Federal Court of Australia

Huynh v Minister for Immigration and Border Protection
[2020] FCAFC 153

|  |  |
| --- | --- |
| Appeal from: | *Huynh and Anor v Minister for Immigration and Anor* [2019] FCCA 3693 |
|  |  |
| File number(s): | VID 15 of 2020 |
|  |  |
| Judgment of: | **REEVES, BROMWICH AND ANDERSON JJ**  |
|  |  |
| Date of judgment: | 18 September 2020  |
|  |  |
| Catchwords: | **MIGRATION** – whether there was a denial of procedural fairness in one Federal Circuit Court Judge relying on draft reasons of another Federal Circuit Judge – whether Tribunal misconstrued or misapplied s 5F of the *Migration Act 1958* (Cth) – whether there was a denial of procedural fairness in failing to disclose to the appellant certain material available to the Tribunal which might have disclosed maker of certain allegations**MIGRATION** – no denial of procedural fairness which was sufficiently material to constitute jurisdictional error – when Tribunal’s reasons are fairly read, Tribunal conducted an evaluative assessment which did not represent a misinterpretation or misapplication of s 5F – no appellable error demonstrated – appeal dismissed |
|  |  |
| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 43*Migration Act 1958* (Cth), ss 5F, 357A, 362A, 375A *Migration Regulations 1994* (Cth), reg 1.15A  |
|  |  |
| Cases cited: | *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93*Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38*Bell Lawyers Pty Ltd v Pentelow* (2019) 372 ALR 555*Branir Pty Ltd v Owston Nominees Pty Ltd (No. 2) Pty Ltd* [2001] FCA 1833*Fox v Percy* (2003) 214 CLR 118*He v Minister for Immigration and Border Protection* [2017] FCAFC 206*Kazar (Liquidator) v Kargarian; In the Matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136*Kioa v West* (1985) 159 CLR 550*Latoudis v Casey* (1990) 170 CLR 534*Lee v Lee* (2019) 266 CLR 129*Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5*Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421*Northern Territory v Sangare* (2019) 265 CLR 164*Oshlack v Richmond River Council* (1998) 193 CLR 72*Parvin v Minister for Immigration and Border Protection and Another* [2019] FCAFC 86*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1*Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679*Snedden v Minister for Justice for the Commonwealth of Australia* [2014] FCAFC 156*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152  |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 103 |
|  |  |
| Date of hearing: | 8 July 2020  |
|  |  |
| Counsel for the Appellants: | Mr Angel Aleksov |
|  |  |
| Solicitor for the Appellants: | WLW Migration Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr Nick Wood |
|  |  |
| Solicitor for the First Respondent: | Clayton Utz |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a Submitting Notice |

|  |  |
| --- | --- |
| **Table of Corrections** |  |
| 20 July 2021 | In [28], deleted “[11]” and replaced with “[9]”; in [80], deleted “breech” and replaced with “breach” in square bracketed text in block quote; in [83] deleted “[61]” and replaced with “[60]”, and in same paragraph deleted “failed” and replaced with “failure” in square bracketed text in block quote. |

ORDERS

|  |  |
| --- | --- |
|  | VID 15 of 2020 |
|   |
| BETWEEN: | THI THUY OANH HUYNH First AppellantLE ICH TRI ANH HUYNHSecond Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNAL Second Respondent |

|  |  |
| --- | --- |
| order made by: | REEVES, BROMWICH AND ANDERSON JJ |
| DATE OF ORDER: | 18 September 2020  |

THE COURT ORDERS THAT:

1. Leave to rely upon ground of appeal 2(b) is refused.
2. The amended notice of appeal filed by leave on 8 July 2020 is otherwise dismissed.
3. The appellant will pay the Minister’s costs of and incidental to the appeal to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# SUMMARY

1. By way of summary, the appellants made three main complaints. First, the appellants said that the primary judge relied on certain draft reasons for judgment (prepared by a different judge of the Federal Circuit Court), those draft reasons were not provided to the appellants and, as a result, the appellants were denied procedural fairness. While that matter was atypical, it did not result in any procedural unfairness, not least because the primary judge’s judgment was expressly stated to be the primary judge’s own.
2. Second, the appellants contended that the Tribunal made its decision solely on the basis that the first appellant and the first appellant’s sponsor did not “have a mutual commitment to a shared life as a married couple to the exclusion of all others”, and therefore failed to satisfy a relevant statutory criterion for the grant of a certain visa. That contention should not be accepted. Among other things, the Tribunal’s reasons demonstrate a proper evaluation of a range of considerations, which was directed towards assessing whether the Tribunal was satisfied that the first appellant’s relationship with the first appellant’s sponsor was genuine and continuing and was properly encompassed by the definition of “spouse” in the *Migration Act 1958* (Cth). The Tribunal did not misconstrue or misapply the statutory standard in making its decision.
3. Third, the appellants say that certain information that the Tribunal had was not provided to the appellants and that constituted a denial of procedural fairness. However, that position should not be accepted. By way of summary, the appellants had received the substance of this information by way of a freedom of information request the appellants made. The appellants commented on the gist of the information during the decision-making process. For these reasons (among others), we are not persuaded that the appellants’ receipt of this information in its original form could have made a difference to the Tribunal’s decision, or constituted a material contravention of the obligation to afford natural justice.
4. In these circumstances, we will dismiss the appellants’ appeal. These are our reasons for doing so.

# PROCEDURAL HISTORY

1. The Federal Circuit Court dismissed an application for judicial review of a decision of the second respondent (the **Tribunal**). The Tribunal’s decision affirmed a decision of a delegate of the first respondent (the **Minister**) which refused to grant to the appellants Partner (Residence) (Class BS) (Subclass 801) visas under s 65 of the *Migration Act 1958* (Cth) (the ***Migration******Act***). The appellants appeal from that decision.
2. The first appellant is the mother of the second appellant. (For convenience, unless otherwise specified, the first appellant and second appellant are hereafter collectively referred to as the **appellant**, which generally accords with the way the first appellant and second appellant were referred to at the hearing of this matter.) The appellant had sought to satisfy the criteria for a Subclass 801 visa on the basis of the appellant’s relationship with her sponsor, Mr Nguyen (the **Sponsor**).
3. At the hearing of the appeal on 8 July 2020, the appellant applied for leave to file an amended notice of appeal. The Court granted the appellant leave to file the amended notice of appeal and leave to pursue ground 2(a) of the amended notice of appeal and reserved its decision as to whether to grant the appellant leave to pursue ground 2(b) of the amended notice of appeal.
4. By the amended notice of appeal, the appellant raised the following grounds of appeal:

The Federal Circuit Court erred in:

1. [N]ot complying with the rules of procedural fairness, in that the Judge relied on draft unpublished reasons of another Judge following an earlier, but the [sic] reconstituted, hearing, without notifying the appellant that his Honour would do so and without giving a copy of those reasons to the appellant.

2. The FCC erred in failing to accept that the decision of the Tribunal was affected by jurisdictional error because:

a. The Tribunal misconstrued or misapplied s 5F(2)(b) of the Migration Act 1958 (Cth).

Particulars

i. The FCC found that the Tribunal did not misconstrue or misapply s 5F(2)(b) at paragraph 30 of its reasons.

ii. The FCC was wrong in that conclusion.

iii. The Tribunal did misconstrue or misapply s 5F(2)(b) because it wrongly understood the notion of “exclusivity” mentioned in that provision, in failing to understand and then to direct its attention to the question whether the “mutual commitment” was as to a “shared life as husband and wife” to the exclusion of all others, and instead decided that it was not satisfied that the “relationship” between the appellant and her husband was an exclusive one.

b. The Tribunal failed to comply with the requirements of procedural fairness in that the Tribunal did [not] notify the appellant of the certification by the Minister that s 375A of the Migration Act 1958 (Cth) applied to certain documents that were before the Tribunal.

Particulars

iv. There was before the Tribunal, certain documents that were the subject of a purported, but invalid, certification by the Minister that s 375A of the Migration Act 1958 (Cth).

v. The applicant was not told about that certification.

vi. The Tribunal was obliged to tell the applicant about that purported certification and in failing to do so, the Tribunal erred in law.

vii. That error was material, because (a) there was information contained in those documents which might realistically have been useful to the appellant in persuading the Tribunal to make a different decision by identifying the source of that “dob-in” information and discrediting the reliability of that source.

viii. The FCC was wrong not to accept that the decision of the Tribunal was affected by jurisdictional error for this reason.

