# FEDERAL COURT OF AUSTRALIA

## Afegogo v Minister for Immigration, Citizenship and Multicultural Affairs

## [2023] FCA 1128

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| Review of: | *Afegogo and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 4448 |
| File number: | WAD 11 of 2023 |
| Judgment of: | **JACKSON J** |
| Date of judgment: | 21 September 2023 |
| Catchwords: | **MIGRATION** - application for judicial review of decision of Administrative Appeals Tribunal - reasonable apprehension of bias - conduct of hearing before Tribunal - applicant appeared with assistance of interpreter before Tribunal - Minister's closing submissions interpreted in summary form for applicant - Tribunal expressed clear views and concerns which were not interpreted for applicant - conduct of hearing might lead fair-minded lay person to apprehend bias on part of Tribunal in the form of prejudgement - application allowed |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 2A, 33, 34J, 35, 39, 40<br>*Migration Act 1958* (Cth) s 500(6L) |
| Cases cited: | *BMT19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 328<br>*Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 41; [2022] 288 FCR 218<br>*Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577<br>*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337<br>*Galea v Galea* (1990) 19 NSWLR 263<br>*Hong v Minister for Immigration and Border Protection* [2019] FCAFC 55; (2019) 269 FCR 47<br>*Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438<br>*Jatin v Minister for Immigration and Border Protection* [2019] FCA 150 |

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| | *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507<br>*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 273 CLR 506<br>*NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328<br>*Re Refugee Review Tribunal; Ex Parte Aala* [2000] HCA 57; (2000) 204 CLR 82<br>*Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28<br>*SZOAF v Minister for Immigration and Citizenship* [2010] FCA 431<br>*SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 |
| Division: | General Division |
| Registry: | Western Australia |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Number of paragraphs: | 75 |
| Date of hearing: | 7 September 2023 |
| Counsel for the Applicant: | Mr L Pham (pro bono) |
| Counsel for the First Respondent: | Mr CM Beetham |
| Solicitor for the First Respondent: | Minter Ellison Lawyers |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice save as to costs |

# ORDERS

**WAD 11 of 2023**

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| **BETWEEN:** | **MOEILESAMI MOEGATULI AFEGOGO**<br>Applicant |
| **AND:** | **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**<br>First Respondent |
| | **ADMINISTRATIVE APPEALS TRIBUNAL**<br>Second Respondent |

**ORDER MADE BY:** **JACKSON J**

**DATE OF ORDER:** **21 SEPTEMBER 2023**

**THE COURT ORDERS THAT:**

1. The application is allowed.
2. The decision of the second respondent dated 23 December 2022 affirming the decision of a delegate of the first respondent dated 29 September 2022 is set aside.
3. The application for review of the delegate's decision is remitted to the Tribunal, to be differently constituted, for determination according to law.
4. The first respondent must pay the applicant's costs of the proceeding, to be assessed if not agreed.

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

# REASONS FOR JUDGMENT

## JACKSON J:

1 This is an application for judicial review of a decision of the second respondent, the Administrative Appeals Tribunal, to affirm a decision of a delegate of the first respondent (**Minister**) not to revoke the mandatory cancellation of a visa held by the applicant, Mr Afegogo. The sole ground of review is:

> The applicant was denied procedural fairness in that the second respondent's conduct in the course of the hearing on 19 December 2022 gave rise to a reasonable apprehension of bias.

2 For the following reasons, the application will be allowed, the decision of the Tribunal will be set aside, and the matter will be remitted to the Tribunal, constituted differently.

### Background

3 Mr Afegogo was born in Samoa in 1995 and arrived in Australia on 25 May 2021 holding a Temporary Work (International Relations) (Class GD) (Subclass 403) visa.

4 In February 2022, Mr Afegogo was convicted of the offence of 'reckless wounding'. He and the victim were both employed by the same company and were living at the same hotel. On the evening of the offence, Mr Afegogo and the victim had been drinking and got into a physical fight. Later that evening, Mr Afegogo took a bread knife from the hotel's kitchen and went to the victim's room. Mr Afegogo stabbed the victim in the back and under the armpit and caused a laceration to the back of the victim's neck. A doctor who assessed the victim said that the wounds penetrated either into or just through the layer of underlying fat. No critical structures were involved.

5 That is Mr Afegogo's only conviction for an offence in Australia (and there is no evidence suggesting that he had any criminal record in Samoa). He was sentenced to 16 months' imprisonment, and so his visa was mandatorily cancelled by a delegate of the Minister, as he did not pass the character test. Mr Afegogo made representations as to why the cancellation should have been revoked, but the delegate refused to do so.

6 Mr Afegogo applied to the Tribunal for review of the delegate's decision and the Tribunal held a hearing on 19 December 2022. A senior member of the Tribunal presided at the

hearing. The Tribunal's decision to affirm the delegate's decision, with reasons, was published on 23 December 2022.

7 At the hearing in this Court, it was common ground that the reasons of the Tribunal were not relevant to determining whether the Tribunal's conduct of the hearing gave rise to a reasonable apprehension of bias. Although different views about that have been expressed in the High Court, the parties' position appears to be orthodox: see ***Chen*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 41; [2022] 288 FCR 218 at [87]-[90] (Bromberg, Murphy and Markovic JJ). Nevertheless, it is convenient to give a brief description of the reasons by way of context.

8 Applying the mandatory ministerial direction ('Direction No. 90 - Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA'), the Tribunal found that the protection of the Australian community and the expectations of that community both weighed very heavily against revocation of the cancellation of the visa. In relation to the question of the likelihood of Mr Afegogo reoffending, although that was his sole offence, the Tribunal found (para 50):

> The only safe finding is that this Applicant's recidivist risk profile is not capable of now being known and understood with any greater level of certainty than was possible at the time of this most recent removal from the Australian community. It follows that his current recidivist risk profile is now no different from the time of his abovementioned most recent removal.

This seemed to lead the Tribunal to conclude that Mr Afegogo had 'an unacceptable recidivist risk' (para 54).

9 The Tribunal found that the best interests of minor children in Australia carried only slight and non-determinative weight in favour of revocation. Impediments on removal to Samoa and links to the Australian community carried moderate weight in favour of revocation. Those links included a relationship that Mr Afegogo said he had formed with an Australian citizen, Ms Alice Connors and her minor children, whose interests the Tribunal considered. But Mr Afegogo and Ms Connors had only met in person once and he did not know the names of the children, and the Tribunal had evident scepticism about the reality and depth of the relationship.

