FEDERAL COURT OF AUSTRALIA

ALA15 v Minister for Immigration and Border Protection [2016] FCAFC 30

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| Appeal from: | *ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047 |
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| File number: |  |
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| Judges: | **ALLSOP CJ, KENNY AND GRIFFITHS JJ** |
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| Date of judgment: | 10 March 2016 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for extension of time and leave to appeal – judicial review application under s 39B of the *Judicial Act 1903* (Cth) – conduct of legal representatives – costs.  **MIGRATION** – whether primary judge denied applicant procedural fairness by refusing to disqualify himself based on reasonable apprehension of bias - whether comparative statistical analysis of Court’s previous decisions relevant to apprehended bias test. |
| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 24  *Judiciary Act 1903* (Cth), ss 39B, 37N(5), 43(3)(f)  *Migration Act 1958* (Cth), ss 477(2), 477(2)(b) |
| Cases cited: | *AAV15 v Minister for Immigration and Border Protection* [2015] FCA 700; (2015) 230 FCR 454  *ABT15* *v Minister for Immigration and Border Protection* [2015] FCCA 1051  *ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047  *ALA15 v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 2048  *AEG15 v Minister for Immigration and Border Protection* [2015] FCA 702; (2015) 230 FCR 465  *AHT15 v Minister for Immigration and Border Protection* [2015] FCA 1215  *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283  *Concrete Pty Limited v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337  *Kautoga v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 1679  *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1  *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248  *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005)228 CLR 294  *Sekigawa v Minister for Immigration and Border Protection* [2016] FCA 127  *Shrestha v Migration Review Tribunal* [2015] FCAFC 87; (2015) 229 FCR 301  *SZUQZ v Minister for Immigration and Border Protection* [2015] FCCA 1552  *SZWBH v Minister for Immigration and Border Protection* [2015] FCAFC 88; (2015) 229 FCR 317  *SZWCW v Minister for Immigration and Border Protection* [2015] FCA 1217  *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488  *Isbester v Knox City Council* [2015] HCA 20  *Ruddock v Vadarlis* [2001] FCA 1865; (2001) 115 FCR 229  *Vietnam Veterans’ Association of Australia (New South Wales Branch Inc) v Gallagher* [1994] FCA 489; (1994) 52 FCR 34 |
|  |  |
| Date of hearing: | 29 February 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 69 |
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| Counsel for the Applicant: | Mr J Williams |
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| Solicitor for the Applicant: | Russell Byrnes Solicitors |
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| Counsel for the First Respondent: | Mr N J Williams SC with Mr M J Smith |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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|  | The Second and Third Respondents submitted to any order the Court may make, save as to costs. |
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ORDERS

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|  | | NSD 1048 of 2015 |
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| BETWEEN: | ALA15  Applicant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent  FEDERAL CIRCUIT COURT OF AUSTRALIA  Third Respondent | |

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| JUDGES: | ALLSOP CJ, KENNY AND GRIFFITHS JJ |
| DATE OF ORDER: | 10 March 2016 |

THE COURT ORDERS THAT:

1. The application for extension of time and leave to appeal be dismissed.
2. In respect of the application described in order 1 above, the applicant pay the first respondent’s costs, as agreed or assessed.
3. The amended application under s 39B of the *Judiciary Act 1903* (Cth) be dismissed.
4. In respect of the amended application described in order 3 above, the applicant pay the first respondent’s costs, as agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

1. The applicant seeks judicial review under s 39B of the *Judiciary Act 1903* (Cth) (***Judiciary Act***) of a decision of the Federal Circuit Court of Australia (**FCCA**). The primary judge refused to extend time under s 477(2) of the *Migration Act 1958* (Cth) (the ***Act***) to enable the applicant to seek judicial review of a decision of the then Refugee Review Tribunal (now the Administrative Appeals Tribunal (the **Tribunal**)). In this Court, the applicant also sought an extension of time for leave to appeal pursuant to s 24 of the *Federal Court of Australia Act 1976* (Cth) (the ***FCA Act***) against a decision by the primary judge to dismiss the applicant’s recusal application. This application was “withdrawn” by the applicant late on the last business day before the hearing was scheduled to take place. It will be necessary to say something more later about this and other aspects of the manner in which the applicant’s legal representatives have conducted the proceedings.
2. For the reasons which follow, we consider that:
3. the application for extension of time and leave to appeal should formally be dismissed, with costs; and
4. the judicial review proceedings should be dismissed, with costs.

