HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **NARADA NATHANSON**
Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issue in this appeal is whether the admitted failure by the Second Respondent (the **Tribunal**) to afford procedural fairness to the Appellant, by failing to put him on notice of a material issue in the review and denying him the opportunity to adduce evidence or make submissions on that issue, amounted to jurisdictional error.

3. In particular, did that denial of an opportunity to be heard establish that the Appellant was deprived of a realistic possibility that the decision in fact made by the Tribunal could have been different if a fair hearing had been provided?

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: CITATION OF JUDGMENTS BELOW

5. The reasons of the primary judge are reported as *Nathanson v Minister for Home Affairs* [2019] FCA 1709. The reasons of the Full Court of the Federal Court are reported as *Nathanson v Minister for Home Affairs* [2020] FCAFC 172 (**FC**).

PART V: STATEMENT OF RELEVANT FACTS

6. A comprehensive summary of the relevant facts is found in paragraphs 7 to 43 of the reasons of Wigney J in the Court below.

7. On 6 August 2018, the Appellant's visa was cancelled by a delegate of the Minister under s 501(3A) of the *Migration Act 1958* (Cth).[1] On 8 January 2019,[2] a delegate made a decision under s 501CA(4) not to revoke the cancellation of the visa.[3] The delegate did not mention the issue of family violence in the reasons for decision.[4]

8. In considering whether there was "another reason" why the cancellation should be revoked, the delegate was required to apply *Direction No. 65 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (**Direction 65**).

9. On 15 January 2019,[5] the Appellant sought review by the Tribunal.

10. On 28 February 2019, *Direction No. 79 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s501CA* (**Direction 79**) came into force and Direction 65 ceased to be in effect.[6]

11. A critical difference between Direction 65 and Direction 79 is the inclusion in the latter of a new clause 13.1.1(1)(b), under the heading "The nature and seriousness of the conduct", which required the decision maker to have regard to:

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[1] Appellant's Book of Further Materials (**AFM**), 12-18.
[2] AFM, 45.
[3] AFM, 38-61.
[4] AFM, 50-51 [16]-[29] (addressing the nature and seriousness of the Appellant's conduct).
[5] Core Appeal Book (**CAB**), 10 [8].
[6] AFM, 150-182.

> The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed.[7]

12. On 21 March 2019, the Tribunal conducted a hearing, at which the Appellant was self-represented.[8] The Appellant's wife was present at the hearing with him.[9]

13. The Tribunal explained the differences between Direction 65 and Direction 79 to the Appellant as follows:[10]

> For your benefit as a preliminary issue, I'd like to highlight that I'm considering the application under Direction 79, the delegate when they made their decision was operating under a different direction because one came into effect in February of this year. That was Direction 65. So I'm going to give you a copy of Direction 79 that marks up in red where the direction is different, so that you're aware. There are only minor changes to the direction but it's important, I think, that you know that I'm making the decision with a slightly different direction in front of me.
>
> … The parts of the direction that I'll be looking at in this case are the preliminary parts of the direction and then part C which applies to cancellations such as the one you have before me. Or that I have before me in your case. Most of those changes relate to how we treat crimes where women and children are involved, and with respect to the conviction history I have for you in front of me, I think they're of minor relevance, those changes. That is, mostly relevance to where the applicant has been charges [sic] in relation to convictions and offences in relation to women and children.
>
> [emphasis added]

14. The only reference to family violence in the Minister's Statement of Facts, Issues and Contentions filed prior to the hearing[11] was in relation to the consideration of the best interests of the Appellant's minor children. The total scope of that mention was:

> The respondent accepts that the applicant is the father of three minor children in Australia, aged three, seven and nine.

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[7] AFM, 166.
[8] CAB, 11 [12].
[9] AFM, 112, lines 15-16; AFM, 85, line 33.
[10] AFM, 89, lines 6 ff.
[11] AFM, 63-78.

> The respondent contends that this consideration should be given limited weight in circumstances where the children have suffered or experienced emotional trauma arising from the applicant's conduct, specifically as a result of incidents of domestic violence resulting in the issuing of violence restraining orders (paragraph 13.2.(4)(h) of Direction 79).[12]

15. There was also before the Tribunal a letter from the Appellant's wife.[13] This letter did not say anything specific about the alleged incidents of family violence, her appraisal of the impact they had on her or on the couple's children, or her views on whether the incidents were likely to be repeated. While present at the hearing, the Appellant's wife did not give oral evidence.