10 The Tribunal concluded that a 'holistic view of the evidence relevant to the Primary and Other Considerations in the Direction therefore does not favour revocation of the delegate's

decision', and so there was not 'another reason' to revoke the cancellation of Mr Afegogo's visa.

11 The matter turns on the Court's evaluation of the course of the hearing before the Tribunal, so it will be necessary to consider the transcript of the hearing in detail. It is convenient before that to summarise the principles applicable to claims of apprehended bias based on the conduct of a hearing.

**Principles**

12 The fundamental principles are not disputed between the parties.

13 Apprehended bias is an aspect of denial of procedural fairness, which may result in jurisdictional error: ***SZRUI*** *v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [2] (Allsop CJ), [21] (Flick J); *Chen* at [34]; both decisions citing *Re Refugee Review Tribunal; Ex Parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [17]. The test for apprehended bias is whether a fair-minded and appropriately informed lay observer might reasonably apprehend that the decision maker might not bring a fair, impartial and independent mind to the determination of the matter on its merits: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6]; *Chen* at [35].

14 A number of relevant points about the application of that test emerge from the authorities. It should be borne in mind that they '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 the maintenance of confidence in the administrative process, and judicial review of it': *SZRUI* at [2].

(1) The court determines the issue objectively: ***Hot Holdings*** *Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [68] (McHugh J).

(2) It is a test of objective possibility, as distinct from probability: *Re Refugee Review Tribunal;* ***Ex parte H*** [2001] HCA 28 at [28].

(3) Nevertheless, an allegation of apprehended bias must be distinctly made and clearly proved: *Minister for Immigration and Multicultural Affairs v* ***Jia Legeng*** [2001] HCA 17; (2001) 205 CLR 507 at [69] (Gleeson CJ and Gummow J). This recognises that such an allegation must not be too readily acceded to, lest it encourage 'shopping' for a more favourable decision maker: see *SZRUI* at [22] (Flick J, Allsop CJ agreeing).

(4) It is also important to understand that it is not enough to establish apprehended bias that the fair-minded observer might reasonably apprehend that the decision maker has come to the hearing with a tendency of mind or predisposition concerning the issues. 'The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion': *Jia Legeng* at [71] and see also at [72], [186]. See also ***Jatin*** *v Minister for Immigration and Border Protection* [2019] FCA 150 at [9]-[10] (Mortimer J).

(5) When the rule as to apprehended bias is applied outside the judicial system, it must take account of the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings. Regard must be had to the statutory provisions applicable to the proceedings, the nature of the inquiries to be made and the particular subject matter with which the decision is concerned: *Ex parte H* at [5].

(6) One must therefore take account of the fact that the Tribunal's role is inquisitorial and that the Tribunal must investigate the facts for itself: *Chen* at [38]; applying ***NADH*** *of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328 at [19]; see also ***Hong*** *v Minister for Immigration and Border Protection* [2019] FCAFC 55; (2019) 269 FCR 47 at [65] (Bromwich and Wheelahan JJ).

(7) In *NADH* at [19] Allsop J (with whom Moore and Tamberlin JJ agreed) said:

> The Tribunal which has to reach a state of satisfaction may want to test and probe a recounted history. It may have particular matters troubling it for resolution, which require questioning and expressions of doubt which are entirely appropriate, but which if undertaken or said by a judge in open court in adversary litigation might give rise to an apprehension of a lack of impartiality.

See also *SZRUI* at [93] (Robertson J, Allsop CJ agreeing). It can be appropriate for the questioning of an applicant and testing of their claims to be robust and forthright: see *SZOAF v Minister for Immigration and Citizenship* [2010] FCA 431 at [17].

(8) The expression of the Tribunal's views in the hearing can actually enhance the fairness of the hearing. In *SZRUI* at [27], Flick J said:

> [T]he proper expression of tentative views by an administrative decision-maker may actually enhance the fairness of the administrative process by alerting a claimant to perceived deficiencies in the claim being made and affording an opportunity to the claimant to address those perceived deficiencies.

(9) Indeed, an opportunity to be heard may be denied where a claimant is not alerted to matters that the Tribunal considers may be important to the decision and may be open to doubt: *SZRUI* at [25]. At [26] Flick J said:

> An opportunity to be heard, it is thereby recognised, may fall short of a meaningful hearing if a claimant is provided with mere time and access to a decision-maker but with no awareness of the issues which the decision-maker considers fundamental or potentially fundamental to his claim.

(10) Nevertheless, the inquisitorial nature of the Tribunal's process does not give it a licence to trespass on accepted principles of apprehended bias. It is still obliged to act with judicial fairness and detachment: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 (Bowen CJ and Deane J).There will be a line beyond which the inquisitorial method does so trespass, which is to be drawn on findings of fact based on the evidence and circumstances of each particular case: *Jatin* at [11], [14].

(11) Thus the question of whether there is a reasonable apprehension of bias is a factual one which is in the end a matter of impression formed on the basis of all the evidence. Previously decided cases can serve as illustrations, but each case depends on its own facts: see *BMT19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 328 at [38] (Wheelahan J); see also *SZRUI* at [99].

(12) However, while evaluative, the task of determining whether there is apprehended bias does not involve the exercise of a true discretion on appeal: see *Chen* at [41]-[42], where the court was tasked with determining whether the primary judge was right or wrong in his conclusion that the appellant had not established a reasonable apprehension of bias.

(13) The whole of the transcript of the proceedings must be reviewed, rather than sentences taken in isolation, and it is to be approached on the basis that the Tribunal member had read the written materials before him: *SZRUI* at [75].

15 Mr Afegogo's written submissions also usefully set out the following principles, which I accept are correct, concerning relevant features of the Tribunal's function and procedures that are taken to be within the knowledge of the fair-minded observer:

> 19. The fair-minded lay observer is taken to be properly informed of the nature of the proceedings or process: *Hot Holdings* at 459 [68] (McHugh J). Thus, in this case, the question of whether the Tribunal's decision was affected by apprehended bias must be approached having regard to the function that was

being performing by the Tribunal. That function was to review the delegate's decision. The Tribunal's duty was 'to do over again' the delegate's decision as to whether the mandatory cancellation of the applicant's visa should be revoked: *MQGT v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 141 at [41]. The Tribunal had to decide the question for itself and arrive at the correct or preferable decision based on the material before the Tribunal.

20. The nature of the Tribunal's review function was informed by the provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) (***AAT Act***): [*Hong*] at 64-65 [62]-[66] (Bromwich and Wheelahan JJ).