## Summary of background facts

1. The applicant is a citizen of Lebanon. He came to Australia on 24 October 2010 on a student visa, which expired on 30 August 2013. He applied for a protection visa on 13 August 2013. The applicant was born a Sunni Muslim. He claimed to have had a very strict religious upbringing and says that his parents, siblings and close relatives were all strict adherents of the Sunni Islamic faith.
2. His claim for protection was because of his religion. He said that after he arrived in Australia he developed his own religious views which led him completely to reject fundamentalist Islam. He claimed that this caused a severe rift between him and his parents. He said that his relationship with his father had deteriorated to the point that he had been disowned and his father refused to talk to him. He claimed that since 2011 his father stopped sending him money to help with his education and living expenses and that he had to support himself, including by working part-time. He claimed that his parents expected him to return to Lebanon after completing his studies and to marry a girl of their choosing. He said that if he returned to Lebanon he feared that he would be forced by fundamentalists to fight in Syria or other war zones. He also claimed to fear that his family, particularly his father, and his community would torture and beat him because of his lack of faith.
3. The applicant’s application for a protection visa was refused by the Minister’s delegate on 20 March 2014. He applied to have that decision reviewed by the Tribunal. The Tribunal affirmed the delegate’s decision on 23 February 2015.

## The FCCA proceedings

1. On 13 April 2015, the applicant filed in the FCCA an application for judicial review of the Tribunal’s decision. As these proceedings were not commenced within 35 days of the Tribunal’s decision, the applicant required an extension of time under s 477(2) of the *Act*.
2. The first return date in respect of the proceeding was 14 May 2015. The primary judge declined to approve consent orders regarding the future conduct of the proceeding. Instead, the Court ordered the Minister to file and serve the Court Book within two weeks (i.e. by 28 May 2015). The applicant was directed to file an amended application with any evidence to be relied upon within two further weeks (i.e. on or before 11 June 2015). The final hearing was initially set down for 10 July 2015 but this was subsequently deferred to 29 July 2015.
3. At the commencement of the hearing in the FCCA on 29 July 2015, the applicant sought leave to file a further amended application and two affidavits in support. He sought orders that:
4. the primary judge disqualify himself;
5. leave be granted to further amend his amended application; and
6. time be extended under s 477 of the *Act*.
7. It is desirable to say something more about one of the affidavits which the applicant filed on the morning of the hearing in the FCCA in support of his recusal application. That recusal application was said to be based on a reasonable apprehension of bias arising from the primary judge’s prior conduct.
8. The affidavit was sworn by Mr Victor Kline on 28 July 2015. Mr Kline is the current editor of the Federal Court Reports and the Federal Law Reports, a position which he has held since 1990. Mr Kline deposed to having reviewed all the primary judge’s judgments in the period from his Honour’s appointment on 1 January 2015 to 19 June 2015 (the latter being the date of the Full Court’s decisions in *SZWBH v Minister for Immigration and Border Protection* [2015] FCAFC 88; (2015) 229 FCR 317 (***SZWBH***) and *Shrestha v Migration Review Tribunal* [2015] FCAFC 87; (2015) 229 FCR 301 (***Shrestha***).
9. Mr Kline’s findings may be summarised as follows:
10. He identified 286 decisions of Judge Street during the relevant period, of which 254, or 88.81% were in the area of immigration law where the Minister for Immigration and Border Protection was the respondent (**immigration judgments**).
11. In all 254 or 100% of the immigration judgments, they were, or appeared to be, delivered ex tempore.
12. Only in two of the 254 immigration judgments, or 0.79% of the immigration judgments, Judge Street found in favour of the applicant against the respondent Minister for Immigration and Border Protection.
13. In 252 out of the 254 immigration judgments, or 99.21%, Judge Street found in favour of the respondent Minister for Immigration and Border Protection.
14. There were only two judgments where the primary judge found in favour of the applicant. In *ABT15* *v Minister for Immigration and Border Protection* [2015] FCCA 1051, the Minister for Immigration and Border Protection conceded that there was an error and in *Kautoga v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 1679, that there was jurisdictional error.
15. In at least 163 of the 254 immigration judgments, or 64.96%, the immigration judgments were given at the first court date. In approximately another dozen cases it was not possible to tell if they were delivered at the first court date or not.
16. During the relevant period, the remaining eight judges of the FCCA in Sydney delivered 309 immigration judgments, or 54.89% of the immigration judgments in the Sydney Registry of the FCCA, whilst the primary judge personally delivered 45.11% of the immigration judgments.
17. The most recent Annual Report of the Migration Review Tribunal (**MRT**) – Refugee Review Tribunal (**RRT**)disclosed that 10.8% of MRT decisions and 12.2% of RRT decisions were set aside, compared with only 0.79% being set aside by the primary judge on judicial review.
18. The applicant, who was represented by Mr Jay Williams of counsel on 29 July 2015, contended that the primary judge was predisposed to the view that applications in migration matters were without merit and that the primary judge’s previously stated views and conduct were characterised by such trenchancy that it was not possible for him to hear the applicant’s application with an open mind. His Honour’s judgments were said to be characterised by the use of forceful phrases which give an appearance of absolute certainty. Mr Williams submitted to the primary judge (without any supporting evidence) that a search of the BarNet-Jade website of his Honour's immigration judgments between 1 January 2015 and 29 May 2015 revealed:

* 140 cases in which the phrase, “no substance” was used by the primary judge; and
* 160 cases in which the phrase, “it is clear” was used by him.

