submissions, and at the oral hearing, the Appellant's representative submitted that, if the Appellant was found not to be a refugee, he should be considered for complementary protection on the basis that the Appellant is very vulnerable to sectarian or general violence in Pakistan.[20] The Tribunal also dismissed these claims, having found that the bomb blast in 2003, and later extortion in Karachi, were isolated criminal acts.[21] The Appellant was also not owed complementary protection.[22]

FIRST APPEAL TO THIS COURT

26. Upon appeal to this Court, the Appellant challenged the decision of the Tribunal made on 15 March 2015. Crulci J made orders remitting the matter to the Tribunal for reconsideration in accordance with the directions that:

    (a) The Tribunal determine the appellant's claim that he is owed complementary protection because he would face harm on account of generalised sectarian and political violence in the context of complementary protection.
    (b) The Tribunal's determination that the appellant, at the time of the decision, did not have a well-founded fear of being persecuted for any Convention reason, is not affected by legal error.

27. Her Honour did not provide reasons for those orders and directions.

SECOND REVIEW BY THE REFUGEE STATUS REVIEW TRIBUNAL

28. On 2 March 2017, the Appellant appeared before the second Tribunal. The Appellant restated that he feared harm prohibited by the international treaties ratified and signed by Nauru from Pakistani militant groups including the Taliban, BLA, MQM, LeJ and Sepah-e-Sahaba. The Appellant claimed to fear this on several bases, including his Pashtun race, his being a wealthy businessman, his political opinion in the perception of these groups, and the fact that his sisters are well-educated and work for NGOs. The Appellant also advanced before the Tribunal for the first time a claim that he would be perceived as an apostate

[17] BD 222 at [52].
[18] Ibid at [54].
[19] BD 224 at [63].
[20] BD 220 at [42].
[21] BD 224 at [66].
[22] Ibid at [67].

because he has lived in a western country, and he will be harmed because of this.

29. The Appellant's representative submitted that the terms of s 22 of the Act require the Tribunal to assess the Appellant's claims *de novo* and disregard the previous assessment of the Appellant's credibility. The Tribunal rejected this submission, given Crulci J's finding that this assessment was not affected by legal error.[23] However, given some factual matters relevant to the complementary protection claims were not the subject of findings by the first Tribunal, and the Appellant provided additional evidence to the second Tribunal, the second Tribunal decided to assess all the Appellant's claims afresh.[24]

30. The Tribunal accepted the Appellant's evidence about his origin, education, his father's grocery shop business, his departure from Quetta in January 2004, his return to Quetta to marry in 2006, his move to Karachi in 2010, his sisters' past employment for NGOs, and the ongoing residence of most of his family members in Quetta.[25] However, with respect to the claims regarding the bomb blast in 2003, his extortion in Karachi by the MQM, and being abducted by the Taliban in 2012, the Tribunal made findings that largely mirrored those of the first Tribunal. The Tribunal also discounted the Appellant's claims to have received repeated threatening phone calls from the Taliban before and after the 2003 bomb blast,[26] and to have been extorted by the BLA following his return to Quetta.[27] Regarding the Appellant's new claim about phone calls received by his brothers, the Tribunal also did not accept that militant groups contacted the Appellant's brothers enquiring about the Appellant.[28]

31. With respect to complementary protection, in light of the finding that the Appellant has not been threatened, harmed or extorted by militant groups in the past, the Tribunal was not satisfied that the Appellant will suffer extortion or harm amounting to prohibited treatment because of his actual or perceived health or because he is a wealthy businessman.[29] On the basis of country information, the Tribunal also did not accept that Pashtuns are targeted by the BLA or other authorities in Balochistan, and found that the Appellant would not be at risk of prohibited treatment because of his race.[30] The Tribunal further considered the risk of generalised violence to the Appellant, and said:

> "*The Tribunal considered whether there is a reasonable possibility that the applicant will be harmed in Quetta as a result of generalised violence not targeted at the applicant. The Tribunal has accepted that two bombs exploded near the applicant's shop in Quetta in December 2003, which also damaged other property and injured other persons. As noted above, the applicant's immediate and extended family remain living in Quetta where they continue to operate their businesses.*

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[23] BD 301 at [24].
[24] Ibid at [25] – [26].
[25] Ibid at [27].
[26] BD 304 at [38].
[27] BD 306 at [47].
[28] BD 305 at [42].
[29] BD 308 at [61].
[30] BD 309 at [66].