16. The Appellant's evidence to the Tribunal was treated as being the written material that he had provided to the delegate. The circumstances of the Appellant coming to be cross examined are unclear. He did not give oral evidence on his own behalf. He was not made aware that he did not have to enter the witness box and could rely solely on his documentary material. The Tribunal seems to have assumed, wrongly, that the Minister had the right to interrogate the Appellant.[14]

17. The Appellant was interrogated by the Minister extensively about materials obtained from Western Australia Police under summons, indicating police reports of family violence involving the Appellant. This material was voluminous, and was tendered at the hearing without forewarning that it might be relied on by the Minister.

18. In closing submissions, the Minister submitted:[15]

> [The Appellant] has also, in my submission, been involved in other violent conduct against his wife and, notwithstanding the fact that [the Appellant's] wife chose not to press charges against [the Appellant], we would submit, that that conduct is extremely serious conduct, especially having regard to the new directions in Directions 79 that any violent conduct against a female is serious, regardless of the sentence imposed.

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[12] AFM, 72 [41]-[42]. Paragraphs 13.2(4)(h) of Direction No. 65 and Direction No. 79 are identical.
[13] AFM, 78.
[14] AFM, 91-92 (T8.41-T9.44).
[15] AFM, 117, line 9.

19. This was the first articulation of the issue of family violence being potentially relevant to the assessment of the nature and seriousness of the Appellant's conduct.

20. No steps were taken by the Tribunal to explain to the Appellant that this issue had emerged in closing submissions following the completion of evidence (including cross examination), nor to give the Appellant any opportunity to address this new issue.

21. In its reasons for affirming the decision, the Tribunal found that the Appellant had engaged in family violence and this conduct in that respect was to be viewed "seriously", which indicates that substantial adverse weight was placed on those findings: Reasons [51]-[59], [74], [84], [98]; see also [111].[16] As found by the primary Judge (at [28]), the "characterisation of the conduct as 'very serious' rests to a considerable degree upon reasoning by reference to the terms of Direction No 79".[17]

22. It was accepted by the majority in the Court below (at [119])[18] that, if the issue of family violence could have been neutralised, the Appellant might realistically have persuaded the Tribunal to restore his visa.

PART VI: ARGUMENT

The unfairness in this case

23. The Tribunal failed to afford procedural fairness to the Appellant in that it did not give him a fair hearing: **FC [46], [83]-[84]**.[19] This was a serious procedural unfairness, which caused practical injustice, and which can be summarised as the Tribunal having misled the Appellant as to the relevance and importance to the decision of the evidence of the Appellant having engaged in acts of domestic violence. Procedural fairness required the Tribunal to afford the Appellant an opportunity to present further evidence and submissions on the "domestic violence" issue under Direction 79. The Tribunal failed to do so.

[16] CAB, 26-28, 32, 35, 38, 42.
[17] CAB, 79. See also CAB, 82 [37].
[18] CAB, 138. See also CAB, 117-118 [47] per Wigney J.
[19] CAB, 117, 129.

Correct principle

24. The Appellant submits that the correct statement of principle is set out by Gageler and Gordon JJ in *Minister for Immigration v WZARH* (2015) 256 CLR 326 (***WZARH***) at [55]-[60], which appears to acknowledge (or to anticipate) the subsequent articulation of the materiality doctrine. Their Honours said (citations and references omitted):

> The concern of procedural fairness, which here operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of an assessor or reviewer to give the opportunity to be heard which a reasonable assessor or reviewer ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration.
>
> Such a breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration is material, so as to justify the grant of declaratory relief by a court of competent jurisdiction, if it operates to deprive the offshore entry person of "the possibility of a successful outcome".
>
> That approach to the determination of the existence and consequence of a breach of an implied condition of procedural fairness governing the exercise of a statutory power is wholly consistent with the often-repeated observation of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* that the concern of procedural fairness is to "avoid practical injustice", and with his Honour's conclusion in that case that there was no denial of procedural fairness where "[n]o practical injustice ha[d] been shown". The absence of practical injustice in *Lam* lay in the fact that "[t]he applicant lost no opportunity to advance his case"; it was not "shown that he lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment".
>
> … *Lam* is not authority for the proposition that it is incumbent on a person who seeks to establish denial of procedural fairness always to demonstrate what would have occurred if procedural fairness had been observed. What must be shown by a person seeking to establish a denial of procedural fairness will

depend upon the precise defect alleged to have occurred in the decision-making process.