1. After hearing the recusal application, the primary judge dismissed it and gave ex tempore reasons (*ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047 (***ALA15 (No 1)***). His Honour observed at [8] that the applicant’s recusal submissions went beyond Mr Kline’s affidavit and also referred to alleged expressions which the primary judge had used in other proceedings which, the applicant contended, could be characterised as a “vehement or entrenched expression of view”.
2. The primary judge accepted (at [11]) the Minister’s submission that Mr Kline’s statistical analysis was not relevant in the recusal application because the “use of such statistical material is not evidence of conduct in respect of which a fair-minded observer might believe that the Court might not bring a fair, impartial, and independent mind to the determination of the matter on its merits”.
3. His Honour concluded at [12] that the statistics and expressions relied upon by the applicant were not “ones by reason of which a fair-minded observer might believe that the Court might not bring an independent and impartial mind to the determination of the matter on its merits”.
4. It is convenient to now summarise the primary judge’s refusal to grant the applicant an extension of time under s 477(2)(b) of the *Act*. As noted above, the application in the FCCA for judicial review of the Tribunal’s decision was filed 14 days outside the prescribed 35 day period. The applicant contended that this period was “minimal” and should not override the merits of his judicial review application. He also contended that the delay was satisfactorily explained in two affidavits, one dated 13 May 2015 by Mr Sam Kizina (the applicant’s migration agent) and the other by the applicant himself sworn 29 July 2015. These affidavits explained that the applicant was suffering from financial hardship and was unable to raise the funds to lodge his judicial review application within time and that the application was filed as soon as funds became available. Other contentions were made on the applicant’s behalf in favour of time being extended, including that there was little to no prejudice to the respondents, it was in the interest of the Australian community that the applicant have his refugee claims reviewed according to Australian and International law and that the substantive application had merit.
5. The application was refused and the primary judge gave ex tempore reasons for judgment (*ALA15 v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 2048 (***ALA15 (No 2)***)). The reasons included the primary judge’s assessment of the further amended application (noting that the primary judge granted leave to amend the amended application so as to add a new ground 4). We will return shortly to summarise the primary judge’s assessment of the strength of those grounds.
6. The primary judge did not accept that an adequate explanation had been provided for the delay in commencing the proceedings. His Honour observed at [5] that the applicant’s affidavit did not address his financial position in any detailed way, but rather made “bald assertions” as to his inability to fund the application, nor did he explain the source of the funds which then became available. His Honour described the migration agent’s affidavit as simply “supporting a request for funds before the application would be lodged”. His Honour stated at [6] that the absence of an adequate explanation was sufficient of itself to refuse the application for an extension of time.
7. Nevertheless, his Honour then turned his mind to whether “there is a sufficiently arguable case to warrant an extension of time in the interests of the administration of justice” (at [6]).
8. Before the primary judge, the applicant contended that the four grounds in his further amended application raised a sufficiently arguable case. We will summarise his contentions in respect of these grounds shortly. As many of his contentions were directed to [67] to [70] of the Tribunal’s reasons for decision, it is convenient to set out these paragraphs now:

67. The Tribunal does accept that there are Sunni extremist groups in Lebanon, including in the Akkar, from where the applicant comes. However, it does not accept that he would be targeted by them. Country information shows that they target Shias and Shia interests, for example the bombing of the Iranian Embassy in Beirut in mid-November 2013 and car bombs in the southern suburbs of Beirut and the Beka’a Valley throughout 2013.

68. The Tribunal accepts that there have been incidents where Sunnis and anti-Syrian regime activists have been shot or otherwise targeted, including in Akkar Province. The Tribunal does not accept that the applicant would have a profile such as those who have had who suffered such harm.

69. The Tribunal accepts that there are Shia and Alawite groups that have used violence against certain Sunnis. However, it does not accept that the applicant has a profile of a person who has been so targeted.

70. The Tribunal has no country information before it that supports a finding that the applicant would be forced to fight in Syria, or that there is a real chance that he would suffer serious harm or that there is real risk that he would suffer significant harm because of generalised violence in Lebanon. The DFAT reports do not support such claims.