    (a) In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism for review that: is accessible; is fair, just, economical, informal and quick; is proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the Tribunal's decision-making: *AAT Act*, s 2A.

    (b) In general, the Tribunal conducts public hearings: *AAT Act*, ss 34J, 35.

    (c) The Tribunal is obliged to ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present their case: *AAT Act*, s 39.

    (d) The Tribunal has power to take evidence on oath or affirmation: *AAT Act*, s 40. Importantly, however, the Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate: *AAT Act*, s 33.

**The hearing before the Tribunal**

16 While Mr Afegogo relies upon the course of the Tribunal hearing as a whole, there were three aspects of it to which he drew particular attention: the senior member did not require the cross examination of Ms Connors to be interpreted; the nature and level of the senior member's interjections in the Minister's oral closing submissions; and the senior member's omission to require those initial closing submissions and the interjections to be interpreted for Mr Afegogo's benefit or to otherwise raise the concerns expressed by the senior member with him.

17 Only a transcript of the Tribunal hearing was in evidence in this Court. No audio recording was tendered. That is consistent with the disavowal by counsel for Mr Afegogo of any submission that the demeanour or manner of the senior member at the hearing gave rise to a reasonable apprehension of bias. There is no suggestion, for example, that the senior member conducted hearing in a rude, aggressive, sarcastic or overbearing way. The impression that emerges from the transcript is that the senior member was calm and courteous throughout.

It was the content of what the senior member said, in all its context, that formed the basis of the application, not how he said it.

18 At the hearing before the Tribunal, Mr Afegogo appeared in person with the assistance of an interpreter, who appeared to be participating by audio or audio-visual link. Mr Afegogo had no representation by a lawyer or migration agent. As will be seen, it is relevant to the question of apprehended bias that, as far as one can tell from the transcript, Mr Afegogo had no command of English, and was entirely reliant on the interpreter to be able to follow the course of the hearing. The Minister did not contend otherwise.

***Opening***

19 After dealing with an agreed list of exhibits, the senior member then proposed to Mr McLaurin, the solicitor appearing for the Minister, that they proceed by first allowing the 'applicant to say whatever he would like to say by way of opening', then moving to cross examination of the applicant and the applicant's witness, Ms Connors (Tribunal transcript (**ts**) 3). It appears that this exchange with Mr McLaurin was not interpreted for Mr Afegogo's benefit.

20 Then, through the interpreter, the senior member asked Mr Afegogo 'is there anything that you would like to say before we start your evidence?' to which Mr Afegogo replied that he had no questions. The senior member then restated the question, asking 'is there anything he would like to say about his case before we get started?'. Mr Afegogo did not make any substantive comments in response.

***Mr Afegogo's oral evidence***

21 Mr Afegogo was affirmed. Before the Tribunal at that point there were two brief handwritten statements attributed to him (albeit in English). The senior member did not then give Mr Afegogo an opportunity to say anything he wished to say by way of evidence in chief. He said to Mr McLaurin 'it's over to you, now, for cross-examination' and Mr McLaurin then proceeded to cross examine Mr Afegogo. This was conducted through the interpreter. The content of the cross examination is not relevant and so will not be set out in these reasons. At the end of it, the senior member asked Mr Afegogo whether he had anything further to say about the evidence that he had just given, but he did not.

***Ms Connors' oral evidence***

22 Mr McLaurin then cross examined Ms Connors. In this application, Mr Afegogo relies on the way in which this was done in support of the allegation of apprehended bias on the part of the Tribunal; Mr Afegogo did not make any criticism of the way Mr McLaurin took part in the hearing, and nor do I.

23 After Ms Connors was affirmed and had confirmed that the contents of her statement were true and correct, the senior member invited Mr McLaurin to cross examine her. The following interaction then took place (ts 19):

> MR McLAURIN: Thank you, Senior Member. Senior Member, could I just confirm, are we - is the tribunal proposing for my questions and Ms Connors answers to be interpreted for Mr Afegogo?
>
> SENIOR MEMBER: I don't think there's a need for that, Mr McLaurin, necessarily. I can do - I can arrange that, if you think that's optimally procedurally fair for the applicant. I don't know that it necessarily is, but I'm happy to do it if you like, no problem.
>
> MR McLAURIN: No, no. I'm happy to proceed without interpretation, Senior Member. …

24 Mr McLaurin did proceed that way, and the initial cross examination was not interpreted. I say 'initial cross examination' because it was then repeated. When Mr McLaurin had finished the first time, and after the senior member asked Ms Connors if there was anything further she wanted to say (there was not), the senior member then asked Mr Afegogo whether he had any questions for Ms Connors. The following interaction then took place (ts 24):

> INTERPRETER: Mr McLaurin, he wants to know - he does not understand fully what the response from the girlfriend. So he wants to know exactly what is the response from the girl - from the lady.
>
> SENIOR MEMBER: Mr McLaurin, it might be wise to, unfortunately, ask you to repeat all of your questions to Ms Connors, and then they'll have to be interpreted to the applicant so he knows what to ask her. If anything. So could I ask you to re-put your questions, just identical questions in the same sequence, Mr McLaurin, and we'll get Ms Connors' answers and then they can be interpreted for the applicant one by one.
>
> MR McLAURIN; Certainly, Senior.
>
> SENIOR MEMBER: Sorry to put you to that trouble.

25 Mr McLaurin then went through the questions again with Ms Connors though, perhaps inevitably, 'identical questions in the same sequence' were not put. Rather, this second round of cross examination was done in a more summary form than the first. The senior member

asked Mr Afegogo whether he had any questions for Ms Connors and he said he had no questions. The senior member asked him whether he had any more witnesses to call and he said he did not. The hearing was adjourned for an hour and resumed after lunch.

***The Minister's closing submissions***

26 While Mr Afegogo relies on the entirety of the hearing as it unfolded, the course the senior member took during the oral closing submissions made on behalf of the Minister is of particular relevance. Accordingly, it is necessary to set out somewhat extensive quotes from the transcript of the Tribunal hearing. (Minor corrections have been made to the transcript throughout and are not marked.)