DFAT assesses there to be a moderate level of generalised violence in Balochistan and the Tribunal accepts that to be the case. On the evidence before it the Tribunal does not accept that generalised violence in Quetta is so pervasive as to create a real risk that the applicant would suffer harm amounting to prohibited treatment if returned to Pakistan."[31]

32. The Tribunal also did not accept there was any reasonable possibility of the Appellant being perceived as an apostate because he has a small tattoo on his hand, has become "Westernised" or consumed alcohol in Nauru, and considered that, if returned to Pakistan, the Appellant will take up again religious practices. There was no real risk of the Appellant facing prohibited treatment for these reasons.[32] The Tribunal further dismissed any claim of prohibited treatment because of his wife's refusal to have lump near her breast operated upon, or because of his mental health issues.[33] The second Tribunal therefore arrived at the same conclusion as the first Tribunal, that Nauru does not owe the Appellant complementary protection obligations.[34]

THIS APPEAL

33. The Appellant's Amended Notice of Appeal asserts:

    1. *The Tribunal erred in law by its failure to reconstitute itself entirely on the remittal of the first Tribunal's decision by the Supreme Court of Nauru. This failure amounted to an apprehension of bias amounting to a breach of the rules of natural justice at common law and s 22 of the Act.*
    2. *The Tribunal erred in law by its failure to consider whether the appellant faced a real risk of harm on account of moderate levels of generalised sectarian and political violence in the context of complementary protection.*

34. Counsel for the Appellant advised that the second ground of appeal had been abandoned with notice to the Respondent upon commencement of the hearing.

35. The first Tribunal was constituted of Ms Wendy Boddison, Ms Sue Zelinka and Mr John Godfrey. The second Tribunal was constituted of Ms Boddison, Mr Sean Baker and Ms Alison Murphy.

36. Upon commencement of the hearing, after the Appellant refused to take an oath or affirmation. Ms Boddison explained:

    "... I won't insist that you take an affirmation, but we could take – draw an inference by your failure to take an affirmation. It's just we don't understand why you won't promise to tell the truth, but, if you won't, we can move on."[35]

37. Following a short adjournment to enable the Appellant's representative to discuss the matter with his client, the hearing resumed and the Appellant

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[31] BD 310 at [70] – [71].
[32] Ibid at [74].
[33] BD 311 at [76].
[34] Ibid at [78].
[35] BD 259 at ln 47 – BD 260 at ln 3.

confirmed that he did not wish to take an oath or affirmation. The Appellant's representative submitted to the Tribunal:

> "*... in regards to making a negative inference, I don't think that's actually open to the tribunal based on the legislative structure. So that's our submission at this point in regards to that.*"[36]

38. The Appellant's representatives filed further written submissions dated 22 March 2017 with the Tribunal, in which the representatives addressed the exchange over the Appellant's refusal to take an oath or affirmation, and any adverse inference that could be drawn from this:

> "*The brevity of the correspondence and the Tribunal's readiness to proceed with the hearing would certainly suggest such an inference. However, given the Tribunal's earlier warning of negative inference, it is more likely that the Tribunal had already formed an adverse credibility finding against [SOS 011], yet proceeded to ask its questions. It would then appear that the Tribunal was asking [SOS 011] to answer its questions with the preconceived notion in its mind that [SOS 011] would not be answering truthfully. We submit that such conduct would be in breach of procedural fairness as it would be contradictory to the objective of a merits review proceeding, being that [SOS 011] must be provided with a real, fair and unbiased opportunity to be heard.*"[37]

