HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **LPDT**
Appellant

and

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

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S SUBMISSIONS

I. SUITABLE FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

II. THE ISSUES

2. The issues posed by this case are as follows:

   a) To what extent can a court, in determining whether there is a realistic possibility that an evaluative assessment by a decision-maker might have been different if the decision-maker's assessment had not been affected by legal error, rely on the decision-maker's reasons that incorporate the error to justify a negative answer?

   b) To what extent can a court, in determining whether there is a realistic possibility that an evaluative assessment by a decision-maker might have been different if the decision-maker's assessment had not been affected by legal error, speculate that the decision-maker would have given different reasons from the ones that it in fact gave?

c) Where a decision is based on an evaluative assessment, and that evaluative assessment was affected by multiple legal errors, is it necessary for the court to assess the materiality of those errors cumulatively?

III. SECTION 78B NOTICES

3. The appellant has considered whether notices should be given in compliance with section 78B of the *Judiciary Act 1903* and is satisfied that that it is not necessary.

IV. REASONS FOR JUDGMENT BELOW

4. There has been no report of the reasons for judgment of the Federal Court of Australia. The median neutral citation is *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 810.

5. The reasons for judgment of the Full Court of the Federal Court of Australia are reported as *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1.

V. FACTS

Cancellation of the appellant's visa; non-revocation of that decision

6. The appellant is a Vietnamese national. He arrived in Australia in 1997 (CAB 110 [5]). In 2008, he was granted a Class BS Subclass 801 (Spouse) visa (CAB 110 [5]).

7. On 10 November 2011, the appellant was sentenced by the County Court of Victoria to 7 years and 6 months' imprisonment for offences which included *conspiracy to import/export marketable quantity of border-controlled drugs or plants* and *attempt to possess marketable quantity of imported border-controlled drugs or plants* (CAB 110 [6]).

8. On 28 June 2013, the Magistrates' Court of Victoria convicted the appellant in relation to making a false statutory declaration and making false statements. The appellant was sentenced to serve 6 months imprisonment on each charge, to be served concurrently (CAB 110 [8]).

9. On 17 August 2017, the County Court of Victoria sentenced the appellant to four years and 6 months' imprisonment in relation to two counts of *traffick drug of dependence* and *deal property suspected proceeds of crime* (CAB 110 [9]).

10. On 8 May 2019, a delegate of the Minister cancelled the appellant's spouse visa under s 501(3A) of the *Migration Act 1958* (CAB 110 [10]). On 13 April 2021, a delegate decided not to revoke the cancellation under s 501CA(4) (CAB 110 [10]).

11. On 7 July 2021, the Tribunal affirmed the delegate's decision (CAB 61 [3]) and gave reasons under s 43 of the *Administrative Appeals Tribunal Act 1976* for its decision (CAB 5).

Tribunal's reasons, and its non-compliances with Direction 90

12. The reasons of the Tribunal speak for themselves, and are not exhaustively summarised here. Aspects of the reasons that the appellant contends bear on the issues arising on the appeal are addressed in the outline of argument below.

13. For present purposes, it suffices to identify the three respects in which the Full Court held that the Tribunal's reasons disclosed that it had failed to comply with *Direction No 90 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**), being a direction issued by the Minister under s 499(1) of the Act, in making its decision.

14. The issue in dispute before the Tribunal was whether, for the purposes of s 501CA(4)(b), the Tribunal ought to be satisfied that there is "another reason" why the decision to cancel the appellant's visa under s 501(3A) should be revoked (CAB 115 [19]). In considering this question, the Tribunal was required by s 499(2A) of the Act to "comply" with Direction 90. Section 6 of Direction 90 required the Tribunal, "[i]nformed by" certain principles, to "take into account the considerations identified in sections 8 ["[p]rimary considerations"] and 9 ["[o]ther considerations"], where relevant to the decision".

15. In its reasons, after referring to relevant elements of Direction 90, the Tribunal "worked its way through each of the Primary Considerations" (CAB 116 [21]).

