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Bias: Some Practical Issues in Tribunals

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Introduction

1. This paper will address some of the more practical issues that can arise in tribunals, and in particular smaller tribunals, when an application is made for the disqualification of a particular member either sitting alone or as part of a panel hearing a matter on the basis of bias. The paper will discuss the difficult issues that arise where the applicant seeking the disqualification has a history of matters before the Tribunal or court hearing the matter. Finally, the paper will look at some problematic issues that arose in a case of *Islam v Minister for Immigration and Citizenship*[1].

Actual Bias

2. It is rare for a claim of actual bias to be made. The test in relation to actual bias is hard to prove from an evidentiary point of view being:

   The state of mind .. so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.[2]

   As the onus of demonstrating actual bias is on the applicant, it is generally the case that a claim of apprehended bias will be made. This may not be the situation with self represented litigants who may have the capacity to interpret normal hearing room interchanges or other actions as evidence of bias. It is perhaps easier to discuss examples of what is not actual bias rather than what might constitute actual bias.

3. The fact that a decision maker may have heard previous matters involving the same applicant and found against them is not enough of itself sufficient to constitute actual bias. In *Kowalski v Repatriation Commission*[3] Spender J stated at para 3:

   However, the assertion that a judge has committed an error in making any particular finding or in making a judgment does not of itself indicate bias. The fact that a judge has not accepted a submission that a party has made, or has found against the party, does not, without more, establish bias in the sense discussed in Dranichnikov v Centrelink [2003] FCAFC 133, *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17, and or *Livesy v NSW Bar Association* [1983] HCA 17.

Spender J went on to say at para 4:

In respect of the complaints that have been made, they are essentially appeal points and the appellant has the right to pursue any rights of appeal so as to vindicate those assertions, in the face of findings by me in the various matters to which the appellant has referred. The fact that I may found to be in error by an appeal court does not mean that I have been biased in the findings I have made.

4. Clearly there are some instances where previous involvement with other matters concerning the same applicant would give rise to a reasonable basis for a judicial officer or tribunal member to disqualify themselves. This includes where there have been adverse credit findings in relation to the applicant or factual matters that have been the subject of previous litigation. Justice Besanko in *Kowalski v Military Rehabilitation and Compensation Commission*[4] came to the conclusion that after being involved in 4 other matters involving the same applicant it was better to disqualify himself given some of the same factual matters he ruled on previously would be the subject of contention within the matter he was currently hearing.

5. The expression of provisional views by a tribunal member is not of itself evidence of actual bias.[5] Care needs to be taken to make it clear that the expression of these views is directed to assist the parties in persuading the tribunal to a different view or to alert them to a weakness in the case which needs to be addressed.

6. In relation to tribunals with limited membership, it is important to note that there is an exception based on necessity in circumstances where the tribunal would not otherwise be able to perform its statutory function. If a tribunal could not otherwise find enough members to form a panel, a member who might otherwise be disqualified for bias may take part in the hearing.[6] Clearly every effort must be made to avoid such a situation, including the appointment where possible of additional members if this can be achieved within a reasonable time frame or bringing members in from other locations if possible to hear the matter.

Apprehended Bias

7. Apprehended bias raises much more difficult issues. The governing principles are set out in *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group*[7]:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement that reflects the fundamental importance of the

principle that the tribunal must be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

8. Whilst it is not unreasonable to expect full time judicial officers to arrange their affairs so as to minimise the potential for claims of apprehended bias, the rule extends to part time tribunal members who, in many cases, have been appointed to the particular tribunal due to their knowledge and ongoing association with a particular area of expertise or knowledge. For example, within the Veterans' Review Board there is a category of member known as a "services member". These members must be nominated by an Ex Service organisation, such as the RSL, in order to be appointed to the position.[8] Generally they are retired service members who bring a wealth of knowledge of service life, conditions and in particular, and operational service such as in the Vietnam war or other conflicts. Of course having specialist members brings with it the usual requirements of disclosure of that specialist member's knowledge of facts or other material and then ask the applicant to respond in circumstances where the tribunal proposes to rely upon that specialist member's knowledge.