39. The submissions also addressed the jurisdiction of the Tribunal to make a *de novo* credibility assessment, referring to the directions of Crulci J of 14 November 2016:

> "*While it is not disputed that the First Tribunal's determination in respect of the Refugee Convention grounds are outside the scope of this Remittal Hearing, it is our respectful submission that the Directions do not specifically state nor imply that the entirety of the First Tribunal's factual findings are binding on this Tribunal. To approach this rigid view and conclude that the First Tribunal's factual findings are binding would be counterintuitive to the whole purpose and exercise of a remittal hearing as the Tribunal, relying on and accepting all of the factual findings of the First Tribunal, would inevitably derive at the same conclusion as the First Tribunal without having properly re-investigated the merits of [SOS 011]'s complementary protection claims. We do not believe this would have been the Court's intention by remitting the matter to the RSRT, albeit as a partial remittal.*
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> *Further, we respectfully submit that applying the credibility findings of the First Tribunal in the Tribunal's assessment of [SOS 011]'s complementary protection claims would be an error of law as the Tribunal would be taking into account irrelevant considerations.*"[38]

40. A footnote to these passages of the submissions raises the question of whether Ms Boddison's reconsideration of the review may have been affected by bias:

> "*In this regard, we also respectfully and cautiously raise our concern to the Tribunal that whether Deputy Principal Member Boddison who heard and decided [SOS*

[36] BD 260 at ln 34 – 37.
[37] BD 286 at [17].
[38] BD 287 at [22] – [23].

011]'s appeal matter at the First Tribunal Hearing could objectively re-consider the evidence before the Tribunal with a fresh eye and an open mind."[39]

41. In concluding their submissions on this matter, the representatives said:

> *"Accordingly, we submit that a reassessment of [SOS 011]'s credibility is not outside the jurisdiction or the power of the Tribunal in this matter. Further, such assessment may lead to a different credibility determination on different facts and evidence which we would submit would be consistent with the RSRT's requirement to act according to the principles of natural justice."*[40]

42. The Appellant before this Court submitted that Ms Boddison, who sat on both tribunals as Presiding Member, may be found by a fair-minded and reasonably well-informed observer to be unable to bring an impartial and unprejudiced mind to the review.[41]

43. The Appellant also raised the question of whether a "reconstituted" tribunal is actually "reconstituted" where one member participated in the initial review. The Appellant submitted that this question must be answered in the negative where the "rotten apple" principle applies – that the bias of one or more members in a multi-member panel may taint the findings of the other members. The Appellant relied on the statement of Basten JA in *McGovern v Ku-Ring-Gai Council* ("*McGovern*"), that:

> *"In the present case, the two councillors alleged to be partial were present at the deliberations and exercised their votes. Even though their votes were not decisive, their presence, if they were disqualified, may have tainted the proceedings and vitiated the decision."*[42]

44. The Appellant submitted that the High Court has accepted that it may be appropriate to order that a decision be remitted to a differently constituted tribunal where that would be "in the interests of justice".[43] The Appellant submitted that this is usually the case where the first decision-maker has made a finding of credibility, as is the case in relation to the first Tribunal in this case.[44]

45. The Appellant submitted that the Federal Court of Australia authority of *MZZXM v Minister for Immigration and Border Protection* ("*MZZXM*") has factual similarities to the case currently before the Court.[45] The Federal Circuit Court remitted the matter to the Refugee Review Tribunal ("RRT") on the basis that the RRT had failed to address the Appellant's complementary protection claims. The matter was remitted to the same Tribunal member. The Appellant made applications that the Tribunal member recuse herself before and during the hearing, and the member declined to do so. Murphy J of the Federal Court said:

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[39] BD 287 at fn 12.
[40] BD 288 at [28].
[41] Appellant's Submissions at [15].
[42] (2008) 72 NSWLR 504 at [104].
[43] *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [62].
[44] *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [142].
[45] [2016] FCA 405.