1. First, as to ground 1 of the judicial review application (which was to the effect that the Tribunal denied procedural fairness by failing to make a finding on a substantial and clearly articulated argument relying upon established facts) the applicant’s contentions were broadly as follows, noting that the contentions were primarily directed to the Tribunal’s findings in [70] of its reasons for decision. The applicant contrasted those findings with the Tribunal’s acceptance in [67] of its reasons for decision that there are “Sunni extremist groups in Lebanon including Akkar, from where the applicant comes” and that country information “shows that they target Shias and Shia interests, for example the bombing of the Iranian Embassy in Beirut in mid-November 2013 and car bombs in the southern suburbs of Beirut and the Beka’a Valley throughout 2013”.
2. The second ground of judicial review was that the Tribunal erred by failing to complete the statutory task required of it to examine and deal with the applicant’s claims or an integer of his claims (relying inter alia on *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 (***NABE***) at [63]). The matters relied upon in support of ground 2 were substantially similar to those advanced by the applicant in relation to ground 1, as summarised above.
3. The third ground of judicial review involved a claim of unreasonableness in the legal sense, relying on *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332. The applicant contended that the Tribunal had reasoned illogically or irrationally and that its findings, in particular those in [70] of its reasons for decision, lacked an evident or intelligible justification.
4. The applicant’s fourth ground of judicial review below was that the Tribunal had failed to take into account relevant considerations, namely:
5. the matters identified in the PAM 3 Refugee and Humanitarian Complementary Guidelines (**PAM 3**); and
6. the country information referred to in [67]-[70] of the Tribunal’s reasons for decision.
7. The primary judge’s reasons for concluding that none of these grounds raised an arguable case may be summarised as follows.
8. As to ground 1, the primary judge concluded at [14] of *ALA15 (No 2)* that there was no substance in the applicant’s contention that there was no evidence to support the Tribunal’s adverse findings in [70] or that his fear of being required to fight in Syria had not properly been addressed by the Tribunal. His Honour also found at [16] that the Tribunal had before it country information identifying the significance of profile and association and that it had made adverse findings on these matters in respect of the applicant. His Honour observed that there was a “clear logical connection between that and the finding made by the Tribunal in para. 70”.
9. The primary judge also rejected as lacking substance the applicant’s contention that the Tribunal had failed to address a claim or integer of his case. In doing so, the primary judge again drew attention to the adverse finding in [70], which his Honour said addressed those claims. His Honour concluded at [17] of *ALA15 (No 2)* that there was no substance in ground 1 and that it did not identify a sufficiently arguable case.
10. As to ground 2, the primary judge noted the acknowledgment by the applicant’s counsel that it was substantially the same as that raised by ground 1. The primary judge stated that the Tribunal’s reference in [41] of its reasons for decision to no country information being provided by the applicant was simply a statement of fact and did not reverse any onus. Furthermore, the primary judge stated at [20] of *ALA15 (No 2)* that it was clear from [67] to [70] that the Tribunal did in fact take into account country information, with the consequence that ground 2 failed to disclose a sufficiently arguable case of jurisdictional error.
11. As to ground 3, the primary judge concluded at [21] of *ALA15 (No 2)* that the Tribunal’s finding in [70] did not lack an evident and intelligible justification. His Honour observed that the country information and Tribunal’s reasoning supported its finding which was open on the material, with the consequence that ground 3 did not disclose a sufficiently arguable ground of jurisdictional error.
12. As to ground 4, the primary judge distinguished *SZUQZ v Minister for Immigration and Border Protection* [2015] FCCA 1552 (***SZUQZ***) on the basis that, in that case, PAM 3 had not been considered at all. His Honour concluded that, reading the Tribunal’s reasons as a whole and without a keen eye for error, the Tribunal’s reference to country information in [23] of its reasons for decision meant that there was no proper basis for inferring that the Tribunal did not have regard to PAM 3 nor take into account the guidelines, with the consequence that there was no sufficiently arguable case in relation to ground 4.
13. For these reasons the primary judge refused to extend time.