# Ground 1: alleged denial of procedural fairness

## Submissions on ground 1

1. The appellant’s application for judicial review was initially heard before Judge Wilson of the Federal Circuit Court, with his Honour reserving judgment. Judge Wilson was subsequently appointed as a Justice of the Family Court of Australia prior to giving judgment. The Federal Circuit Court was then reconstituted by Judge Burchardt to hear the application for judicial review afresh.
2. The substance of the appellant’s complaint in ground 1 is that the primary judge, Judge Burchardt, in his reasons for judgment, reveals that he had access to draft reasons prepared by Judge Wilson, upon which Judge Burchardt placed extensive reliance in preparing his reasons for judgment. The appellant was not informed about this document nor provided with a copy of the draft reasons. The appellant submits that the primary judge should have notified the appellant of “the gist of the adverse material” in the draft reasons relied upon by the primary judge and the failure to do so was contrary to the rules of procedural fairness.
3. The Minister submits that it is unnecessary for this Court to determine whether the judgment below is affected by procedural unfairness. That is because, even if it was, that would not cause this Court to grant the appellant the relief sought as a consequence. It was said that any unfairness that was occasioned to the appellant by Judge Burchardt relying on Judge Wilson’s draft reasons in preparing his own judgment, will be cured by this Court determining the success or failure of the other grounds of appeal.

## Consideration of ground 1

1. There is nothing in the reasons or conduct of the primary judge which would support this ground of appeal. This is so for the following reasons.
2. The appellant’s written submissions did not cite any authority which would support the appellant’s contention under ground 1.
3. The appellant’s submissions did not argue that the relevant circumstances evinced any relevant bias on the part of the primary judge. The appellant’s submissions were directed to whether the impugned circumstances entailed a breach of what is commonly referred to as “the hearing rule”.
4. Broadly speaking, the rules of procedural fairness do not have an immutably fixed content (see *Snedden v Minister for Justice for the Commonwealth of Australia* [2014] FCAFC 156 [175]-[178]; 230 FCR 82 (per Middleton and Wigney JJ) (***Snedden***) citing *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; 295 ALR 638 at [156]). What will be both sufficient and necessary to ensure a fair hearing in any given case will depend on, and vary with, the context in which a decision maker acts, including any statutory or regulatory requirements or considerations (see *Snedden* at [177] and the various High Court authorities cited there). The content of procedural fairness is flexible and adaptable to the circumstances of the particular case and must be approached on the basis of what is reasonable (*Kioa v West* (1985) 159 CLR 550 (***Kioa***) at 627) and necessary to avoid “practical injustice” (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [37]-[38]). What is required by procedural fairness is a fair hearing, not a fair outcome (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [25] (per Gleeson CJ and Kirby, Hayne, Callinan and Heydon JJ)).
5. The primary judge recorded in his reasons for judgment (**Reasons**), as a preliminary matter, the following (at [1]):

I should make an acknowledgement at the outset. In preparing these reasons for judgment in respect of grounds 1-8, I have had the considerable benefit of draft reasons for judgment prepared by Justice Wilson prior to his appointment to the Family Court. With his Honour’s permission I have relied extensively on those draft reasons in preparing this judgment. *Self-evidently, it is my judgment and all errors and infelicities are mine alone.* (Emphasis added.)

1. As the primary judge observed in the last sentence of [1] (emphasised by way of italicised text above), the judgment “and all errors and infelicities” are the primary judge’s alone. That is demonstrated by a consideration of the balance of the reasons where the primary judge identified the matter which was the subject of judicial review, narrated the factual background, recorded the relevant findings in the Tribunal’s reasons and then, dealing with ground 1 of the judicial review grounds (grounds 2 to 8 having been abandoned on appeal and grounds 9 and 10 having not been before Judge Wilson on judicial review), concluded the following in relation to that ground (at [30]):

***It seems to me*** that in relation to this ground the Tribunal made no error. It was required to examine a domestic relationship between the applicant and the sponsor against considerations set out in section 5F of the [*Migration Act*] and ref 1.15A of the Regulations. The concept of exclusivity was one consideration. ***I reject*** the contention urged by the applicant that in undertaking that task the Tribunal somehow adopted “the fairy-tale or Hollywood notice of a happy marriage” as appeared in the wording of this ground. ***In my view*** the Tribunal was entitled to reach the conclusion that it reached in relation to the concept of “exclusive”. The evidence revealed that the [S]ponsor fathered two children with [another person, Ms Le] at a time he was married to the [first appellant]. It was true that the sponsor was not married to Ms Le at that time and so the [S]ponsor was not concurrently married to two persons. However, in fathering two children to Ms Le, it could scarcely be said that the sponsor was simultaneously committed exclusively to his union with the applicant.  ***In my view*** the applicant’s creative and unrealistic characterisation of the facts of this case was misdirected. ***In my view*** the Tribunal made no error in the manner suggested under ground one. This ground is devoid of merit. (Bold, italicised text added for emphasis.)

1. The primary judge’s Reasons quoted above are, as the primary judge said at Reasons [1], “self-evidently” his own reasons for judgment. Moreover, there is nothing in the Reasons of the primary judge to indicate what comprised the “draft reasons for judgment” prepared by Judge Wilson. It is not known whether they were merely descriptive of background facts and the submissions put by counsel at the hearing before Judge Wilson. There is nothing to indicate that the “draft reasons for judgment” were deliberative of the single relevant ground of appeal that was argued before Judge Wilson. In this respect, the oral submissions of the appellant’s Counsel asserted that these draft reasons were “adverse to the appellant”, but there is nothing to indicate that what was in the “draft reasons for judgment”, let alone whether or not the content of those draft reasons were adverse to the appellant. Given the content of the “draft reasons for judgment” is unknown, there existed a range of possibilities and other inferences equally open. In any event, it is not suggested by the appellant in this appeal that the primary judge did not turn his mind to the task or that he did not form an independent opinion in discharging his duty in hearing the judicial review.
2. The problems with this ground were tested in argument. The appellant accepted that, if it was “equally open” to infer that the relevant earlier draft reasons might not have been adverse to the appellant, or might have been a mere narrative of factual detail without substantive consideration, then this ground cannot succeed. For the reasons set out above, inferences of that kind are equally open based on the available material and accordingly this submission must fail. To reiterate, there was and is no evidence to support the assertion that the relevant draft reasons were adverse to the appellant. The appellant’s argument presumes that an adverse final outcome in a final judgment provides a sound basis for an inference that an earlier draft (and, it follows, an incomplete version) of the relevant reasons were adverse and complete. The factual substratum does not support that inference. It is entirely possible that the earlier draft was favourable to the appellant, but, having reviewed that earlier draft, the primary judge took a different view as to the outcome of the matter. The appellant simply does not know (and neither does this Court) what was in the relevant draft reasons. Assertions to the contrary are speculative and cannot on their own support a finding that procedural fairness was denied.
3. In any event, the appellant accepted that, in circumstances where the appellant’s appeal to this Court entails a rehearing, any procedural unfairness which arose (and, for the reasons above, we are not persuaded that any such unfairness did arise) has been cured by way of the rehearing on this appeal. As a result, this ground appeared to be principally directed to altering a costs order below, which the appellant said is “an appropriate way to recognise that each Judge should decide a case for themselves based on the materials and arguments put before them, and not on what some other judge has prepared in draft”.
4. We do not accept that as being an appropriate exercise of the discretion as to costs in this case for the following reasons.
5. This Court “has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which [the *Federal Court of Australia Act 1976*]or any other Act provides that costs must not be awarded” (*Federal Court of Australia Act 1976* (***FCA Act***), s 43(1)). “Except as provided by any other Act, the award of costs is in the discretion of the Court …” (*FCA Act*, s 43(2)).
6. The High Court stated the following in *Northern Territory v Sangare* [2019] HCA 25; 265 CLR 164 at [24]-[25] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ):

It is well established that the power to award costs is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation …

A guiding principle by reference to which the discretion is to be exercised – indeed, “one of the most, if not the most, important” principle – is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party. The application of that principle may be modified or displaced where there is conduct on the part of the successful party in relation to the conduct of the litigation that would justify a different outcome. For example, a successful defendant may be refused its costs on the ground that its conduct induced the plaintiff to believe that he or she had a good cause of action. (Citations omitted.)

1. The High Court stated the following in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29; 372 ALR 555 at [33] (Kiefel CJ, Bell, Keane and Gordon JJ):

… costs are a creature of statute. It has never been thought that any of the ubiquitous statutory provisions empowering courts to order costs are available to compensate a litigant for his or her time and trouble in participating in litigation. That is because costs are awarded by way of indemnity; they are not awarded as compensation for lost earnings, much less as a reward for a litigant's success. The courts have long regarded the statutory power to make an order for costs as confined by the concern to provide the successful party with a measure of indemnity against the expense of professional legal costs actually incurred in the litigation. (Citations omitted.)