9. Some of the armed services are reasonably small in terms of the numbers of serving personnel e.g. the Australian Navy. It is not unusual for a service member to have served with or served alongside some of the applicants before the Board. Where such an association is known in advance, a member will often ask to be excused from the hearing if they feel they cannot bring an independent mind to the hearing or otherwise feel they would compromise the independence of the Board due to a previous association with the applicant.

10. Even where a member feels they are able to sit, there is a further issue. At the Board, the respondent Repatriation Commission usually does not appear. A disclosure by the services member of a previous association or knowledge of particular events often results in no objection being taken by the applicant. The view within the Board is that many applicants feel they have a better chance of success with a services member who might be more sympathetic to their application. The absence of a representative of the respondent Commission places a heavy burden on the Board member to weigh carefully the consequences of continuing to sit, even where no objection is taken by the applicant. Members need to consider the respondent's position in terms of if they were present, would they raise an objection?

Islam v The Minister for Immigration and Citizenship[9]

11. This case provides a good example of the difficulties tribunal members can get into where they have overlapping functions. The decision, whilst correct at law is in my view unfortunate and is not particularly helpful in terms of the practicalities of everyday tribunal life.

12. Mr Islam appealed to the Administrative Appeals Tribunal against a decision of the delegate of the respondent Minister that he failed the character test proscribed in S501 of the *Migration Act 1958* (Cth) on account of his substantial criminal record. A

cancellation of Mr Islam's visa would have resulted in him being deported back to his native Bangladesh. He had resided in Australia since 1991 when he arrived in Australia at the age of 5 with his family.

13. Mr Islam had a criminal history dating back to 2004. In 2006 he was sentenced to 4 years imprisonment with an 18 month non-parole period following convictions for aggravated robbery and breach of a recognisance. In November of 2007 the Minister warned Mr Islam that any further conduct bringing him within the provisions of Section 501 would lead to the question of his visa being reconsidered and a failure to head the waring given would no doubt weigh heavily against him.

14. It was alleged that on 1 May 2008 Mr Islam committed an armed robbery in company of a Domino's Pizza in Mawson, ACT. He was arrested within days and refused bail.

15. On 30 May 2008, an Australian Federal Police Officer appeared in chambers before a Senior Member of the Administrative Appeals Tribunal seeking a warrant under the *Surveillance Devices Act 2004* (Cth) seeking a listening device to record the conversations of Mr Islam. I should note that AAT members issue approximately 98 % of the 3000 plus annual warrants under the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access)Act 1979*

16. In order to issue such a warrant , the Senior Member needed to be satisfied that:

    the person has committed, or is suspected on reasonable grounds of having committed, or being likely to commit, a class 1 general offence or a class 2 general offence; and

    that information that would likely to be obtained by the use of the listening device would be likely… to assist … inquiries being made in relation to the commission of the offence by the person[10]

17. On 25 June the Minister sent a notice of intention seeking to cancel Mr Islam's visa, notwithstanding Mr Islam entered a plea of not guilty to the charge.

18. On 10 October, a delegate of the Minister refused an application for a subclass 457 visa for Mr Islam. By this stage he had been taken back into custody after breaching bail conditions for a third time. The decision to refuse a visa was based on Mr Islam's criminal history and the risk of recidivism.

19. Mr Islam appealed to the Administrative Appeals Tribunal against the decision to refuse him a visa. The hearing came before the same tribunal member who had previously issued the listening devices warrant referred to above.

