Federal Court of Australia

Sayed v National Disability Insurance Agency (No 2) [2022] FCA 1591

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| File number: | VID 520 of 2022 |
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| Judgment of: | **O'BRYAN J** |
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| Date of judgment: | 23 December 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to recuse on the grounds of actual bias and apprehended bias – rulings made during first case management hearing – application dismissed  |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44*Federal Court of Australia Act 1976* (Cth) s 37M*Judiciary Act 1903* (Cth) s 39B*National Disability Insurance Scheme Act 2013* (Cth) ss 32, 33, 37, 48, 49, 99, 100(6), 103*National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022* (Cth)  |
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| Cases cited: | *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175*Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 218*DOQ17 v Australian Financial Security Authority (No 2)* [2018] FCA 1270; 363 ALR 681*Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337*Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479*Isbester v Knox City Council* (2015) 255 CLR 135*Johnson v Johnson* (2000) 201 CLR 488*Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507*QRS v Legal Profession Board of Tasmania* [2017] TASFC 10*Sayed v National Disability Insurance Agency* [2022] FCA 1494*Steven Dural v The Queen* [2021] VSCA 82*Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71*Westpac Banking Corporation v Forum Finance Pty Ltd (Apprehended Bias Application)* [2022] FCA 981  |
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| Division: | General Division |
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| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 79 |
|  |  |
| Date of hearing: | 16 December 2022  |
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| Solicitor for the Applicant: | The Applicant was self-represented |
|  |  |
| Counsel for the First Respondent: | Mr N Swan |
|  |  |
| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |

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| **Table of corrections** |
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| 16 January 2023 | In the last line of paragraph 7, the word “not” has been inserted before “have a current practising certificate”. |

ORDERS

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|  | VID 520 of 2022 |
|   |
| BETWEEN: | MUHAMMAD ALI SAYEDApplicant |
| AND: | NATIONAL DISABILITY INSURANCE AGENCYFirst RespondentADMINISTRATIVE APPEALS TRIBUNAL OF AUSTRALIASecond Respondent |

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| --- | --- |
| order made by: | O'BRYAN J |
| DATE OF ORDER: | 23 December 2022 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application filed on 25 November 2022 be dismissed.
2. There be no order as to costs.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. By interlocutory application filed on 25 November 2022 (**recusal application**), the applicant seeks an order that I recuse myself from further involvement in these proceedings by reason of “actual (prejudgment) bias”. The recusal application states that it is brought on the ground that:

During the course of the Case Management hearing on 4th November 2022 … the judicial officer engaged in conduct that likely amounted to unprofessional and oppressive conduct, and caused unfair prejudice to applicant’s legitimate interests in the proceeding.

1. The recusal application identifies three matters addressed during the first case management hearing in this proceeding, conducted on 4 November 2022, which are the subject of the applicant’s complaint. The application also raises, as a fourth complaint, the Court’s refusal to order production of an audio recording of the case management hearing. That refusal is the subject of separate reasons published by the Court on 12 December 2022 in *Sayed v National Disability Insurance Agency* [2022] FCA 1494 (***Sayed No 1***).
2. Much of the background to the proceeding has been set out in *Sayed No 1*. These reasons assume familiarity with the matters there stated. Matters of specific relevance to the applicant’s complaints will be elaborated in the context of considering the applicant’s complaints.
3. In support of his recusal application, the applicant filed written submissions on 12 December 2022. The first respondent, the National Disability Insurance Agency (**NDIA**) took no position on the application but filed written submissions on 15 December 2022 setting out the applicable legal principles for the assistance of the Court.
4. The recusal application was heard on 16 December 2022. For the reasons explained in *Sayed No 1* at [19], the hearing was conducted using the Microsoft Teams platform with the applicant appearing by audio only (at his request). In the course of the hearing, the applicant’s audio connection faded in and out on occasions, and there were a number of pauses while the applicant established a better connection. That also occurred during the first case management hearing. Overall, though, I am satisfied that the applicant was able to advance the submissions he wished to make on both occasions.
5. As described in *Sayed No 1*, the applicant applied to the Court for a copy of an audio recording of the case management hearing conducted on 4 November 2022. For the reasons given in *Sayed No 1*, I refused that application but made orders that would ensure that the applicant had access to the written transcript of the case management hearing prepared by the Court’s transcript provider, Auscript. On 14 December 2022, the applicant sent the Court an application for leave to appeal from the orders made in *Sayed No 1*. At the commencement of the hearing of the recusal application on 16 December 2022, I asked Mr Sayed whether he wished to proceed with the hearing or adjourn the hearing pending the hearing and determination of his application for leave to appeal against *Sayed No 1*. The applicant confirmed that he wished to proceed with the hearing of the recusal application and he did so on the basis of the transcript of the case management hearing.
6. At the commencement of the hearing of the recusal application, the applicant stated that: “I must now also disclose that I am an admitted practitioner”. I asked the applicant whether that meant that he currently holds a practising certificate, to which the applicant replied that he is an admitted lawyer but he had not applied for a practising certificate and did not hold one. Subsequently, the applicant stated that he is admitted to the Supreme Court of Tasmania and that he is on the roll as an Australian lawyer, but that he does not have a current practising certificate.
7. At the hearing, the applicant advanced lengthy oral submissions in support of the recusal application, and made reference to a number of authorities. Although the recusal application alleged actual bias, in oral submissions I understood the applicant to base his application on apprehended bias in the alternative.
8. Allegations of actual or apprehended bias are serious matters and must be assessed carefully by the Court. It is regrettable if a litigant in this Court forms the impression that the presiding judge prejudged the litigant’s case so as to be unable or unwilling to decide it impartially. However, statements made or rulings given by a judge addressing matters of practice and procedure in the course of a case management hearing must be assessed in the context of ordinary judicial practice. That includes the necessity for active case management in order to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible (as per s 37M of the *Federal Court of Australia Act 1976* (Cth)). As observed by the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) in *Johnson v Johnson* (2000) 201 CLR 488 (***Johnson***) at [13] in the context of an allegation of apprehended bias:

… the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.

1. The speed with which issues of practice and procedure may be addressed and determined in a case management hearing may surprise self-represented litigants, even one who has been admitted to legal practice such as the applicant. It is necessary for the Court to conduct case management hearings and resolve issues of practice and procedure with expedition to ensure that the limited resources of the Courts are applied in the most efficient manner in the public interest: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [92]-[93]. In doing so, however, the Court must also be mindful of its obligations towards self-represented litigants (recently summarised by the Full Court in *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479 at [51]-[57]).
2. It is unfortunate that the present proceeding has become delayed by cascading interlocutory applications that have been brought by the applicant. The case management of this proceeding has also been complicated by the very large number of emails sent by the applicant to my chambers and to the Court Registry. The large volume of communications and the interlocutory applications have prevented the efficient progress of the proceeding to a final hearing.
3. For the reasons that follow, the recusal application should be dismissed.