> *"In my view the appellant established an appearance of unfairness in Ms Muling proceeding to hear the application on remittal when she expressed a considered view in the first decision that the appellant was not to be believed on significant aspects of his evidence."*[46]

46. The Appellant also drew the attention of the Court to the comments of Murphy J at [113]:

> *"In circumstances where Ms Muling had previously decided that the appellant was not to be believed in relation to matters of significance, it is difficult to avoid the possibility that upon remittal Ms Muling would be predisposed towards the same conclusion regarding the appellant's truthfulness. The observer might legitimately wonder how Ms Muling could bring a mind open to persuasion to the remitted application when she had already reached a considered view that the appellant was not to be believed on important aspects of his claim."*

47. The Appellant accepted that, unlike in *MZZXM*, the Appellant made no application that Ms Boddison excuse herself. However, the Appellant contended that his right to object to the participation of Ms Boddison in the review has not been waived. Firstly, the possibility of waiver is excluded where there has been gross bias.[47] Secondly, some authorities indicate that public interest in a fair hearing prevails over the utility of the concept of waiver.[48] Thirdly, the impact of the bias may not be visible until the final decision is made.[49] The Appellant submitted that, in this case, it was not apparent until the Tribunal delivered its reasons how the Tribunal would deal with previous credibility findings.

48. The Respondent tendered as evidence an affidavit of Ms Rea Hearn Mackinnon dated 27 March 2018, Principal Member of the Tribunal, who stated that she is responsible for:

- scheduling sitting periods of between 8 and 14 days several times each year in Nauru according to the availability of members;
- considering the review applications to allocate to each three-member panel having regard to the length of the sitting period, the need for expeditious decision-making according to the statutory timeframes, the desirability of decisions being made in order of lodgement or remittal from this Court, and whether there is an relationship between the applications;
- where remittals are concerned, considering the basis of the remittal and any directions made by the Court.[50]

49. The Respondent accepted the recitation of the test for apprehension of bias as put by the Appellant. It submitted that a party may acquiesce in the deciding of a case by a particular decision-maker, notwithstanding that the decision-maker may be biased, where the party, assuming knowledge of all the relevant facts, does

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[46] [2016] FCA 405 at [122].
[47] Appellant's Submissions at [24].
[48] *Kennedy v Cahill* (1995) 118 FLR 60; *Aukland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.
[49] See *Johnson v Johnson* ("*Johnson*") (2000) 201 CLR 488 at 517 – 519.
[50] See Respondent's Submissions at [31].

not object to the decision-maker participating in the proceeding.[51] The doctrine of necessity also acts as an exception to the apprehension of bias rule and aims to safeguard statutory processes.[52]

50. The Respondent submitted that a fair-minded lay observer fully apprised of the all the following circumstances would not apprehend any bias on the part of the Tribunal:

    (a) the statutory framework governing the Tribunal and its functions in the conduct of reviews, including on remittal;
    (b) the practical constraints on the Tribunal in terms of the availability of members and travel to Nauru;
    (c) the constitution of the first Tribunal and the first decision including the adverse credibility findings;
    (d) the decision of the Supreme Court, including the orders for remittal and accompanying directions and the fact that the first Tribunal decision was not quashed;
    (e) the next available sitting periods of the Tribunal and its constituent members in each period;
    (f) the appellant's attitude to the scope of the remittal and his position that the second Tribunal was required to consider his claims afresh and was not bound by the earlier Tribunal's credibility findings;
    (g) the constitution of the second Tribunal, including that one member was the same as the first Tribunal;
    (h) the practical circumstances confronting applicants, including the appellant, in Nauru.[53]

51. The Respondent further advanced the argument that, if a Tribunal is to be disqualified every time one member has previously participated in a review in which adverse credibility findings were made, this would be contrary to the requirement to consider each case upon its facts and circumstances. The concept of automatic disqualification would also be contrary to the High Court's finding in *Ebner v Official Trustee in Bankruptcy*.[54]