27 Immediately on resumption after the luncheon adjournment, the following took place (ts 28-29):

> SENIOR MEMBER: Now, Ms Interpreter, through you could you please tell the applicant that we have reached the part of the hearing where we are summarising what the case is about and how the tribunal is to decide the case depending on the view of the applicant and compared to the view of the respondent, okay? So the respondent, his representative, Mr McLaurin, is of course going to say why the applicant should not get the visa. The applicant should listen to what Mr McLaurin says and then reply with anything he's got to say about why he should get the visa, okay? So please tell him that.
>
> INTERPRETER: Yes. All right, thank you.
>
> SENIOR MEMBER: All right. Mr McLaurin, a couple of options. I'm sure it must be exceedingly irritating for you to have to make closing submissions only to have to stop every so often for your submission to be interpreted. There's a couple of ways we can proceed. I suppose you and I can have the closing submission discussion and then you could repeat that in precis form for the interpreter to interpret to the applicant and then the applicant could reply to the interpreted versions; so that's one way. The second way is for you to go through the painstaking process of saying what you want to say, stopping every so often so that it can be interpreted and then going through your submissions that way. I leave it entirely to you. Either way to my mind is fair to the applicant. Question is there has to be fairness to the person making the submissions and that in this case of course is you. So what would you prefer?
>
> MR McLAURIN: Thank you for those options, Senior Member. I prefer to go through the first option and to (indistinct) my submissions for the tribunal to agitate any questions and issues it has with me and then I will summarise, I suppose, the effect of the submissions for Madam Interpreter to give Mr Afegogo the gist of what I'm saying.
>
> SENIOR MEMBER: That's fine. Since you're following that option, I give you a very broad licence in terms of how you precis your remarks directly to the applicant through the interpreter, okay?
>
> MR McLAURIN: Okay. Thank you, Senior Member.

> SENIOR MEMBER: All right. Now, Ms Interpreter, through you please tell Mr Afegogo that the government's lawyer is going to have a discussion with me about the case and then after that the government's lawyer will, through you, have the same discussion with the applicant; okay?
>
> INTERPRETER: Okay, yes. Okay, thank you very much, sir.

28 Mr McLaurin then commenced his submissions by reference to the considerations which Direction 90 required the Tribunal to take into account. However, shortly after commencing, the senior member cut him off, saying (ts 29):

> SENIOR MEMBER: Mr McLaurin, I've got to tell you. I've looked at this. I understand which ones weigh against him but I'm struggling to find which ones weigh for him and, if they do, to what extent they do. We can go through it as we go but I think it's a pretty clear matter.
>
> MR McLAURIN: Yes.

29 That was followed by this interaction (ts 29):

> SENIOR MEMBER: Yes, there are ones that weigh for him, two in particular, we'll get to those. But they just can't attract much weight.
>
> MR McLAURIN: I would certainly agree with that, Senior Member. And the weight that we would suggest, if any, should be afforded to the considerations; the best interests of the child, the links to the community in particular, should be very minimal if any at all. I suppose it's necessary to go through the protection of the Australian community just to outline the Minister's position about the risk of reoffending in particular given that [is] the primary focus of these matters. So if that's - - -
>
> SENIOR MEMBER: Well, let me assist and we can make it a shorter discussion. If you wish, let's characterise the nature and seriousness of his conduct, right? Let's go straight to the direction, paragraph 8.l.l(l)(a), look at the chapeau at (a). The chapeau at (a) in the third line refers to crimes that are viewed very seriously. So his offending surely falls under (1) under sub-paragraph (a), therefore his offending is very serious. That's my analysis.
>
> MR McLAURIN: I would agree with that, Senior Member. Yes, of course, it was a violent offence with circumstances of aggravation. I needn't rehash the details of it now but I would agree with that analysis entirely.
>
> SENIOR MEMBER: Okay. So none of the four sub-paragraphs under sub-paragraph (b) are captured and the important thing about that is that if you look at the chapeau in paragraph (b), look at the second line, the word 'serious' is mentioned about that type of offending but he, as I understand it, gets no relief under sub-paragraph (b) because none of the indicia of his offending falls under any one of those sub-paragraphs in sub-paragraph H(d) [sic]. So straight up, his offending must be found to be, and can only be, very serious.
>
> MR McLAURIN: Yes, I agree with that, Senior Member.
>
> SENIOR MEMBER: Then we go to (c). He's only received the one sentence of 16 months, on the head to do nine. So you can't actually form a narrative around the

> nature of the sentences he's received and, in any event, we can take into account the sentence that he's received because it's not excluded in 8.1.1(c). You see how it excludes a lot of the other sentences for those categories of offences but it doesn't exclude (a)(i) which is violent and/or sexual crimes. So that can be taken into account but not determinatively so I would suggest. There's no frequency because he's only done the one offence; There's no cumulative effect because there's no sequence of offending; there's no evidence of him providing false or misleading information to the department; and, as best as I know, there's no evidence of him receiving a formal warning in writing from the department under sub-paragraph (g). So what we're left with is paragraphs that militate in favour of a finding of the very serious nature of his conduct and those paragraphs are 8.1.l(l)(a)(i) and 8.1.1 (l)(c) which refers to the nature of the sentences that were imposed on him.
>
> MR McLAURIN: Yes, I would agree with that, Senior Member.
>
> SENIOR MEMBER: Okay. Then we go to risk. Of course that's perhaps the most nuanced part of the discussion so I'm happy for you to talk to that if you like.

30 Mr McLaurin then did have an opportunity to develop his submissions on the subject of the likelihood that Mr Afegogo would reoffend. His submission was that Mr Afegogo's intoxication had contributed to his offending, and that there was an ongoing risk that he would drink to excess again and reoffend in a similar way, particularly because he had gone through inadequate rehabilitative treatment. At this point, the senior member inquired as to whether there was knowledge of any offences committed by Mr Afegogo in Samoa while intoxicated or any alcohol-related misconduct in Samoa. After a short discussion, the senior member and Mr McLaurin concluded was that there was not. This was on the basis of a letter confirming that Mr Afegogo had no record of convictions in Samoa, in relation to which the senior member observed 'we can't reasonably find any misconduct relating to alcohol in his history in Samoa; right?' (ts 32).

31 However, the senior member then said (ts 32-33):

> SENIOR MEMBER: All right. But in Australia I think it's without question that the primary motivating factor behind his offending here was alcohol. I don't think that can be reasonably denied. I think also the evidence around the circumstances of him reaching such a state of intoxication as to almost end the life of the [victim? was], I think, quite spurious and difficult to sustain. I also agree with your submission. I think the evidence around rehabilitation is scant and unconvincing and it's not insignificant when you look at the reality that a magistrate, while dealing with the applicant shortly after him being charged, refused to release him on bail.
>
> I think in all of the circumstances the end point for all of this is that the applicant's recidivist risk is really no different to what it was at the time that he was most recently removed from the community or, put another way, it's incapable of being known with any greater certainty than was known at the time of his most recent removal from the community. So for those reasons, I think the only rational finding that can apply to primary consideration one must be that it attracts a very heavy level of weight or at least a heavy level of weight in favour of refusing the visa.