## Applicable legal principles

1. The applicable legal principles are well-settled. As explained in many cases, the common law principles concerning bias are fundamental to the Australian judicial system (see for example *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337 (***Ebner***) at [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ). Relevantly, the principles are concerned with circumstances that might lead a judge to decide a case other than on its legal and factual merits or that might create a reasonable apprehension of that occurring (see for example *Ebner* at [8]).
2. The test for bias in the form of prejudgment was stated by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72]:

The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

1. At [71], their Honours observed (citation omitted):

Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker’s mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, 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.

1. In oral submissions, the applicant referred the Court to *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 in support of the proposition that bias need not be confined to an intentional state of mind and may be subconscious (at 127 per Burchett J and at 135 per North J).
2. The applicant also referred to *Steven Dural v The Queen* [2021] VSCA 82 and placed reliance on statements by the Victorian Court of Appeal to the effect that the applicant had a legitimate grievance about a number of procedural matters (at [30]-[32]). In that case, however, the Court dismissed the recusal application brought by the applicant observing that the applicant’s grievances with respect to procedural matters were quite different to the question of judicial bias (at [33]).
3. The applicant also referred to *QRS v Legal Profession Board of Tasmania* [2017] TASFC 10. In that case, the Full Court of the Supreme Court of Tasmania concluded that the primary judge’s discharge of certain suppression orders should be set aside on the ground of bias. Before giving the appellant an opportunity to make submissions about the discharge of the orders, the primary judge had made a number of comments indicating that she agreed with propositions advanced by the respondent. The applicant relied on the conclusion expressed by Blow CJ at [4] to the effect that bias had been established because the primary judge unequivocally expressed a concluded view without affording the appellant an opportunity to make any submissions as to the issue.
4. Finally, the applicant made passing reference to *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 218 at [44].
5. The test for apprehended bias is whether a fair­minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: *Johnson* at [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Ebner* at [6] per Gleeson CJ, McHugh, Gummow and Hayne  JJ. In *Isbester v Knox City Council* (2015) 255 CLR 135, the plurality (Kiefel, Bell, Keane and Nettle JJ) observed (at [20] and [23], citations omitted):

20 The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.

…

23 How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.

1. In determining this recusal application, I have also given careful consideration to the following observations of the majority in *Ebner* (at [19]-[ 20]):

19 Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

20 This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

## Ground 1 – application for a cost-capping order

1. The first ground advanced by the applicant in support of the recusal application is that his application for a cost-capping order was denied without giving the parties an opportunity to be heard on the motion.
2. As explained in *Sayed No 1*, the applicant’s cost-capping application was made to the Court by an email sent to chambers on 2 November 2022. The email stated as follows (errors in original):

I am available for CM hearing by telephone: [numbers redacted].

Further I pleased to advise that I have setup Microsoft Team on my phon. Please use this email to send invite. However I note that due to limited access to wireless data I won’t be able to use video feature.

Lastly, by way of Notice to the First Respondent - I will move the Court to make cost‐capping orders. I don’t accept that the Agency requires attendance by 3 lawyers to instruct their counsel at a case management hearing. This is a typical example of NDIA’s wasteful and oppressive practices, rrunning up legal costs by pilling on lawyers against a SRL!

1. At the commencement of the case management hearing on 4 November 2022, I explained to the parties, and particularly for the benefit of the applicant (whom, at that time, I understood to be a self-represented litigant without legal training or experience), that the purpose of case management hearings is to make whatever procedural and timetabling orders are required to prepare the matter for a final hearing. I also indicated that there were a number of issues that I wished to address. The first two had been raised in correspondence by the applicant, being a cost-capping order and a concern about the transcript of the proceeding before the Administrative Appeals Tribunal (**AAT**). The third concerned my own questions about the formulation of the appeal.
2. In relation to the cost-capping application, I asked the applicant to make any submissions to the Court about the costs of the proceeding (transcript p 3). Mr Sayed made the following submission:

I was hoping that your Honour, perhaps, can discuss with the respondents and consider making a costs capping order. The only reason for that being when I saw emails from one of their lawyers that four – four practitioners will be attending a case management hearing for three lawyers instructing a counsel, I wasn’t happy about that. I felt that that’s a bit of an overkill. And I just want to make sure that as this matter proceeds, I’m not having – at the end of it, in case if I lose – pay for a team of lawyers when this is, essentially, not – not really an appeal in relation to any of my needs or any of substantive orders that could have made by the Tribunal.

It is a very simple proceeding. It is simply whether the review that should have happened internally within the agency took place or not. And whether the Tribunal was correct in deciding it had no jurisdiction to entertain my review application. It’s a simple proceeding and I just want to make sure that I’m, at the end of it, not looking at a six figure costs bill. That’s all.

1. I refused to make a cost-capping order and gave the following reasons:

Can I say this – and I will say this for the benefit of the respondent as well – if you are unsuccessful in this proceeding, Mr Sayed – as you have already indicated you do face – at least the possibility, nothing certain – but you face the possibility of having a costs order made against you in the proceeding. And I might say that that is the usual outcome, but it’s not certain that that will be the outcome, but that’s the usual outcome if you’re unsuccessful in a proceeding. However, the amount of costs that you will be required to pay are, ultimately, assessed by the court under a process that’s known as taxation of the costs.

In that process, the court will only order you to pay the costs that the court considers are fair and reasonable, having regard to the issues in the proceeding. Now, I say that, obviously, both for your benefit and also for the benefit of the respondent. The respondent will be aware of that and the respondent will, undoubtedly, be aware that if it has a number of legal practitioners involved in the proceeding – and ultimately, the court determines that that was excessive cost, having regard to the issues in the proceeding – then the respondent, even if they’re successful, on a taxation is – are very unlikely to recover their costs on that.

Now, that’s, of course, ultimately a matter for the respondent because the respondent is perfectly entitled to use whatever legal resources it likes, but knowing that it may not get paid for it in a costs order. But the proper time for assessment of whether costs are reasonably incurred or not is after a costs order has been made because it’s only at that time, when the proceeding has been finally determined, that the court, through its taxing officer, is able to make an assessment of what the reasonable costs ought to have been for the proceedings. So I’m not prepared to make any kind of cost capping order now. It’s too early in the proceeding, the issues are too undefined. And, further, I consider, Mr Sayed, that you have the protection of the taxation process of the court to protect you from incurring unreasonable costs.