16. The first such consideration was "protection of the Australian community from criminal or other serious conduct" (s 8(1)). In considering that matter, the Tribunal was required to give consideration to "the nature and seriousness of the non-citizen's conduct to date" (s 8.1(2)(a)). And, in considering that matter, the Tribunal was required to have regard to certain matters as set out below.

a) First, the Tribunal was required by s 8.1.1(1)(a) to have regard to the Minister's proposition that certain "types of crimes or conduct" described therein are viewed "very seriously" by the Australian Government and the Australian community (emphasis added). There was no dispute below that none of the appellant's convictions fell within any one of these described types(cf. CAB 123-124 [46]-[54]).

b) Secondly, the Tribunal was required by s 8.1.1(1)(b) to have regard to the Minister's proposition that certain "types of crimes or conduct" described therein are considered by the Australian Government and Australian community to be "serious" (emphasis added). The Full Court held, and the appellant does not dispute, that the appellant's drug offending could be characterised as falling within one of these described types, being "crimes committed against vulnerable members of the community" (CAB 141 [118]).

c) Thirdly, the Tribunal was required by s 8.1.1(1)(g) to have regard to whether the appellant has re-offended "since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the [appellant's] migration status".

17. With respect to the first matter, the Tribunal found that s 8.1.1(1)(a) of Direction 90 "militates strongly in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" (CAB 116 [22]). However, as the Full Court accepted, that involved error (CAB 125 [55]). "[T]he error lies in the very lack of any articulated comprehensible connection between the conclusion and the articulated basis for it" (CAB 127 [64]). The Tribunal's reasoning "bore no exposed logical connection with either the preceding paragraphs (at TR [69]-[70]) or the precis of what sub-paragraph (a) stated: at TR [68]" (CAB 129 [71]).

18. With respect to the second matter, the Tribunal found that s 8.1.1(1)(b) of Direction 90 "militates in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" (CAB 116 [24]). However, as the Full Court found, that also involved error. "Given that sub-paragraph (b) establishes the deemed views of the Australian government and community that certain criminal conduct is 'serious' (as distinct from 'very serious'), the failure of the Tribunal to elucidate a course of

reasoning by which those deemed views could support its 'very serious' conclusion, constitutes an error" (CAB 141 [119]).

19. With respect to the third matter, the Tribunal found that "[t]his consideration is directly relevant in this case", and specifically found that it was satisfied that the appellant "re-offended since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status" (CAB 117 [26]). However, as the Full Court found, the consideration in s 8.1.1(1)(g) could not be regarded as applicable (CAB 146 [140], see also [150]). That is because there was no evidence before the Tribunal that the appellant had in fact been formally warned or otherwise been made aware in writing of the consequences of further offending (CAB 146 [141]-[150]).

20. None of these matters are reagitated by the Minister by way of a notice of contention. Accordingly, the Minister now accepts that the Full Court was right to uphold each of the appellant's grounds of review below, subject to the issue of materiality.

VI. ARGUMENT

21. The ultimate question arising on the appeal is: assuming counterfactually that the Tribunal had not made the three errors identified by the Full Court, is there are a realistic possibility that the Tribunal could have made a different decision?

22. The answer to that question is "yes". It is possible that the Tribunal could have:

a) in considering the nature and seriousness of the appellant's criminal offending under s 8.1.1(1), found that the Australian Government and Australian community regarded it as "serious" (rather than "very serious");

b) particularly in that circumstance, to have itself regarded the offending as "serious" (rather than "very serious"); and

c) for either or both of those conclusions to have affected the balance of the Tribunal's overall assessment of the relevant considerations, such that it was satisfied that there is "another reason" for revoking the cancellation decision.

23. The Full Court' pathway of reasoning to "no" is variously affected by error of principle, and by misapplication of principle.