## The proceedings in this Court

1. At the commencement of the hearing in this Court, the applicant sought leave to rely upon an amended s 39B *Judiciary Act* application. His original judicial review application, which was lodged on 2 September 2015, was deficient because, as the Minister’s counsel pointed out in their written outline of submissions in chief, the FCCA had not been joined as a party (see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005)228 CLR 294 at [91] per Gummow J, at [153] per Kirby J and at [180] per Hayne J). This oversight was rectified in the proposed amended application.
2. The original s 39B *Judiciary Act* application contained four grounds of judicial review, however, this was reduced to only two grounds in the proposed amended application. The first ground was that the primary judge denied the applicant procedural fairness by refusing to disqualify himself due to reasonable apprehension of bias. The second ground was that the primary judge fell into jurisdictional error by refusing to disqualify himself and then proceeding to hear and determine the applicant’s extension of time application under s 477 of the *Act* when the primary judge did not possess jurisdiction to do so. The Court granted the applicant leave to file and rely upon the amended judicial review application. The grounds abandoned related to the rejection by the primary judge of the merit of the proposed substantive judicial review proceeding, which was the reason he refused the application for an extension of time.
3. The applicant sought to tender a copy of Mr Kline’s affidavit in support of his amended judicial review application in this Court. The affidavit was admitted into evidence subject to the Minister’s objection which was based on relevance. The Court informed the parties that it would deal with the admissibility of the affidavit in its reasons for judgment.
4. Although the application of the apprehended bias test can give rise to difficulties, the parties were in substantial agreement as to the primary elements of the test. That is hardly surprising because the test is relatively well settled. It is whether a fair-minded and appropriately informed lay observer might reasonably apprehend that the Court might not bring a fair, impartial and independent mind to the determination of the matter on its merits (see, for example, *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (***Ebner***); *Concrete Pty Limited v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577 and *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283 (***British American Tobacco***)).
5. Other relevant principles are:
6. at least the following two steps are involved in a case involving an allegation of apprehended bias:
   * 1. there must be an identification of what it has said might lead a judge to decide a case other than on its legal and factual merits; and
     2. there must be an articulation of the logical connection between the matter and the feared deviation from a course of deciding a case on its merits (*Ebner* at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ);
7. an allegation of bias against a judge on the basis of prejudgment is a serious matter not the least because it carries with it the suggestion that the judge has failed to honour his or her judicial oath as such might be questioned by the fair-minded observer. As is also the case where such an allegation is made against an administrative officer, the allegation must be “distinctly made and clearly proved” (*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 (***Jia Legeng***)at [69] per Gleeson CJ and Gummow J); and
8. as noted above, the test assumes that the hypothetical fair-minded lay observer is to be attributed with appropriate knowledge of relevant matters so as to be in a position to make a reasonably informed assessment of the likelihood of apprehended bias (see, for example, *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [13] per Gleeson CJ, Gaudron, McHugh and Gummow and Hayne JJ and at [53] per Kirby J; *British American Tobacco* at [47]-[48] per French CJ and at [144] per Heydon, Kiefel and Bell JJ and *Isbester v Knox City Council* [2015] HCA 20 at [23] per Kiefel, Bell, Keane and Nettle JJ and at [57] per Gageler J).
9. The applicant contended that the statistical material in Mr Kline’s affidavit should be attributed to the hypothetical observer without any further analysis or attempt to go behind the raw statistics and, if this approach was followed, apprehended bias would be made out.
10. There are several reasons why these contentions must be rejected and why the Minister’s objection to Mr Kline’s affidavit should be upheld (as it was also below). The first is that, for such raw statistical material to be attributed to the hypothetical observer, it normally would need to be accompanied by a relevant analysis of the individual immigration judgments determined by the primary judge in order that the statistics were placed in a proper context. Absent such analysis, the hypothetical observer would not be able to make an informed assessment of the significance of the raw statistics. It may be, for example, that a close analysis of some, many, or all of the relevant judgments reveal that they had been determined on a reasonable and plausible basis. And, even if some or all of the judgments were wrongly decided, that may be the consequence of human frailty on the part of the judge and not prejudgment, a consideration which a fair-minded lay observer would take into account.
11. Secondly, and contrary to the applicant’s submission, raw statistics concerning the outcome of immigration matters which have been determined by the primary judge compared with other FCCA judges or the outcome of MRT-RRT decisions generally does not necessarily indicate prejudgment. As Gleeson CJ and Gummow J observed in *Jia Legeng* at [71], the fact that it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.
12. Thirdly, there are two additional reasons why the statistics from the Annual Report of the MRT-RRT which are referred to in Mr Kline’s affidavit are irrelevant:
13. those statistics relate to the period 2013-2014, which is prior to the primary judge’s appointment; and
14. more significantly, those statistics are not confined to the outcome in the FCCA of judicial review proceedings of MRT-RRT decisions, but also included appeal proceedings in this Court and the High Court. Accordingly, they do not provide a valid “control” for statistical purposes.
15. Fourthly, we accept the Minister’s submission that the mere fact that a particular judge has decided a number of cases, the facts and circumstances of which are unknown, one way rather than another, does not go any way to assisting the hypothetical observer making an informed assessment as to whether that judge might not bring an impartial and unprejudiced mind to the resolution of the question in a particular proceeding before that judge. As Heerey J observed at [26] and [33] in *Vietnam Veterans’ Association of Australia (New South Wales Branch Inc) v Gallagher* [1994] FCA 489; (1994) 52 FCR 34 (***Vietnam Veterans’ case***)(in rejecting as irrelevant statistical evidence which purported to show that a particular decision-maker was more likely to decide against applicants than other decision-makers):