1. It is apparent that the applicant disagrees with my ruling on his application for a cost-capping order. However, disagreement with a ruling made by a judge does not establish bias or apprehended bias. In the recusal application, the applicant contends that the above ruling was made without proper consideration or giving the parties an opportunity to be heard on the motion. I reject that contention. The applicant was afforded an opportunity to be heard. In any event, to the extent the applicant considers that he was denied procedural fairness (in terms of the hearing rule) or that the ruling reveals error, he is entitled to seek leave to appeal the ruling.
2. For those reasons, I reject the applicant’s contention that, in addressing this issue at the case management hearing, I displayed bias or that a reasonable apprehension of bias arose. I therefore reject ground 1 of the applicant’s recusal application.

## Ground 2 – application for an order requiring the AAT to provide an audio recording of the AAT hearing on 11 August 2022

1. The second ground advanced by the applicant in support of the recusal application concerns his application for an order requiring the AAT to provide an audio recording of the AAT hearing on 11 August 2022. In his recusal application, the applicant contends that, during the case management hearing, I engaged in oppressive cross-examination (over the applicant’s objection) in relation to the source of an annotated transcript, which served no material purpose other than an attempt to embarrass the applicant.
2. As explained in *Sayed No 1*, the applicant has filed a notice of appeal from a decision of the AAT made on 11 August 2022. By that decision, the AAT dismissed the applicant’s application for review of a decision of the NDIA on the basis that the AAT did not have jurisdiction. The AAT concluded that the NDIA had not made a decision under s 100(6) of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) and, as a consequence, there was no decision that was reviewable by the AAT (as per s 103 of the NDIS Act). The AAT dismissed the application pursuant to s 42A(4) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).
3. The applicant appeared at the AAT hearing on 11 August 2022 by telephone.
4. By his amended interlocutory application filed on 25 September 2022, the applicant sought an order from the Court requiring the District Registrar of the AAT to file with the Court a complete and accurate copy of the audio recording and transcript record of the proceeding before the AAT on 11 August 2022. Attached to the interlocutory application was a record of communications between the applicant and the AAT in which the applicant had requested a copy of a transcript of the hearing before the AAT prior to filing his notice of appeal in this Court. The correspondence also included an email sent on 13 September 2022, after the notice of appeal had been filed, in which the applicant requested a transcript of the AAT hearing pursuant to r 33.18(1)(c) of the *Federal Court Rules 2011* (Cth). In that email, the applicant also sought an audio recording of the hearing. The reason for the latter request was not stated.
5. Between the filing of that interlocutory application and the case management hearing on 4 November 2022, the applicant engaged in further correspondence with the AAT Registry about obtaining a transcript and audio recording of the hearing in the AAT. The correspondence was copied to my chambers. As this was effectively *inter partes* correspondence, my chambers communicated with the applicant requesting him not to copy chambers in such correspondence. This correspondence was part of extensive and argumentative correspondence received by my chambers from the applicant both before and after the case management hearing.
6. At the request of my chambers, on 3 November 2022 (immediately prior to the case management hearing) the applicant filed a further copy of his amended interlocutory application which attached the correspondence he wished to rely on at the case management hearing. The correspondence included an email sent by the applicant to the AAT on 21 October 2022 in which the applicant acknowledged receipt of the AAT hearing transcript the previous day. The email relevantly asserted as follows (formatting and errors in original):

PLEASE BE ADVISED THAT THE TRIBUNAL HAS PROVIDED ***AN INCORRECT AND INCOMPLETE TRANSCRIPT OF THE HEARING***.

I HAVE ONLY GONE THROUGH THE FIRST HALF OF HEARING AND ALREADY FOUND A SIGNIFICANT PART OF THE HEARING MISSING FROM THE TRANSCRIPT.

PLEASE FIND, ***ATTACHED*** TRANSCRIBED SECTION OF THE HEARING WITH MISSNG TEXT MARKED IN RED.

I ALSO REMIND THE REGISTRAR THAT THE APPLICANT HAS PREVIOUSLY SERVED: ***NOTICE TO PRODUCE*** THE AUDIO RECORDING BEFORE JUSTICE OBRAYN, AT 9 AM ON 4 OCTOBER 2022.

I ALSO REFER TO ***FEDERAL COURT RULE 33.18(1)(C)*** WHICH REQUIRED, THE REGISTRAR TO HAVE FILED EVIDENCE WITH THE COURT, ***WITHIN 21 DAYS AFTER SERVICE OF NOTICE***.

IT IS NOW CLEAR THAT THE SECOND RESPONDENT (AAT) - IS EITHER UNABLE OR UNWILLING TO COMPLY WITH THEIR DUTY TO THE COURT, OR OTHERWISE ACT AS A MODEL LITIGANT - BY PERPETUALLY AND UNREASONABLY REFUSING TO PROVIDE AN ACCURATE TRANSCRIPT OR TRUE COPY OF THE AUDIO-RECORDING OF THE HEARING.

IT THEREFORE LEAVES APPLICANT NO CHOICE BUT TO GIVE NOTICE OF THE DOCTORED TRANSCRIPT PROVIDED BY THE TRIBUNAL (REFER TO THE ATTACHED DOCUMENT) AND ARRANGE FOR THE ORIGINAL AUDIO/VIDEO RECORDING OF THE ENTIRE HEARING TO BE PRODUCED BEFORE THE JUDGE ON THE AFOREMENTIONED DATE (REFER TO THE ATTACHED NOTICE).

1. Attached to the email, and included as part of the correspondence, was a version of the transcript of the AAT hearing that had been annotated by the applicant to show text that the applicant asserted had been incorrectly added to the transcript and to mark-up text that the applicant asserted had been incorrectly omitted from the transcript.
2. The email contained serious allegations that the AAT was “either unable or unwilling to comply with their duty to the court, or otherwise act as a model litigant by perpetually and unreasonably refusing to provide an accurate transcript or true copy of the audio-recording of the hearing” and that the AAT had provided a “doctored transcript”.
3. It was apparent from the correspondence filed with the Court prior to the case management hearing that the applicant sought an order for an audio recording of the AAT hearing on 11 August 2022 because the applicant asserted that there were material errors in the transcript.
4. At the case management hearing on 4 November 2022, I asked the applicant to address me about the transcript of the AAT hearing (transcript p 5). The applicant stated that he had compared the transcript with his notes and had highlighted what he considered to be discrepancies in the transcript. Noting that the applicant had said that he had prepared the annotated version of the transcript from his notes, I asked the applicant whether he had an audio recording of the AAT hearing. The applicant refused to answer that question, essentially asserting that the question was not relevant (at transcript pp 5 to 7). I then explained to the applicant that I had asked that question in order to assess whether there was a sufficient basis on which to require the AAT to produce an audio recording of the hearing (transcript p 7). If the applicant had prepared the annotated version from his own audio recording, that would have provided a stronger evidentiary foundation for requiring the audio recording to be produced to determine whether the transcript had been prepared with sufficient care. The applicant stated that he disagreed, and then his argument shifted ground entirely. The applicant submitted that, in cases alleging bias, the Court requires an audio recording of the relevant hearing (transcript p 7). The applicant then addressed me on the grounds in his notice of appeal in which allegations of bias were made having regard to the conduct of the AAT hearing (transcript pp 7 to 9). Having heard the applicant on that ground, I asked counsel for the NDIA whether the NDIA had any objection to an order requiring production of the audio recording (transcript p 9). Counsel replied in the negative. I then enquired what form of order the Court needed to make. In response, counsel for the NDIA stated that he had instructions that the AAT had informed the NDIA that the applicant’s request was being processed. As a result of that information, I determined that it was unnecessary to make an order at that point in time and ruled as follows (transcript p 10):

Well, Mr Sayed, what I will do is, with that indication from Mr Swan that the AAT might in fact be processing your request, I might hold off making a specific order today, and I will leave it up to the AAT in the first instance, hopefully, to comply with the request – if not, to Mr Swan and his instructors, perhaps, to renew a similar request with the AAT, and I am going to proceed on the basis that the audio recording will be produced.