Preliminary observations

24. Before directly addressing the issue of materiality directly, it is apt to make two preliminary observations.

25. The first concerns s 499 of the Act. Subject to any question of materiality, it is a jurisdictional error for the Tribunal to fail to "comply" under s 499(2A) of the Act with a direction given by the Minister under s 499(1). The consequence of each of the Tribunal's non-compliances here is that it failed to address, in the manner prescribed, "one of the primary considerations affecting the decision required of it"; accordingly, subject to any question of materiality, the Tribunal "failed to conduct the review required by the Act, and thereby fell into jurisdictional error".[1]

26. The second point concerns the nature of the matter in s 501CA(4)(b). The Tribunal must assess whether it is satisfied that there is "another reason" for revocation. As this Court has explained, "[t]he breadth of the power conferred by s 501CA … renders it impossible … to formulate absolute rules about how [a decision maker] might or might not be satisfied about a reason for revocation".[2] The breadth and evaluative nature of the assessment vested by s 501CA(4)(b) in the Tribunal (not the Court) makes it a "tall order"[3] for the Minister to seek to persuade the Court, in light of the established facts, that there is no possibility that the Tribunal would have made a different assessment, had it not made the three errors that it did in making the assessment that it did.

Materiality – applicable principles

27. The materiality of a breach of a condition on the valid exercise of a statutory requires consideration of "the basal factual question of how the decision that was in fact made was in fact made".[4] The appellant had the onus of proving the historical facts on the

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1 *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, [68] (French CJ, Kiefel, Bell and Keane JJ).

2 *Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs v Viane* (2021) 96 ALJR 13, [15] (the Court). See also *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, [56] (Gageler J), [71] (Gordon J).

3 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, [49] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

4 *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, [32] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* (2021) 95 ALJR 441, [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

balance of probabilities.[5] That onus was readily discharged here, by the appellant adducing the Tribunal's reasons into evidence.[6]

28. "Then", as this Court held in *Nathanson*, "it is necessary to consider whether the decision that was in fact made could have been different had the relevant condition been complied with 'as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined'" (emphasis added).[7] Put another way, determination of materiality is "a question of counter-factual analysis to be determined by the court as an objective possibility" (emphasis added).[8] In answering this question, a court "must be careful not to assume the function of the decision-maker".[9]

29. The "standard of reasonable conjecture" has been described by this Court as "undemanding".[10]

30. There has been some, but limited, consideration by this Court as to how materiality is worked out, in circumstances where there is error in the reasoning of the decision-maker about an evaluative or discretionary matter. In *Thornton,* the Court held that the Minister's impermissible consideration of the respondent's youth offending in assessing whether he posed an unacceptable risk of harm to the Australian community was material to the Minister's decision not to revoke the cancellation decision.[11] Notably, Gordon and Edelman JJ held that the Minister's impermissible consideration of the youth offending was "relevant to the actual course of the decision-making" and therefore "infected the whole of his reasoning"; the

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5 *Ibid.*

6 See, e.g., *Nathanson* (2022) 96 ALJR 737, [75] read with [72]-[74] (Gordon J).

7 *Nathanson* (2022) 96 ALJR 737, [32] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* (2021) 95 ALJR 441, [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

8 *MZAPC* (2021) 95 ALJR 441, [37] (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [47] (Kiefel CJ and Gageler J).

9 *MZAPC* (2021) 95 ALJR 441, [51] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

10 *Nathanson* (2022) 96 ALJR 737, [33] (Kiefel CJ, Keane and Gleeson JJ). See also Gageler J at [46], emphasising the distinction between "could" and "would", and at [47] observing that "[e]stablishing that threshold of materiality is not onerous".

11 See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488, [37]-[38] (Gageler and Jagot JJ) and [78] (Gordon and Edelman JJ). Steward J, dissenting in the result on the principal issue, did not discuss materiality.

"reasonable conjecture that the decision *could* have been different had the error not occurred cannot, on the face of the Minister's reasons, be displaced".[12]

31. In *Chamoun*, the Federal Court (Mortimer and Bromwich JJ) urged caution in a court relying on the reasons in fact given by the decision-maker, where the statement of manifests error bearing on the ultimate task, in seeking to demonstrate that error was immaterial. Their Honour held that the "reconstructive" inquiry "cannot simply be done by taking the reasons and findings as they stand, because those reasons are a product which incorporates the misunderstanding".[13] Their Honours continued:[14]

> … The approach must be more objective, and nuanced, than that. Otherwise, there is a risk that the decision-maker's reasons are used in a way which amounts to prejudgment. Such prejudgment would itself normally give rise to error. It cannot be used as proof of immateriality.