There are cases in which conduct on the part of an administrator in the course of a hearing can be demonstrated to have misled a person into refraining from taking up an opportunity to be heard that was available to that person in accordance with an applicable procedure which was otherwise fair. To demonstrate that the person would have taken some step if that conduct had not occurred is, in such a case, part of establishing that the person has in fact been denied a reasonable opportunity to be heard.

Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given.

25. Where Gageler and Gordon JJ say that "the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome", their Honours should be understood as speaking in a broader sense, and not in any sense that would cut across the proposition that an applicant for judicial review bears the onus to prove relevant historical facts.[20]

26. As Kiefel CJ, Gageler, Keane and Gleeson JJ observed in *MZAPC* at [33]: "There are conditions routinely implied into conferrals of statutory decision-making authority by common law principles of interpretation which, of their nature, incorporate an element of materiality, non-compliance with which will result in a decision exceeding the limits of decision-making authority without any additional threshold needing to be met." Their Honours identified the rule against bias and legal unreasonableness as two examples of this situation. Justice Edelman identified similar considerations.[21]

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[20] *MZAPC v Minister for Immigration* (2021) 390 ALR 590 (***MZAPC***).

[21] *MZAPC*, [181]-[182] (Edelman J).

27. Procedural unfairness at large does not fit within this principle because it may be accepted that, absent statutory adjustment of the usual implication as to the threshold of materiality,[22] procedural unfairness in a bare or merely technical sense would not be sufficient to establish materiality. Indeed, it is difficult to see how such a bare or technical irregularity could give rise to practical injustice. However, at least where procedural unfairness has caused practical injustice, as in this case, a materiality component is "built in" to the legal error.[23] Another way of putting this may be that there is a ready inference of a realistic possibility of a different decision had the procedural unfairness not occurred (for example, if a fair hearing had been provided), in the absence of anything that is capable of rebutting that inference by establishing that the outcome could not have been affected.[24]

28. The counter-factual analysis contemplated by the materiality principle turns on the proof of historical facts as to how the decision was in fact made, and not on proof of what would have been done by the applicant if provided with a fair hearing. The inquiry requires "reasonable conjecture",[25] and its application is usefully illustrated by the facts of *Stead v State Government Insurance Commission*,[26] where there was no need for the appellant (having established the denial of a possibility of a successful outcome) to lead evidence of what counsel would have submitted nor to prove that the trial judge would have found the submission persuasive. This results from the position that a court conducting a "materiality analysis" must not assume the function of the decision-maker.[27]

29. In each of *Minister for Immigration v SZMTA*[28] and *MZAPC*, materiality fell to be determined according to a settled factual record of the administrative decision-making process, in circumstances where there was no occasion to consider whether a lost opportunity was sufficiently valuable to meet the materiality test. In conducting the materiality analysis in those situations, the Court had a crystallised set of historical facts against which to compare the impact of the lost opportunity. In cases such as the present

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[22] *Hossain v Minister for Immigration* (2018) 264 CLR 123 (***Hossain***), [30] fn 33, referring to *SAAP v Minister for Immigration* (2005) 228 CLR 294.

[23] *MZAPC*, [160] (Edelman J).

[24] See *MZAPC*, [47]-[48] (Kiefel CJ, Gageler, Keane and Gleeson JJ), referring to the "unnegated possibility" by reference to *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

[25] *MZAPC*, [38].

[26] (1986) 161 CLR 141; see also *MZAPC*, [49]-[50].

[27] *MZAPC*, [51].

[28] *Minister for Immigration v SZMTA* (2019) 264 CLR 421.

appeal, as in *WZARH*, there is no such crystallised set of facts because the lost opportunity might have led to any number of possible courses of action. The possible *results* of those possible courses of action cannot be determined with any specificity because, as experience teaches, a new line of inquiry might open up yet further new issues.