1. If “one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party” (*Latoudis v Casey* (1990) 170 CLR 534 (***Latoudis***)at 643 (per Mason CJ)). “They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings” (ibid; *Latoudis* at 563 per Toohey J and at 567 per McHugh J). Thus, “in civil proceedings an order may, and usually will, be made even though the unsuccessful party has nearly succeeded or has acted reasonably in commencing the proceedings” (*Latoudis* at 567 per McHugh J). It “may, and usually will, be made even though the action has failed through no fault of the unsuccessful party” (ibid).
2. However, it appears there is no “absolute proposition that the sole purpose of a costs order is to compensate one party at the expense of another” (*Oshlack v Richmond River Council* (1998) 193 CLR 72 (***Oshlack***) at [43] per Gaudron and Gummow JJ). It may be “true in a general sense that costs orders are not made to punish an unsuccessful party” (ibid at [44]). Although dissenting in *Oshlack*, McHugh J set out some helpful general statements concerning an award of costs. His Honour noted at [66] that “[b]y far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation”. McHugh J reiterated at [67] that the “primary purpose of an award of costs is to indemnify the successful party”.
3. McHugh J also set out several instances where a court had departed from the usual order as to costs, including circumstances “when the successful party by its lax conduct effectively invites the litigation”, and when the successful party “unnecessarily protracts the proceedings”, “succeeds on a point not argued before a lower court”, “prosecutes the matter solely for the purpose of increasing the costs recoverable”, or “obtains relief which the unsuccessful party had already offered in settlement of the dispute (*Oshlack* at [69]; citations omitted). These exceptions were stated to be directed to the conduct of the successful party, not any asserted conduct of a judicial officer.
4. In *Kazar (Liquidator) v Kargarian; In the Matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136; 197 FCR 113, Greenwood and Rares JJ stated the following at [7]-[9]:

The operation of the pre-judicature system with respect to costs infuses the approach to the flexibility of the discretion in the post Judicature Act environment and particularly in the modern treatment of costs applications operating under rules which are the genetic descendents of the Judicature Act provisions (such as s 43 of the Federal Court Act). In reflecting upon the practice of the High Court of Chancery (as described in Daniell’s Practice of the High Court of Chancery, 5th Ed (1871), Vol 2, p 1239) and the discretionary nature of the award of costs in that court, Gleeson CJ, Gummow, Hayne and Crennan JJ observe at [34] in [*Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52] that the discretion historically was not inflexibly constrained by the rule of awarding the costs of the suit to the successful party but that the court would, in exercising the discretion to award costs, take into consideration the circumstances of the particular case before it or the situation or conduct of the parties.

The practice guiding the exercise of the discretion [as to costs] was that the Court of Chancery did not regard the awarding of costs as a penalty or punishment but merely a necessary consequence of a party having created litigation in which the party had failed … [W]ithout subsuming the discretion within inflexible rules, the discretion would be exercised according to broad settled principle as described. Having observed these matters about the practice of the Chancery Court, their Honours concluded those remarks by observing at [34] that “[t]he similarity with the modern treatment of costs applications will be readily apparent”.

The exercise of the discretion takes account of all of the contextual circumstances of the litigation and the conduct of the parties. One aspect of the award of costs is a recognition that a party has been put to expense which, taking account of the merits as ultimately found on the trial of the action, might otherwise have been avoided. That consideration does not infuse the award of costs with any sense of penalty or punishment but simply recognises the compensatory nature of an award of costs, in context and according to principle. That is why an award of costs, although involving the exercise of a discretion, generally favours the successful party …

1. These principles are generally reflected in this Court’s Costs Practice Note. It provides the following:

The purpose of a costs order is to compensate a successful party rather than punish an unsuccessful party. However, the Court will consider the appropriateness of the making of a special costs order in circumstances which may warrant it, including where parties have failed to comply with their pre-litigation “genuine steps” obligations, where the “overarching purpose” duty has not been met, where parties engage in an abuse of process, raise unmeritorious arguments before the Court or otherwise conduct themselves inappropriately in the litigation. (Citation omitted.)

1. As stated above, we are not satisfied that there was procedural unfairness in the manner contended by the appellant. As a result, guided by the statutory text and the principles set out above, this is not a proper occasion to determine the issue raised by the appellant. This is not the occasion to consider whether there can or should be, in the exercise of discretion as to costs, a principle which would enable a variation to a costs order below on the basis of the conduct of a judicial officer or towards the objective of indicating that the course taken by a judicial officer was contrary to, for example, a potential public policy or contrary to an implied normative standard asserted by the appellant concerning the preparation of judgments.
2. In these circumstances, there is no justifiable basis for this Court to grant the relief sought, namely to disturb the costs order below: the appellant will either succeed or fail on the other grounds of appeal and costs should follow that event in the usual way.

## Disposition of ground 1

1. For these reasons, ground 1 is dismissed.

# Ground 2(a): alleged MISINTERPRETATION of A provision of the act

1. The appellant by ground 2 contends that the primary judge erred in failing to accept that the decision of the Tribunal was affected by jurisdictional error because the Tribunal misconstrued or misapplied s 5F(2)(b) of the *Migration Act*. The appellant submits that the primary judge was wrong to conclude at [30] of the Reasons that the Tribunal did not misconstrue or misapply s 5F(2)(b). The appellant contends that the Tribunal did misconstrue or misapply s 5F(2)(b) because it wrongly understood the notion of “exclusivity” in that provision.

## The appellant’s submissions

1. The appellant submits that, whilst the Tribunal accepted much of the evidence that indicated that the appellant and her husband met the criteria in s 5F(2) (Tribunal Reasons, [15]), the Tribunal was highly influenced by one piece of evidence – which was to the effect that the appellant’s husband had two children with another woman (Ms Huyhen also known as Ms Le (the **Third Party**)) (Tribunal Reasons, [16]). The appellant submits that the Tribunal was not satisfied that the appellant and her husband had a mutual commitment to a shared life as husband and wife to the exclusion of all others (as required by s 5F(2)(b)), because of concerns that the Tribunal had to the effect that the appellant’s husband might have some kind of “relationship” with the Third Party. This finding was, in the appellant’s submission, based on a misconception or misunderstanding of what is required by s 5F(2)(b) of the *Migration Act*.
2. The appellant submits that the expression “to the exclusion of all others” in s 5F(2)(b) should be understood as excluding polygamous marriages. The appellant submits that the statutory expression “to the exclusion of all others” is directed to the relationship and status of husband and wife in a broader social sense, and not directed towards considerations concerning the nature of any sexual or romantic life that the husband and wife might lead, including whether a husband, for example, might have a sexual relationship with a person outside of the marriage. The appellant submits that the mere existence of an adulterous relationship is not, of itself, probative for the purposes of assessing the relevant relationship or status referred to in s 5F(2)(b).
3. The appellant submitted that the correct question that the Tribunal should have asked was this: did the appellant and her husband have a commitment to a relationship and status commensurate with that of a “husband and wife”, and was the commitment to this relationship or this status exclusive. It was said that, in construing s 5F(2)(b) in this way, adultery would not preclude the relationship from satisfying the criterion in s 5F(2)(b) denoted by the words “to the exclusion of all others”. In the appellant’s submission, continued or extensive adultery (including if there are children born by way of that adultery) would not preclude the relationship from meeting the criteria in s 5F(2)(b).
4. The appellant submits that the Tribunal did not make any findings about the nature of the adulterous relationship between the husband and the Third Party, nor, it is submitted, did the Tribunal turn its attention to the impact of such an adulterous relationship upon the claimed exclusivity. The appellant submits that the Tribunal simply relied upon the existence of an adulterous relationship to conclude that the appellant and her husband did not meet the criteria in s 5F(2)(b).

## The Minister’s submissions

1. The Minister submits that s 5F(2)(b) required the Tribunal to undertake an evaluative assessment to determine the quality and nature of the relevant relationship in order to determine whether two persons have a mutual commitment to a shared life to the exclusion of all others. It was said that the requirement that they be “a married couple” is determined by reference to the definition in s 5F(2)(a), which requires consideration of the legal status of the two persons to be “married to each other under a marriage that was valid for the purposes of [the *Migration Act*]”. The Minister submits that, whereas s 5F(2)(a) requires consideration of legal status, ss 5F(2)(b) and (c) involve consideration of evaluative or circumstantial matters bearing on the quality or nature of the relationship. The Minister submits that the reasons of the Tribunal demonstrate that the Tribunal undertook an evaluation of the quality and nature of the relationship after considering all the evidence and found that the appellant and the Sponsor were not in an exclusive spousal relationship and did not satisfy the criteria for the grant of the Partner (Residence) (Class BS) (Subclass 801) visa under s 65 of the *Migration Act*.