32. That analysis is sound,[15] and it is pertinent here. So, for example, the realistic possibility of a different decision by the Tribunal had it not made the multiple errors that it did is not excluded by pointing to one paragraph in the Tribunal's reasons where the Tribunal assessed the appellant's criminal conduct as "very serious", being a particular paragraph that does not itself (i.e., read in isolation) manifest legal error. Where other paragraphs of the Tribunal's reasons that bear on the same assessment manifest legal error, the possibility that those errors have infected the assessment recorded in the first-mentioned paragraph is obvious. Indeed, to contend otherwise would be to suggest that the Tribunal could – and indeed certainly did – prejudge the

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12 *Thornton* (2023) 97 ALJR 488, [80].

13 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75, [70] (Mortimer and Bromwich J).

14 See also *MKBL v Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1827, [58] where Jackson J, after referring to the requisite "reconstructive" exercise and *Chamoun*: "[I]n a case like the present that does not mean that the error can be surgically excised from the Tribunal's reasons, leaving the framework surrounding it intact".

15 Perhaps, though, the Full Court's word "proof" here is inapposite; "persuasive of" might be more apt. See *MZAPC* (2021) 95 ALJR 441, [85] (Gordon and Steward JJ): "The task of demonstrating that a decision could realistically have been different had error not occurred is better understood as directed at the quality or severity of the error and what, as a matter of logic and common sense, might have resulted. It necessarily calls for an assertion as to how a decision might have been different and explanation as to why that is so. But because the bar is low, a court should hesitate to reject a sensible and reasonable postulation about what the result could have been. Naturally, speculation and conjecture will not be sufficient. More is needed. But it is not necessarily a task which is determined by leading evidence any by demonstrating what is possible on the balance of probabilities. That is because the subject matter of the inquiry is hypothetical; it is not a matter of *proving* what could have happened. Rather, the task is one of persuasion, based upon the nature of the breach and the claims that have been made, as well as logic and common sense…"

degree of seriousness of the appellant's offending before complying with s 8.1.1 of Direction 90 (which prescribes matters that the Tribunal must consider in considering the nature and seriousness of the non-citizen's criminal offending).

The Full Court erred in finding the each of the Tribunal's errors were immaterial

The first error by the Tribunal – s 8.1.1(1)(a)

33. The Full Court's discussion of materiality starts at CAB 129 [73], in the context of its consideration of the first error made by the Tribunal in not complying with s 8.1.1(1)(a) of Direction 90. The Full Court correctly identified a number of legal principles and authorities; but it did not correctly apply those principles as is explained below. Moreover, the Full Court's articulation of principles was not entirely correct.

34. In particular, the Full Court deprecated against "formalism" in assessing jurisdictional error. The Court held that "[a]n approach to assessing materiality which is driven by formalism would see jurisdictional error established in almost every case" (CAB 131, [80]). It continued:

> Errors may too readily be deemed jurisdictional because, where a decision-maker engages in an error en route to a final decision, a formalistic argument could almost always be mounted that, without the error, the course of the final decision *might* have been different. Such formalistic arguments would urge that, because the course of reasoning on that hypothesis will not be known, it *could* theoretically have been different with a different outcome. But that approach fails to recognise that to label an error "jurisdictional" is to reflect on its gravity: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [25] (Kiefel CJ, Gageler and Keane JJ). It is not the approach which the authorities require the court to take.

35. However, where a decision-maker breaches an express or implied condition on the exercise of statutory power, and it is a reasonable conjecture the decision could (not would) have been different but for the error, then the decision-maker has made a jurisdictional error.[16] Deprecation of a conjecture that the decision could have been different as "formalistic" adds nothing, and is apt to distort the inquiry.