If it’s not produced, say, in a couple of weeks, either party can contact my chambers either to convene another hearing or – and I might mention this to Mr Swan as well – if, Mr Swan, it turns out the AAT needs an order of this court in order to produce it and you need an order, well, the parties could prepare a consent order and send it to my chambers, and I will make the order in chambers and move it along.

1. I reject the applicant’s contention that, during the case management hearing, I engaged in oppressive cross-examination in relation to the source of the annotated transcript, which served no material purpose other than an attempt to embarrass the applicant. There is nothing improper in the Court asking a litigant questions to determine whether there is a sufficient basis for an order being sought by the litigant. It is unusual for a litigant to refuse to answer the Court’s questions. The question asked of Mr Sayed was relevant to the principal basis on which he had requested an audio recording of the hearing: vis, that the transcript produced by the AAT contained material errors.
2. The applicant argued that the irrelevance of the question asked of him was demonstrated by my subsequent indication that, if necessary, I would order production of the audio recording. That is incorrect. The course of the application altered when the applicant put his application on a different basis – that the audio recording was necessary to determine the applicant’s claims of bias on the part of the AAT. Having heard those submissions, and ascertained that the NDIA had no objection, I considered it appropriate that an audio recording be produced. There was no need to make an order, however, as it appeared that the recording would be produced to the applicant by the AAT in any event.
3. For those reasons, I reject the applicant’s contention that, in addressing this issue at the case management hearing, I displayed bias or that a reasonable apprehension of bias arose. I therefore reject ground 2 of the applicant’s recusal application.

## Ground 3 – the form of the applicant’s notice of appeal

1. The third ground of the recusal application is that, on my own motion, I sought to question the validity of the proceeding before ruling on the matter without notice or opportunity to make submissions.
2. The ground principally relates to questions I raised with the parties at the case management hearing about the formulation of the proceeding and a ruling I gave, albeit without making any orders at that time. The ruling related solely to a matter of practice and procedure: whether the claims sought to be brought by the applicant had been put in a form that would enable their proper hearing and determination. The ruling was made in an effort to assist the applicant to put his claims in proper form so that they could be heard and determined. As will be explained below, the ruling does not relate to the merits of the applicant’s claims and, in my view, cannot be perceived as having impacted negatively on the applicant’s legal rights or interests. Nevertheless, the applicant alleges that certain statements I made in the course of considering that issue evinced bias or gave rise to a reasonable apprehension of bias.
3. A second matter arose at the case management hearing in the course of the consideration of the formulation of the applicant’s claim. The NDIA made an open offer in Court to the applicant that the NDIA was prepared to undertake a review of the applicant’s current statement of participant supports under s 100 of the NDIS Act. The significance of that offer will be explained further below, but it can be noted that an order to that effect is sought by the applicant by way of relief in the proceeding. Despite that, the applicant indicated at the hearing that he rejected that offer.
4. In order to consider ground 3, it is necessary to provide some further background concerning the legal framework in which decisions under the NDIS Act are made, the administrative decisions that preceded the applicant’s application before the AAT and the claims made in this proceeding.

### Legislative framework – NDIS Act

1. The following is a brief overview of the principal provisions of the NDIS Act relevant to the applicant’s claims in this proceeding. Many of the provisions referred to below were amended by the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022* (Cth) (**2022 Amendment Act**) with effect on 1 July 2022. It is sufficient for present purposes to refer to the provisions as in force prior to amendment, as this section is only intended to describe the basic framework of the NDIS Act as it relates to the applicant’s claims. In due course, the provisions may need to be examined more closely.

#### Preparing participants’ plans (Ch 3, Pt 2, Div 2)

1. Chapter 3, Pt 2, Div 2 of the NDIS Actprovides for the preparation of NDIS participant plans. Section 32 provides as follows:

**32 CEO must facilitate preparation of participant’s plan**

(1) If a person becomes a participant, the CEO must facilitate the preparation of the participant’s plan.

(2) The CEO must commence facilitating the preparation of the participant’s plan within 21 days of the person becoming a participant.

1. Section 33 provides the “matters that must be included in a participant’s plan”. Relevantly, s 33(2) provides that:

(2) A participant’s plan must include a statement (the ***statement of participant supports***), prepared with the participant and approved by the CEO, that specifies:

(a) the general supports (if any) that will be provided to, or in relation to, the participant; and

(b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and

(c) the date by which, or the circumstances in which, the Agency must review the plan under Division 4; and

(d) the management of the funding for supports under the plan (see also Division 3); and

(e) the management of other aspects of the plan.

1. Section 37 specifies when a participant’s plan is in effect and provides as follows:

**37 When plan is in effect**

(1) A participant’s plan comes into effect when the CEO has:

(a) received the participant’s statement of goals and aspirations from the participant; and

(b) approved the statement of participant supports.

(2) A participant’s plan cannot be varied after it comes into effect, but can be replaced under Division 4.

Note: Under Division 4, a participant may request a review of his or her plan at any time and may revise the participant’s statement of goals and aspirations at any time, which results in the replacement of the plan.

(3) A participant’s plan ceases to be in effect at the earlier of the following times:

(a) when it is replaced by another plan under Division 4;

(b) when the participant ceases to be a participant.

#### Varying and replacing participants’ plans (Ch 3, Pt 2, Div 4)

1. Ch 3, Pt 2, Div 4 of the NDIS Act provides for the variation and replacement of participants’ plans. Prior to the recent legislative amendments, s 48 provided that a participant may request that the CEO conduct a review of the participant’s plan at any time and the CEO must determine whether to do so. Section 49 provided that, if the CEO conducts a review of a participant’s plan under section 48, the CEO must facilitate the preparation of a new plan with the participant in accordance with Div 2. By the amendments made under the 2022 Amendment Act, the language of “review” used in s 48 was changed to “reassessment”.