MR McLAURIN: Yes, Senior Member. I would (indistinct words).

32 After passing over the second primary consideration in Direction 90 as having no application, with which Mr McLaurin agreed, the senior member then said in relation to the third primary consideration, the best interests of minor children (ts 33):

> SENIOR MEMBER: Primary consideration three, when you look at the nature of the relationship with Ms Connors, it's difficult to see any sort of relationship with her beyond, at best, its formative stages. I'm not saying that the relationship is put up to the tribunal as a sham but what I am saying is that they're only at the commencement of their relationship. And the effect of that, for the purposes of primary consideration three, has to surely be, surely be, that whatever relationship the applicant might have with her children is also in its very formative stages. The evidence was pretty clear that he's never met them and the extent of his relationship is a speaking relationship with them on the phone or on FaceTime. I'm hard pressed to find any convincing support for the engagement of the factors at 8.3(4) of the direction and, in any event, where I think the primary consideration three element does not really assist the applicant is that the four children that reside with Ms Connors- well, two are aged over 18 and two will be over 18 in April and June next year. I just can't see how this attracts any modicum of support for him.

33 To which Mr McLaurin said 'I would agree' and added two further comments. The senior member agreed with those comments and said 'So in terms of weight allocable to the applicant pursuant to primary consideration three, it's surely no greater than a slight weight, surely'. To which Mr McLaurin said 'yes, I would support that, Senior Member'.

34 On primary consideration four, the expectations of the Australian community, the senior member said (ts 34):

> … I don't think his violent kind of offending necessarily falls under any of the auspices of 8.4(2) but it is, I think - and you'd agree, wouldn't you - offending that necessarily engages the normative expectation in paragraph 8.4 that the Australian community expects someone with this sort of conviction not to hold a visa to remain here.
>
> MR McLAURIN: Yes, I would certainly agree with that.

35 The senior member then asked whether Mr McLaurin had anything else he wanted to say on primary consideration four. Mr McLaurin then made a point about the weight that was to be given to the consideration, given that Mr Afegogo's offence occurred soon after his arrival in Australia. After that the senior member said (ts 34):

> SENIOR MEMBER: I think your point is this, isn't it, that there's the normative expectation at paragraph 8.4(1) particularly and your submission is that upon an application of the principles appearing in paragraph 5, particularly 5.2(4), of the direction that there are little or no countervailing factors against that normative expectation such that he gets the view. So on that basis he gets no weight under

primary consideration four and the expectation in the Australian community weighs heavily against him one would have to find sure.

MR McLAURIN: Yes, I would support that, Senior Member.

SENIOR MEMBER: Okay. Anything else on PC-4?

MR McLAURIN: No, thank you, Senior Member.

36 Next, the hearing moved to discuss the 'other considerations' in Direction 90. The following exchange ensued (ts 34-35):

SENIOR MEMBER: Okay. Well, then let's go to impediments. He came here as a 27 year old and has not been here for very long and he seems to be at a good age and in a good state of mental and physical health; that's so?

MR McLAURIN: Yes, I would entirely agree with that.

SENIOR MEMBER: All right. And he lived basically all his life in Samoa so I can't imagine substantial language or cultural barriers being experienced by him upon return?

MR McLAURIN: No.

SENIOR MEMBER: And in (c), the social, medical and/or economic support available to him in Samoa. Well, he's lived there basically all his life and he made mention during his evidence of an involvement in a supportive way actually for members of his family through his work. As I understood it, his brother's not the greatest helper for the family but the applicant says that he was. So clearly there's a level of connection-well, at least a social connection - between him and his family in Samoa. And in terms of medical and government economic support, well, he'll be entitled to that to the same extent of whatever's available to other citizens of that country. That washes out, doesn't it, surely?

MR McLAURIN: Yes, that's our submission (indistinct words).

SENIOR MEMBER: All right. So to the extent that any weight can be found for him here, it's either neutral or of very slight weight?

MR McLAURIN: He has claimed that he would face a level of disgrace in his community for returning. But there's not much evidence about that. It's really hasn't been developed by Mr Afegogo so it's only what weight the tribunal would wish to attribute to that. But any economic issues, obviously he gave evidence that he would work at the farm when he returns and care for his parents so there's obviously a role for him both in an emotional sense and an economic sense. So I suppose that the (indistinct) to removal are heavily mediated by those factors. So, yes, neutral or very slight weight in his favour is the appropriate weight to be afforded to that consideration.

SENIOR MEMBER: Okay …

37 After passing over the question of the impact of Mr Afegogo's offending on the victim, there being no evidence about that, the following occurred, bringing Mr McLaurin's oral submissions to their end (ts 35-36):

SENIOR MEMBER: Okay. And then you go to OCD [other consideration (d)]. Now, I'll have to look into this more closely but his only connection to Australia is Ms Connors and her children, isn't it, that's it?

MR McLAURIN: Yes, as far as I'm aware.

SENIOR MEMBER: And to the extent that he has any relationship, if any, with her, that's really limited to one physical meeting and an online relationship that's been developed over several months and little more than that?

MR McLAURlN: Yes, and is capable of continuing online according to both of them if he's removed to Samoa.

SENIOR MEMBER: And the other thing is you have to wonder about what they do know of each other; if she knows that he's in immigration detention, she's visited him in immigration detention but doesn't know why he's in immigration detention.

MR McLAURIN: Yes, it does call into question there the closeness of their relationship. I would adopt what Senior Member said about it being in the formative stage still. So obviously it still requires much more development before it can be reasonably said to be a close relationship.

SENIOR MEMBER: Or taken seriously. And then in terms of his relationship with her two eldest children that remain at home. Well, he's never met them and she says and he says only spoken to them on the phone. So, yes, they're a link to Australia but it's a very tenuous link, I think, you'd agree?

MR McLAURIN: (Indistinct words.)

SENIOR MEMBER: Yes. Okay. So what weight do we allocate to other consideration (d)?

MR McLAURIN: Well, I think (indistinct words) his contributions to the community were for about a month while he worked at the Junee Prime Lamb, these links, Senior Member, are fairly tenuous. It was more of a neutral weight but the Minister acknowledges that a very moderate degree of weight could be afforded to it.

SENIOR MEMBER: Okay. So he does not get the visa, you say, on the combined and respective heavy weights allocable to primary consideration one and primary consideration four which outweigh the moderate and/or slight weights respectively allocable to primary consideration three and other considerations (b), if any to that one, and (d). That's it, isn't it?