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[16] Indeed, at least in one sense, the decision-maker would make a "grave" error simply by breaching an express or implied condition on the exercise of a statutory power, in the sense described in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

36. In any event, the reasons given by the Full Court for finding that there was no realistic possibility of the Tribunal making a different decision had it not misapplied paragraph 8.1.1(1)(a) reveal error in the application of principle.

37. **First**, the Full Court held that, even if the Tribunal had concluded that paragraph 8.1.1(1)(a) was entirely irrelevant, there was not a realistic possibility that the Tribunal could have considered the conduct to be merely "serious", or (if it did) that the Tribunal might have revoked the cancellation (*CAB* 136 [97], [100], 137 [103]).

38. In this respect, while the Full Court cited the caution in *Chamoun*, it in fact failed to heed it. Whilst it is clear that the Tribunal in fact found that the appellant's conduct was "very serious", the possibility that that conclusion was influenced by the Tribunal's errant conclusion that s 8.1.1(1)(a) "militated strongly" in favour of a finding that the appellant's criminal ought to be characterised as "very serious" cannot be discounted. Indeed, the possibility that, but for the Tribunal's error, it might have characterised the appellant's offending as merely "serious" is obvious, especially given the Full Court's undisputed conclusion at CAB 141 [118] that the appellant's offending could be characterised as falling within one of the "types" of crimes described in s 8.1.1(1)(b) (being offending deemed to be considered by the Australian Government and community to be merely "serious").

39. The Full Court's observations at CAB 136 [100] that the Tribunal "clearly gave significant weight" to sub-paragraphs (c) to (e) demonstrate the impermissible reconstruction.[17] The Tribunal expressed no view on the strength of the weight that it placed on subparagraphs 8.1.1(c) to (e), either individually or cumulatively or *vis-avis* other sub-paragraphs. The Tribunal stated only that each of those paragraphs militated in favour of a finding that the totality of the appellant's offending must be viewed as very serious. The Full Court could not, within the bounds of the historical facts of the reasoning in the decision, have disentangled the Tribunal's finding at CAB 28 [92] only to then reconstruct the reasons by attributing the weight that it thought the Tribunal would have given to individual components of this primary consideration (protection of the Australian community).

40. The submissions at [31] to [32] above are also repeated.

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[17] Cf. *MZAPC* (2021) 95 ALJR 441, [38]-[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

41. **Secondly**, the Full Court held that the Tribunal's assessment that the weight of "the Other Considerations favouring revocation was 'slight' reveals that the Tribunal did not consider there to be much force in the only considerations that countervailed against the conclusion driven by the conclusions reached on Primary Considerations 1 and 4" (*CAB 137* [101]).

42. However, in this respect, the Full Court again failed to heed the caution in *Chamoun*.

43. The Tribunal's assessment of the seriousness of the appellant's offending was an inextricable part of its overall evaluative assessment as to whether it was satisfied that there is "another reason" why the cancellation decision should be revoked. Without the error, the Tribunal could possibly have concluded that the appellant's conduct was "serious" rather than "very serious" and, as a result, assigned less relative significance to this primary consideration (protection of the Australian community) than other considerations.

44. In other words, because the weight that the Tribunal in fact accorded to particular considerations was relative to the weight that the Tribunal accorded to other considerations, the Court cannot use findings given by the Tribunal "as they stand"[18] – for example that the appellant's ties to the Australian community "weigh slightly [but] not determinatively" in favour of revocation (CB 45 [158]) – as a basis for concluding that there is no realistic possibility of a different decision had the Tribunal not erred in connection with its conclusion as to the seriousness of the appellant's offending and the weight that it accorded the consideration of protection of the Australian community.

45. This analysis is reinforced by a recent judgment of the Full Court of the Federal Court in *CRNL*.[19] The Full Court explained that "compliance with [Direction 90] is not achieved by focusing upon individual considerations and attributing some form of 'weight' to that consideration viewed in isolation".[20] The task required by Direction 90 is to bring together the considerations as part of a single evaluation of their relative significance thereby weighing them all together. The Court observed:[21]

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18 *Chamoun* (2020) 276 FCR 75, [70] (Mortimer and Bromwich JJ).

