HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN AND GLEESON JJ

NARADA NATHANSON APPELLANT

AND

MINISTER FOR HOME AFFAIRS & ANOR RESPONDENTS

Nathanson v Minister for Home Affairs
[2022] HCA 26
Date of Hearing: 10 March 2022
Date of Judgment: 17 August 2022
M73/2021

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 9 October 2020 and, in lieu thereof, order that:*

    (a) the appeal be allowed;

    (b) the orders of the Federal Court of Australia made on 18 October 2019 be set aside and, in lieu thereof, it be ordered that:

        (i) the application for review be allowed;

        (ii) the decision of the Administrative Appeals Tribunal dated 4 April 2019 be set aside;

        (iii) the application be remitted to the Tribunal to be heard and determined according to law; and

        (iv) the first respondent pay the applicant's costs; and

(c) the first respondent pay the appellant's costs.

3. The first respondent pay the appellant's costs.

On appeal from the Federal Court of Australia

Representation

C J Horan QC with A Aleksov for the appellant (instructed by Lawson Bayly)

G R Kennett SC with A P Yuile for the first respondent (instructed by Sparke Helmore Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Nathanson v Minister for Home Affairs

Administrative law – Judicial review – Jurisdictional error – Requirement that error must be material – When error will be material – Where appellant's visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where delegate of Minister for Home Affairs decided not to revoke cancellation – Where appellant sought review of non-revocation decision by Administrative Appeals Tribunal ("AAT") – Where AAT denied appellant procedural fairness by not giving opportunity to address relevance of incidents of domestic violence to primary consideration prescribed by direction made under s 499 of *Migration Act* – Whether denial of procedural fairness material – Whether, in discharging onus, appellant required to establish nature of evidence or submissions that might have been presented had AAT hearing been procedurally fair.

Words and phrases – "judicial review", "jurisdictional error", "material", "materiality", "natural justice", "onus of proof", "practical injustice", "procedural fairness", "realistic possibility of a different outcome", "reasonable conjecture".

1 KIEFEL CJ, KEANE AND GLEESON JJ. The issue in this appeal is whether procedural unfairness by the Administrative Appeals Tribunal ("the Tribunal") in the course of hearing the appellant's application for review of a decision to refuse to revoke the mandatory cancellation of his visa involved jurisdictional error. Following a hearing conducted by the Tribunal, the Tribunal affirmed the decision to refuse to revoke the visa cancellation. As the Courts below recognised, the Tribunal's error in failing to afford the appellant procedural fairness will have involved jurisdictional error only if that failure was material to the Tribunal's decision. Materiality is established if the error deprived the appellant of a realistic possibility of a different outcome[1]. The appellant bore the onus of demonstrating that the denial of procedural fairness was material in this sense[2].

2 Applying these principles, the appellant discharged his onus of demonstrating that the Tribunal's denial of procedural fairness deprived him of a realistic possibility of a different outcome. That realistic possibility was demonstrable from the record of the Tribunal's decision. Contrary to the conclusion of the majority of the Full Court of the Federal Court of Australia, the appellant was not required to articulate a specific course of action which could realistically have changed the result[3]. It follows that the appeal must be allowed and the matter remitted to the Tribunal for determination according to law.

Relevant facts and Tribunal decision

3 The appellant, a citizen of New Zealand born in Zimbabwe, arrived in Australia in 2010 when he was 26 years old. In 2013, the appellant was granted a Class TY Subclass 444 Special Category visa. In 2018, a delegate of the respondent Minister cancelled that visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth). Section 501(3A) required the Minister to cancel the visa because the Minister was satisfied that the appellant did not pass the "character test" in s 501(6) of the Act and because the appellant was then serving a sentence of imprisonment on a full-time basis in a custodial institution for offences against laws of the Northern Territory. The particular offences that led to cancellation of the appellant's visa

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1 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 449 [2], 462 [85]; 390 ALR 590 at 592, 610; see also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [30]-[31].

2 *SZMTA* (2019) 264 CLR 421 at 433 [4]; *MZAPC* (2021) 95 ALJR 441 at 449 [2]; 390 ALR 590 at 592.

3 Contra *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 53 [127].

were depriving a person of personal liberty, aggravated assault, stealing and driving a vehicle in a dangerous manner. The objective circumstances of the offences were serious, including in that: the victim was a seventy year old man; the attack was unprovoked and the victim was deprived of his liberty for almost 12 hours during which the appellant threatened the victim's life; and the offending involved the victim in a high speed car pursuit with police. For the offences, the appellant had been sentenced to a total effective period of imprisonment of two years and six months.

4 On 10 January 2019, a delegate of the Minister decided not to revoke the mandatory cancellation of the appellant's visa, pursuant to s 501CA(4) of the Act. In making that decision, the delegate was required to comply with the ministerial direction, made under s 499 of the Act and known as "Ministerial Direction 65"[4]. Ministerial Direction 65 required the delegate to have regard to a range of considerations, set out in Pt C of the Direction, in exercising the relevant discretion. The considerations included three "primary" considerations labelled in the Direction as: the protection of the Australian community from criminal or other serious conduct; the best interests of minor children in Australia; and expectations of the Australian community[5]. In addition, the Direction specified that "other" considerations were required to be taken into account where relevant[6]. The Direction specified, non-exhaustively, five "other" considerations which were labelled: international non-refoulement obligations; strength, nature and duration of ties; impact on Australian business interests; impact on victims; and extent of impediments if removed. The Direction explained each of these considerations and, in several instances, specified factors required to be considered in addressing the relevant consideration. The Direction relevantly stated that: both primary and other considerations may weigh in favour of, or against, whether or not to revoke a mandatory cancellation of a visa; primary considerations should generally be

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4 *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

5 Paragraph 13(2) of *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

6 Paragraph 14 of *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

given greater weight than the other considerations; and one or more primary considerations may outweigh other primary considerations[7].