MR McLAURIN: That's the case in a nutshell, yes, Senior Member.

SENIOR MEMBER: All right. Anything else?

MR McLAURIN: No, I think we've covered all of the topics I'd like to mention, Senior Member.

### *Translation of Mr McLaurin's submissions*

38 After the conclusion of Mr McLaurin's submissions, the senior member said (ts 37):

> Thank you, Mr McLaurin. All right. Now, Ms Interpreter, through you I want you to tell the applicant that the government's lawyer is now going to summarise the case for him and I want Mr Afegogo to listen carefully so that he can reply to anything he wants to reply to. Please tell him that.

39 Mr McLaurin then repeated his submissions for translation. He outlined the submissions that he said weighed against the visa cancellation being revoked and the submissions that he said weighed in favour of the visa cancellation being revoked. Unsurprisingly, the translated submissions did not capture the full detail of what had been discussed between Mr McLaurin and the senior member in the untranslated submissions. As with the second round of cross examination of Ms Connors described above at [0], it was a summary and contained less detail than what had actually been discussed.

40 For example, on the topic of the seriousness of Mr Afegogo's offending and the risk of him reoffending, Mr McLaurin said the following, with the interpreter translating (ts 38):

> MR McLAURIN: The Minister says that the offences were serious because they involved violence against another person.
>
> INTERPRETER: Thank you, sir.
>
> MR McLAURIN: The Minister says that there is a risk that Mr Afegogo could reoffend in the future because the offences involved alcohol and he drunk the alcohol because he was celebrating and he could again drink alcohol if he was to celebrate in the future again.
>
> INTERPRETER: Thank you, sir.
>
> MR McLAURIN: The Minister says that the rehabilitative treatment is not sufficient to show that he is no longer a risk of abusing alcohol and getting into fights.
>
> INTERPRETER: Can you repeat again, sorry?
>
> MR McLAURIN: Sorry, Madam Interpreter. The Minister says that the treatment and courses undertaken by Mr Afegogo aren't sufficient to show that he is rehabilitated and that he is no longer at risk of drinking alcohol and getting into fights.

41 The interaction between Mr McLaurin and the senior member on these points during the untranslated closing submissions is outlined at [0]-[0] above. Had that interaction been interpreted, that would have put a different complexion on matters for Mr Afegogo, compared to the submissions that were in fact interpreted for him. The interpreted submissions did not raise the specific concerns that the senior member had with Mr Afegogo's rehabilitative efforts including his concern that the evidence around rehabilitation was 'scant and unconvincing'. They also did not capture the senior member's comments that '… therefore his offending is very serious' and 'so straight up, his offending must be found to be, and can only be, very serious' and that 'the only rational finding that can apply to primary consideration one must be that it attracts a very heavy level of weight or at least a heavy level of weight in favour of refusing the visa'.

42 Similar comments can be made about the rest of Mr McLaurin's submissions, as interpreted to Mr Afegogo. While they broadly covered the points discussed with the senior member in Mr McLaurin's closing submissions, much detail was missing and the senior member's views and concerns were not translated at all.

43 Again, this involves no criticism of Mr McLaurin, who was only doing what the senior member directed him to do and could not be expected to have made note of or to have repeated the full detail of his interactions with the senior member. Also once again, Mr Afegogo's case in this Court is not that these differences in themselves involved a denial of procedural fairness. The point for present purposes is that at no stage in the precis submissions did the senior member interject to make it clear to Mr Afegogo that he had serious concerns with his application, and that he had raised these with Mr McLaurin in the untranslated closing submissions. Mr Afegogo's case is that this might lead the fair-minded, appropriately informed observer to apprehend that the senior member was not interested in whatever Mr Afegogo might have had to say if he had been apprised of the concerns, because the senior member had already made up his mind.

***Mr Afegogo's submissions***

44 After Mr McLaurin's 'precis' of his submissions was interpreted, the senior member asked Mr Afegogo if he wanted to say anything in reply. In brief comments, Mr Afegogo apologised for what happened and said that he wanted a chance to keep on working and to support his family. He said, 'I will not want this to happen again and I will not go back to drinking like this anymore' (ts 39-40). The senior member then asked him whether there was anything else he wanted to say, to which Mr Afegogo apologised again for his offending (ts 40).

45 The senior member did not ask Mr Afegogo any questions or put to him the views about the merits of the application that he had raised with Mr McLaurin.

***Closing the hearing***

46 The senior member and Mr McLaurin then had a brief discussion about the deadline for the Tribunal to deliver reasons. It was agreed that the 84th day (i.e. the day before which, under s 500(6L) of the *Migration Act 1958* (Cth), the Tribunal had to deliver its reasons, or the delegate's decision would be considered affirmed) was 26 December 2022, so, seven days

after the day of the hearing, Monday 19 December. 26 December was of course the Boxing Day holiday (a Monday) immediately after Christmas Day.

47 The senior member then said:

> … there being nothing further, I will simply adjourn the hearing now, pending the publication of a decision on or before 26th, Mr McLaurin.
>
> MR McLAURIN: Thank you Senior Member.
>
> SENIOR MEMBER: All right. Ms Interpreter, through you, please tell the applicant that by the 26 December I have to have a decision made in this case - I have to make a decision. So he will know on or before 26 December - that is this month - what the outcome will be, whether he gets the visa to stay here or whether he has to go back to Samoa, okay?

48 The senior member thus reserved his decision. A written decision including the reasons summarised at the outset of this judgment was delivered on Friday, 23 December 2022 (the last business day before Christmas).

**Consideration**

49 Two matters can be dealt with quickly at the outset. First, the Minister initially submitted that the fact that the Tribunal was required to make a decision within a truncated timeframe (see [0] above) is a factor that helps to explain why the senior member engaged with Mr McLaurin in the way that he did. However after some further discussion with me at the hearing, counsel for the Minister accepted, properly, that if the hearing before the Tribunal had gone for longer than it did, that could hardly have borne upon the Tribunal's ability to meet the 84-day time limit imposed upon it by the *Migration Act*. The Minister therefore did not press the point.

50 Second, the Minister also initially submitted that the fact that the Tribunal reserved its decision, rather than proceeding directly to deliver its decision at the hearing, was relevant. But after his attention was drawn to remarks of Robertson J in *SZRUI* at [84] suggesting that weight should not be put on the ability of the Tribunal to make that choice, counsel for the Minister properly disavowed reliance on that point. And, as already mentioned, it ended up being common ground that that the reasons of the Tribunal were not relevant. So counsel for each party ended up agreeing that the point in time at which the Court is to assess whether there is a reasonable apprehension of bias is the very end of the hearing, before the Tribunal has reserved or delivered its decision, as the case may be. I accept that is so and that is the basis on which I will proceed.