## Consideration of ground 2(a)

### The statutory provision

1. Section 5F of the *Migration Act* relevantly defines “spouse” as follows:

(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the two persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) *they have a mutual commitment to a shared life as a husband and wife to the exclusion of all others*; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the condition in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist. (Emphasis added.)

1. The Tribunal found that the relationship between the appellant and her husband did not meet the definition of “spouse” in s 5F(2) of the *Migration Act*.
2. Whether a person is a “spouse” of another person depends on whether they are in a “married relationship”: s 5F(1). Section 5F(2) defines the expression “married relationship”. Section 5F(2)(a) requires a consideration of the legal status of the two persons and whether they are “married to each other under a marriage that is valid for the purposes of this Act”. Subparagraphs (b) and (c) of s 5F(2) require an evaluative assessment of the existence, nature or quality of the relationship. Relevantly, the Full Court (Siopis, Kerr and Rangiah JJ) in *He v Minister for Immigration and Border Protection* [2017] FCAFC 206; 255 FCR 41 at [51] made the following observation in respect of the word “spouse” in s 5F:

… The definition seems designed principally to avoid sham or contrived marriages being used to obtain the grant of visas. The conditions the persons must have are a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship be genuine and continuing*are impressionistic and evaluative* … (Emphasis added.)

1. The ordinary, plain meaning of the words used in s 5F(2)(b) are directed to an assessment of the “mutual commitment to a shared life” as a married couple. In that context, the concluding words “to the exclusion of all others” requires an evaluative assessment of the existence, nature and quality of the commitment.
2. In *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5; 236 FCR 303 (***Angkawijaya***), Allsop CJ stated the following at [2]:

The task of the delegate and the Tribunal was not straightforward. By reference to the terms of the *Migration Act 1958* (Cth) and the regulations thereunder, *a value judgment was required to be formed about whether two people had a mutual commitment to a shared life to the exclusion of all others that was genuine and continuing*. That task involved careful and sensitive consideration of the evidence of the human relationship presented to the Tribunal. *The task was a mixture of fact-finding and evaluative characterisation* (emphasis added).

1. Kenny and Griffiths JJ also observed (at [15] and [61]) the important matter that:

It is also relevant to note s 65 of the [*Migration Act*], which makes it clear that, before the Minister (or his or her delegate) can grant a visa, he or she must be **satisfied** of various matters, including that there is compliance with relevant criteria which are prescribed by the Act or the Regulations. The important point is that compliance with the prescribed criteria turns on the decision-maker’s **satisfaction** as to whether or not the relevant criteria have been met and not on the objective existence of that fact.

… the decisionmaker’s task under s 65 of the [*Migration Act*]focuses on the question whether the requisite state of satisfaction exists in relation to compliance with the prescribed criteria for the grant of a partner visa. An assessment of the various matters and considerations which are relevant to the application of s 5CB [which is relevantly similar to s 5F but relates to de facto partners] and reg 1.09A necessarily involves an evaluation of those matters and considerations on the part of the relevant decision-maker, who must balance them against each other having regard to all the relevant circumstances. As Conti J stated in *Jian Xin Lui v Minister for Immigration & Multicultural Affairs* [2001] FCA 1437 at [23]:

In determining the propriety of one person’s commitment to a marriage, the very nature of the task requires an evaluation, based on human experience, understanding and perception of the available spectrum of potentially relevant circumstances of each particular case …

(Bold text in the original.)

### The Tribunal’s assessment of the statutory criteria

1. The appellant’s submission in oral argument was that the Tribunal made a finding or a conclusion that s 5F(2)(b) is not met, and on that basis alone affirmed the decision under review. The appellant’s submission was that, in the Tribunal, the appellant failed to satisfy one criterion, and one criterion only, namely s 5F(2)(b).
2. A fairer reading of the Tribunal’s reasons is the appellant failed to persuade the Tribunal of the conditions which had to be satisfied in s 5F(2), particularly ss 5F2(b) and (c), and did not focus solely on s 5F(2)(b). Contrary to the appellant’s submissions, the Tribunal did not merely conclude that the existence of a sexual relationship between the Sponsor and the Third Party was determinative of whether there was the requisite mutual commitment that s 5F(2)(b) speaks to. Rather, the Tribunal considered a range of factors which were referrable to ss 5F(2)(b) and (c).
3. By way of example, the Tribunal’s reasons disclose that the Tribunal considered many factors relevant to assessing the quality of the commitment between the appellant and the Sponsor, as follows:
4. The circumstances of the appellant’s relationship with the Sponsor including, in particular, the considerations set out in r 1.15A of the *Migration Regulations 1994*(Cth). The Tribunal considered the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the appellant and the Sponsor’s commitment to each other: Tribunal Reasons, [11].
5. The Tribunal considered the background to the appellant and Sponsor’s relationship from when they first met in Saigon in October/November 2006, the relationship prior to the appellant arriving in Australia on 5 March 2012, the appellant’s marriage to the Sponsor in November 2011, and the subsequent application lodged by the appellant for a partner visa on 17 December 2012: Tribunal Reasons, [12].
6. The Tribunal recorded the Sponsor’s claims to have been previously married and divorced and “that he had a relationship with [the Third Party]”: Tribunal Reasons, [13]. The Tribunal recorded that the Sponsor gave clear evidence that his relationship with the Third Party had ceased in 2011: ibid. The Tribunal noted that “[s]ince [2011,] however, [the Sponsor] has had two children with [the Third Party]”: ibid.
7. The Tribunal referred to the delegate’s refusal to grant the appellant a Partner (Residence) (Class BS) visa on the ground that the delegate “was not satisfied that the relationship between the appellant and the [S]ponsor was genuine”: Tribunal Reasons, [14]. The Tribunal referred to the Department’s records recording that the delegate was troubled by the Sponsor’s relationship with another woman, the Third Party: Tribunal Reasons, [14]. The Tribunal Reasons referred to the Sponsor having had two children with the Third Party during the period of time that the appellant and the Sponsor claimed to have been in a spousal relationship: Tribunal Reasons, [14]. The Tribunal referred to the fact that the Sponsor does not deny that he had two children with the Third Party: Tribunal Reasons, [14].
8. The Tribunal referred to various documents such as photographs, written statements by the parties, statutory declarations, bank account records, utility bills and other miscellaneous material: Tribunal Reasons, [15]. The Tribunal noted that these materials, on their face, supported the oral evidence of the appellant and the Sponsor: ibid. The Tribunal then stated the following (at [15] of the Tribunal Reasons):

[t]his evidence if looked at cumulatively and uncritically suggests that the parties are aware of and share their financial resources; and that they share day-to-day household expenses. The above information also suggests that the parties cohabitate and share the raising of the secondary applicant. The information at face value also suggests that the parties represent themselves to other people as being married to each other. The information also indicates that various friends see the relationship as being a married one. The parties’ oral evidence suggests that they provide each other with companionship and emotional support and that they have some future plans and see the relationship as long-term.

1. The Tribunal then observed the following at [16]:

However[,] there is other evidence and information concerning whether the applicant and [S]ponsor's relationship is mutually exclusive. In this regard the Tribunal notes the evidence in that the [S]ponsor and his “former” girlfriend [the Third Party] have two children, born 2010 and 2014, during the period the parties claim to have developed and commenced their relationship.

