IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S85 of 2015

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Appellant

And

WZARH

First Respondent

ADOFO GENTILE

IN HIS CAPACITY AS INDEPENDNET MERITS REVIEWER

First Respondent

RESPONDENT'S SUBMISSIONS IN REPLY

Part I: Certification

1. The redacted version of the reply is in a form suitable for publication on the internet.

Part II: Issues

2. The Respondent responds to the Appellant's appraisal of the issues in the following terms:

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a. The first identified issue in the Appellant's Submissions (AS)at [3] identifies an issue that does not arise on the Full Court's reasons. The Full Court did not find that 'procedural unfairness results merely because an independent merits reviewer has adopted a procedure that is 'different' from, and 'inferior' to, a 'legitimate expectation'. For the reasons given below, this characterization is an unfair over simplification of the approach of the Full Court which was concerned with identifying whether there had been a denial of procedural fairness in particular (and extraordinary circumstances) where there was no issue that a duty to accord procedural fairness existed.

b. It should also be noted that the first issue does not involve any attempt by the appellant to challenge the correctness of the reasons in this Court *Lam*[1], nor does it seek to allege that the Full Court misunderstood the reasoning in *Lam* or failed to apply it[2].

c. The second issue at AS [4] contains a number of problems:

    1. First, it alleges no error on the part of the Full Court in the way that it approached the question of whether procedural fairness had been denied to the respondent in the circumstances;
    2. Second, it appears to suggest (although not directly) that the matter before the Full Court depended on the existence of some fixed rule as to when procedural fairness will be found, when it was not;
    3. Third, it proceeds on the assumption that 'the review had been reconstituted', as though it was a statutory process conducted by an institution whose members may reconstitute from time to time- which it is not. Such an attempt to view the second reviewer as a mere continuation of the first reviewer's role was rejected by the plurality (and that finding is not the subject of a challenge)[3].

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[1] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
[2] See Notice of Appeal AB 347-8
[3] [2014] FCAFC 137 at [31] per Flick and Gleeson JJ AB328.52-60.

3. It is to be noted that neither identified issue alleges any particular error on the part of the Full Court in any particular finding by it (other than, perhaps, its ultimate conclusion to which exception is taken).

4. The true issue in the appeal is whether the analysis by the Full Court below involved an error of law or principle in considering whether procedural fairness was denied in the peculiar circumstances of this case, where an applicant for asylum was told by a reviewer that he was being given an opportunity to make oral submissions to her, which the reviewer would consider in making her recommendation to the Minister; and subsequently not being informed that no such recommendation would be made by her and that a new reviewer would conduct the review in circumstances where the Respondent did not know the existence of that person, nor was there any disclosure of, or explanation for, the new review until the adverse recommendation had been made.

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The Respondent concurs with the assessment of the Minister that no notice should be given under s 78B of the *Judiciary Act 1903*.

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Part IV: Facts

6. The procedural history of the matter is as set out below.

7. The Respondent is a citizen of Sri Lanka. He arrived by boat on 7 November 2010.

8. In January 2011 he made a request for a refugee status assessment. That assessment was adverse.

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9. In May 2011 he sought an independent merits review[4]. He was interviewed by an Independent Merits Reviewer on 16 January 2012. A recording and transcript of that interview was prepared[5].

10. After the hearing, the Respondent wrote to the Independent Merits Reviewer enclosing documents to support his application. For as yet unexplained reasons, the Independent Merits Reviewer who conducted the January 2012 interview became unavailable.

11. On 4 May 2012 the Respondent made a further written submission addressed to the Department. The review process was completed and the second Independent Merits Reviewer on 25 July 2012 found that the Respondent was not a person who met the criteria for a protection (Class XA) visa.

12. At some time after 7 May 2012, a different Independent Merits Reviewer then became engaged unbeknownst to the applicant[6].

13. A recommendation was made by the second reviewer that the Respondent not be recognised as a person to whom Australia has protection obligations or as a member of the same family unit of such a person.

14. Judicial review was sought.

15. His application for judicial review was dismissed by the Federal Circuit Court of Australia in October 2013: *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608.