51 The following points relevant to the claim of apprehended bias emerge from the Tribunal hearing as described above.

52 In opening and at several other points throughout the hearing, the senior member gave Mr Afegogo the opportunity to say whatever he wanted to say. This suggests an openness on the part of the senior member to hear Mr Afegogo's side of the case, even though as an unrepresented applicant without a good command of English, he was not able to take full use of the opportunity.

53 However, the senior member did not give Mr Afegogo the opportunity to say what he wanted to say in oral evidence before he was cross examined. The brief handwritten statements Mr Afegogo had submitted were far from comprehensive so it was possible that he could have had more to say orally. But he was not given the chance at that point. He was, however, given the opportunity to comment on the evidence he gave in cross examination.

54 The senior member did not see a need, initially, for Ms Connors' cross examination to be interpreted for Mr Afegogo. He submits that this supports an inference that the senior member's mind might have been closed to persuasion, in that he may not have been interested in any submission that Mr Afegogo might have made about Ms Connors' evidence in cross examination. The senior member only relented, and had Mr McLaurin repeat the cross examination so that it could be interpreted, after Mr Afegogo said he did not fully understand the evidence she had given and wanted to know exactly what she had said. That the senior member relented might suggest that he was willing to hear what Mr Afegogo had to say, but that he allowed the initial cross examination to proceed without interpretation points the other way.

55 Similarly, the senior member did not see a need for Mr McLaurin's oral closing submissions on behalf of the Minister to be interpreted to Mr Afegogo other than in 'precis' form. And the senior member gave Mr McLaurin 'a very broad license' in relation to how he was to summarise his remarks. This deprived Mr Afegogo of a full opportunity to participate in the hearing, in particular a full opportunity to appreciate that many points were made against him by the senior member. Mr Afegogo does not, however, submit that this, or the lack of interpretation of the first cross examination of Ms Connors, is itself a defect in the procedural fairness of the hearing that amounts to jurisdictional error. Rather, he submits, once again, that the apparent lack of concern of the senior member to permit Mr Afegogo to participate as fully as possible in the hearing might lead a fair-minded observer to think that the senior

member might not have been interested in whatever Mr Afegogo had to say, in particular in response to the many observations made in the course of Mr McLaurin's oral submissions.

56 The senior member intervened many times in those submissions. Indeed, save for a passage in which Mr McLaurin made submissions about the risk of Mr Afegogo reoffending, it is no exaggeration to say that the senior member took control of Mr McLaurin's closing submissions. This is a mirror image of the way in which, often, a highly interventionist approach in submissions is said to give rise to apprehended bias. Usually, it is excessive intervention of the decision maker in the submissions of the *unsuccessful* party that is enlisted in that way. Hence the statements in the authorities summarised at [0]0-0 above as to how testing an applicant's claims, and making the applicant aware of the decision maker's concerns, can be consistent with the Tribunal's inquisitorial function, and can enhance the fairness of the hearing.

57 None of those things can explain the Tribunal's interventions here, because the Tribunal was intervening in the submissions of the ultimately successful party, the Minister, and was doing so in a way that did not bring any of its concerns to the attention of the unsuccessful party, if concerns is truly what they were.

58 In truth, the matters the senior member raised were frequently raised in a strong way, which made it sound like he had already made up his mind. He interjected near the start of Mr McLaurin's submissions to say that he could see the factors weighing against Mr Afegogo but was 'struggling' to see any that weighed in his favour (and that was prefaced by 'I've got to tell you', suggesting a strong view). Although he was prepared to allow he and Mr McLaurin to 'go through it', he thought 'it's a pretty clear matter'. This implied that even though they would go through the various relevant matters raised by Direction 90, the senior member thought it was unlikely that this would result in him deciding in Mr Afegogo's favour. That is reinforced by the senior member's subsequent comments (which have been set out above, but are collected here for convenience) that:

(a) two factors weighing in Mr Afegogo's favour 'just can't attract much weight' (this said before he had heard from Mr McLaurin about those factors, let alone from Mr Afegogo);

(b) 'therefore his offending is very serious. That's my analysis';

(c) 'So straight up, his offending must be found to be, and can only be, very serious';

(d) 'So what we're left with is paragraphs that militate in favour of a finding of the very serious nature of his conduct';

(e) 'I just can't see how this', that is, the interests of Ms Connors' minor children 'attracts any modicum of support for him';

(f) 'So in terms of weight allocable to the applicant pursuant to primary consideration three, it's surely no greater than a slight weight, surely';

(g) 'So on that basis he gets no weight under primary consideration four and the expectation in the Australian community weighs heavily against him one would have to find sure'; and

(h) in relation to impediments on return to Samoa, 'So to the extent that any weight can be found for him here, it's either neutral or of very slight weight'.

59 It is true that when it came to the important subject of the risk of Mr Afegogo reoffending, the senior member did call that 'perhaps the most nuanced part of the discussion' and permitted Mr McLaurin to develop his submissions on that point. But after hearing that submission the senior member expressed a number of apparently strong conclusions: that 'without question that the primary motivating factor behind his offending here was alcohol. I don't think that can be reasonably denied'; that the evidence around the circumstances of the offending was 'quite spurious and difficult to sustain'; and that he agreed with Mr McLaurin's submissions (before he had heard any submission from Mr Afegogo) and that 'the evidence around rehabilitation is scant and unconvincing' and that it was 'not insignificant' that the magistrate did not release Mr Afegogo on bail. The senior member then expressed the same conclusions about recidivism as are found in in his reasons as set out at [0] above, before saying that 'the only rational finding' that could be made about the primary consideration of risk to the Australian community 'must be that it attracts a very heavy level of weight or at least a heavy level of weight in favour of refusing the visa'.

60 It is further relevant that this was said in circumstances where, during evidence, the senior member had not taken the opportunity to ask Mr Afegogo himself about the likelihood of reoffending. That is despite the senior member's subsequent acknowledgment that this was the 'most nuanced part of the discussion' and his concerns about the 'scant' nature of the evidence on the point. To ask Mr Afegogo himself whether he was likely to reoffend, and why the Tribunal should be convinced of any protestations to the contrary, would have been an obvious step to take if the Tribunal's mind truly was open to persuasion about the matter.

