



HIGH COURT OF AUSTRALIA

17 August 2022

NATHANSON v MINISTER FOR HOME AFFAIRS & ANOR
[2022] HCA 26

Today, the High Court unanimously allowed an appeal from the Full Court of the Federal Court of Australia. The appeal concerned the question of whether the Administrative Appeals Tribunal's denial of procedural fairness to the appellant was material, in that it deprived the appellant of a realistic possibility that the decision made by the Tribunal could have been different if a fair hearing had been provided, so as to give rise to jurisdictional error.

In 2018, the appellant's visa was mandatorily cancelled by a delegate of the then Minister for Home Affairs pursuant to s 501(3A) of the *Migration Act 1958* (Cth). Another delegate of the Minister made a decision, pursuant to s 501CA(4), not to revoke the cancellation of the visa. The appellant applied to the Tribunal for a review of the delegate's decision. The Tribunal affirmed the decision to refuse to revoke the visa cancellation. In making its decision, the Tribunal was required to comply with the Minister's direction known as "Ministerial Direction 79". That Direction prescribed as a factor for consideration (in assessing the "primary consideration" of the protection of the Australian community from criminal or other serious conduct) "[t]he principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed". It was not in dispute that the Tribunal denied the appellant procedural fairness in that the Tribunal misled the appellant in relation to the significance of certain changes brought about by Ministerial Direction 79 to the considerations applicable to the Tribunal's decision, and in that the appellant was not given an opportunity to give or adduce evidence or to make submissions on the way in which two domestic violence incidents should have affected the Tribunal's consideration of the primary consideration of the protection of the Australian community.

In proceedings for judicial review of the Tribunal's decision, the Federal Court at first instance, and a majority of the Full Federal Court on appeal, found that the denial of procedural fairness affecting the Tribunal's decision was not material, and so did not constitute jurisdictional error.

The High Court unanimously found that the denial of procedural fairness was material, and so did constitute jurisdictional error. In reaching that finding, a majority of the Court held that in many, if not most, cases where an applicant has been deprived of a chance to make submissions on a topic of relevance, reasonable conjecture from established facts about the decision-making process will readily show a reasonable possibility that the outcome would have been different. In the appellant's case, additional evidence and submissions directed to mitigating the significance of the evidence of domestic violence could realistically have affected the outcome of the Tribunal's review. There was no need for the appellant to establish the nature of any additional evidence or submissions that might have been presented at the Tribunal hearing, had that hearing been procedurally fair.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*