30. It is these considerations that underscore the wisdom of the inference made by Allsop CJ in *Degning v Minister for Home Affairs* (***Degning***),[29] that "he would have said whatever he could have said." That is also a reflection of the teaching of experience that, if an opportunity is afforded to a person, the course of events may be difficult to predict: "the law is strewn with examples of open and shut cases which, somehow, were not".[30]

31. If it be accepted that a person could have said or done something useful with an opportunity that should have been given to them, then materiality is established. This is consistent with the fact that the principles of procedural fairness focus on procedures and not outcomes.[31] The materiality doctrine does not change this position.

Evidence going to materiality in procedural unfairness cases on judicial review

32. There are situations where, in order to succeed, an applicant might need to adduce evidence at the hearing of a judicial review application alleging procedural unfairness.

33. Established since at least *Lam*,[32] an applicant might need to adduce evidence to prove that they have in fact been deprived of some procedural opportunity. That is a well-known concept, often engaged where a decision maker has made some representation about the procedure that would be adopted but has then departed from that representation.

34. There are other situations where evidence at trial be necessary of what might have been *done* with a procedural opportunity. For example, if circumstances align such that the "value" of a procedural opportunity can be seen to be an opportunity to adduce some specific additional item of evidence, such as a document. In that situation, an applicant for

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[29] (2019) 270 FCR 451 at [39], Collier J agreeing at [43]. See CAB, 122 [59]-[60] (Wigney J); cf. 144 [136]-[137] (Steward and Jackson JJ).

[30] *John v Rees* [1970] Ch 345 at 402 (Megarry J).

[31] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 96 [16] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *Minister for Immigration v WZARH* (2015) 256 CLR 326 at 341 [54]-[55] (Gageler and Gordon JJ).

[32] *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1.

judicial review should be able to adduce evidence of the particular document on the judicial review hearing, lest it be inferred that they could not have given that document to the administrative decision maker.

35. There may be other situations where evidence, whether from the judicial review applicant or some other person, is called for. This might be to establish some fact the existence of which is necessary but which cannot be inferred from the decision record; or to rebut some matter, for example, to rebut a possible inference that a strategic decision had been made before the administrative decision maker.

36. It is not useful to seek to catalogue the cases in which evidence might or might not be required in order to establish procedural unfairness or practical injustice. The examples set out at paragraphs 33 to 35 above are the exception to the general rule set out above, and it likely to be a rare case indeed that a person will need to prove what might have been *done* with an opportunity if it had been provided to them.

37. In circumstances like the present case, it was not necessary for the Appellant to adduce evidence of what he might have *done* with the opportunity to address the issue of the family violence being viewed and given weight as "serious" or "very serious" conduct for the purposes of new clause 13.1.1(1)(b) of Direction 79. It is sufficient to show that the opportunity was valuable, in the sense that something useful might have been done with the opportunity.

The decision below

38. The majority below (Steward and Jackson JJ) concluded that the procedural unfairness in this case was immaterial essentially because the Appellant did not identify "anything specific that would or could have been put to the Tribunal by way of evidence or submissions that might have led to a different result", and therefore did not establish that that there was a realistic possibility of a different outcome if he had been given a fair hearing: **FC [126]**.[33] Notwithstanding the accepted finding that the Appellant had been denied procedural fairness and had not been given a fair opportunity to be heard on an issue that was material to the Tribunal's decision, the majority took the view that it was incumbent on the applicant "to identify … a matter or matters that could have been put before the

[33] CAB, 140-141.

Tribunal, from which the court could infer that there was a realistic possibility of a different outcome" (**FC [127]**),[34] or at least "to articulate (through his legal representatives) a specific course of action which could realistically have changed the result" (**FC [131]**).[35]

39. The majority found that the Appellant "knew that the allegations of domestic violence were important" (**FC [131]**; see also **FC [128]-[130]**).[36] The reasoning supporting this notion is unstable – it is unclear whether it refers to actual knowledge, or that the Appellant "should have known": see **FC [128]**.[37] In any event, even if one accepts that the Appellant actually knew that the allegations of domestic violence were important to the case in a general sense, he did not know – and was positively misled – about the way in which those allegations might be important (see Wigney J at **FC [61]**).[38]

40. The majority was not prepared to infer that further evidence from the Appellant's wife might have been helpful (**FC [132]**).[39] However, the Court should not have required evidence to have been led at trial of what the Appellant's wife would have said. It should have been inferred that the wife's support of her husband might realistically have translated into helpful evidence, even if exposed to cross examination. In turn, that might have influenced the weight to be given to these matters (see Wigney J at **FC [74]**).[40] The majority in the Court below were wrongly attempting to assess probabilities, and not possibilities.