61 The senior member then summarised the Minister's case in the Tribunal, before Mr McLaurin himself had an opportunity to do so, by saying:

> So he does not get the visa, you say, on the combined and respective heavy weights allocable to primary consideration one and primary consideration four which outweigh the moderate and/or slight weights respectively allocable to primary consideration three and other considerations (b), if any to that one, and (d). That's it, isn't it?

62 All this was said before Mr Afegogo had an opportunity to make his closing submissions about the matter.

63 Of course, these numerous strong conclusionary comments are not to be read in isolation from the rest of the transcript. They must be assessed in the full context of the hearing. But when that is done, the tenor of the senior member's approach to the closing submissions that emerges, quite clearly, is that he already had views about each of the considerations that were relevant under Direction 90, he put those views to Mr McLaurin, for the most part without hearing from him first, and all Mr McLaurin could do was to express agreement and occasionally add extra commentary. It is, again, no exaggeration to say that with the exception of the subject of risk of reoffending, the senior member put the Minister's submissions for him. While it may be accepted that the Tribunal's inquisitorial functions go some way to explaining the senior member's approach, in my view they are less than a complete explanation or justification.

64 It is also relevant that the senior member's concerns with Mr Afegogo's application were not translated. While it is not submitted that this of itself is a denial of procedural fairness, the fact that the senior member did not at any point make it clear to Mr Afegogo the extensive concerns he had with his application might be taken by a fair-minded observer to indicate that he had no interest in what Mr Afegogo had to say about those concerns.

65 The Minister submits in this Court that the materials reveal that the Tribunal member was 'polite and engaging' with Mr Afegogo, Mr McLaurin and Ms Connors, that he had prepared for the hearing and gained an appreciation of the relative strengths and weaknesses of the parties' positions. He was experienced and well versed in the requirements of Direction 90. All of that may be accepted, but it does not gainsay the possibility that he came into the hearing with firm views that were not open to change.

66 The Minister also points to things the senior member said which suggest that his mind was open, for example his attempt to understand whether Mr Afegogo had a record of misuse of alcohol in Samoa, his statement that he would need to look into Mr Afegogo's connections to Australia 'more closely', and his various invitations to Mr Afegogo to comment or say what he wanted to say. I acknowledge these and have taken them into account. I have also taken into account, as the Minister submits, that the senior member's strong views about alcohol as the cause of offending were consistent with Mr Afegogo's acknowledgement of the same point. But it appears to me that in the overall evaluation the Court must make, those matters do not outweigh the impression potentially emerging, from the closing submissions in particular, that the senior member had already made up his mind.

67 The Minister also submits that where there is a complaint that the decision maker has intervened excessively, the stage at which the intervention occurs can be relevant. It may be more readily excused if it occurs later in the hearing, where it is designed to permit the decision maker to better comprehend the issues and to weigh the evidence: see ***Galea v Galea*** (1990) 19 NSWLR 263 at 281, point 5 (Kirby A-CJ, Meagher JA agreeing). I accept that submission, and it is to be acknowledged that the main concerns about the senior member's conduct of the hearing arise at the stage of closing submissions. It may be expected that by that stage the Tribunal had formed, at least, provisional views that could usefully be put to Mr McLaurin for the reasons just given. But the question remains whether, judged in that context, the interventions potentially went beyond those purposes so as to raise the necessary apprehension on the part of the fair-minded observer.

68 As to that, the Minister submits that what the senior member was doing in Mr McLaurin's closing submissions was testing his views about the relative merits of Mr Afegogo's position and the Minister's position in the Tribunal in order to confirm whether his understanding was correct. That was in a context where Mr McLaurin was representing a model litigant and could have been expected to give the Tribunal a level of assistance commensurate with that. The Minister submits that the:

> overwhelming impression from the transcript read as a whole is that the Tribunal was well-prepared, well-versed in the law, understood the critical issues, sought in an exchange with counsel for a model litigant to test and understand the positions, and to have the applicant reply to the case against him.

69 Where this characterisation breaks down, with respect, is where it says that the asserted impression was 'overwhelming'. It is, at least, equally likely that the fair-minded observer

would have left with the impression that the Tribunal had made little or no effort to ascertain Mr Afegogo's position, whatever it might have been, and that it had strong preconceived views in favour of the Minister's position in the Tribunal, of which it sought confirmation during Mr McLaurin's oral submissions. The 'double might' nature of the test for apprehended bias must be taken seriously. The question is not how the Court *should* characterise the hearing, taken as a whole, but whether the fair-minded observer *might* apprehend that the course of the hearing might have manifested prejudgement. While that needs to be firmly established, the many passages from the transcript considered above meet that standard.

70 Although said in the different context of an appeal from judgment in a Supreme Court trial, the evaluative task facing the Court in this case is well encapsulated by the following two principles stated by Kirby A-CJ in *Galea v Galea* (at 281, points 3 and 4, citations removed):

> 3. Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion'.
>
> 4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion.

71 Of course, it must be steadily borne in mind that when the allegation is of apprehended bias, all that must be established is that a fair-minded observer might think that the decision maker has closed their mind in that way.

72 In this case I respectfully consider that such an observer may well have concluded that the number and nature of the senior member's interventions in Mr McLaurin's closing submissions means that the senior member had indeed moved into 'self-persuasion'. There was nothing provisional about the way in which most of the interventions were put. It was at least reasonably open to form the impression that the senior member took over Mr McLaurin's closing submissions because he thought that was the most efficient course to take in circumstances where Mr Afegogo was not going to be able to say anything to persuade him that there was another reason to revoke the cancellation of the visa. Moreover, the senior member's concerns were put to Mr McLaurin and not interpreted for Mr Afegogo,

thereby denying him any opportunity to persuade the Tribunal to change its views. That is likely to strengthen the reasonable observer's sense of apprehension that the senior member had already made up his mind. That apprehension would be further strengthened by the Tribunal's initial decision not to have Ms Connors' cross examination interpreted for Mr Afegogo's benefit.

**Materiality**

73 It was, correctly, common ground that if the Tribunal's decision were affected by apprehended bias, there was no separate requirement that this be material before jurisdictional error was established: see *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 273 CLR 506 at [33].

**Conclusion**

74 The decision of the Tribunal will be set aside. In the circumstances, it is appropriate to direct that the review be conducted afresh by a differently constituted Tribunal.

75 While counsel for Mr Afegogo appeared pro bono, the usual order for costs will be made in case there are disbursements or other expenses that may be recoverable.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate:

Dated: 21 September 2023