1. The Tribunal considered the appellant and Sponsor’s evidence that the appellant worked at the Sponsor’s noodle shop without being paid a wage and that the Sponsor transfers money to the appellant to pay the rent and bills for the rented property in which they reside: Tribunal Reasons, [17].
2. The Tribunal considered bank statements tendered in evidence and concluded that they did not demonstrate a pattern of how the joint account of the appellant and Sponsor was used to pay household expenses: Tribunal Reasons, [18].
3. The Tribunal considered the appellant’s evidence that she had no income to “pool” with her Sponsor and the appellant’s evidence that she was the main person running the noodle shop and her evidence that her Sponsor gives her money when she needs it: Tribunal Reasons, [19].
4. The Tribunal referred to the evidence that the Sponsor is providing financial support to the Third Party who is living at a certain property owned by the Sponsor. The Tribunal referred to the evidence that the Third Party does not work and is financially supported by the Sponsor (the Tribunal recorded that the Sponsor gives the Third Party $300 to $500 per week depending on needs and depending upon whether the Sponsor can shop for milk and nappies for his two young boys): Tribunal Reasons, [20].
5. The Tribunal then made its finding concerning its consideration of the financial aspect of the relationship between the appellant and the Sponsor. The Tribunal stated the following at [21] of the Tribunal Reasons:

Considering all the evidence before the Tribunal, whilst acknowledging bank statements in both names, the Tribunal does not accept that there is sufficient the evidence [sic] that the applicant and [S]ponsor pool their financial resources and share their day to day household expenses in a way that indicates they are in a genuine marriage.

1. The Tribunal referred to evidence directed to the consideration as to the nature of the household. The Tribunal observed that the first appellant, Sponsor and the second appellant lived together in a certain property in one suburb whereas the Sponsor (and Third Party)’s two young boys remain living with the Third Party at a property owned by the Sponsor in a different suburb: Tribunal Reasons, [24].
2. The Tribunal referred to the evidence of the appellant and the Sponsor concerning them seeing the Sponsor’s two young sons (ie the sons born to the Third Party). The Tribunal found inconsistencies in the evidence given by the appellant and the Sponsor and determined to afford it little weight: Tribunal Reasons, [25]-[28].
3. The Tribunal considered evidence directed to the nature of the household and the social aspects of the relationship between the appellant and the Sponsor. The Tribunal considered photographs, statutory declarations of witnesses and the evidence of the appellant and the Sponsor as to the nature of the household and the social aspects of their relationship. The Tribunal stated the following at [33] of the Tribunal Reasons:

The [S]ponsor's evidence in particular was concerning. Asked what social things he and the [first appellant] did together, he replied that in Vietnam, they attend funerals. He then said he also went to a funeral in Sydney, once, but did not take the [first appellant] as she had to look after the shop. Asked about any attendance at community events he said he went to a stone laying ceremony for the Mekong Nursing Home but added he did not take the [first appellant]. He said there was a crew filming the event and he asked the crew back to the noodle shop to film there.

1. The Tribunal found that, whilst some weight could be placed on the relevant statutory declarations and photographs, in light of “other concerns” which the Tribunal had, the weight attached to these considerations was not determinative: Tribunal Reasons, [29]-[33]. In light of the context of this reference to “concerns”, the Tribunal was evidently unpersuaded that the matters referred to above provided cogent evidence of the expected social aspects of the asserted relationship.
2. The Tribunal then considered matters concerning the nature of the appellant and Sponsor’s commitment to each other. The Tribunal noted that the inception and development of the relationship between the appellant and the Sponsor was at times concurrent with the Sponsor’s evidence of his relationship with the Third Party: Tribunal Reasons, [34].
3. The Tribunal referred to the appellant’s evidence that, after arriving in Australia, the Sponsor opened a noodle shop in July 2009 and the appellant commenced working there. The appellant’s evidence was that she was “very busy and did not get round to marriage until after receiving a reminder from the Immigration Department”: Tribunal Reasons, [35]. The appellant and Sponsor married in November 2012 and claimed to have lived together since their marriage: Tribunal Reasons, [35].
4. The Tribunal referred to the appellant’s evidence (in her statement) to the effect that, after she arrived in Australia in March 2012, her Sponsor admitted to her “that he had betrayed her, having [had] children with another woman”, the Third Party: Tribunal Reasons, [36].
5. The Tribunal referred to certain evidence of the appellant which concerned the living arrangements of the Sponsor (and Third Party)’s first son and the Third Party living at a particular property: Tribunal Reasons, [37]. The Tribunal stated the following at [37] of the Tribunal Reasons:

At the hearing the [first appellant] gave evidence that at the time she arrived in Australia in 2012 her husband's first son by [the Third Party], born 2010, was living with him at [a certain] address. However, she claimed at the hearing that it was not until early 2014 that [the Third Party] came to live with them at [that] address. The Tribunal finds it implausible that the infant son was living away from his mother. The Tribunal also notes the inconsistent evidence of the [first appellant], in this regard. In an earlier written statement dated September 2014, the [first appellant] records that it was from the end of 2013 that [the Third Party] came to their home “more regularly”. She claimed that[,] though she found this unpleasant, she did not object as [the Third Party] was then expecting a second child, fathered by her [S]ponsor and had nowhere else to stay. The [S]ponsor said [the Third Party] was in financial difficulties.

1. The Tribunal then addressed the issue of the [S]ponsor’s infidelity at Tribunal Reasons [38]-[44] as follows:

38. Asked why she tolerated her [S]ponsor's apparent infidelity, the [first appellant] explained that[,] though it was stressful that her husband had “kids” with another woman[,] … she thought to herself that anyone can “make a mistake” and she said she did not know what else to do.

39. The [first appellant] recorded in her statement that she was unable to watch her husband all the time when he went out to business. Asked what she meant by this she explained to the Tribunal that “it was why he went out and had a child with another woman” because she could not keep an eye on him. Asked if this meant she did not trust him, she responded that she did trust him but then said that she was not aware of his relationship with [the Third Party] and that is why she let it happen. In considering this evidence the Tribunal notes other evidence given by the [first appellant] that her [S]ponsor first told her about his relationship with [the Third Party] when she was in Vietnam before her visa was granted.

40. Asked why [the Third Party] was not with her own husband, the [first appellant] said she “was told they had a fight”.

41. Noting the delegate's concerns, the Tribunal questioned the parties extensively in relation to the allegation that the [Sponsor] is in a relationship with a person known as [the Third Party] …

42. The Tribunal has also considered the parties' evidence of plans for their future together which included having children and purchasing land to build a temple and to develop a farm. The [first appellant] and [S]ponsor both gave evidence that they have provided support to each other through the challenges of life over some 20 years.

43. Whilst the Tribunal accepts the parties have known each other for a substantial period before they married and whilst they claim the relationship is long term and that they are committed to it, *having considered all the evidence cumulatively*, the Tribunal remains concerned that the relationship *is not exclusive* and that the *[S]ponsor is in a relationship with [the Third Party]*. The [S]ponsor and [the Third Party] have two children together born *during the course of the relationship* between [the first appellant] and [the] [S]ponsor. The Tribunal places *significant weight* on this evidence and does not accept that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

44. Having considering all the evidence regarding their relationship, and their commitment to each other, the Tribunal is not satisfied that the applicant and sponsor are in an exclusive relationship. *The Tribunal is unable to be satisfied of the genuine nature of the application* and formed the view it is likely that this relationship is contrived for migration purposes. (Emphasis added.)

### Did the Tribunal misconstrue or misapply the relevant statutory provision?

1. In our view, in light of the matters set out above, the Tribunal did not misconstrue or misapply s 5F of the *Migration Act*. This is so for the following reasons.
2. It is apparent that the Tribunal considered and evaluated the existence, nature and quality of the appellant and the Sponsor’s “commitment to a shared life as a married couple to the exclusion of all others”: s 5F(2)(b). It is apparent that the Tribunal was “concerned” that, while the first appellant and the Sponsor were said to have a form of relationship, that relationship was “not exclusive” (Tribunal’s Reasons at [43]-[44]). That is one way of expressing that the Tribunal was not satisfied on the evidence before it that the first appellant and the Sponsor’s relationship could be properly categorised as being a certain species of relationship, namely a relationship of a kind that is answerable to the statutory criterion which necessitates the relationship proceeding in a manner which is “to the exclusion of all others”: s 5F(2)(b).
3. In the context of the Tribunal’s various findings (extracted above) concerning the manner in which the relevant relationship had proceeded, the Tribunal did not misconstrue or misapply s 5F(2)(b) by considering, and placing weight on, the Sponsor’s admitted infidelity and adultery as an exclusionary factor for the purposes of s 5F(2)(b). The Tribunal’s reasons (at [43]) place “significant weight” on the evidence of the adulterous relationship. That was something which was open to the Tribunal on the evidence.
4. Moreover, the appellant’s contentions in this Court indicated that, while it was accepted that the appellant “couldn’t control her husband’s [relevant] urges”, this was not a relationship of “consented adultery, or some kind of open marriage”. The appellant appeared to argue that, in the absence of any such consent, even with the presence of certain admitted adultery, the appellant’s relationship with the Sponsor could be characterised as a relationship “to the exclusion of all others”.
5. However, the appellant’s submissions did not identify this consideration of consent in the statutory text. As Kenny and Griffiths JJ stated in *Angkawijaya* (extracted above), “the decision-maker’s task under s 65 of the [*Migration Act*] focuses on the question whether the requisite state of satisfaction exists in relation to compliance with the prescribed criteria for the grant of a partner visa”. Matters of consent may be relevant to an “assessment of the various matters and considerations which are relevant” to the application of s 5F, which “necessarily involves an evaluation of those matters and considerations on the part of the relevant decision-maker” (ibid). While the absence of a visa applicant’s consent to admitted adultery may be a relevant factor in the assessment of whether s 5F has been satisfied, there is no indication in the statute that it is determinative of that matter.
6. In this respect, the appellant’s argument fails to adequately address the detailed consideration which formed the basis for the Tribunal’s decision. It was open to the Tribunal to assess whether or not the admitted infidelity in this case so eroded the component of exclusion that it was not genuine or did not entail the requisite relationship within the terms of s 5F of the *Migration Act*. To paraphrase the reasons of the Tribunal, the Tribunal plainly found that the Sponsor was conducting a life which *included* to a significant degree the Third Party. But, *in addition to that*, the Tribunal took into account a range of other considerations (which are set out in detail above and preceded the Tribunal’s ultimate conclusion). In that sense, the Tribunal’s decision has a basis in s 5F(2)(c) in that the Tribunal was not satisfied that the purported relationship was “genuine and continuing” (s 5F(2)(c) of the *Migration Act*) based on the various matters the Tribunal had regard to.
7. In addition, a critical part of the Tribunal’s reasons was [43] (extracted above). That paragraph stated that:

[t]he [S]ponsor and [the Third Party] have two children together born during the course of the relationship between [appellant] and [the] [S]ponsor. The Tribunal places ***significant weight*** on this evidence and does not accept that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others. (Bold, italicised text added.)

1. This sentence came towards the end of the Tribunal’s reasons after the Tribunal had considered a range of other factors (as set out above). It shows that the Tribunal placed “significant weight” on the Sponsor’s relationship with the Third Party – but “*significant* weight” does not mean “determinative weight” or “conclusive weight”. It is that type of consideration which ensures the appellant’s contention (ie that the Tribunal affirmed the relevant decision *solely* on the basis of s 5F(2)(b) and its consideration of factors connected to that statutory criterion) should not be accepted.
2. In short, the appellant put her case on ground 2(a) on the basis that “[t]he Tribunal … should be understood as saying … one criterion, and one criterion only, was [not satisfied], s 5F(2)(b)”. For the reasons set out above, that submission fails.

### Was there error in the primary judgment?

1. The exercise of this Court’s appellate jurisdiction is governed by Division 2 of Part III of the *Federal Court of Australia Act 1976* (Cth). It involves an appeal by way of rehearing: *Branir Pty Ltd v Owston Nominees Pty Ltd (No. 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 (***Branir***) at [20] per Allsop J (as his Honour then was), with Drummond and Mansfield JJ agreeing; see also *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 (***Aldi***) at [1] to [10] per Allsop CJ and at [45] per Perram J.
2. The task of the appellate court is to conduct a “real review” of the trial and the primary judge’s reasons: *Lee v Lee* [2019] HCA 28; 266 CLR 129 at [55] per Bell, Gageler, Nettle and Edelman JJ (citing *Fox v Percy* [2003] HCA 22; 214 CLR 118 at 126-127 per Gleeson CJ, Gummow and Kirby JJ and *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; 90 ALJR 679 at 686).
3. The “task of a court on an appeal by way of rehearing is the correction of error”: *Branir* at [22]. If the appellate court is to vary or reverse the decision of the primary judge, it is necessary for the appellate court to demonstrate error in the primary judge’s findings or conclusion: *Branir* at [21].
4. Given the matters set out above, there is no error disclosed by a review of the primary judge’s reasons at [30] (extracted at [17] above), which considered whether the Tribunal misconstrued or misapplied s 5F(2)(b) of the *Migration Act*. It follows that there is no appellable error and ground 2(a) must be rejected.

### Disposition of Ground 2(a)

1. For these reasons, ground 2(a) is dismissed

# Ground 2(b): Was there a different denial of procedural fairness?

## The appellant’s submissions

1. The appellant by ground 2(b) complains that the Tribunal failed to comply with the requirements of procedural fairness in that the Tribunal did not notify the appellant of the certification by the Minister that s 375A of the *Migration Act* applied to certain documents that were before the Tribunal. The appellant further submits that the certificate was not valid because it did not state on its face any reasons which would support a claim for confidentiality on public interest grounds.
2. The appellant submits that the certificate information contained highly prejudicial allegations sourced from an anonymous “dob in” informant. Those allegations were said to be to the effect that the appellant was actually married to a different person and that the Sponsor was actually married to another woman who was the mother of his children. The appellant submits that the “dob in” information (being a “Job Details Report” dated 1 August 2013) contained highly prejudicial allegations and, had the appellant known of the “dob in” information, the appellant could have taken steps to discredit the reliability of the source of that information. The appellant submits that the Tribunal’s error was material in that, had the existence of the certificate and the “dob in” information been known to the appellant, it might realistically have been used by the appellant to persuade the Tribunal to make a different decision.

## Minister’s submissions

1. The Minister submits that there has been no denial of procedural fairness by the Tribunal. The Minister says that the Tribunal’s obligation under s 362A to “facilitate access” to written material is only enlivened by a request for such documents being made. The Minister submits that no such request was ever made in this case and, as a consequence, no occasion arose for the Tribunal to give the appellant “access” to any documents the subject of the s 375A certificate.
2. In any event, the Minister submits that any breach of procedural fairness by the Tribunal in not disclosing to the appellant the existence of the s 375A certificate occasioned no jurisdictional error as the breach was not material. It was said that the appellant had obtained all but seven pages of the documents covered by the s 375A certificate as a result of earlier requests for access made under the *Freedom of Information Act 1982* (Cth) (***FOI Act***). The Minister submits the only documents which the appellant did not have access to were the so-called “exempt documents” which comprised seven pages which were exempt from the obligation to provide access under the *FOI Act*.
3. In this respect, provided to this Court as part of the Appeal Book in this matter was a relevant “Decision Record” of the Department of Immigration and Border Protection dated 17 February 2015. That record indicated that the appellant was given access to a certain Departmental file “containing 189 folios” but “folios” “50 – 56” (referred to as the “Departmental Job Details Report”) were not provided by reason of s 45(1) of the *FOI Act*. The Appeal Book in this Court also contained seven documents titled “Job Details Report” which were labelled with the numbers “50” to “56”. The Minister’s submissions indicated that it was only these seven documents which were not provided in response to the relevant request under the *FOI Act*.
4. The Minister submits that the appellant not having access to the seven pages of the exempt documents could not have deprived the appellant of a realistic possibility of the Tribunal arriving at a different decision. The Minister submitted that position arises because the appellant was on notice of the substance of the adverse material contained in the exempt documents and had provided a detailed response to that information in a statement to the Tribunal. In this respect, the Minister referred to a submission to the Tribunal by the appellant’s Migration Agent dated 3 May 2016 and a submission made to the Immigration Department by the appellant dated 3 September 2014.

## Consideration of ground 2(b)

### The statutory provisions

1. Sections 357A to 367 (including s 362A) appear in Division 5 of Part 5 of the *Migration Act*. Division 5 is titled “Part 5-reviewable decisions: conduct of review”.
2. Section 357A(1) provides that Division 5 “is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with”. “Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with” (*Migration Act*, s 357A(2)).
3. Section 362A provides as follows:

(1) Subject to subsections (2) and (3) of this section and sections 375A and 376, the applicant, and any assistant under section 366A, are entitled to have access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review.

(2) This section does not override any requirements of the *Privacy Act 1988*. In particular, this section is not to be taken, for the purposes of that Act, to require or authorise the disclosure of information.

(3) This section does not apply if the Tribunal has given the applicant a copy of the statement required by subsection 368(1).

1. Section 375A appears in Division 8 of Part 5 of the *Migration Act*. Division 8 is titled “Part 5 reviewable decisions: miscellaneous”. Section 375A of the *Migration Act* provides as follows:

(1) This section applies to a document or information if the Minister:

(a) has certified, in writing, that the disclosure, otherwise than to the Tribunal, of any matter contained in the document, or of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 375(a) or (b)); and

(b) has included in the certificate a statement that the document or information must only be disclosed to the Tribunal.

(2) If, pursuant to a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies:

(a) the Secretary must notify the Tribunal in writing that this section applies to the document or information; and

(b) the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.