41. The majority was not prepared to infer that a submission that the domestic violence episodes should not be regarded as "very serious" under the Direction could have assisted the Appellant (at **FC [133]**).[41] But the Tribunal's analysis of implications to be drawn from the change in the Direction was dubious (see Wigney J at **FC [41]-[43], [44], [65]**),[42] and it might not have taken much to dissuade an open-minded Tribunal from that path of analysis. The majority were wrong in this conclusion.

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[34] CAB, 141.
[35] CAB, 142.
[36] CAB, 141-142.
[37] CAB, 141.
[38] CAB, 122.
[39] CAB, 142.
[40] CAB, 126.
[41] CAB, 142-143.
[42] CAB, 115-117, 123.

42. The majority was not prepared to infer that the Appellant, through further evidence or submissions, could have limited the adverse impact of the allegations of domestic violence upon the (otherwise helpful) weight to be given to the interests of his children (**FC [134]**).[43] Again, the principle applied is unstable as it is unclear whether the Appellant's actual knowledge supports the point, or that he was "on notice" or "must have known" of the importance of the allegations. In any event, the conclusion is plainly wrong. Had the Appellant's wife been called,[44] the Tribunal would have heard oral evidence from the mother of the affected children and the principal victim of any domestic violence. To suggest that her evidence could not possibly have moved the Tribunal to reassess the various considerations in play is squarely against ordinary human experience.

43. With respect, the criticism made of the majority's reasoning by Wigney J at **FC [59]-[78]** is compelling.[45] The majority's reasoning bypasses principles in relation to the effect of a denial of procedural fairness on the jurisdiction of an administrative tribunal, and treats *SZMTA* as requiring the Appellant to establish a realistic possibility of a different outcome by pointing to specific evidence or submissions and showing how they might have changed the outcome of the Tribunal's decision. The majority make speculative and contentious assumptions both about what the Appellant or his wife might have put by way of further evidence or submissions, and how such evidence or submissions might have been viewed by the Tribunal: see **FC [128]-[134]**.[46]

44. Justice Wigney examined the factual record that was admitted at trial and inferred that it was realistically possible for the Appellant to have taken up the opportunity that should have been afforded to him. Given the significance of the issue to the Tribunal's decision, Wigney J inferred that an open-minded Tribunal might realistically have been persuaded to reach a different decision.

45. In essence, Wigney J was prepared to draw the same inference as Allsop CJ in *Degning* that "he would have said whatever he could have said" about the issue, had it been drawn to his attention. In *Degning*, the inference was available because of Mr Degning's participation

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[43] CAB, 143.

[44] A realistic possibility since she was present at the hearing and the Tribunal or the Minister could have called her, avoiding the limitation under s 500(6H).

[45] CAB, 121-127.

[46] CAB, 141-143.

in the process and the gravity of the decision to his future and ordinary human experience and plain common sense. Those same features applied in this case, and the same inference should have been drawn by the majority.

46. This Court should draw such an inference and find that materiality and jurisdictional error was established.

PART VII: PRECISE FORM OF ORDERS SOUGHT BY THE APPELLANT

47. The Appellant seeks the following orders on the Appeal:

a. The appeal is allowed.

b. Orders 1 to 4 of the Federal Court of Australia dated 9 October 2020 be set aside, and in lieu thereof it is ordered that:

i. The appeal is allowed.

ii. The orders made by Colvin J on 18 October 2019 be set aside, and in lieu thereof it is ordered that:

1. The application for review is allowed.

2. The decision of the Administrative Appeals Tribunal is set aside.

3. The application be remitted to the Tribunal to be heard and determined according to law.

4. The First Respondent pay the Applicant's costs.

c. The First Respondent pay the Appellant's costs.

PART VIII: ESTIMATED TIME FOR ORAL ARGUMENT

48. The Appellant estimates he will require 1.5 hours for oral argument.

Dated: 3 December 2021

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

ANNEXURE

LIST OF STATUTES AND STATUTORY INSTRUMENTS

1. *Migration Act 1958* (Cth), ss 501(3A), 501CA(3)-(4)