19 *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138.

20 *CRNL* [2023] FCAFC 138, [28] (Colvin, Stewart and Jackson JJ).

21 *Ibid*.

> A task of that kind cannot be performed by fragmenting the consideration into an evaluation of individual considerations, attributing to each of them some form of individual abstract term purporting to be a measure of their significance, and then aggregating by some form of calculus each of those individual assessments. To undertake the task in that manner is not to comply with the Direction.

46. The Tribunal's task being one of conducting a holistic and relative assessment of considerations in Direction 90 in forming the overall evaluative assessment required by s 501CA(4)(b) means that the Full Court could not, within the bounds of the historical facts of the reasoning in the decision, determine that there is no realistic possibility that there could have been a different decision but for the Tribunal's errant reasoning on s 8.1.

47. The Tribunal's assessment of the appellant's conduct as "very serious" informed its findings about the gravity of the risks would result if he were to reoffend in a similar way, and whether that risk was acceptable. This is evident from the Tribunal's reasons at CAB 31 [100], 33 [103] and [104]. Plainly, but for the Tribunal's errors affecting its assessment of the appellant's conduct as "very serious", the Tribunal might have given less weight to the consideration in s 8.1 in the overall assessment.

48. The weight that the Tribunal placed on the consideration in s 8.4 (expectations of the Australian community) was also relative to the weight that the Tribunal placed on considerations weighing in favour of affirming the delegate's decision. At both CAB 46 [158] and [161], the Tribunal made findings to the effect that it gave weight in favour of revoking the cancellation that was "not determinative". That analysis necessarily involved relative weighting with considerations such as that in s 8.1. In this way, the error in ascribing weight to the consideration in s 8.1 flowed through to affect the relative weight given to the consideration in s 8.4.

49. Contrary to the Full Court's reasons at *CAB137* [102], the Tribunal's consideration of s 8.4 was not "undisturbed" by the Tribunal's error. The Tribunal's finding at CAB 25 [71] that the appellant's conduct was "very serious" (rather than merely "serious") was an inextricable part of its ultimate conclusion at CAB 47 [164(e)] that the "strong, <u>combined</u> and determinative weight" (emphasis added) that it accorded to the protection of the Australian community *and* the expectations of the Australian community outweighed the other considerations.

50. The Tribunal *could* have placed more relative weight on a consideration in favour of revoking the cancellation of the appellant's visa, or less relative weight on considerations in favour of affirming the cancellation, had it found that the appellant's offending was not "very serious". This was a realistic possibility that cannot be excluded by reconstructing the reasons (that are otherwise a product which incorporates the Tribunal's misunderstanding of its task) to find that the relative weight would inevitably have been unchanged such that the overall outcome of the balancing exercise could not have been different.

The second error by the Tribunal – s 8.1.1(1)(b)

51. The Full Court found that the second error by the Tribunal concerning s 8.1.1(1)(b) was immaterial for the same reasons as it did with respect to the error concerning paragraph 8.1.1(1)(a) (*CAB 142* [124]). The submissions outlined above therefore equally apply to this conclusion of the Full Court.

The third error by the Tribunal – s 8.1.1(1)(g)

52. The Full Court's approach to assessing the materiality of the third error by the Tribunal raises a distinct error of principle by the Full Court.

53. As noted above, the Full Court found that there was no evidence upon which the Tribunal could have concluded that paragraph 8.1.1(1)(g) applied here.

54. However, the Full Court concluded that, if the Tribunal had (counterfactually) realised that paragraph 8.1.1(1)(g) was inapplicable, the Tribunal "would" instead have chosen instead consider a different matter that it was not required by Direction 90 to consider, and having considered that different matter would have given it the same weight as the matter (reflected in s 8.1.1(1)(g)) that it did in fact errantly consider and give weight to here (*CAB 150* [159]). In other words, the Full Court found that, if the Tribunal had counterfactually not made the error in the reasoning that it in fact engaged, then it "would" have engaged in different (substitute) reasoning to the same result.