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[4] See AB103-108 which was not included by the appellant in the Green Book materials below. Noting the personalized requirements for the respondent to provide materials and limited privacy consents to the "Independent Reviewer" (Ab104.42-49); and that the "Independent Reviewer" may use a range of methods to communicate with the applicant: AB104.30-40..

[5] AB239-278. See in particular 239.50-60; 240.25-60 in which the procedure was described by the first reviewer. There is no dispute that this procedure was departed from without notice to the respondent: AS [56]

[6] See response to the applicant confirming receipt of the post-hearing submission and confirming it had been sent to *the Reviewer* (AB229.20) while simultaneously it was forwarded to the new reviewer without any disclosure to the respondent: see AB212.10-30.

16. The Respondent then appealed to the Full Court of the Federal Court of Australia.

17. The grounds of appeal centred only on an allegation of denial of procedural fairness[7] particularised as being because (i) the IMR hearing was not conducted by the IMR who made the adverse recommendation to the Minister; and (ii), that the visible scarring on the arm of the respondent[8] was not taken into account in findings that the appellant would have an insufficient profile to come to the attention of the authorities in Sri Lanka[9].

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18. Their Honours (Flick and Gleeson JJ with Nicholas J agreeing, giving his own reasons) allowed the Respondent's appeal, with costs, set aside the primary judge's orders and made a declaration that the Reviewer's recommendation was affected by an error of law, namely, that in recommending to the Minister that the Respondent should not be recognised as a refugee, the Reviewer had denied the respondent procedural fairness.

Part V: Applicable Statutory Provisions

20 19. The statutory provisions identified and reproduced by the appellant in the annexure to his submissions are accepted as correct in relation to items 1, 3 and 5. Items 2 and 4 (and pages 5-24 and 28-43 respectively) include legislation which were not the subject of any argument below (nor apparently on the appeal to this Court) are not relevant.

Part VI: Argument

20. The characterization of the plurality's reasoning at [19] as simply that the respondent had been denied procedural fairness because he did not attend

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[7] See AB307.
[8] See AB285- There was no dispute that scar was given to him by the EPDP (AB 57) noting the marks look like a tiger claw scratch.
[9] Contrary to the appellant's submissions at AS [18], this ground was not pressed on the basis that there was a failure to take into account a mandatory statutory consideration.

any interview before the Reviewer does not reflect the true nature of their Honour's reasoning.

21. Noticeably absent from the Minister's recitation of the Full Court's reasons, at AS [20]-[22] is any reference to the reasons of the plurality at paragraphs [9] to [16] where their Honours expressly disavowed any universal obligation or rule of procedural fairness providing a right to an oral hearing. Their Honours engaged in a careful analysis and review of the authorities and found that "in the present statutory context, no support should be given to any broadly expressed conclusion that all applicants for refugee status are entitled to an oral hearing in all circumstances. ..." and further that "clearly enough whether the rules of natural justice or procedural fairness require an oral hearing depends on the facts and circumstances of each individual case, including the statutory context in which decisions are required to be made. No one factor, be it recourse to the touchstone of credibility or persona disadvantage, provides any infallible guide to when an oral hearing may be required in order to ensure an affected person has been given a "fair opportunity to be heard" .

22. The court below considered and reviewed the authorities concerning whether there was "a legitimate expectation as to the procedure to be followed" on the facts of the case. No criticism is made by the applicant of the court's analysis of these authorities.

23. The Minister suggests that the plurality articulated "statements of principle" at [24] of its reasons for decision. Such a submissions should be rejected. There is nothing in the decision to suggest that the plurality was seeking to establish "statements of principle". The plurality was simply discussing the nature of the particular circumstances of the present case. They were not laying down any proscriptive of universal rule or principle. There is no special leave point generated by the classification of this part of the reasons as 'statements of principle'.

24. The part of the plurality's reasons make it clear that its reasoning referable to the particular circumstances of this case. They said: "In the circumstances of the present case, the appellant was put in the position whereby he justifiably thought he was participating in a review process involving him being extended an opportunity to put his claims in person." It is this benefit that the applicant was "stripped of". The plurality's reasons, contrary to the flavour by the appellant, were not an abstract complaint about being stripped of a benefit of an interview. Understood in this way, the reasons of the plurality at [25] do not involve the sort of abstract universal statements of principle attributed to them by the appellant.