### Was there a breach of the obligation to afford procedural fairness?

1. Obligations of procedural fairness in relation to these statutory provisions have been the subject of consideration in a number of Full Court decisions.
2. In *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; 244 FCR 305 (***Singh (2016)***), the Full Federal Court (Kenny, Perram and Mortimer JJ) stated that “[a]ll that s 375A does in relation to the conduct of a review hearing is to prevent the information or documents *subject to a certificate* from being disclosed to the applicant”, and “procedural fairness does not require disclosure of the *certified matter*” (at [40]; emphasis added). However, “s 357A(2) is no impediment to [the] argument that general law notions of procedural fairness might require the disclosure of a *certificate*”, as distinct from the information or documents which are the subject of that certificate (at [40]; emphasis added). Their Honours then stated (at [42]) the following:

The effect of the certificate, if valid, is to require the Tribunal to conduct the review without disclosing the documents or information the subject of the certificate to an applicant. It is possible … that the Tribunal may be able to provide particulars of the confidential material sufficient to satisfy the requirements of s 359A whilst not infringing those of s 375A. But even where this occurs, the fact remains that the extent of an applicant’s participation in the review is circumscribed by the existence of the certificate which, even with particulars, denies access to relevant material. In that sense, the certificate has the immediate effect of diminishing an applicant’s entitlement to participate fully in the review process. That is a sufficient interest to enliven an obligation of procedural fairness.

1. Their Honours stated that “[t]he fact is the existence of the certificate has an immediate and adverse impact on an applicant’s entitlement to participate in the hearing” (*Singh (2016)* at [51]). Their Honours stated that the appellant in *Singh (2016)* “had a sufficient interest to give rise to an obligation to afford him procedural fairness upon the issue of the certificate”, and “that obligation required the Tribunal to disclose to him the certificate which had been issued” (*Singh (2016)* at [52]).
2. Pausing there, the Minister’s submissions did not challenge the appellant’s factual assertion that the appellant was not made aware of the existence of the certificate arising under s 375A. In light of the statements of the Full Court in *Singh (2016)*, without more, the Tribunal’s failure to inform the appellant of the existence of the certificate under s 375A was a breach of the Tribunal’s obligation to afford procedural fairness to the appellant.

### The question of materiality

1. However, a finding that there was such a breach of procedural fairness is an initial consideration, but it is not the end of the matter. To reach a finding of jurisdictional error, the breach needed to be material. The question therefore arises whether this breach of procedural fairness was sufficiently material to sound in jurisdictional error.
2. In this respect, for the following reasons, the failure to inform the appellant of the existence of the s 375A certificate was not material and therefore did not result in jurisdictional error.
3. The relevant test of materiality was set out in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 (***SZMTA***). In *SZMTA*, Bell, Gageler and Keane JJ stated that “the fact of notification [that s 438 of the Act applies in relation to a document or information (and s 438 has similarities to s 375A)] triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review” (*SZMTA* at [2]). However, breach “of that obligation of procedural fairness constitutes jurisdictional error on the part of the Tribunal *if, and only if,* the breach is material” (*SZMTA* at [2]; emphasis added).
4. Such a breach “is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome” (*SZMTA* at [2]). Their Honours noted the following at [38]:

[b]ecause procedural fairness requires disclosure of the fact of notification [of a certificate under s 438 (which is a relevantly similar provision to s 375A)], non-disclosure of the fact of notification constitutes, without more, a breach of the Tribunal’s implied obligation of procedural fairness. For such a breach to constitute jurisdictional error on the part of the Tribunal, however, the breach must give rise to a “practical injustice”: the breach must result in a denial of an opportunity to make submissions and that denial must be material to the Tribunal’s decision. (Citations omitted.)

1. In relation to the facts of *SZMTA*, it “was common ground that the Tribunal had not disclosed the fact of the notification to the” relevant visa applicant (*SZMTA* at [66]). However, the “evidence … established that the [visa applicant] had previously been provided with copies of all of the documents the subject of the notification in response to a request under the *Freedom of Information Act 1982* (Cth)” (ibid). Their Honours concluded as follows (at [72]):

Accepting that the breach [that is, the breach of the Tribunal’s obligation of procedural fairness (which arose by reason of the non-disclosure of the fact of notification of the certificate)] denied the first respondent an opportunity to make submissions on the validity of the notification and to present his evidence and make submissions in the knowledge that the documents and information which were the subject of the notification might not be taken into account by the Tribunal, *the critical fact remains that the documents and information were of such marginal significance that the denial could not realistically have made any difference to the result.* (Emphasis added.)

1. In *Parvin v Minister for Immigration and Border Protection and Another* [2019] FCAFC 86; 269 FCR 247 (***Parvin***), the relevant Department had received certain non-disclosable information, as defined in s 5 of the *Migration Act* (*Parvin* at [8]). The information was to the effect that the appellant and another person had not lived together in a spousal relationship, and that the appellant entered into the relationship for the sole purpose of obtaining permanent residence in Australia (ibid). The Tribunal sent a letter to the appellant which notified the appellant (among other things) that the Department had “received information from a number of different sources between October 2009 and April 2011 that [the appellant] and [the appellant’s] sponsor had not lived together in a spousal relationship at any time and that [the appellant] married [the appellant’s] sponsor for the sole purpose of obtaining permanent residence in Australia” (*Parvin* at [18]).
2. O’Callaghan J (Perram and Perry JJ agreeing) noted that it was common ground between the parties in *Parvin* that “s 375A of the *Migration Act* prohibits disclosure by the Tribunal of particulars of information which is the subject of the s 375A certificate; that the existence of the certificate should ordinarily be disclosed to permit the applicant to make submissions about it; and that a failure to do so may give rise to a denial of procedural fairness” (*Parvin* at [42] citing *Singh (2016)* at [12] and [53]-[59]). His Honour noted that “a number of the observations made by the plurality in *SZMTA* relate to the obligation of a Tribunal to accord procedural fairness generally, *and obviously apply as much to the non-disclosure obligations under s 375A as they do to s 438*” (*Parvin* at [47]; emphasis added).
3. O’Callaghan J (Perram and Perry JJ agreeing) concluded as follows (at [59]-[60]):

… the appellant and her solicitor were … *well aware* that the Tribunal had before it relevant confidential information. In those circumstances, it was open to the appellant to have requested further detail of the confidential information, to the extent the Tribunal was permitted to disclose it.

It follows, in my view, that the non-disclosure of the certificate did not deprive the appellant of any opportunity to give evidence or make arguments to the Tribunal and thereby to deprive her of the possibility of a successful outcome. It follows that no [denial of procedural fairness] is made out [by reason of the failure to disclose the existence of a certificate purportedly issued under s.375A of the Migration Act] … (Emphasis added.)

### The breach was not material

1. In light of the guidance provided by those authorities, the following matters assume prominence. Similarly to the appellant in *Parvin*, in this case, any non-disclosure of the identity of the source of the relevant allegation did not deprive the appellant of any opportunity to give evidence or make arguments to the Tribunal or otherwise deprive the appellant of the possibility of a successful outcome. This is so for the following reasons.
2. To recall, the appellant’s submission in short was that there was information before the Tribunal (but, it was said, unavailable to the appellant) which might have revealed, to the appellant or the Sponsor, the identity of a “dobber” which could realistically have enabled the appellant and Sponsor to undermine the “dobber’s” credibility.
3. The appellant referred to a document that was not disclosed to the appellant which essentially stated that a source had alleged (among other things) that the appellant and the Sponsor were not in a genuine relationship. The appellant said that the person who provided that information (ie the “dobber”) “must have a very close relationship” with the Third Party given the document indicates that person knew the Third Party was one month pregnant. It was said that only a person close to the Third Party could conceivably have been told of such a close personal circumstance. It was contended that this information would have enabled identification of the “dobber” and therefore would have provided the appellant with an opportunity to discredit that informant.
4. The record indicates that the appellant was provided with an opportunity to comment on the general tenor of the allegations in this document (as opposed to the document itself). It was also not disputed that the appellant was aware that the relevant “dob-in” existed. Rather, the appellant’s complaint was that, had the appellant been given this document, by reason of the indication in the document that the Third Party was one month pregnant (which, it was said, only a person close to the Third Party could have known), the appellant could have identified the maker of the allegation which would have enabled the appellant to test that maker’s credibility (for example, by producing information which damaged the credit of the maker of the relevant allegation).
5. However, the material before the Tribunal discloses that, by way of the appellant’s participation in the departmental process and a particular freedom of information request made by the appellant, it was (or reasonably would have been) readily apparent to the appellant that certain allegations had been made against the appellant and the Sponsor from an unknown person in the community. Much of the material placed before the Tribunal was directed to addressing those allegations. The material before the Tribunal shows that:
6. A statement dated 3 September 2014 by the Sponsor sought to address the types of issues referred to in the relevant allegation.
7. There is a statement dated 3 September 2014 by the appellant. It recorded the following:

[o]n 28 August 2014, [the first appellant] was called for interview by an Immigration Officer, who told me that:

1. I, [the first appellant] and [the Sponsor] have engaged in a false husband-and-wife relationship on a condition that I have to work without pay for several years.