#### Review of decisions (Ch 4, Pt 6)

1. Part 6 of Ch 4 deals with the review of decisions. Section 99 contains a table setting out “**reviewable decisions**” under the Act and the relevant decision-maker in respect of each of those decisions. Prior to the recent legislative amendments:
2. item 4 provided that a “decision to approve the statement of participant supports in a participant’s plan” pursuant to s 33(2) is a reviewable decision; and
3. item 6 provided that “a decision not to reassess a participant’s plan” pursuant to s 48(2) is a reviewable decision.
4. Section 100 provides for the review of reviewable decisions. It relevantly provides:

(1)        The decision-maker of a reviewable decision must give written notice of the reviewable decision, and of the reasons for the reviewable decision, to each person directly affected by the reviewable decision.

…

(2)        A person who is directly affected by a reviewable decision may request the decision-maker to review the reviewable decision. If the person is given a notice under subsection (1) the person must make the request within 3 months after receiving the notice.

(3)        A request may be made by:

(a)         sending or delivering a written request to the decision-maker; or

(b)         making an oral request, in person or by telephone or other means, to the decision-maker.

(4)        If a person makes an oral request in accordance with paragraph (3)(b), the person receiving the oral request must:

(a) make a written record of the details of the request; and

(b) note on the record the day the request is made.

(5)        If:

(a) the decision-maker receives a request for review of a reviewable decision; or

(b)         …

the decision-maker (the reviewer) must review the reviewable decision.

…

(6) The reviewer must make a decision:

(a) confirming the reviewable decision; or

(b) varying the reviewable decision; or

(c) setting aside the reviewable decision and substituting a new decision.

1. Section 103(1) provides that applications may be made to the AAT for review of a decision made by a reviewer under s 100(6).

### Application to the AAT

1. In his further amended notice of appeal in this Court, the applicant included his application to the AAT. Although matters stated in that application may be controversial, the application serves to identify the claims made by the applicant as to the administrative decisions made by the NDIA or the NDIA’s failure to make decisions, relevant to his application to the AAT. The application refers to the following matters:
2. On 30 March 2022, the applicant joined the NDIS, after an internal review by the agency which set aside an earlier decision by a delegate denying the applicant access to the scheme.
3. On 7 June 2022, the applicant received his first participant plan. However, the applicant was unhappy with the delegate’s decision to approve the statement of participant supports under s 33(2).
4. During a teleconference meeting on 29 June 2022, the applicant made a review request by telephone. The applicant contends that he “reasonably understood it to constitute a decision for the purpose of s 100(6)(a)”. The nature of the review actually conducted is in dispute. A review under s 100(6) is reviewable by the AAT, whereas a review under s 48 is not.
5. On 7 July 2022, the applicant filed an application for review in the AAT.
6. On 29 July 2022, the applicant received a second plan including a second statement of participant supports. In a letter accompanying the second plan, the delegate stated that a review of his first plan had been undertaken pursuant to s 48.
7. On 11 August 2022, the AAT determined that it does not have jurisdiction to review the applicant’s statement of participant supports. In its reasons published on 18 August 2022, the AAT concluded (at [10]) that the applicant had not lodged a reviewable decision made pursuant to s 100(6) of the NDIS Act with the Tribunal at the time he purported to make his application, as required by s 103 of the NDIS Act, to ground the Tribunal’s jurisdiction to review such a decision.

### Applicant’s further amended notice of appeal

1. As explained in *Sayed No 1* (at [15]-[18]):

15 … the further amended notice of appeal raises a number of questions as to the formulation of the applicant’s claim.

16 First, the original notice of appeal was stated to be an appeal under s 44 of the AAT Act from the AAT’s decision and sought an order under s 44(5) of the AAT Act that the decision of the AAT be set aside and the applicant’s review application be remitted with a direction that the AAT, constituted differently, reconsider the matter according to the law. The notice of appeal was properly formulated in accordance with FCR r 33.12 and using Form 75. However, the applicant incorrectly joined the AAT as a party to the proceeding as so constituted. In an appeal from the AAT to the Federal Court under s 44 of the AAT Act, the AAT is not a party and should not be named as a respondent to the proceeding.

17 Second, the further amended notice of appeal contains an additional basis of “appeal”, being the Court’s jurisdiction under s 39B(1A) of the *Judiciary Act 1903* (Cth). It can be inferred that, by the “notice of appeal”, the applicant also seeks judicial review of the AAT’s decision. An application for judicial review is not an appeal and such an application is made under FCR r 31.11 and using Form 69. However, the Court may waive compliance with those rules. In an application for judicial review, the body being reviewed (in this case the AAT) is a necessary party to the proceeding.

18 Third, the further amended notice of appeal also purports to seek relief against the NDIA, including an order in the nature of mandamus compelling the NDIA to review the applicant’s current Statement of Participants’ Supports and make a decision pursuant to s 100(6) of the NDIS Act. While purporting to seek such relief, the further amended notice of appeal does not in any obvious or clear way seek judicial review of a decision of the NDIA. Further, to the extent that the applicant seeks judicial review of a decision of the NDIA (in addition to appealing and seeking judicial review of the AAT’s decision), a question arises whether a separate proceeding is properly required.

### Consideration of issues at the case management hearing

1. The above summary of the legislative framework, the administrative decisions that preceded the applicant’s application to the AAT and the claims made in this proceeding provide the context to the third matter I raised with the applicant at the case management hearing on 4 November 2022, relating to the formulation of the claims in the proceeding.
2. I first asked the applicant whether it was his intention both to appeal the decision of the AAT under s 44 of the AAT Act and also to seek judicial review of the AAT decision under s 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) (transcript p 11). The applicant confirmed that that was his intention (transcript p 12). I then asked the NDIA whether it was content to treat the applicant’s “notice of appeal” (Form 75) as also comprising an application for review under s 39B, and the NDIA confirmed that it had no objection (transcript p 13). I subsequently told the applicant that the Court was content to treat the further amended notice of appeal as constituting both an appeal of the decision of the AAT under s 44 of the AAT Act and an application for judicial review of the AAT decision under s 39B of the Judiciary Act (transcript p 14).
3. Following that exchange, the NDIA adverted to other aspects of the applicant’s further amended notice of appeal that appeared to be directed to decisions, or non-decisions, of the NDIA rather than the AAT (transcript p 13). In that respect, the NDIA adverted to questions 17 to 20 of the section of the notice of appeal headed “questions of law” which were in the following form (omitting footnotes):

17. Whether respondent’s failure to perform it’s statutory function pursuant to s118(1)(a)(ii) NDIS Act, insofar as failing to undertake mandatory review under s100(5) and consequently failing to make a decision under s100(6) and subsection 101(2)(b)(ii), likely to have constituted ‘statutory maladministration’ by the respondent ? (‘**maladministration**’)

