HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M73/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M73 of 2021

BETWEEN:

NARADA NATHANSON
Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. The Appellant certifies that this outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF ARGUMENT

2. It is accepted that the Appellant was denied procedural fairness. *Appellant's written submissions (**AS**), [23].*

    - Primary judge at [56], [58] [CAB 87]; Full Court at [2], [46], [83]-[84] [CAB 105, 117, 128-129].

3. The Tribunal failed to give the Appellant an opportunity to adduce evidence or make submissions on a critical issue.

    a. The critical issue was whether alleged family violence incidents should be viewed seriously, having regard to new paragraph 13.1.1(1)(b) of Direction No 79, when considering the nature and seriousness of the Appellant's offending or other conduct to date (in the context of the primary consideration of protection of the Australian community).

    b. The Appellant was not put on notice that this was an issue in the review, and was told by the Tribunal that the changes in Direction No 79 were "only minor" and "of minor relevance" to his case, given his conviction history.

c. It is not in dispute that the Tribunal's findings in relation to the protection of the Australian community (and ultimately its decision not to revoke the cancellation) depended on the evidence of domestic violence in the light of Direction No 79.

    - Primary judge at [28], [37] [CAB 79, 82]; Full Court at [47], [104] [CAB 117-118, 134].

4. The denial of procedural fairness gave rise to jurisdictional error if it deprived the Appellant of a "realistic possibility" of a different decision or successful outcome. *AS [24]-[31]*. Although materiality may not be inherently "built in" to procedural fairness, there is nevertheless a degree of overlap in the applicable considerations.

10 • *Minister for Immigration v WZARH* (2015) 256 CLR 236 at [55]-[60].

- *Minister for Immigration v SZMTA* (2019) 264 CLR 421 at [45].
- *MZAPC v Minister for Immigration* (2021) 390 ALR 590 at [47]-[51].

5. The Appellant was not required to prove or establish what he would have done if he had been provided with a fair opportunity to be heard in relation to the critical issue. *AS [32]-[37]*. All that needed to be shown, as a matter of reasonable conjecture based on the historical facts (*i.e.* as to the hearing that was conducted and the decision in fact made by the Tribunal), is that there was a realistic possibility that the outcome might have been different.

6. It appears to be common ground that the Appellant had a realistic chance of a different
20 outcome if he could possibly have "neutralised" the significance of the domestic violence issue in relation to the nature and seriousness of his past conduct: Full Court at [119] [CAB 138].

7. It can be inferred that the Appellant would have said whatever could be said in order to address the question whether the evidence of the domestic violence incidents should be viewed seriously as "other conduct" and as to its weight as a consideration against the revocation of the cancellation of his visa. *AS [45]-[46]*.

- *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at [39].

8. The majority of the Full Court (and the primary judge) erred in concluding that the Appellant was required to identify some specific additional evidence, argument or matter
30 which might have persuaded the Tribunal to reach a different decision. *AS [38]-[43]*.

- Primary judge at [60]-[62] [CAB 88]; Full Court at [127]-[131] [CAB 140-142].

9. None of the three particular features relied on by the majority of the Full Court support a conclusion that it was incumbent on the Applicant to identify a matter or matters that could have been put before the Tribunal in order to infer a realistic possibility of a different outcome.

   a. On the findings below, it was not apparent to the Appellant that the evidence in relation to domestic violence would be relied on and given decisive weight by the Tribunal under clause 13.1 of Direction No 79 (as opposed to its use to discount the weight of the best interests of the minor children).

10 b. The letter from the Appellant's wife did not mean that there was nothing more that she might have been able to say about the domestic violence incidents or their consequences, which could realistically have persuaded the Tribunal to view the conduct differently or to give it different weight. Indeed, the letter itself is suggestive of there being more to the story than what is set out in the letter itself.

   c. To the (limited) extent that the Appellant had accepted that the domestic violence incidents occurred, further evidence or submissions as to the circumstances and context of those incidents could have influenced the Tribunal's evaluative task, including its assessment of the "nature and seriousness" of the Appellant's conduct to date.

20 10. Nor was there any basis on which it could be inferred or suggested that further evidence from the Appellant's wife might have made matters worse for the Appellant: *cf* Full Court [132]. It was not necessary to establish a realistic possibility that the wife's evidence could have proved that there was no domestic violence, but simply that such evidence might realistically have affected the weight to be given to such conduct in relation to the Tribunal's consideration of the protection of the Australian community.

Dated: 10 March 2022

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