2. [The Third Party], mother of my husband's own children, is the real wife of [the Sponsor].

3. I paid $50,000 AUD to someone named Mr. Tham Minh Nguyen to act as [the Third Party]'s prospective spouse.

1. The first appellant’s statement then went on to address those matters.
2. The relevant delegate’s letter to the first appellant advising of the delegate’s decision is dated 25 November 2014.
3. The first appellant applied for review of that decision in or around 4 December 2014.
4. It appears a Freedom of Information request was made in or around January 2015 and a response to that request was provided in or around February 2015. As part of that response, it was not contested that the appellant received a document (titled “Operational Integrity Referral”) which recorded the following:

I have concerns that [the appellant and the Sponsor’s] relationship is not genuine, but rather contrived for the purposes of gaining PR. There has been an allegation lodged with the department on 01/05/2013 stating that [the appellant and the Sponsor] on this application are married only on paper for Immigration … It is alleged that [the Third Party and the Sponsor] … are the genuine couple.

1. The first appellant’s migration agent made submissions to the Tribunal, which are dated 3 May 2016.
2. The Tribunal’s decision is dated 20 May 2016.
3. In these circumstances, the following matters are apparent. The appellant provided to the Department a detailed response to the relevant adverse information in a statement dated 3 September 2014.
4. In addition, by in or around February 2015, at least the general character of the relevant adverse information (ie the information that was contained in the documents the subject of the s 375A certificate), was in the appellant and the appellant’s representatives’ possession by reason of the request for information under the *FOI Act*. The appellant provided to the Tribunal the appellant’s detailed response to that information.
5. In these circumstances, like the appellant in *Parvin*, the appellant here and the appellant’s migration agent were (or at least were in a position to be) “well aware” that the Tribunal had before it the relevant allegation (see *Parvin*, [59]-[61]). Like the appellant in *Parvin*, it was therefore open to the appellant “to have requested further detail of the [relevant allegation], to the extent the Tribunal was permitted to disclose it” (*Parvin*, [59]-[61]). There is no indication in the record that the appellant did so.
6. In any event, the appellant had in the appellant’s possession, and had an opportunity to address (and did address), the relevant allegations. The appellant’s submissions and evidence in the Tribunal were generally directed to that task: the appellant’s case before the Tribunal was largely directed to demonstrating the genuineness of the appellant and Sponsor’s relationship. By way of example, there was a deal of material before the Tribunal concerning the financial aspects of the appellant and Sponsor’s relationship.
7. However, the Tribunal was not satisfied of that genuineness, and the basis for the Tribunal’s decision related to evidence which was independent of the informant’s identity. By way of example, it was not the informant’s allegation, or any particular credibility of that informant, that underpinned the Tribunal’s reasoning: the basis of the Tribunal’s reasoning was an assessment of whether the evidence submitted to the Tribunal by the appellant satisfied the Tribunal that the relevant relationship was genuine as required by the terms of s 5F of the *Migration Act*.
8. In this respect, the adverse allegation stands apart from the evidence submitted to the Tribunal. That evidence was directed to satisfying s 5F of the *Migration Act* and, in turn, addressed the substance of the relevant allegation. In addition, as stated above, the adverse allegation (as opposed to the evidence directed to that allegation by the appellant) was not a material basis for the Tribunal’s decision.
9. As a result, discrediting the source of the allegation is of little moment. In these circumstances, the documents the appellant did not have access to, or any inference or deduction they may have enabled, was not material: there was no realistic possibility that access to the exempt documents could have resulted in the Tribunal arriving at a different decision: *SZMTA* at [45] per Bell, Gageler and Keane JJ.
10. Moreover, it is not apparent that the appellant sought to identify and somehow discredit the maker of the relevant allegation at any point in the lengthy period of this decision-making process. It is apparent that the appellant sought to discredit the allegation (as distinct from its source) by the way in which the appellant’s case has been conducted throughout the decision-making process. However, the appellant had the gist of the allegation for a good deal of time, and it is not apparent that the appellant or the appellant’s representatives sought to somehow deduce the identity of, or otherwise discredit, the “dobber”. In these circumstances, even if the appellant had been provided with the relevant information pursuant to the relevant certificate, the evidence does not adequately support the counterfactual contended by the appellant, namely, that, had certain particular information been provided to the appellant, the appellant would have taken steps to identify, or otherwise discredit, the “dobber”.
11. This is particularly so given there is no evidence that the appellant made a request to the Tribunal under s 362A. There is no indication in the record that such a request was made by the appellant or the migration agent that represented the appellant in the Tribunal. The absence of a request to the Tribunal is a relevant factor: it is difficult to see how it can be consistently said that the fact of the s 375A certificate, or the documentation which was the subject of the s 375A certificate, is now material when, in the conduct of the appellant’s case before the Tribunal, any documentation held by the Tribunal was seen as insufficiently important to warrant a rudimentary request under s 362A to the Tribunal to potentially retrieve any material related to any s 375A certificate which might have been held by the Tribunal (particularly in circumstances where, as stated above, the appellant had possession of documents which indicated the Department was aware of the relevant allegation, and potentially its source). In this respect, it should be noted that the appeal book in this matter included a letter to the appellant dated 8 December 2014. That letter enclosed a document titled “Migration Review Tribunal – Information for Review Applicants”, which stated (among other things) the following:

**What happens next?**

Tribunal staff will now ask the department to provide any documents or files it has that relate to the decision you want reviewed.

…

**Can I get access to information the Tribunal holds?**

You can request access under the *Freedom of Information Act 1982* (FOI Act) to access any documents that the Tribunal holds in relation to your application, subject to some restrictions. If we cannot disclose some information, we will let you know and how you can seek review of our decision not to grant access. Access to written material is also available under the *Migration Act 1958* (Migration Act) where the case is active. Further details regarding access under both the FOI Act and the Migration Act are available on our website at www.mrt-rrtgov.au/About-Us/Access-to-infonnation.aspz. (Bold and italicised text in the original.)

1. In these circumstances, we do not accept that the failure to disclose to the appellant the existence of the s 375A certificate, or the material which was the subject of that certificate, resulted in denying the appellant an opportunity to give evidence or make arguments to the Tribunal regarding the adverse information, or otherwise deprived the appellant of the realistic possibility of a successful outcome (see *SZMTA* at [2]).
2. The failure to disclose to the appellant the existence of the s 375A certificate, or the material which was the subject of that certificate was, at most, an immaterial breach of an obligation to afford procedural fairness. Such immaterial breaches do not entail jurisdictional error (see *SZMTA* at [2]).

### The reasoning of the primary judge did not involve appellable error

1. Turning to the reasoning of the primary judge relevant to this ground of appeal, we find no appellable error in the reasoning of the primary judge in considering whether any breach of procedural fairness was material to the decision. The primary judge concluded at Reasons [44]:

In my opinion, the material that the applicant unquestionably obtained in 2015 sufficiently disclosed to her the gravamen of the information that the Tribunal ultimately had before it. Even if she had had the materials that were not provided, I do not think that further evidence would have made any difference. The reason for this is in a sense an overarching one.

1. We agree with this conclusion of the primary judge, subject to reading the reference to “would” have made a difference in context as reflecting a conclusion that there was no reasonable possibility of a different outcome.

## Disposition of ground 2(b)

1. For the reasons given above, proposed ground 2(b) must be rejected. Accordingly, leave to rely upon ground 2(b) is refused.

# Disposition of appeal

1. The Court will dismiss the appeal for the reasons given and make the following orders:
2. Leave is refused to rely upon ground of appeal 2(b).
3. Otherwise dismiss the amended notice of appeal filed by leave on 8 July 2020.
4. The appellant to pay the Minister’s costs of and incidental to the appeal to be taxed in default of agreement.

|  |
| --- |
| I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Reeves, Bromwich and Anderson. |

Associate:

Dated:  18 September 2020