52. In regards to the Appellant's "rotten apple" argument, the Respondent submitted that Spigelman CJ explicitly rejected the "rotten apple" test in *McGovern*:

> *"It is necessary to allow for special cases, for example, when a particular member of a collegial body has, or has had, particular influence on the other members. Except in such cases, a rotten apple test is not, in my opinion, the approach that an independent observer "might" reasonably adopt in the usual pre-judgment case. Rather a "but for" test should generally be applied, that is, the Court should ask whether or not the person(s) reasonably suspected of pre-judgment decided the outcome."*[55]

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[51] *Vakauta v Kelly* ("*Vakauta*") (1989) 167 CLR 568.
[52] Respondent's Submissions at [63].
[53] Ibid at [65].
[54] (2000) 205 CLR 337.
[55] Ibid at [45].

53. According to the Respondent, the Appellant's submission to the Tribunal, which identified Ms Boddison as a person reasonably suspected of pre-judgment, had the effect of alerting the other Tribunal members to the Appellant's concerns, such that they may be wary of that concern in their decision-making.[56]

54. In conclusion, the Respondent submitted that the Appellant waived his right to object by failing to object to the participation of Ms Boddison despite knowing the second Tribunal was constituted with one member from the first Tribunal, and that the case they were putting forward involved an assessment of the Appellant's credibility.[57] Having regard to the Tribunal's statutory role, functions, and sitting arrangements, the Republic also submitted that the doctrine of necessity applies.[58]

CONSIDERATION

55. There are three matters to be determined in this case in response to the claim by the Appellant that he has been denied procedural fairness:

    (1) whether a fair-minded observer would reasonably conclude that the second Tribunal as reconstituted may be biased;
    (2) if so, whether the Appellant waived his procedural rights by electing not to seek the recusal of the member of the Tribunal who had sat on both the first and second Tribunals; and
    (3) if there is a breach of the bias rule and there has been no waiver, whether the doctrine of necessity permitted the Tribunal to sit as it did.

56. The bias rule has a flexible quality that differs according to the circumstances in which it is exercised. It is affected by the nature of the decision to be made as well as its statutory context, what is involved in making the decision, as well as the identity of the decision-maker.[59]

57. The test for whether a tribunal member is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the tribunal member might not bring an impartial and unprejudiced mind to the resolution of the questions the member is required to decide.[60]

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[56] Respondent's Submissions at [73].
[57] Ibid at [76] – [78].
[58] Ibid at [81].
[59] *Isbester v Knox City Council* [2015] HCA 20; (2015) LGERA 263 at 269 [23] per Kiefel, Bell, Keane and Nettle JJ.
[60] See *Livesey v New South Wales Bar Association* ("*Livesey*") (1983) 151 CLR 288 at 293-294; *Webb v The Queen* ("*Webb*") (1994) 181 CLR 41; *Johnson* at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Isbester v Knox City Council* [2015] HCA 20; (2015) LGERA 263 at 276 [58] per Gageler J; *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [3].

58. The test is objective and remains the contemporary yardstick.[61]

59. The issue is one of important principle because if public confidence in the administration of justice is to be maintained, the perspective of fair-minded and informed members of the public should not be ignored.[62]

60. The assessment involves consideration of whether the decision-maker's role may give rise to an appearance of unfairness. As Allsop CJ observed in *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship*: "The rules to assess whether apprehended bias was present form part of the body of principles, rooted in fairness, and directed to the necessity for executive power to be exercised fairly and to appear to be exercised fairly, in support of confidence in the administrative process, and judicial review of it."[63]

61. The evaluation in this instance needs to take place conscious of the importance of the decision being made by the Tribunal and its potential consequences. The plurality observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*:

> "*The Tribunal enjoys very considerable power over individuals who come within its jurisdiction. In the nature of that jurisdiction, its exercise will sometimes affect the welfare, and even the lives, of the persons involved and possibly those associated with them. The requirements of natural justice in a particular case may vary in accordance with considerations such as the functions and independence of the relevant decision-maker and the importance of the decisions that person makes. By such criteria, members of the Tribunal are, and are expected to be, persons who approach their functions free from disqualifying bias.*"[64]

The plurality went on to express the gravest of concern if procedures adopted by the Tribunal, which is comparable to the Tribunal in Nauru, appeared to be "irretrievably biased", either to the parties or to the ordinary, reasonable member of the community.[65]

62. A comparable point was made by Bingham LJ in *Secretary of State for the Home Department v Thirukumar*: "It is, however, plain that asylum decisions are of such moment that only the highest standards of fairness will suffice."[66] Thus, any significant infraction of the principles of procedural fairness may require appellate intervention.

63. In circumstances where a finding as to credibility has been made in a first set of proceedings, the hypothetical observer may well form a view that the tribunal

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[61] See eg *British American Tobacco Australia Services Ltd v Laurie* ("*British American Tobacco*") (2011) 242 CLR 283 at 306-307 [47]-[48] per French CJ; *McGovern v Ku-Rin-Ggai Council* ("*McGovern*") (2008) 72 NSWLR 505 at [4] per Spigelman CJ

[62] *Webb* at 52 per Mason CJ and McHugh J.

[63] [2013] FCAFC 80 at [2]-[3].

[64] [2001] HCA 23 at [64].

[65] Ibid.

[66] [1989] EWCA Civ 12 at [46].

member will not approach their task a second time with an open mind. As the learned authors, Aronson and Groves, observed in their 5th edition of *Judicial Review of Administrative Action*[67], this will generally occur where the first tribunal has made findings as to the credibility of, for instance, an applicant for refugee status:

> "*The High Court has accepted that courts empowered to order that a decision be remitted to a differently constituted decision-maker should not exercise that power automatically but rather where it is appropriate "in the interests of justice." This protean test is usually satisfied when the first decision-maker has made a finding of credibility, indicated a preference for the evidence of one witness, failed to provide procedural fairness to a party or engaged in some form of conduct or finding that might lead the hypothetical observer to conclude that the original decision-maker might not approach the remitted matter with an open mind.*"[68]

64. Although in some respects it is anomalous, it has been held that the test applies to tribunals that hold their hearings in private, such as the Tribunal in Nauru. As Gleeson CJ, Gaudron and Gummow JJ observed in *Re Refugee Review Tribunal; Ex parte H*:

> "*There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as is the case with the Tribunal, proceedings are held in private.*
>
> *Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias.*" [69]

65. The fictional observer is not to be assumed to have a detailed knowledge of the law or of the character or ability of the tribunal member.[70] The assessment should be undertaken in the context of ordinary tribunal practice and the hypothetical lay observer will be assumed to be properly informed as to the nature of the proceedings, the matters in issue and any conduct the subject of complaint.[71]

66. Kirby J in *Johnson v Johnson*[72] usefully summarised the attributes of the fictitious bystander:

> "*Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstance. The bystander would be*

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[67] Thomson Reuters, 2013, at [9.280].
[68] Applied by Murphy J in *MZZXM v Minister for Immigration and Border Protection* [2016] FCA 405 at [119]-[120].
[69] [2001] HCA 28 at [27]-[28]
[70] *Johnson* at 493 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[71] See *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45 at [37] per Rares and Jagot JJ; *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 per Gleeson CJ, Gaudron and Gummonw JJ.
[72] (2000) 201 CLR 488 at 508 [53].

taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by a single isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." [citations omitted][73]

67. The reasonable observer "is to be presumed to approach the matter on the basis that ordinarily a judge will act so as to ensure both the appearance and the substance of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of prejudgment or bias."[74] The same might be said of a tribunal member.