All such evidence could show is that, because a decision-maker has decided a particular kind of case in a particular way in the past, he or she is likely to decide a case of the same nature in the same way in the future. Even if that be accepted as a conclusion of fact, it does not make out a case of apparent bias. The law is not so ignorant or disdainful of human nature as to assume that judges or quasi-judicial decision-makers are automatons. It may well be that, for example, it can be predicted from past experience that judge A is more likely to impose a prison term for a particular crime than judge B, or that judge C will award greater damages for the same sort of injury than judge D. It is for this very reason that the listing of cases is a jealously guarded element of any system of justice …

…

For the foregoing reasons I do not think the statistical evidence proffered has any probative effect as to the correctness or otherwise of decisions of panels over which Mr Marsh presided. But there is the further fundamental obstacle that, even if incorrectness be proved in respect of such decisions, and shown to exist at a higher level compared with the decisions of panels without Mr Marsh, that does not establish a circumstance which might give rise to a reasonable apprehension of bias. All court systems and many administrative decision-making systems provide for appeals. As part of such appeal processes, decisions are routinely set aside for errors of fact or law. But in the vast majority of such cases there is no suggestion of apparent bias.

1. We do not accept the applicant’s argument that the *Vietnam Veterans’ case* is either distinguishable or was wrongly decided. Although at [20] Heerey J described the test for apprehended bias as turning on whether “in all the circumstances, the parties or the public might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the questions involved in it”, we do not consider that this formulation materially misstates the test as enunciated in the series of cases identified in [35] above. In any event, at [35] of his reasons for judgment, Heerey J expressed the test by reference to “a reasonable fair-minded observer”, which is consistent with the modern formulation of that part of the test.
2. The applicant submitted that the *Vietnam Veterans’ case* is distinguishable because the statistical analysis there (which indicated that there were appeals in 51.28% of the cases determined by the particular administrative decision-maker), was “very different” from the statistical analysis here. We disagree. Both statistical analyses were irrelevant to the apprehended bias test for the reasons given both above and by Heerey J. In the absence of further relevant material which puts such statistics in a proper and informed context, such raw statistics are generally likely to be irrelevant to the knowledge and information which is imputed to the hypothetical observer.
3. Fifthly, and independently of the other reasons given above, Mr Kline’s affidavit was irrelevant to the recusal application because the statistical analysis it contained related to a period which ended on 19 June 2015, which was the date the Full Court published its reasons for judgment in *SZWBH* and *Shrestha*. In these cases, the Full Court was critical of the primary judge’s practice of dismissing matters summarily at the first court date, without prior notice to the applicant and, in one case, over the Minister’s opposition. The recusal judgment was handed down on 29 July 2015. We accept the Minister’s submission that the primary judge’s conduct prior to 19 June 2015 is irrelevant to an allegation of apprehended bias in a case which post-dates the Full Court’s decisions. As is evident from the relatively detailed account above of the proceedings in the FCCA and the primary judge’s reasons for judgment in *ALA15 (No 2)*, the application for an extension of time below was not disposed of at the first return date. The primary judge considered the evidence filed by the applicant and addressed the submissions which were made on the applicant’s behalf by his counsel, Mr Jay Williams. These circumstances are very different from those which arose in cases such as *SZWBH* and *Shrestha*.
4. Mr Jay Williams sought to overcome this difficulty by referring in closing address to five other decisions of this Court in which critical observations were made in respect of some aspects of other judgments by the primary judge (*AAV15 v Minister for Immigration and Border Protection* [2015] FCA 700; (2015) 230 FCR 454; *AEG15 v Minister for Immigration and Border Protection* [2015] FCA 702; (2015) 230 FCR 465; *AHT15 v Minister for Immigration and Border Protection* [2015] FCA 1215; *SZWCW v Minister for Immigration and Border Protection* [2015] FCA 1217 and *Sekigawa v Minister for Immigration and Border Protection* [2016] FCA 127). All these cases related to decisions of the primary judge which pre-dated the Full Court’s decisions in *SZWBH* and *Shrestha*. Accordingly, they take the matter no further.
5. Insofar as the applicant’s case relies on the assertion that the primary judge had repeatedly used phrases such as “no substance” or “it is clear” in many of his immigration judgments, no evidence was adduced to substantiate this claim, which was only raised in the applicant’s written submissions. In any event, and perhaps more significantly, even if it be the case that the primary judge has repeatedly used those expressions, that is not probative of whether the hypothetical observer might apprehend that the primary judge might not bring an open mind to bear in determining the applicant’s proceedings. Such phrases are not uncommonly used by judicial officers. Their use, even frequently, would not of itself indicate to the fair-minded and informed hypothetical observer that a judge might be biased, at least without the observer knowing more about the context in which the phrases were used.
6. Mr Jay Williams accepted that if his client’s first ground of judicial review failed, so necessarily must the second.
7. For these reasons, the amended application under s 39B of the *Judiciary Act* should be dismissed.

