HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M73 OF 2021**

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **NARADA NATHANSON**
Appellant

AND: **MINISTER FOR HOME AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT

PART I FORM OF SUBMISSIONS

1. We certify that these submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The central issue on the appeal is whether an admitted procedural fairness error on the part of the Administrative Appeals Tribunal (**Tribunal**) was material in all of the circumstances of this case.

3. More specifically, the issue is whether the failure of the Tribunal to provide the appellant an opportunity to be heard on an additional use of, or the weight to be given to, certain factual issues in the case amounted to jurisdictional error.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. Notice under s 78B of the Judiciary Act 1903 (Cth) is not required.

PART IV FACTS

5. The appellant refers to and relies upon the background of facts set out by Wigney J below in his Honour's judgment at [7]-[43]. While that background captures most of

the relevant facts, it also contains his Honour's reflections and observations about the primary factual material. With respect, the first respondent does not agree with all of his Honour's observations and this Court cannot consider them a joint or accepted position.

6. The majority below (Steward and Jackson JJ) also set out the background facts before the Tribunal at [80]-[107]. It is submitted that this Court can accept this statement of facts as accurate.

7. At the same time, the nature of the argument in this case, and the need to clearly identify the "historical facts" relevant to the procedural fairness error for the purposes of assessing materiality, necessitates a more detailed analysis of the primary factual material, as well as the inferences that the parties say can be drawn from that material.

8. To begin with, it is correct to say that the domestic violence incidents were not mentioned in the delegate's decision or in the attachments to that decision. The delegate's decision was made on 8 January 2019.[1]

9. The appellant sought review of the decision on 10 January 2019.[2]

10. The first respondent sought, by summons issued through the Tribunal, relevant documents from various police services, including the Western Australian Police (**WAPOL**). The summonses were issued on 24 January 2019.[3] Relevantly, WAPOL responded by letter dated 29 January 2019, which was received by the Tribunal on 5 February 2019.[4]

11. It is not clear on the evidence that was before the Courts below precisely when these materials were provided to the appellant, or when he became aware of their contents. However, and contrary to paragraph [17] of the appellant's submissions (**AS**), the first respondent submits that it can be inferred that it must have occurred prior to 5 March 2019 (and certainly prior to the hearing on 21 March 2019). This inference is available because:

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1 Appellant's Book of Further Materials (**ABFM**) p 45.
2 Tribunal at [1], Core Appeal Book (**CAB**) p 9,
3 First Respondent's Book of Further Materials (**RFM**), 5.
4 RFM, 9.

11.1. The material was provided to the Tribunal in early February (as above).

11.2. On 5 March 2019 the appellant provided to the Tribunal a letter in support of his application, written by his wife,[5] which addressed the domestic violence incidents. There would have been no cause to produce such a letter absent notice of the domestic violence incidents, which came in the form of the WAPOL documents.

11.3. At the beginning of the hearing in the Tribunal, when evidentiary material was being tendered, the appellant was asked if he had "seen the material that was produced by the police and the courts?", and he responded that he had.[6]

12. It is also worth mentioning that no procedural fairness complaint has been made on the basis that the WAPOL information was not provided earlier to the appellant, or in respect of its use for the purposes of the best interests of the child issue. The complaint, and this appeal, concerns the additional use to which that information was put and its characterisation as "very serious" under the new Direction.

13. The letter from the appellant's wife addressed two occasions where she had reported her husband to police and had made statements against him. This could only have been a reference to the domestic violence incidents. The appellant's wife said:

> On two occasions I proceeded to report my husband to the police and making statements against him. Those statements were made out of selfishness, fear, out of frustration and, maybe, despair. I didn't realise that my thoughtless actions would affect not only our relationship further it affected our children as well as my husband's character in the future. Unfortunately, it's taken this brokenness to make me realise how damaging that was and still is.
>
> I am so remorseful. He too was a victim to my choices I needed help emotionally and mentally at that time [sic] but was too proud to admit it and in total denial. I am really sorry, I realise how damaging that was in our partnership how it did not help solve the problems we found we were facing. We both regret the things we have done that have led to the dissolution of our marriage and as well regret the things we did not do to try to solve it and save our marriage.

14. The first respondent submits that, in substance, this is a statement explaining the statements the appellant's wife had made to WAPOL about the domestic violence incidents, downplaying the seriousness of those incidents, and explaining that the couple's relationship had recovered from the incidents and police involvement.