18. As a corollary, whether the respondent’s improper and unauthorised exercise of the power conferred under s 48, likely to have constituted ‘torts of malfeasance’ against the applicant? (‘**malfeasance in public office**’)

19. Based on the values set out in the ‘objects’ and ‘principles guiding conduct’ under subsections 3(1)(a), (i), 4(7) and 17A NDIS Act, whether the respondent had a duty not to act in a manner that purported to limit applicant’s review rights under s103 of the Act (‘**scope of protection afforded by the objects and principles of the Act**’)

20. Whether the respondent acted to limit, unreasonably and/or without affording proper consideration to the applicant’s fundamental ‘human rights’, namely the right to ‘equality under the law and protection against discrimination on the basis of applicant’s disability or impairment’, both enshrined under the ICCPR and CRPD, as well as given legal effect by the state law of Victoria pursuant to subsection 8(3) of the Victorian Charter of Human Rights and Responsibilities 2006 (Vic)? (‘**Victorian Charter Rights**’)

1. It should be noted that, in questions 1 to 13 of the section of the notice of appeal headed “questions of law”, each of the questions concerned the conduct, statements or decision of the “member” which, in context, is clearly a reference to the member of the AAT who decided the applicant’s review application. Question 14 refers to the failure by the “respondent” to comply with s 50J(c) of the NDIS Act; in the context of the question it is not entirely clear whether the question is directed to the AAT or the NDIA. Questions 15 and 16 are directed to the AAT’s decision, albeit asking whether the NDIA led the AAT into error. In contrast, questions 17 to 20 concern actions, decisions and duties of the “respondent” which, in context, is clearly a reference to the NDIA (the first respondent to the proceeding).
2. The NDIA also adverted to the relief sought by the applicant in the further amended notice of appeal which was stated in the following terms (footnotes omitted):

1. An order under s 44(5) AAT Act that the decision made by the second respondent on 11 August 2022 is set aside, and applicant’s review application is remitted with a direction that the Tribunal, constituted differently, is to reconsider the matter according to the law.

2. Alternatively to 1, Court to issue, or direct the issue of, writ of mandamus under s 23 FCA Act, compelling the first respondent to:

a. review applicant’s current ‘Statement of Participants’ Supports’ and make a decision pursuant to s100(6) NDIS Act, and

b. file and serve an affidavit of compliance no later than 14 days after the day on which the writ is served on the respondent.

3. A declaration that the first respondent failed to perform it’s statutory function under subsection 118(1)(a)(ii), by failing to undertake mandatory review pursuant to subsections 100(5) and (6) of the NDIS Act.

4. A declaration that the first respondent acted for an improper purpose and without legal authority in deciding to initiate a plan reassessment under subsection 48(2) and by its subsequent failure to notify the applicant of that decision, as per required under subsection 48(6) NDIS Act.

5. Such further orders as the Court considers appropriate.

1. It can be seen that the first prayer for relief is that the AAT’s decision be set aside. An order of that kind is consistent with an appeal from, or judicial review of, the AAT’s decision. However, the second prayer for relief, sought in the alternative, is a writ of mandamus directed to the NDIA, and the third and fourth prayers for relief are for declarations that the NDIA had failed to act lawfully. Relief of that kind can only be sought in a proceeding seeking judicial review of identified decisions made by the NDIA or the NDIA’s failure to make an identified decision.
2. The further amended notice of appeal set out the grounds on which the applicant sought the above relief. Under the heading “on the grounds that”, the document states six grounds. Each of those grounds is directed to alleged errors on the part of the AAT. There are no grounds directed to any alleged error on the part of the NDIA.
3. After explaining to the applicant that an application to review a decision of the NDIA is a different and separate application to a review of a decision of the AAT, I asked the applicant whether he was intending to review decisions of the NDIA (transcript pp 14 and 15). The applicant replied in the affirmative. The applicant then addressed the Court on why he was seeking to review the decision or decisions of the NDIA.
4. In the course of the applicant’s address, I asked the applicant whether he was seeking the NDIA to conduct a review of his plan under s 100 of the NDIS Act (transcript p 16). The applicant replied that that is what he wanted from the outset, but that he no longer wanted that. Those answers appear to be inconsistent with the form of relief sought by the applicant in his further amended notice of appeal, by which he seeks a writ of mandamus compelling the NDIA to “review applicant’s current ‘Statement of Participants’ Supports’ and make a decision pursuant to s100(6) NDIS Act”. The transcript then records the following exchange (with bolding added to identify statements which are the subject of particular complaint by the applicant):

HIS HONOUR: I’m just trying to get what you want from the court, though, just so I can – we can work out what the procedure should be. So you want to have the section 48 - - -

MR SAYED: .....

HIS HONOUR: Mr Sayed, can you pause for a moment. I have been listening for a long time, and this hearing has been going for a long time. Is the relief that you want from the court to set aside the section 48 review? I’m trying to work out what relief you want from the court.

MR SAYED: ..... the relief – if you will – I will take your Honour back to my notice of appeal. Reliefs are set out very clearly; okay? Because I tend to have problem with – so if you consider my notice of appeal, as it ought to have, it states the grounds and the reliefs that I’m after. So final orders sought is an order under section 44(5) that the decision made by the second respondent, which is AAT, is set aside, and applicant’s review application is remitted with direction the tribunal, constituted differently, will reconsider the matter according to the law; okay?

HIS HONOUR: Okay.

MR SAYED: To put me back in the situation that I should have been.

HIS HONOUR: Okay. Now, can I just say one – I understand that. Can I just say this. It seems to me – the tribunal decision, as you know, is very short.

MR SAYED: Yes.

HIS HONOUR: And the tribunal reached the conclusion that it had no jurisdiction because the agency had done a section 48 review and not the section 100 review; you say you requested it. Be that as it may, it did a section 48 review. **Mr Sayed, if I conclude – if a find at the hearing that the tribunal was correct to find that that’s what the agency did, no matter what it was asked to do – that’s what the agency did; it did a section 48 review – it seems to me it’s going to be almost impossible for you to win the appeal against the AAT because the AAT does not have jurisdiction to review a section 48 decision.**

And that’s why I have been asking you about this other application that you seem to be contemplating, which is an application against the agency for failing to do the section 100 review. **I’m really trying to work out what application actually achieves any useful goal for you in these proceedings, but I am struggling to do that**.

MR SWAN: Your Honour, can I - - -

MR SAYED: Well, perhaps that’s because, your Honour, I haven’t had the opportunity to take you through the law.

HIS HONOUR: No, sure.

MR SAYED: And it’s useful.

HIS HONOUR: All right.

MR SAYED: Okay.

HIS HONOUR: Yes. No, we’re not going to do that today. Let me just ask Mr Swan this question. **Mr Swan, will you be bringing an application to strike out those parts of** **the further amended notice of appeal that purport to seek relief against your client on the basis that it’s not in proper form and it’s utterly confused in trying to blend the matter in this way?**

MR SWAN: Your Honour, I don’t have those instructions at present; that’s something we might have to do in due course. But can I raise what I think might be a practical solution, possibly, to - - -

HIS HONOUR: Yes.