25. The reasoning of the plurality at paragraph [25] of their reasons is entirely consistent with the observation of Chief Justice Gleeson in *ex parte Lam* at [33] and [38]. That is, the applicant did lose an opportunity to advance his case, he lost the opportunity to orally advance his case to the person who would be making the recommendation. That was an opportunity which he had been told he would have, and fairness would require that the public authority would be held to its promise in the circumstances.

26. His Honour Justice Nicholas dealt in detail with the Minister's submissions in reliance on the observations of Gleeson CJ in *Lam* at [34]-[38]. His Honour correctly found that the effect of the Chief Justice's reasoning was that mere disappointment was not sufficient; and that the departure from the representation needed to result in procedural unfairness to the applicant. The Minister's reference at AS [12] to paragraph [48] of Justice Nicholas' reasons needs to be read in light of the introductory part of that paragraph, which is omitted from the Minister's recitation in AS [12], namely that it was the representations made during the course of the interview which brought upon the content of requirement for procedural fairness in the particular circumstances of the case. His Honour Justice Nicholas was not referring to some abstract notion of a reasonable entitlement to expect that claims would be considered by the person by whom he was interviewed.

27. The implied criticism at AS [23] to [25] of the inference drawn by Justice Nicholas that it was more likely than not that it would have sought an opportunity for an interview with the second reviewer (at AS [13]) should be

rejected. It was an entirely reasonable and open inference for his Honour Justice Nicholas to make in the circumstances of the case where the evidence was that the appellant had accepted the invitation to participate in an oral hearing (and indeed to have provided further submissions to addressed to that particular reviewer).

28. The Minister further criticises Justice Nicholas reasons for having dealt with submissions his Honour said the Minister had made. The Minister suggests that he made no such submissions as described by Justice Nicholas. That submission should be rejected.

29. The submissions at AS [28] to [36] which traverse the use of the expression 'legitimate expectations' at various points in public law are not of any assistance in the present case. The correct approach to the role of expectations created in a person by person exercising a public law function has been the subject of authoritative analysis by this Court in *Lam's case*. No new issue arises on the facts of this case that would involve a departure from the explanation of the approach in that case, which was applied by the Full Court in the decision below with great care[10].

30. For example, contrary to the respondent's submissions at [28], the plurality appreciated that issues surrounding 'legitimate expectations' arose in a variety of circumstances[11].

31. The Court was well aware (and recorded) the serious limitations on the utility of the expression[12].

32. Further, it should be noted that the Minister's reference to the authorities at [30] and [31] are of little assistance in circumstances where *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 and *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 were principally concerned with legitimate expectations as a means of generating a duty to accord procedural fairness rather than a means by which the content or breach of such a duty could be ascertained in a particular set of circumstances (as it was used in the case below). There is no dispute in the

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[10] [2014] FCAFC 137 at [18]; [19]; [25]; [29] per Flick and Gleeson JJ; and [44] –[47] per Nicholas J.
[11] [2014] FCAFC 137 at [19]
[12] [2014] FCAFC 137 at [18] per Flick and Gleeson JJ and [44] per Nicholas J.

present case about the existence of a duty to accord procedural fairness to the respondent.

33. The submission at [32] is likewise not to the point. There was no question of the Full Court having regard to a 'substantive right' to legitimate expectations. The Full Court disavowed any such notion[13].

34. The Minister's submission at AS [40] to [44] does not assist him. The Full Court found that as a matter of general principle there is no universal obligation to afford an oral hearing in the IMR process, however that is not to say (as the Applicant suggests) that there was no finding by the Full Court that in the circumstances the respondent was not entitled to any oral hearing. To the contrary, it is clear that the plurality accepted that, in the circumstances, he was entitled to an oral hearing before the reviewer who made a recommendation and although Justice Nicholas appears to have decided the matter on a narrower ground of an entitlement to be told that there was a new reviewer and seek a further oral hearing before him; his Honour's reasons are also consistent with a motion that the failure to provide an oral hearing before the second reviewer in the present case was a denial of procedural fairness.