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5 ABFM p 78.

6 Transcript of Tribunal hearing, ABFM p 87, lines 18-21.

15. The first respondent also submits that it can be inferred from the filing of this statement and its explanation about the domestic violence that the appellant knew the domestic violence incidents would be in issue, and that they could be important before the Tribunal.

16. On 8 March 2019, the Minister filed his Statement of Facts, Issues and Contentions (**SOFIC**). That document referred to "incidents of domestic violence resulting in the issuing of violence restraining orders."[7] The reference was made in support of a submission seeking to reduce the weight that the best interests of the appellant's three minor children should be given as a factor supporting revocation. The SOFIC also referred to a decision of the Tribunal in support of that proposition, and the harm that can be done to children whose parents suffer domestic violence.[8]

17. Thus, by at least the time of the SOFIC, if not earlier, the appellant was aware that the domestic violence incidents would be relevant and important to his hearing, albeit the only particular issue to which they had been linked was the best interests of his children.

18. At the beginning of the hearing, the Tribunal formally took note of the material that would be tendered. This included the police material which, as mentioned above, the appellant said he had seen. The Tribunal then proceeded to discuss the new Direction. As outlined in the appellant's submissions at AS [13], the Tribunal explained the differences between the Directions, stating as it went that the changes were minor, especially "with respect to the conviction history I have for you in front of me". While the Tribunal did say that the changes mostly involved "how we treat crimes where women and children are involved", it is of course accepted that the Tribunal did not say that a possible effect of the new Direction would be that domestic violence incidents would be treated more seriously.

19. The Tribunal then moved to opening submissions,[9] and then the oral evidence. Contrary to what is suggested at AS [16], the appellant was not forced into the witness box, but was asked "are you going to give evidence? Are you proposing to give evidence? So, at

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7 At [42], ABFM p 72.

8 At [43], ABFM p 72.

9 Transcript, ABFM 89.

the moment you're acting for yourself, so you can make submissions. But you can also give evidence in support of your application. And Mr Burgess, might ask you some questions about your evidence and your history and I might also ask you some questions."[10] The appellant responded "Yes, Ma'am".[11]

20. Relevantly for the present appeal, the appellant was questioned fairly extensively about the domestic violence incidents.[12] He gave evidence about whether police had attended his home in response to a domestic violence call;[13] gave evidence about what he recalled from probably the most serious incident;[14] accepted that his wife had told the police that "there had been previous domestic violence incidents and previous physical violence";[15] gave evidence that his wife had not pressed charges for the incidents;[16] gave evidence about the stressors on the relationship that he said had led to their "altercations";[17] gave evidence about when he was served with a violence restraining order and about what he had or had not done to his wife physically;[18] accepted, when it was expressly put to him, that the most serious incident (which involved an allegation that the appellant had grabbed his wife by the throat and had hit her head against a wall) had occurred as his wife had stated to police;[19] and accepted that there had been another incident involving him grabbing his wife by the throat.[20]

21. As stated by the appellant (at AS [15]), the appellant's wife was apparently present at the hearing in the Tribunal, but was not called to give evidence.

22. At the end of the Minister's questioning, the Tribunal member also asked the appellant some questions, including about the issue of a Violence Restraining Order (**VRO**) against him. The appellant was asked about why, as he understood it, his wife had wanted a VRO:[21]

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10 Transcript, ABFM 91, lines 41-46.
11 Transcript, ABFM 92, line 1.
12 Transcript, ABFM 96-101.
13 Transcript, ABFM 96 lines 26-46.
14 Transcript, ABFM 97 lines 6-46.
15 Transcript, ABFM 97 lines 16-19.
16 Transcript, ABFM 97 lines 25-26
17 Transcript, ABFM 98 lines 33-34; ABFM 99 lines 15-22.
18 Transcript, ABFM 99 lines 29-47.
19 Transcript, ABFM 100 lines 9-22.
20 Transcript, ABFM 100 lines 24-47.
21 Transcript, ABFM 111 lines 38-47.

> You say you don't know the reasons for that VRO. Have you discussed that with your wife, why she sought a VRO? --- Yes. Yes, we have. We have been openly communicating since.
>
> Why does she say she wanted a VRO against you? How do you understand from her perspective? --- At the time, my wife has stated to me that she just feared that I was getting influenced by drugs a fair bit, and that was one of the main reasons she was – she was just worried with me being around the kids under the influence of drugs and I think that was also a way – a way out of me due to the stress of trying to raise a young family.