20. At the hearing in relation to the visa refusal, both the respondent department and the Senior Member were at pains to indicate that as Mr Islam had pleaded not guilty to the

robbery charge and a hearing was still pending, no reliance would be placed on that matter in relation to the visa refusal issue. The Tribunal member stated:

> *Oh, well, I – you haven't been convicted of those so I certainly won't be- I'll – in fact, I can tell you I will not be taking that into account, I mean, you haven't been convicted of that so its best you don't go into that.*

In his written reasons affirming the decision to refuse the visa the Tribunal member specifically recorded that he did not take into account in any way the alleged offences of May 2008.

21. In preparing for the hearing of the robbery charge, Mr Islam was served with a copy of the brief of evidence that included a copy of the listening device warrant authorised by the Tribunal member. It then became apparent the same tribunal member had issued the warrant and affirmed the decision to refuse him a visa.

22. Justice Finn considered claims by Mr Islam that his hearing at the Tribunal should be set aside due to bias and a denial of procedural fairness. In relation to bias, at para 52 Finn J stated:

> *Where it might reasonably be said that the having of (or having had) that information or opinion by virtue of a prior official decision might compromise the proper and impartial taking of the later decision, the same official ought not to participate in the later decision. To do so would involve the member in the discharge, of incompatible functions. Such was the case here.*
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> *53. It was inappropriate for the Tribunal member, having determined to authorise the issue of the warrant in relation to Mr Islam, to have then made the s501(1) refusal determination given the association in the subject matter of the two determinations – or at least to have done so without the informed waiver objection of Mr Islam to his doing so.*

23. Finn J at para 53 then went on to suggest that the Tribunal should have procedures in place to guard against such a possibility (as arose in this case).What does not appear to have been put to the court in this case is the procedures required to be adopted by the Tribunal in relation to record keeping (or the non keeping of records to be more precise). The only record kept by the Tribunal is the granting/ non granting of a warrant, the time taken, the member concerned and the agency seeking the warrant. All supporting affidavit material and the warrant itself are returned to the agency seeking the warrant upon completion of the consideration by the authorised member. This is required by the relevant legislation with the presumed purpose of limiting the possibility of compromise of ongoing law enforcement operations. I am advised that some operations may involve multiple warrants over periods extending to 12 months or longer. Other than relying upon the memory of a particular member who may issue in excess of 100 warrants over the course of a year involving many different investigations and persons of interest, it is simply not possible to implement the "procedures" Justice Finn suggests.

24. Given the criticisms raised by Justice Finn, it is perhaps interesting to contrast these with procedures adopted every day in the civil courts and courts of summary jurisdiction when material sought to be introduced into evidence is objected to. The normal procedure is for the material to be considered and the objections argued. A ruling is then made. If the material is rejected, the Judge then does not consider the rejected material in any findings made at the conclusion of the matter. No-one would suggest that in these circumstances a Judge, if they reject prejudicial material sought to be adduced in evidence, could not go on to hear the matter to conclusion.

Conclusion

25. Notwithstanding the apparent settled law, bias still can raise real practical difficulties with in Tribunals. *Islam* serves as a warning as to the difficulties that can arise with apprehended bias in a tribunal setting. Great care needs to be exercised . At the end however, even with care; it is perhaps just necessary to accept that, on occasions, we might all be found to have fallen into error.

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[1] [2009] FCA 1526 per Finn J
[2] *Minister for Immigration and Multicultural Affairs v Jai* (2001) CLR 507 at 532 Gleeson CJ and GummowJ.
[3] [2010] FCA 217
_ftnref44.[2009] FCA 1044
[5] *Vakauta v Kelly* (1989) 167 CLR 568 at 571 (Brennan, Deane and Gaudron JJ)
[6] See para 3.3.3.3 COAT Practice Manual for Tribunals and *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88 (Mason CJ and Brennan J)
[7] [2000] HCA 63 para 6 per Gleeson CJ, McHugh, Gummow and Hayne JJ
[8] See S158 (3) *Veterans' Entitlement Act 1986*
[9] [2009] FCA 1526 (18 December 2009) per Finn J
[10] Section 12 (G)(2)(i) and (ii) *Australia Federal Police Act 1979 (Cth)*