55. That approach of the Full Court involves significant error in the approach to the assessment of materiality. The Tribunal did not engage in the postulated reasoning. The interpretative principle of materiality does not invite the Court to hypothesise that the administrative decision-maker has been tutored in the error that it in fact

made, and then allow the Court to speculate as to whether (so tutored) the decision-maker would have engaged in different reasoning to that which it engaged in.

56. There is also no sound basis upon which the Court can speculate that the Tribunal would have engaged in the postulated reasoning but for its error. Indeed, for the Full Court's analysis to hold water, it would need to go so far as excluding the reasonable possibility that the Tribunal would not have engaged in the postulated reasoning. There is no lawful basis for this conjecture.[22] It travels far beyond "reasonable conjecture within the parameters set by the historical facts"[23] to conclude that that the Tribunal certainly would have engaged in substitute reasoning crafted by the Court but which the Tribunal did not engage in, so as to find that the error in the reasoning that the Tribunal did engage in was immaterial. The Full Court's approach is apt to transform judicial review into "a form of merits review".[24]

57. Notably, before the Tribunal, "the Minister raised the reoffending under paragraph 1.1.1(1)(g) and not independently of that sub-paragraph" (*CAB 150* [159]). And the "historical facts" reveal that the Tribunal purported simply to consider each of matters set out in Direction 90 in turn. The Tribunal did not consider any matters that it was not required by Direction 90 to consider.

Cumulative assessment of materiality

58. The Full Court conducted no cumulative assessment of whether the Tribunal's decision could realistically have been different had it not made the three separate errors that it made in the course of determining the appellant's review application.

59. Notwithstanding that it was not specifically invited to do so, it should have. As a matter of logic and principle, the question of materiality must be addressed in light all of all the errors that a decision-maker makes, rather than in an atomised way.

60. And here, when all of the errors of the Tribunal are compounded, it is even easier to demonstrate the realistic possibility that, but for those errors the Tribunal's decision might have been different. That is because, at the threshold step, but for the

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22 Cf. *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [36] (Kiefel CJ, Gageler and Keane JJ), criticising the suggestion of Mortimer J in dissent in the judgment appealed from as rising "no higher than conjecture".

23 *MZAPC* (2021) 95 ALJR 441, [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

24 *Nathanson* (2022) 96 ALJR 737, [84] (Gordon J).

compound errors, it is even easier to justify as realistic the conjecture that the Tribunal could have assessed the appellant's offending to be "serious" (rather than "very serious").

VII. ORDERS SOUGHT

61. The appellant seeks the following orders:

a) The appeal be allowed.

b) The orders of the Full Court on 3 May 2023 and 25 May 2023 be set aside and in lieu thereof:

i. The orders of the Federal Court on 14 July 2022 be set aside and in lieu thereof:

a. a writ of certiorari issue to quash the decision of the second respondent on 7 July 2021 not to revoke the cancellation of the appellant's visa.

b. a writ of mandamus issue directed to the second respondent requiring them to determine the appellant's request for revocation according to law.

c. the first respondent pay the appellant's costs and incidental to the trial, and of and incidental to the appeal to the Full Court.

d. any further or other order that the Court thinks fit.

c) The first respondent pay the appellant's costs of and incidental to the application for special leave to appeal, and of the appeal, to the High Court.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

62. The appellant estimates that he requires 1.5 hours for presentation of his oral argument.

Dated: 2 November 2023

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **LPDT**
Appellant

and

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

Administrative Appeals Tribunal
Second Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Item 3 of Practice Direction no 1 of 2019 the Appellant sets out the relevant statutory provisions referred to in the submissions:

	Description	Version	Provision
1.	*Migration Act 1958* (Cth)	as at 7 July 2021	ss 499, 501CA
2.	*Direction No 90 under s 499 of the* Migration Act 1958 *(Cth) – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*	as at 7 July 2021	ss 6, 7, 8.1, 8.1.1, 8.1.2, 8.4