68. The making of an earlier decision by a tribunal member may provide reasonable grounds to apprehend that the tribunal member may not look critically at the first decision, or treat the additional information which touched on the grounds for that earlier decision with the degree of objectivity required.[75]

69. If the Tribunal "as a whole is affected by the actuality or appearance" of prejudgment, the Tribunal will be precluded from embarking upon an inquiry but "If the Tribunal as a whole is not so affected but some of its members are, those members will, subject again to the possible operation of the rule of necessity, be disqualified."[76]

70. The potential of a person with prior involvement in a decision to contaminate others or at least to be so regarded has been recognised by the appellate courts.[77]

71. On 14 November 2016 Crulci J of this Court made orders remitting the decision to the Tribunal for reconsideration in accordance with a direction that the Tribunal determine the Appellant's claim that he is owed complementary protection because he would face harm on account of generalised sectarian and political violence in the context of complementary protection, and the Tribunal's determination that the Appellant, at the time of the decision, did not have a well-founded fear of being persecuted for any Convention reason, is not affected by legal error.

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[73] Applied by French CJ in *British American Tobacco* at 306-307 [46].
[74] *Livesey* at 299.
[75] See *Gabrielsen v Nurses Board of South Australia* ("*Gabrielsen*") [2006] SASC 199 at [49] per Duggan J.
[76] *Laws v Australian Broadcasting Tribunal* ("*Laws*") (1990) 170 CLR 70 at 91 per Deane J. See too *McGovern* at [47]-[48]; *Gabrielsen* at [55] per Duggan J.
[77] See eg *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

72. At its next sitting the Tribunal constituted itself with the same Principal Member as had presided over the first Tribunal. There was some uncertainty as to the scope of the hearing to be conducted by the second Tribunal and submissions were filed on behalf of the Appellant.

73. The second Tribunal ultimately accepted submissions on behalf of the Appellant that it should reassess all of the Appellant's claims afresh and considered new claims and evidence advanced by the Appellant in relation to the complementary protection issue.

74. In my view the decision by the second Tribunal to reconstitute itself with the same presiding member from the first Tribunal was imprudent, constituted undesirable practice likely to detract from confidence in the independence of the second Tribunal's decision-making, and was in error on the basis that that member had already reached clear views as to the Appellant's credibility. The functioning of the shared presiding member would arouse reasonable concerns in a fair-minded lay observer about the influence that she might wield on the analysis of the material before the Tribunal.

75. In light of the seriousness of the decision and the centrality of a finding of credibility to the Tribunal's decision-making, although the remitted scope of the hearing was limited, I find that a fair-minded lay observer might reasonably apprehend that the Tribunal member shared between the first and second Tribunal might not bring an impartial and unprejudiced mind to the resolution of the questions the Tribunal was required to decide.

Waiver

76. As long ago as 1895, Hood J in *Re McCrory; Ex parte Rivett* identified that it is incumbent upon a party who has a concern about whether the bias rule would be breached to do so to raise that concern promptly:

> "*A litigant who knows (as the applicant did here) that there may be some objection to the constitution of the Bench is bound to mention it at once, in fairness both to the magistrate and to the other side, and even if the objection be a good one the litigant cannot otherwise be allowed to complain if with knowledge he remains silent.*" [78]

77. A similar approach was enunciated in 1985 by the Australian High Court in *Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*:

> "*The law has, in the past, taken a strict view of the consequences of the failure of a party to object to the participation in proceedings by a member of a tribunal who is said to be biased. In some cases it has been held that a party entitled to object to the participation of an adjudicator, disqualified by interest or likelihood of bias, will be deemed to have waved that entitlement, if, being fully aware if the circumstances, he fails to object as soon as is reasonably practicable. In other cases it has been held*

[78] (1895) 21 VLR 3 at 6.

that a party failing to take objection may be refused relief if he seeks a discretionary remedy." [79]