23. In closing submissions, the Minister made the submissions that appear at AS [18]. It should also be noted that the Minister made submissions, at the same time, about the effect of the domestic violence evidence on the best interests of the child issue,[22] which had been foreshadowed in the SOFIC.

24. While the appellant had an opportunity to make submissions to the Tribunal after the submissions for the Minister were made,[23] it is of course accepted that the new use and weighting for the domestic violence material was not expressly identified by the Tribunal, nor was a chance to put on evidence in response to that point expressly given. Accordingly, the Tribunal did not give the appellant a proper or sufficient opportunity to make submissions or to give further evidence about that point.[24]

25. The Tribunal discussed the domestic violence evidence in respect of risk to the community (the new or additional purpose for that material) in its reasons at [51]-[59] CAB 26-28. In doing so, it noted the letter from the appellant's wife, as well as the WAPOL reports and the conduct to which the appellant had admitted in his oral evidence. It is clear from [59] that the Tribunal took this material into account in its consideration of risk to the community, along with the evidence of the appellant's criminal offending. The Tribunal also referred to the domestic violence material in dealing with the best interests of the child issue, at [113]-[115] CAB 42-43.

PART V ARGUMENT

26. The first respondent submits that the legal principles that apply in this case are settled and this case therefore turns on the application of those principles to the particular facts of this case. The first respondent submits:

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22 Transcript, ABFM 117 lines 22-27; ABFM 119 lines 6-26..

23 Transcript, ABFM 121, lines 4-44.

24 See decision at first instance at [56], CAB 87; decision of the majority on appeal at [83]-[84] CAB 128-129.

26.1. The decision of the majority of this Court in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 provides the framework of principles applicable to this case.

26.2. The question for the Court then is whether, "as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined", the decision of the Tribunal could have been different if the procedural irregularity had not occurred. This is a question of fact and application of principle to fact.

26.3. The majority below were correct to conclude that, in the circumstances of this case, including that the appellant had admitted to incidents of domestic violence; the appellant knew that those incidents would be taken into account for the purposes of assessing the best interests of the child; the appellant had been asked extensive questions about the incidents; and that the appellant's wife had already given a statement in the case, there was nothing before the Court below to support an inference that the appellant "could have or would have said anything more which realistically might have improved his position".

Legal principle

27. The first respondent submits that the principles are now settled by the majority's judgment in *MZAPC*. There is no conflict between *MZAPC* and the reasoning of Gageler and Gordon JJ in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, on which the appellant heavily relies. The majority in *MZAPC* expressly address *WZARH* and bring it within the statements of principle they set out.[25] *WZARH*, as well as *Stead v State Government Insurance Commission* (1986) 161 CLR 141, ultimately support the principles expounded in *MZAPC*. However, to the extent that there are shades of difference between them, the later and more closely reasoned statements in *MZAPC* would clearly be preferred.

28. *First*, although there is some suggestion in the appellant's argument that there can be procedural fairness cases where the materiality requirement is met simply by demonstration of the error,[26] procedural fairness is not in the category of errors which,

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25 *MZAPC* at [59] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

26 See AS [27].

"of their nature", incorporate an element of materiality.[27] The proper approach is, as the appellant appears to recognise, that an applicant must show that any alleged procedural fairness error was material in all the circumstances of the case.[28]

29. *Secondly*, the reasoning of Gageler and Gordon JJ in *WZARH* accords with this principle, by their Honour's express reference to a "material" breach of the conditions on statutory power justifying the grant of declaratory relief and the reference to *Stead*;[29] and by their Honours' reference to the refusal of curial relief if the failure "did not deprive the person of the possibility of a successful outcome".[30]

30. *Thirdly*, the decision in *Stead* itself recognised that a failure to provide an opportunity to be heard might not always result in jurisdictional error. The question would remain, whether the denial of the opportunity to be heard would possibly have made any difference. For example, where a party was denied a chance to make submissions on a legal point, that denial might make no difference given an appellate court or court on review could decide the correctness of the legal point for itself. If a party was denied a chance to make submissions on an issue of fact, then "it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference".[31] But the Court left open the possibility that this might occur. This point was affirmed by the majority in *MZAPC*.[32]

31. *Fourthly*, as the above suggests, it may be that in many or most cases, the failure to allow a party to make submissions on an important point will be enough to establish materiality. The facts of the case and the issue on which submissions were not allowed (or to which a party's attention was not drawn) may themselves support an appellate court's satisfaction of the possibility of a different outcome. However, equally, there

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27 *MZAPC* at [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

28 See also *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [55] (Gageler J); *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 at [15] (Kiefel CJ and Gageler J) and [109] (Edelman J).