35. The real issue is not what procedural fairness may or may not have required as an abstract concept; but what procedural fairness required in the particular circumstances of this particular case. The appellant mischaracterizes the approach of the Full Court as an "attempt to identify some detriment to the respondent". That was not the approach of any of the members of the Full Court. The members of the Full Court sought to identify what procedural fairness required in the circumstances and whether there was a departure from what was procedurally fair rather than a mere breach of the representation. In fact it is clear that the Full Court did not view the matter as one of requiring the establishment of detriment to the applicant, the plurality said "It is to be constantly recalled that the rules of

[13] [2014] FCAFC 137 at [26]

procedural fairness are not directed at the outcome of an administrative process but rather at ensuring a fair hearing." Justice Nicholas' reasons were directed to rejecting a submission by the Minister that some detriment needed to be established in the circumstances of the case. His Honour was not confining the issue in the case to whether there was detrimental with a breach of representation as the Minister suggests.

36. It is incorrect to say, that the Full Court failed to address why the reviewer was required to invite the respondent to a face to face hearing or interview in circumstances where procedural fairness would not entitle him to such a hearing in the first place. There is no common law rule whereby an administrator is not required to invite a person to an oral hearing. This is yet another appeal to universal rules that do not exist. To the contrary, the authorities make it clear that in some circumstances an oral hearing will be warranted and in some circumstances will not . It is also unhelpful to suggest as the Minister does that the applicant had be given an oral hearing "gratuitously" by the first reviewer. That characterization is not borne out in the evidence and indeed it is plain from what the first reviewer said that she believed that the particular circumstances of the applicant's case meant that it would be procedurally fair to provide him with an oral hearing. There is no suggestion that the first reviewer was motivated by a sense of altruism or generosity. Such an argument is similar to the argument which was rejected in *NAFF v Minister for Immigration and Multicultural Affairs* (2004) 221 CLR 1 at [59.1] and [61] and [63] per Kirby J.

37. It is incorrect to say, that the Full Court did not "identify any unfairness to the respondent as a result of the departure from that expectation". The unfairness identified was that the appellant was deprived of the opportunity to apply from an oral hearing before the person who made the recommendation to the Minister.

38. There was evidence below that the respondent has been misled by the previous reviewer's statements. In his affidavit to the Federal Magistrate's

Court, which was before the court below, respondent gave evidence that he expected the author of his IMR report would be Ms Muling.

39. Furthermore, the transcript of the interview (excerpts of which are reproduced in the reasons of the plurality) made it plain that he was led to believe that the recommendation would be prepared by Ms Muling.

40. Further, contrary to the submission of the appellant, the respondent did lose the opportunity to put information or argument in support of his case, he lost the opportunity to have an oral hearing before the person who would be making the recommendation to the Minister. That was an opportunity which he had before the departure from the representation. It was an important opportunity. Further, the examples given by the Minister in AS [21] are not exhaustive of the types of practical unfairness that may follow from the departure from a representation. It is clear that the Full Court turned its mind to whether or not the departure from a representation or administrative process involved practical unfairness to the applicant in the peculiar circumstances of this case and there is no basis to suggest that their Honours' approach to that finding involved error.

41. The appellant's raises a false argument in that it seeks to take the example provided by Gleeson CJ in *Lam* as providing a universal requirement for applicants to establish prior to relief being granted. In any event, the suggestion that unfairness was mitigated to zero should be rejected in light of the finding made by the plurality at [31] that the interview conducted by the independent merits reviewer in January 2012 did not satisfy any requirement on the part of the second independent merits reviewer to conduct an oral hearing or interview.

42. Contrary to the Minister's submission, the plurality were not "testing the existence of procedural unfairness" by reference to whether the review was different and inferior from that which he had been led to expect would be conducted. The process of the plurality did not involve such a didactic exercise. The plurality was simply noting a range of factors relevant to a

finding of procedural unfairness, including the fact that the appellant justifiably thought he was participating in a review process involving an opportunity to put his claims in person and was thereafter stripped of that benefit without warning.