78. The issue was re-examined in the 1989 decision of the High Court in *Vakauta v Kelly*.[80] Dawson J reviewed the authorities and held that "where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it."[81]

79. To similar effect in the same case, Brennan, Deane and Gaudron JJ held that where a judicial officer engages in conduct that is such as to convey to a reasonable and intelligent lay observer an impression of bias:

> "... *a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object.*"[82]

80. In the same case, Toohey J concluded that:

> "*There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way the remarks will be viewed. It will then by for the judge to determine what course to adopt, in particular whether to stand down from the case. ... In any event objection must be taken: see Re McCrory; Ex parte Rivett. ... In the result, when a party is in a position to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased.*"[83]

81. The Appellant and his legal representatives were aware that the second Tribunal included the presiding member from the first Tribunal and that the decision by the first Tribunal had not been quashed. They were also aware that the case that they were advancing incorporated an assessment by the second Tribunal of the Appellant's credibility.

82. However, at no stage did the Appellant or his legal representatives seek that the presiding member in common between the two panels of the Tribunal recuse herself for ostensible bias. The closest that the legal representatives came to canvassing this was in a footnote in submissions filed on 22 March 2017 where they stated in very tentative terms: "we also respectfully and cautiously raise our concern to the Tribunal that whether Deputy Principal Member Boddison who heard and decided [SOS 011]'s appeal matter at the First Tribunal Hearing could

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[79] (1985) 60 ALJR 181 at 182.
[80] (1989) 167 CLR 568.
[81] Ibid at 579.
[82] Ibid at 572.
[83] Ibid at 587.

objectively re-consider the evidence before the Tribunal with a fresh eye and an open mind." This falls a considerable distance short of either a submission that the presiding member should recuse herself for ostensible bias or for an argument advanced in a suitably timely fashion.

83. In these circumstances, the Appellant should be regarded as fully aware of the circumstances and to have made a forensic decision not to raise the issue. This means that he has waived his right to object on this ground later.

The Rule of Necessity

84. Given my finding in relation to waiver, it is not strictly necessary to determine the assertion by the Respondent that the rule of necessity applies. However, for the sake of completeness, the following observations are made.

85. The rule of necessity operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions where, but for its operation, the discharge of such functions would be frustrated – to public or private detriment.[84] It permits a decision-maker to sit when no other decision-maker otherwise could do so.[85] However, the rule is not lightly invoked, given the importance of the absence of actual or apparent bias in decision-making. As Deane J observed in *Laws v Australian Broadcasting Tribunal*:

> "*There are, however, two prima facie qualifications of the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Second, when the rule does apply, it applies only the extent that necessity justifies.*"[86]

86. It is apparent from the affidavits of Rea Hearn Mackinnon, the Principal Member of the Tribunal, dated 27 March 2018 and 12 April 2018, that although the Tribunal consisted of nine members, it would have been inconvenient and costly to constitute the Tribunal with three new members.[87] However, these considerations are not such in this decision-making context as to qualify for the defence of necessity.

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[84] See *Metropolitan Fire and Emergency Service Board v Churchill* [1998] VSC 51 per Gillard J.

[85] See *Dimes v Proprietors of Grand Junction Canal* (1952) 10 ER 301 at 313; see also *Dickason v Edwards* (1910) 10 CLR 243 at 259 per Isaacs J; *Builders Registration Board v Rauber* (1983) 57 ALJR 376 at 385-386, 392 per Brennan and Deane JJ. See too *R v Auctioneers and Agents Committee; Ex parte Amos* (1985) 2 Qd R 518.

[86] *Laws* at 96. See RRS Tracey, "The Doctrine of Necessity in Public Law" (1982) *Public Law* 628.

[87] There was no evidence that the cost would be "enormous" in the overall context or that it was be productive of substantial delay: see *Thellusson v Rendelesham* [1859] 11 ER 172 at 173.

87. Pursuant to s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.

Justice Ian Freckelton
Dated this 19th day of April 2018