## Costs

1. Mr Neil Williams SC (who, together with Mr M J Smith, appeared for the Minister) submitted that costs should follow the event in respect of both the application for an extension of time for leave to appeal and the amended s 39B *Judiciary Act* application.
2. Mr Jay Williams submitted that his client should not be ordered to pay costs having regard to his impecunious circumstances and the nature of his proceedings, which were described as being “a public interest test case”. He added that the proceedings were important in order to maintain public confidence in the judiciary.
3. None of these contentions warrants the Minister being deprived of his costs. The applicant’s financial and personal circumstances are not sufficiently compelling matters to displace the general principle that costs ordinarily follow the event. We also reject the applicant’s characterisation of the proceedings as “a public interest test case” or one which was aimed at preserving public confidence in the judiciary (see *Ruddock v Vadarlis* [2001] FCA 1865; (2001) 115 FCR 229 at [18]-[25] per Black CJ and French J). The proceedings were primarily designed to advance the applicant’s personal rights and interests under migration law.
4. For these reasons, the applicant should be ordered to pay the Minister’s costs of both the “withdrawn” application for an extension of time and leave to appeal and the amended s 39B *Judiciary Act* application.

## Some concerns regarding some conduct by the applicant’s legal representatives

1. It is appropriate to record some concerns relating to some aspects of the conduct of the applicant’s legal representatives. As will shortly emerge, the applicant’s legal representatives failed to comply with the Court’s case management orders and seemingly decided for themselves when and how standard steps in the preparation of the proceeding should occur. This conduct caused considerable inconvenience to the Court and its staff. It is probable that it had similar effects on the Minister’s legal representatives. The relevant conduct was most unsatisfactory and should not be repeated. If it happens again consideration may need to be given to making personal costs orders under s 37N(5) and s 43(3)(f) of the *FCA Act*.
2. It is necessary to describe the relevant conduct and the circumstances in which it occurred at some length.
3. On 2 September 2015, Mr Jay Williams, who was then acting on a direct access basis for the applicant, lodged an application in this Court under s 39B of the *Judiciary Act*. The application was formally filed on 4 September 2015 and a case management hearing was then scheduled to take place on 23 September 2015. On that day Robertson J made orders that the applicant file and serve any amended originating process and any further affidavit evidence on or before 7 October 2015. An order was also made for the Minister to file and serve any affidavit evidence and the matter was listed for a further case management hearing.
4. On 20 October 2015, Robertson J made further standard case management orders. The applicant was ordered to file and serve its outline of submissions and a chronology of relevant events 20 business days before the hearing, i.e. to file and serve on or before 29 January 2016. The Minister was ordered to file and serve his outline of submissions etc 15 business days before the hearing. The applicant was ordered to file and serve any submissions in reply 10 business days before the hearing, i.e. 12 February 2016. A 10 page limit was imposed on all these submissions. The applicant was also ordered to file and serve copies of the Application Book 5 business days before the hearing, i.e. 19 February 2016.
5. On 7 October 2015, the applicant’s solicitor (Mr Matthew Byrnes of Russell Byrnes) lodged an application for leave to appeal the recusal judgment and a fresh application under s 39B of the *Judiciary Act*. At the same time Mr Byrnes lodged an affidavit affirmed by him on 7 October 2015.
6. The applicant’s legal representatives then took it upon themselves to act otherwise than in compliance with the orders made on 20 October 2015. On 2 February 2016 (i.e. two days late), Mr Jay Williams caused to be filed and served two separate written outlines of submissions in respect of the applicant’s challenges to the recusal and primary judgments. The outlines totalled more than 20 pages in length. In contrast, in compliance with the Court’s orders, the Minister filed and served a single outline of written submissions which were within the page limit. Mr Jay Williams then responded by causing to be filed and served two separate written outlines of submissions in reply, which totalled 12 pages in length. This conduct was inconsistent with the Court’s orders dated 20 October 2015. Those orders were designed to encourage the parties’ legal representatives to avoid prolixity and to identify clearly the primary issues in contention for determination by the Court. The applicant’s written submissions, both in chief and in reply, were loquacious, unduly repetitive, unfocused and contained numerous distracting typographical errors.
7. Contrary to the Court’s orders, the applicant failed to file and serve either a chronology or copies of the Application Book by the appointed times.