43. The statements of the plurality in paragraph [27] were concerned with rejection of a submission made by the Minister: namely that the adverse findings as to credibility had been based on inconsistencies in the evidence and claims and this would somehow defeat the legitimate expectation held out to the appellant as to the procedure to be followed in resolving his claim. It is in that context, that the plurality were referring to the focus of the analysis being the procedure rather than the outcome of the administrative decision making process. Further, the sophistry at AS[24] inures in the attempt to incorrectly confine the basis of the Full Court's finding of a breach of procedural fairness to a mere departure from a legitimate expectation. That was not the process of reasoning in which the Full Court engaged. The Full Court looked at, whether, in all of the circumstances of the case, it was procedurally unfair for the person who made the recommendation to the Minister to have not provided an oral hearing to the applicant.

44. It is the mischaracterization by the appellany of the approach of the Full Court that leads to the error in his submission at [25], that the Full Court was simply establishing that the breach of representation itself gave rise to the relief in judicial review. It is very clear that the plurality understood that the considerations of "legitimate expectation" was merely a tool or "useful concept" when considering "what must be done to give procedural fairness to a person whose interests might be affected by an exercise of power".

45. Likewise the submission in AS [26] is misconceived. At no point did the Full Court engage in a process of elevating considerations of "legitimate expectations" to a substantive basis for relief. The applicant's misconception of the Full Court's approach underlies its error in asserting that the application for special leave is concerned with a revisitation of ex

parte Lam. The Full Court did not deviate from ex parte Lam into the realm of legitimate expectation as a substantive cause of action.

46. The appellant's approach, proceeds on the flawed assumption that the Full Court applied the notions of "legitimate expectations" as a substantive ground of judicial review. As was said by Kirby J in NAFF [68] "There is nothing in this Court's decision in Lam that obliges abandonment of reference to 'legitimate expectations' as a tool of judicial reasoning". It is plain that the substance of what the Full Court was concerned with (in both sets of reasons) was whether or not there had been a denial of procedural fairness and not whether there had been a departure from a legitimate expectation per se.

47. The reasoning in AS [54] is circular and should be rejected. It depends upon some universal rule that a person is never entitled to a face to face hearing, is not founded on any authorities. It is also inconsistent with authority that a denial of a face to face hearing may in certain circumstances involve a denial of procedural fairness.

48. There was no obligation, contrary to the submission at AS [54], on the appellant below to have demonstrated that an oral hearing before the second reviewer would have made a difference . It is certainly not open for the applicant to seek the drawing of a factual inference in this Court that any questions the second reviewer may have had, had already been asked by the previous reviewer, and that he considered he could make a recommendation on the material before him.

49. In any event, Justice Nicholas' reasons at [52]-[53] provide a powerful and correct repost to any suggestion that there was no prospect that an oral hearing before the second reviewer could have made a difference, or that the second reviewer's findings of inconsistencies were so unanswerable that an oral hearing would be pointless.

50. The appellant's submission at AS [34] proceeds on a basis that an oral hearing may have been desirable but not essential. Such a submission again proceeds from the flawed assumption that there is a general or universal rule that there will never be an obligation to accord an oral hearing to an applicant unless particular classes of exemptions are met. There is

no such general rule, the submission is flawed. Whilst there is no universal positive obligation to have an oral hearing in all cases, nor can it be said that no obligation exists to have any hearing in any circumstances. The applicant's case seeks to establish universal rules. The Full Court was right to reject such an absolutist approach and to find that in the particular circumstances of this case, it was procedurally unfair for the second reviewer to not invite the respondent to an oral hearing or at the very least to have notified him about the change in reviewer and invite him to make submissions about whether a further oral hearing should take place.

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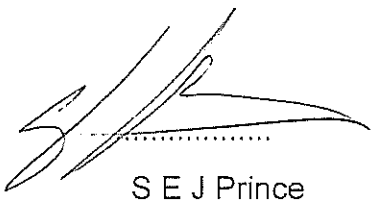
Part VII: Notice of Contention or Cross Appeal

51. There is no Notice of Contention or Cross Appeal.

Part VIII: Time Estimate:

52. The Respondent estimates that its oral submissions will take approximately two hours.

20 Dated:



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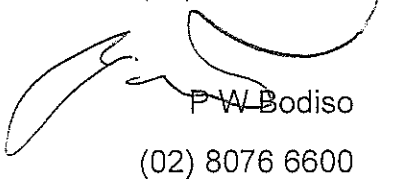

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30 15 June 2015