29 *WZARH* at [56] (Gageler and Gordon JJ).

30 *WZARH* at [60] (Gageler and Gordon JJ).

31 *Stead* (Mason, Wilson, Brennan, Deane and Dawson JJ) at 145-146.

32 *MZAPC* at [49] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

might be other facts disclosed by the record that undermine an obvious or inevitable conclusion that materiality is made out.[33]

32. *Fifthly*, it remains at all turns the onus of the applicant to show that the procedural irregularity was material.[34] The threshold might be more easily met for some procedural fairness errors than others, but the onus remains. As the majority said in *MZAPC* at [46], it would be wrong to understand *Stead* as "conveying that the appellant did *not* need to show that the denial of procedural fairness had deprived him of the possibility of a successful outcome".

33. *Sixthly*, the onus on the applicant extends to proving, on the balance of probabilities, "the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with [the procedural condition that has been breached]".[35]

34. *Seventhly*, the Court on review is charged with the responsibility of "determining for itself whether the result in fact arrived at by the decision-maker in the decision-making process could realistically have been different had that procedural irregularity not occurred."[36] In doing so, it is necessary to consider the facts and materials before the original decision-maker, and to consider the decision-making process in fact engaged in by the decision-maker, as proved by inferences drawn from admissible evidence.[37]

35. In light of all of the above, the first respondent submits that it is unhelpful to ask the question whether the character of the procedural irregularity is of a kind that inherently meets the materiality threshold. This distracts from the principal enquiry, which is simply whether the evidence establishes that the outcome in the case could possibly have been different if the irregularity had not occurred. There will be cases where that threshold will be easily met, but ultimately the enquiry is the same. And, importantly, the answer to the question will in every case turn on the particular facts and circumstances of the case.

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33 *MZAPC* at [48]-[49] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

34 *MZAPC* at [35], [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *SZMTA* at [46] (Bell, Gageler and Keane JJ). See also *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at [35]

35 *MZAPC* at [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

36 *MZAPC* at [51] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

37 *MZAPC* at [52] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

Relevant historical facts and application to this case

36. To properly appreciate the context in which the procedural error occurred, it is necessary to consider in some detail the course of events and evidence in this matter. That follows at least because this is not a case where an issue was never raised, where a party was given no notice at all that a particular factual point would be relevant, or where a party sought and was denied a hearing on an issue. Rather, this is a case where the decision-maker gave material greater weight than had been anticipated (or explained) prior to the hearing, used the material for more than just the original stated purpose, and did not invite further submissions on that more extended use of the material.

37. Nonetheless, it is submitted that there is a "crystallised set of facts" against which materiality is to be assessed. They are the facts that appear in the evidence that was before the decision-maker (and courts below), as set out in some detail above at [8]-[25]. The materiality counterfactual is to be assessed against that record of "how the decision that was in fact made was in fact made".[38]

38. Against that factual background, the question is whether the appellant was deprived of the possibility of a successful outcome, because he did not have an opportunity to address the additional use of the domestic violence evidence in respect of the risk that he might pose to the Australian community, and the characterisation of such domestic violence as "very serious" conduct.

The appellant did not need to lead evidence

39. The first point to be made is that the first respondent does not submit, and the Courts below did not hold, that any general principle required the appellant to file *evidence* about specifically what he would have said and done if a further opportunity to address the domestic violence incidents had been extended to him. It is not suggested that the appellant needed to run the case he would have run before the review court in order to succeed.