MR SWAN: - - - ..... matter which I was instructed today as our suggested way forward, which is – as your Honour will have seen in the pleading there has been three plans, and what the applicant is concerned about and what the tribunal was concerned about was the first plan, which then led to the second plan made pursuant to section 48. But there was, of course, a third plan also pursuant to section 48 in early September.

Now, the applicant can still seek internal review of that. My client, if the applicant is content today – my client is prepared to do an internal review of that on an urgent basis, within four weeks, by 2 December. Now, a couple of things might come from that. The applicant might get exactly what he wants so, in a practical sense, everything falls away.

HIS HONOUR: Yes.

MR SWAN: If not, he can – because that is an internal review under section 100 he would then have an appeal right to the AAT.

HIS HONOUR: Yes.

MR SWAN: So he could take whatever he does or doesn’t want to to the tribunal. So if that’s done, that might in fact make this proceeding moot and, probably, just overcome by later events.

HIS HONOUR: I understand.

MR SWAN: So my ..... generally, just to jump ahead a little bit, but just to finish that - - -

HIS HONOUR: Yes, sure.

MR SWAN: The proposal, effectively, was going to be if the applicant’s content for that course – for an urgent internal review to be done – that your Honour stand the proceeding over for five weeks, and we see what the outcome of that is. Either he gets what he wants or he can go off to the tribunal.

HIS HONOUR: Yes.

MR SWAN: And it might be that your Honour doesn’t actually need to decide anything in this case.

HIS HONOUR: No. Mr Sayed, what do you say to that?

MR SAYED: I am sorry, your Honour. I think it’s time for me to just be honest. It’s very disrespectful – extremely disrespectful – to consider my proceeding – my appeal against abusive conduct from a tribunal member and six months of abuse from the agency – that I have gone through all this to simply settle or request a review to get what I want. Agency had time to do what they’re required to do under the law and work with me for six months, including agency CEO now or then acting CEO, and what I got was ..... no, let me clarify this, please. I, with all the - - -

HIS HONOUR: No one was interrupting you, Mr Sayed.

MR SAYED: Okay. Number 2, for your Honour to raise the issue of whether the agency wants to now raise an objection to my notice of appeal – that’s extremely prejudicial. They had opportunities. They sat on this amended notice for a month. They had 14 days to apply and file a notice of objection.

To your Honour to instigate that if they want to do this – look, I am – I’m not a barrister; okay? I have health issues. And, unfortunately, I have come across some unprofessional conduct from judicial officers. So I might not be able to speak eloquently; however, I have done my homework to make sure that my notice of appeal is on solid ground. Now, if they wish to file an objection, they need to apply for leave to do that, and I will oppose that.

HIS HONOUR: All right.

MR SAYED: And it’s very wrong for your Honour to be suggesting that they do that or ask them if they want to do it. They had the opportunity. Now - - -

HIS HONOUR: No, that’s fine. Okay, Mr Sayed. I understand your position. Your position is you do not accept the offer that’s being made by the agency; is that correct?

MR SAYED: I absolutely reject any offer of that nature.

1. After that exchange, I informed the applicant that I considered that there would need to be a separate proceeding (in respect of the intended application for judicial review of the conduct of the NDIA) (transcript p 20). In the context of the applicant refusing the open offer from the NDIA, I also confirmed that the applicant was aware that he faced the risks of an adverse costs order in the proceeding (transcript p 20). I then made the following ruling (transcript p 21):

HIS HONOUR: Yes. **I’m ruling today, Mr Sayed, that your notice of appeal is not in proper form, and it is not in proper form; it confuses two quite separate proceedings in a convoluted way, and it shall not be allowed to proceed in that manner. It needs to be fixed up, and I am very prepared to explain to you how it needs to be fixed up, but it is not in proper form. It commences as an appeal - - -**

MR SAYED: .....

HIS HONOUR: Mr Sayed, you will have all the opportunity in the world, but I am explaining to you what the legal position is. **It commences as an appeal against the AAT. That is quite a separate matter and it has to be separate proceeding, to a judicial review application against the agency. The decisions that are involved that were made by the tribunal is an entirely separate decision to any decision that was made by the agency.**

You are perfectly entitled to review each of those decisions – the decision of the AAT and the decision of the agency – but they are separate decisions, and they need to be articulated separately as separate proceedings; they will both be heard by me, but they will need to be done in that manner, and it will not – I won’t ..... go forward in this manner. What I am going to do is – I think all I can do today, this – I have to move on to a different hearing – different proceeding. So I’m actually going to adjourn this matter. I was hoping to make timetabling orders today, but it has not been possible, but it has been useful to at least get some idea of the lay of the land.

My chambers will be in contact with the parties about a further opportunity for a hearing, at which time the manner in which the proceedings will need to be reformulated – if, as I understand your intention, Mr Sayed – is that to go forward as applications for review of both the tribunal decisions and the agency decisions, they will need to be reformulated in order to do that. Now, I won’t make any further orders today other than the matter will be adjourned. There will be another case management hearing scheduled in the next few weeks, as soon as I have time to be able to schedule another case management hearing.

MR SAYED: Thank you, your Honour.

HIS HONOUR: If, in the meantime, the parties are able to engage in useful discussions – obviously, in the hearing today the agency has put an offer to Mr Sayed – perhaps the offer can be explained in writing, and there might be some benefit in that, just for the sake of it. But I encourage the parties, because it is their duty under the rules of the Federal Court to engage in constructive dialogue to try and resolve matters – and I encourage the parties to do that in accordance with the requirements of the Federal Court Act. But, otherwise, the matter will be adjourned to a date to be fixed. Thank you. Please adjourn the court.

MR SAYED: I am happy to have a dialogue. I take my responsibility to the court very seriously. I have tried to engage in a dialogue, and I am very happy – as long as it’s clear that no dialogue will entail any sort of settlement or consent order without the court adjudicating on matters – legal matters that I have raised. That’s all, your Honour. I am very happy at any point, any time, to courteously and professionally engage with the other party, and any things that we can agree and simplify the issues that this matter needs to proceed on, I am very, very invested in doing that.

As I say, as a self-represented litigant, I don’t want to drag this into technicalities. I want to keep it as short as possible, but as long as the court and the other side knows I haven’t – I don’t – I have taken it very seriously to bring these matters to the court, and I will pursue this to the end. All I’m after is a determination. If I am wrong, then that needs to be said so that people like me know where we stand.