8. At 4:23 pm on Friday, 26 February 2016, after obtaining the consent of the Minister’s legal representatives, Mr Jay Williams emailed the Chief Justice’s associate. He said that his client wished to “withdraw” his application for leave to appeal the recusal judgment and would seek leave to rely solely on an amended s 39B *Judiciary Act* application. He forwarded a draft amended application and amended submissions in reply. He said that he would attempt to have all outstanding documents, including the Application Book, chronology and list of authorities by 5 pm that day.
9. Notwithstanding that, as noted above, as far back as 20 October 2015, Robertson J had ordered the applicant to file and serve copies of the Application Book by no later than 4 pm on Friday, 19 February 2016. This order was not complied with. Belatedly, late on Friday, 26 February 2016 (i.e. immediately preceding the weekend before the hearing), Mr Jay Williams emailed to the Chief Justice’s associate an electronic copy of the Application Book, which totalled 555 pages. He also attempted to provide this material electronically to the Australian Government Solicitor by way of “dropbox”. Mr Jay Williams initially said by telephone to the Chief Justice’s associate that he would provide hard copies but then at 8.47 pm on 26 February 2016 he told the Chief Justice’s associate that neither he nor his client could afford to do so and he asked the Court to print its own hard copies (the Court was subsequently informed that Mr Jay Williams and his solicitor were acting pro bono on behalf of the applicant, in the sense of “no win–no fee”). He also provided a “dropbox” link which included 30 additional documents without indicating what they were and whether he had some expectation that they be printed. Mr Williams forwarded electronically a new application for leave to amend his client’s s 39B *Judiciary Act* application, a supporting affidavit affirmed by Mr Byrnes on 26 February 2016 and amended submissions in reply.
10. On Saturday, 27 February 2016 Mr Jay Williams was informed by the Australian Government Solicitor that they were unable to access the documents which he had forwarded to them the previous evening by way of “dropbox”. He was told that the security systems for the Australian Government Solicitor information technology system did not allow access to dropbox. Later that morning, Mr Williams forwarded by email to the Australian Government Solicitor copies of what were described as “Final Submissions” and a “Chronology”.
11. On Sunday 28 February 2016 at 1:58 pm, and without the Court’s leave, Mr Williams sent an email to the Chief Justice’s associate, copied to the Minister’s legal representatives, in which he said that because the applicant had “withdrawn” the application for leave to appeal and his submissions were “fragmented” over the two initial applications, he attached what he described as “the applicant’s final submissions, which condenses the outline and reply into one”. This document totalled 17 pages. He also belatedly provided a chronology. He asked the Australian Government Solicitor to indicate whether “this is acceptable” and said that he would include the material in the Application Book. As noted above, Robertson J had made orders on 20 October 2015 for the filing of the completed Application Book by no later than 4 pm on 19 February 2016.
12. Mr Jay Williams also advised in his email dated 28 February 2016, sent at 1:58 pm, that he was finalising the list of authorities based on the applicant’s final submissions (the list of authorities was due to be filed and served by 4 pm on 19 February 2016). Mr Williams asked the Australian Government Solicitor to tell him by 4 pm, Sunday 28 February 2016, whether there were any other documents which the Minister wished to be included in the Application Book and that his aim was to provide the Application Book to the Court and the Minister by 5 pm on Sunday, 28 February 2016.
13. At 3.23 pm on Sunday, 28 February 2016, Mr Jay Williams forwarded to the Minister’s legal representatives and the Chief Justice’s associate a revised index to the Application Book, with additions underlined. He asked that he be informed by 4 pm that day (i.e. 37 minutes after he sent his email) whether “this is acceptable or if there should be any further inclusions”.
14. Between 4.58pm and 5.07pm, on Sunday 28 February 2016, Mr Jay Williams sent four emails to the Chief Justice’s associate which attached parts of an electronic copy of the new Application Book, which in total contained approximately 750 pages. The index contained several relevant errors.
15. At 9:40 am on the morning of the hearing, and without the Court’s leave, Mr Jay Williams provided the Minister’s legal representatives and the Court with a six page document entitled “Outline of the applicant’s oral submissions”.
16. The Court acknowledges that the applicant’s legal representatives were acting on a pro bono basis. Such involvement generally assists in the due and efficient administration of justice and the Court is grateful to practitioners who become involved on a pro bono basis. It is no excuse, however, for not complying with the Court’s orders in the manner and frequency which occurred here.

## Conclusion

1. For these reasons, the application for an extension of time and leave to appeal, and the amended application under s 39B of the *Judiciary Act*, will both be dismissed, with costs.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Kenny and Griffiths. |

Associate:

Dated: 10 March 2016