40. However, what is submitted, and what was accepted by the majority below,[39] is that something further needed to be adduced *in the circumstances of this case*, because the

[38] *MZAPC* at [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

[39] At [127], CAB 141; [131] CAB 142.

historical facts of the case – and in particular the fact that domestic violence was already an issue before the Tribunal to some degree – were not enough to support an inference that there was a realistic possibility of a different outcome. To put it another way, as the majority said below, restating a submission from the appellant's counsel, the appellant had to identify how the opportunity he had lost was "valuable".[40]

41. The facts of this case are likely to be very rare. The issues concern *how* evidence already before the Tribunal could or might have been used, and whether adding to or further explaining it might have changed the outcome; not *whether* evidence could be used or whether there was *any* evidence or submission that could be made on a topic. For that reason, it cannot simply be inferred that there was more to say on the topic and the appellant would have said it.[41] The appellant had more work to do to satisfy his onus. If a breach of procedure deprives an applicant of a chance to make submissions on an otherwise untouched topic of relevance, less will be required to show the loss of a possibility of a successful outcome than if that same topic has already received attention in the evidence

The majority below were correct to say there was no possibility of a different outcome

42. The first point with which the appellant takes issue in the treatment of facts by the majority below is the statement that the appellant knew the allegations of domestic violence were important.

43. This was a finding open on the factual background of the matter set out above. That the appellant knew the allegations were important can be inferred from his active step in adducing to the Tribunal the letter from his wife addressing the domestic violence (as recognised by the majority below at [129] AB 141). It can be inferred that that step was taken in response to the WAPOL material that had been obtained by the Minister. The appellant was also on notice from the Minister's SOFIC (majority at [128]). That was an important document and there is no reason in the evidence to think that the appellant had not read it.[42] On doing so, he would have appreciated that domestic violence was a matter that was in issue and likely to carry some weight against him.

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40 At [120], CAB 139.

41 Contrast *Degning v Minister for Home Affairs* (2019) 270 FCR 451 [39] (Allsop CJ), discussed further below.

42 *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at [14] (Allsop CJ).

44. The second point with which the appellant takes issue is that the majority was not prepared to infer that further evidence from the appellant's wife might have been helpful. Again, it is submitted that this finding was open on the factual material. In particular, it is relevant that the appellant's wife had already expressed her regret and remorse for her actions in reporting the appellant to police; had already attempted to explain her motivations; had generally expressed the strong sentiment that the incidents were not serious; and had explained that she and the appellant had reunited. In other words, she had already given a submission that addressed the seriousness of the incidents (see majority at [129] AB 141).

45. Importantly, the appellant's wife had not said the incidents did not happen, and of course the appellant himself accepted in his evidence that if his wife had made the statements to police, then that was her position. One might have expected that, if the appellant's wife were prepared to give evidence that the incidents did not occur, she would have said that in her letter. There is no reason to infer that she would give that evidence, if called in response to an invitation to address the incidents further. That left reducing the apparent seriousness of the incidents – which the wife's statement already addressed.

46. The third point made by the appellant is that the majority should not have found that the incidents would always be considered serious regardless of submissions made about them. There are at least three difficulties with this argument.

46.1. First, the appellant's wife had already given evidence downplaying the seriousness of the incidents and attempting to place them in the context of the couple's relationship. She made plain that she considered herself to be somewhat at fault and also made clear that the relationship was continuing. The appellant had also given evidence about the incidents, to the extent that he could recall them. It is difficult to see what more might have been said about the seriousness of the incidents.

46.2. Secondly, the evidence was that the incidents had occurred – the police statements were in evidence and the appellant had admitted those statements would have accurately reflected what his wife had told police. Where he could remember the incidents, he generally admitted the aspects of the incidents put to him. The incidents included features that the appellant had grabbed his wife's

neck on two occasions (hard enough to cause bruising on one of those occasions), he had banged her head against a wall, and the appellant's eldest son witnessed one of these incidents. It is difficult to see how the Tribunal would not have considered those features as "serious", regardless of the Direction.

46.3. Thirdly, the Tribunal's interpretation of the Direction was reasonable and not "suspect or questionable" (contra Wigney J at [44]). The relevant part of the Direction, paragraph 13.1.1(1)(b) said:

> (1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including:
>
> …
>
> b) The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed;

46.4. The Tribunal was aware that the appellant had not been convicted of any domestic violence offence (apparent from [57] CAB 27). But it recognised that paragraph 13.1.1(1) extended beyond criminal offending to "other conduct to date". This is plainly correct. The Tribunal did not then apply subparagraph (b) regardless, but said that the factors in the sub-paragraphs "may inform" consideration of the seriousness of the "other conduct" that has not resulted in conviction. That is, contrary to Wigney J's suggestion at [44] that the Tribunal found itself compelled to have regard to the Direction, it did no more than take guidance from the factors in the list in (1) as to what might be considered as serious, and applied that principle to the relevant "other conduct".

