HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **LPDT**
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Administrative Appeals Tribunal
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. Jurisdictional error is an expression not simply of the existence of an error but of the gravity of that error. See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [25], [28]-[30] (Kiefel CJ, Gageler and Keane JJ).

   (a) As such, a statute which requires a condition to be observed in the course of decision-making is not ordinarily to be interpreted as denying legal force and effect to every decision made in breach of the condition.

   (b) Rather, a statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.

3. The principle of materiality accommodates determination of the limits of decision-making authority conferred by statute to the reality that "[d]ecision-making is a function of the real world" by distinguishing the statutory conditions on the conferral from the statutory consequence of breach of those conditions and by recognising that the legislature is not likely to have intended that a breach that occasions no "practical injustice" will deprive a decision of statutory force [**RS [8]**].

4. Breach of a condition is material to a decision only if compliance with that condition could realistically have resulted in a different decision.

   (a) The determination of materiality by a court therefore involves a question of counter-factual analysis to be determined by the court as a matter of objective possibility [**RS [6], [10]**].

   (b) The counter-factual analysis requires determination of:

      (i) on the balance of probabilities by inferences drawn from the totality of the evidence, the historical facts as to what occurred in the making of the decision (that is, "how the decision that was in fact made was in fact made"); and

      (ii) as a matter of reasonable conjecture within the parameters set by those historical facts, whether the decision that was in fact made could realistically have been different had the condition been complied with.

5. Bearing the overall onus of proving jurisdictional error, an applicant for judicial review bears the onus in respect of this counter-factual analysis [**RS [7]**]. See also *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at [2] (Kiefel CJ, Keane and Gleeson JJ), [46] (Gageler J).

6. Here, the statutory context in which the threshold of materiality is to be considered is that of the broad, evaluative decision-making power conferred by s 501CA of the *Migration Act 1958* (Cth) and the binding guidance given by the Minister under s 499 of that Act in *Direction No 90 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA.*

7. Although, in undertaking the counterfactual inquiry, a reviewing court must be careful not to assume the function of the decision-maker, it cannot be said that, where a reviewing

court does take that care in undertaking the counterfactual inquiry, every error in the making of an evaluative decision, including a decision under s 501CA(4), will necessarily be found to have deprived an applicant of the realistic possibility of a different outcome [**RS [11]-[16]**].

Subparagraph 8.1.1(1)(a) of Direction 90

8. The Administrative Appeals Tribunal found that subparagraph 8.1.1(1)(a) of Direction 90 "militates strongly in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" [**RS [18]**]. The Full Federal Court concluded that the Tribunal's reasons disclosed no "comprehensible connection" between that finding and the articulated basis for it [**RS [19]; CAB 127 [64]**, **129 [71], 134 [91]; see also CAB 128 [69]**].

9. Having regard to the nature of the error identified by the Full Court, the Full Court was correct to find that, even taking the appellant's case at its highest, the error was not material [**RS [20]-[23]**].

   (a) That is, even if the Tribunal had treated subparagraph 8.1.1(1)(a) as irrelevant to its task, there was not a realistic possibility of a different outcome.

   (b) That is because:

      (i) as the Full Court correctly concluded, even if the Tribunal had found that the appellant's offending was "serious" rather than "very serious", and had therefore afforded less weight to the first primary consideration in Direction 90, there was no realistic possibility of a different outcome [**RS [23], [25]**]; and

      (ii) that conclusion was correct "as a matter of reasonable conjecture within the parameters set by the historical facts" comprised of the Tribunal's findings, including its findings about other aspects of the first primary consideration and its findings about the fourth primary consideration and the other considerations [**RS [24]-[42]**].

Subparagraph 8.1.1(1)(b) of Direction 90

10. The Tribunal found that subparagraph 8.1.1(1)(b) "militates in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" [**RS [44]**]. The Full Court concluded that the Tribunal's reasons in relation to this finding "suffered from the same error … identified in relation to [the finding on] subparagraph (a)" [**RS [45]; CAB 141 [119]**]. The Full Court considered that the reasons stated by the Tribunal did not elucidate "why or how a deemed view that the Australian government and community view certain kinds of criminal conduct as 'serious' (as distinct from 'very serious') 'militates in favour of' a finding that the [appellant's] criminal conduct was of a 'very serious nature'" [**CAB 141 [119]; see also CAB 141-142 [121]**].

11. For the same reasons as those relating to the error in respect of the Tribunal's finding on subparagraph 8.1.1(1)(a), the Full Court was correct to conclude that, even taking the appellant's case at its highest, the error in respect of the Tribunal's finding on subparagraph 8.1.1(1)(b) was not material [**RS [45]**]. That is, even if the Tribunal had disregarded subparagraph 8.1.1(1)(b) as irrelevant to its task, "with so little weighing in

the [appellant's] favour (arising from the Other Considerations)" there was not a realistic possibility that the Tribunal's weighing exercise could have reached a different outcome [**RS [45]; see paragraph 9 above**].

Subparagraph 8.1.1(1)(g) of Direction 90

12. The Tribunal found that the matter in subparagraph 8.1.1(1)(g) of Direction 90 "was directly relevant in this case", and that the appellant had "reoffended since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status" [**RS [47]**]. The Full Court held that those findings were affected by error because there was no indication that the appellant had ever received any such formal warning or otherwise been made aware in writing about the consequences of further offending in terms of his migration status" [**RS [48]**].

13. The Full Court did not accept, however, that the error relating to those findings was material because: first, the Tribunal had found as a matter of fact that the appellant was aware that criminal offending could jeopardise his migration status; and, secondly, the Tribunal had found that the reoffending of the appellant in those circumstances contributed to the Tribunal's "overall view that the nature and seriousness of the [appellant's] conduct can only be characterised as very serious" [**RS [48]**]. For the reasons given by the Full Court, that conclusion was correct [**RS [49]-[53]**]. Further, and in any event, even if the Tribunal had not had regard to these matters, there is no realistic possibility that the outcome of the Tribunal's decision could be different [**RS [53]; see paragraph 9 above**].

Cumulative assessment

14. In undertaking the counter-factual inquiry for the purposes of determining materiality, the Full Court was not required to assess, on a cumulative basis, the errors in the Tribunal's reasons relating to subparagraphs 8.1.1(1)(a), (b) and (g) [**RS [54]-[58]**].

15. In any event, on a proper understanding of its reasons for judgment, the Full Court proceeded on that basis [**RS [59]-[60]; see CAB 137 [103]; see also, for example, CAB 142 [122]**]. In doing so, the Full Court was correct to conclude that, absent those errors, there was no realistic possibility of a different outcome.

16. Further, and in any event, even if the Full Court did not proceed on that basis, a cumulative assessment would not demonstrate any realistic possibility of a different outcome [**RS [61]-[62]; see paragraph 9 above**].

Dated: 5 February 2024

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