HIS HONOUR: I understand. Mr Swan, so I think Mr Sayed has made it clear that he will not resolve the matter on the basis of the agency as put; however, I am concerned about the ill-manner in which the proceeding has been formulated. It’s plain to me Mr Sayed wishes to press both forms of application. If it is possible for the solicitors for the agency to assist in the proper formulation of both proceedings so it can go forward, I must say I would be grateful for that.

If it’s reformulated, I would be proposing to make timetabling orders to bring the matter on for hearing quite promptly, but I do want the issues to be identified with clarity in properly formulated proceedings so that the court can actually deal with the issues with that clarity, knowing what issues are being dealt with, if I could say that. So the even if there was dialogue between the parties just to assist in putting the two applications that Mr Sayed plainly wishes to bring into a proper form, and then on the next occasion we can make timetabling orders and, you know, hopefully, really have the matter come on for hearing – it will probably, unfortunately, press into the summer vacation – but as early as we possibly can in the new Court year.

MR SWAN: Yes, your Honour. We will write to the applicant about the format of the proceedings, and we will – the offer I made is an open offer; we will reiterate that in writing and it remains open.

HIS HONOUR: Certainly. No. Thank you. Good. Can I thank the parties for their assistance. Please adjourn the court.

1. The applicant contends that the passages marked by bolding in the above exchanges demonstrate prejudgment bias or, alternatively, apprehended bias. The applicant submitted that (i) I initiated an objection to the further amended notice of appeal in circumstances where no application had been brought by the NDIA in that respect; and (ii) having initiated the objection, I proceeded to rule on the objection without giving the applicant an opportunity to be heard.
2. I consider that the passages the subject of the applicant’s complaint do not demonstrate actual bias or give rise to a reasonable apprehension of bias for the following reasons.
3. First and foremost, the ruling made was that the applicant’s further amended notice of appeal was not in a form that enables the applicant to proceed in an application for judicial review of decisions of the NDIA. That is a ruling as to practice and procedure; in particular, a ruling as to the Court’s procedures for constituting particular types of proceeding. The ruling does not in any sense affect the applicant’s legal rights and interests. Indeed, the intended effect of the ruling, which I consider to be apparent from the transcript, is to enable the applicant to proceed on a claim that the applicant wishes to bring, but which has not been properly constituted.
4. As stated earlier in these reasons, the common law principles concerning bias are concerned with circumstances that might lead a judge to decide a case other than on its legal and factual merits or that might create a reasonable apprehension of that occurring. As observed by Perry J in *DOQ17 v Australian Financial Security Authority (No 2)* [2018] FCA 1270; 363 ALR 681 at [15], generally speaking, interlocutory rulings ought not to be regarded as giving rise to a reasonable apprehension of bias or actual bias because they necessarily precede the final resolution of the proceedings and therefore do not finally determine any of the issues. In *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 (***Michael Wilson***), the majority (Gummow ACJ, Hayne, Crennan and Bell JJ) rejected an allegation of apprehended bias arising from a number of interlocutory rulings made by Einstein J at first instance for the reason that (at [72]):

In none of the applications was Einstein J required to make, and in none of the applications did he make, any determination of any issue that was to be decided at trial.

1. As recognised in many cases, the determination of interlocutory applications may disqualify a judge from hearing a proceeding, but that will only occur if the judge has been required to make adverse credit findings or otherwise make statements or rulings that prejudge an issue to be determined in the proceeding or create a reasonable apprehension of such prejudgment: cf *Michael Wilson* at [72]-[73]; *Westpac Banking Corporation v Forum Finance Pty Ltd (Apprehended Bias Application)* [2022] FCA 981 at [7]-[11]. None of those circumstances exist in the present case.
2. Second, it is not entirely accurate that I initiated the objection to the further amended notice of appeal. At the case management hearing, the NDIA drew my attention to the difficulties with the stated questions of law and relief sought. Regardless, under the active case management procedures adopted in this Court in order to advance the overarching purpose stated in s 37M of the FCA Act, it is not improper for the docket judge to raise and determine matters of practice and procedure. That is particularly so where a litigant does not have legal representation and where it is apparent that the procedure adopted by the litigant will not enable the litigant’s intended claim to be pursued (efficiently, fairly or at all).
3. Third, as to the applicant’s complaint that I asked counsel for the NDIA whether the NDIA intended to bring an application to strike out any part of the further amended notice of appeal, the question was required in order to have certainty as to the NDIA’s position. I regret having posed the question with adjectival elaboration of the procedural problems I considered to exist in the applicant’s further amended notice of appeal. However, the adjectival elaboration was subsumed by the procedural ruling I gave. In all the circumstances, I do not consider that, by reason of the adjectival elaboration, a fair­minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of the proceeding brought by the applicant.
4. Fourth, as to the applicant’s complaint that he was not given an opportunity to be heard on the ruling I gave, any such failing does not establish bias or a reasonable apprehension of bias. To the extent the applicant considers that he was denied procedural fairness in that respect, the appropriate recourse is to seek leave to appeal the ruling. That may not be possible at present because I did not make any orders following the ruling I gave. As stated at the case management hearing, my hope was that the applicant would consider the matter and, if necessary with the assistance of the NDIA, file an application in respect of his intended claim against the NDIA. If the applicant ultimately refuses to take that step, it may be necessary for the Court to make orders with respect to the further amended notice of appeal, which orders will be amenable to an application for leave to appeal. However, any such orders will relate to a matter of the Court’s practice and procedure, not the merits of the applicant’s proposed claim.
5. On the basis of the foregoing matters, I reject the applicant’s contention that, in addressing this issue at the case management hearing, I displayed bias or that a reasonable apprehension of bias arose. I therefore reject ground 3 of the applicant’s recusal application.

## Ground 4 – refusal to order production of an audio recording of the case management hearing

1. The fourth ground advanced by the applicant in support of the recusal application concerns his application for an order requiring the production of an audio recording of the case management hearing on 4 November 2022.
2. Neither the applicant’s recusal application nor the applicant’s written submissions made clear why or how the Court’s refusal to order the production of an audio recording of the case management hearing demonstrated bias or apprehended bias.
3. On 12 December 2022, in advance of the hearing of the recusal application, I made an order refusing the applicant’s application and published reasons for that refusal: see *Sayed No 1*. As noted earlier, the applicant has now filed an application for leave to appeal that decision. Despite filing that application for leave to appeal, the applicant did not seek an adjournment of the hearing of the recusal application and advanced his submissions at the recusal hearing on the basis of the transcript of the case management hearing.
4. In the circumstances, I see no basis for the applicant’s contention that, by refusing his application for production of an audio recording, I displayed bias or that a reasonable apprehension of bias arose. I therefore reject ground 4 of the applicant’s recusal application.

## Conclusion

1. For the reasons given above, I dismiss the applicant’s recusal application. As the NDIA took no position on the application and provided submissions for the assistance of the Court, it is appropriate that there be no orders as to the costs of the application.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan. |

Associate:

Dated: 23 December 2022