46.5. In any event, as his Honour stated at [45], the correct interpretation of para 13.1.1(1) did not form a feature of the appellant's case on review or appeal. He should not be allowed to rely upon it now. For materiality purposes, the question is only whether a submission on the seriousness with which the conduct was to be viewed could possibly have altered the outcome. It is submitted it could not.

47. A further argument made by the appellant is that the judgment of the Full Federal Court in *Degning v Minister for Home Affairs* (2019) 270 FCR 451 supports a finding that the appellant would have "said whatever he could" and that the content of the appellant's submissions or evidence must be assumed to have the capacity to affect the outcome.

48. However, as the majority below accepted (at [135]-[136]), the facts of *Degning* distinguish it from this case. Most importantly, in *Degning*, the appellant had been presented with evidence (incoming passenger cards) without any explanation or idea of if or how they would be relevant to his case. Their relevance was, as the Chief Justice found, "somewhat opaque" having regard to the letter he received and the Direction.[43] As a result, the appellant made no submissions at all on the evidence.

49. That is different to the present case, where (as explained above) the domestic violence incidents were already in issue in respect of a topic that was apparent to the appellant – best interests of the children. That is, there was already a strong reason for the appellant to adduce evidence about those matters if he could, and to make submissions on the facts if he could. The adducing of the letter from his wife suggests that he understood that the incidents were important and had, in fact, taken steps to address them in evidence (see majority at [137]).

50. All that the discussion of facts in *Degning* and this case confirms is that the application of procedural fairness and materiality principles is a fact specific exercise. The Court ultimately gains little from the comparison with *Degning*, because it turned on its facts, as does the present case. And it is the specific, likely rare, facts of this case that result in the appellant failing to show materiality. Even if one assumes that the appellant in this case might "say whatever he could", it was not apparent that he had not already done so, nor that whatever further things he might say would make any difference.

51. Finally, the matters identified by Wigney J at [63]-[78] should not be accepted as giving rise to materiality:

    51.1. First, in respect of the evidence that the appellant may have given, he did have this opportunity, through his time in the witness box and through his answers to the questions from the Minister and the Tribunal (as set out above). This included quite open questions from the Tribunal at the close of the evidence. Further, it is likely that the police documents would ultimately be the best evidence of the incidents. That follows because the appellant said he did not recall the incidents well (because he was intoxicated) and he accepted the statements would be an

[43] *Degning* at [20], [25], [29], [35] (Allsop CJ).

accurate reflection of what his wife told police – and, it may be inferred, of what actually happened.

51.2. In addition, the evidence from the appellant's wife had explained that the couple had reunited and were continuing to work on their relationship together.

51.3. Secondly, in respect of his wife's evidence, it is submitted that the letter she had provided did cover the major issues or concerns that were likely to arise from the incidents, and so she had already addressed herself to that task. Beyond restating those matters, it is hard to see what more she might have said, even if her evidence would have been positive (as the letter was).

51.4. In respect of the construction of paragraph 13.1.1(1), this has been earlier dealt with. Even assuming that the appellant might make some cogent submission about the operation of that paragraph, the Tribunal's decision represents a considered and reasonable interpretation of the paragraph. As the Court in *Stead* acknowledged (at 145), the scope for materiality to be met in respect of a procedural fairness error is reduced where the error is a failure to allow submissions on a legal topic. In this case, that is compounded when the interpretation of the decision-maker is a reasonable one as a matter of law.

52. Ultimately, once it was established that the domestic violence incidents had occurred, and the details about those incidents arising from the police reports were confirmed, downplaying or explaining away those incidents was always going to be very difficult. The appellant did, however, have a chance to do so, albeit within the context of the assessment of the best interests of his children. In fact, it was always going to be important for the appellant to address the incidents in that context, lest the weight attributed to that factor in his favour be reduced.

53. It may be inferred that he understood this. And in the factual circumstances of this case, the Court should accept that the evidence given by the appellant's wife, combined with the oral evidence that the appellant himself gave, was the best that he could have produced to the Tribunal on the domestic violence topic. It follows that the opportunity to say more or produce more evidence would not have provided the possibility of a different outcome.

PART VI TIME FOR ORAL ARGUMENT

It is estimated that 1 hour will be required for the presentation of the oral argument of the first respondent.

Dated: 17 January 2022

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