5 It is necessary to describe the consideration labelled "protection of the Australian community from criminal or other serious conduct" in more detail. Paragraph 13.1(1) of Ministerial Direction 65 exhorted decision makers to have regard to "the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens". By para 13.1(2), decision makers were directed that they should also give consideration to: (a) the nature and seriousness of the non-citizen's conduct to date; and (b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct. As to the former of these matters, para 13.1.1 of the Direction mandated that decision makers have regard to specified factors including principles that: without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously; and crimes against, relevantly, vulnerable members of the community, such as minors, the elderly and the disabled, are serious.

6 This explanation of Ministerial Direction 65 serves to illustrate that the delegate, in deciding whether to exercise the power in s 501CA(4), was required to engage in a detailed examination of the history, circumstances and prospects of the appellant and to make evaluative findings concerning multiple considerations including by reference to general principles stated in the Direction.

7 As permitted by s 500(1)(ba) of the Act, the appellant applied to the Tribunal for a review of the delegate's decision. In dealing with the application, the Tribunal was required to stand in the shoes of the original decision maker but having regard to the state of affairs as it stood at the time of the Tribunal's decision[8]. Relevantly, the Tribunal was required to ensure that the appellant was given a reasonable opportunity to present his case[9].

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7 Paragraphs 8(3)-8(5) of *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

8 *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51], citing *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 299 [40], 315 [100], 324-325 [134].

9 *Administrative Appeals Tribunal Act 1975* (Cth), s 39(1).

8 On 28 February 2019, Ministerial Direction 65 was replaced by a direction known as "Ministerial Direction 79"[10]. Ministerial Direction 79 was identical to Ministerial Direction 65 in most respects. However, a significant difference was the inclusion in Ministerial Direction 79, by para 13.1.1(1)(b), of the following factor for consideration in assessing the nature and seriousness of the non-citizen's conduct:

> "The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed."

9 The appeal to this Court proceeded on the basis that the Tribunal was required to act in accordance with Ministerial Direction 79. It was not suggested that the appellant might have had any accrued right to consideration of his application to the Tribunal in accordance with Ministerial Direction 65[11] and that question is not considered further. It is common ground that the appellant was not put on notice of the significance of this principle for the Tribunal's review until the Minister's closing submissions at the Tribunal hearing on 21 March 2019. There is no suggestion that the appellant had ever been charged with or convicted of any domestic violence offence and the delegate had not mentioned domestic or family violence in their statement of reasons for deciding not to revoke the mandatory visa cancellation.

10 The appellant was generally aware that allegations of domestic violence were relevant to the Tribunal's review. The Minister obtained under summons two police reports of family violence involving the appellant in 2012 and 2016. The appellant was aware of these reports prior to the Tribunal hearing and there was no suggestion of procedural unfairness in their use at the hearing. Seemingly intended to respond to the police reports, the appellant submitted to the Tribunal a letter of support from his wife dated 5 March 2019, in which she referred to two occasions on which she had reported the appellant to the police. However, the letter did not say anything specific about the incidents that led to the reports or express any views about whether the incidents were likely to be repeated. It is fair to say that the letter was principally concerned with the interests of the appellant's family which, the wife argued, would be best served by permitting the appellant to remain in Australia.

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10 *Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

11 cf *Esber v The Commonwealth* (1992) 174 CLR 430.

11 The Minister provided the appellant with a Statement of Facts, Issues and Contentions prior to the Tribunal hearing. That document did not address para 13.1.1(1)(b) but did refer to "incidents of domestic violence resulting in the issuing of violence restraining orders" as a matter affecting the best interests of the appellant's minor children, and to "numerous unprovoked violent offences against strangers and assaults against [the appellant's] partner" as a matter affecting the expectations of the Australian community.

12 At the Tribunal hearing, the appellant represented himself. Early in the hearing, the Tribunal member noted that she was considering the application under Ministerial Direction 79. The Tribunal member gave the appellant a copy of Ministerial Direction 79 with red markings to identify changes from Ministerial Direction 65. She said that there were "only minor changes to the direction" and further commented that "[m]ost of those changes relate to how we treat crimes where women and children are involved, and with respect to the conviction history I have for you in front of me, I think they're of minor relevance, those changes. That is, mostly relevance [sic] to where the applicant has been charges [sic] in relation to convictions and offences in relation to women and children." The solicitor appearing for the Minister at the Tribunal hearing did not raise any issue concerning these observations.

13 The appellant then gave some evidence on his own behalf, after which the Minister's solicitor made brief oral opening submissions. The Minister's solicitor stated the Minister's contention that the appellant had been convicted of many serious crimes and "there's also evidence of serious behaviours that should be of concern to the Australian community". The solicitor did not specify the nature of the "serious behaviours" and he did not say anything to indicate that, by reason of the new language in Ministerial Direction 79, any domestic or family violence was to be viewed very seriously by the Tribunal in conducting its review.

14 The Minister's solicitor then questioned the appellant, including about the two police reports of family violence involving the appellant. The appellant made several admissions, although he also gave evidence to the effect that he had no real recollection of either incident. Then, in closing submissions, the Minister's solicitor contended that the appellant had been involved in violent conduct against his wife that was "extremely serious conduct, especially having regard to the new directions in Directions [sic] 79 that any violent conduct against a female is serious, regardless of the sentence imposed".

15 The Tribunal took no steps to draw to the appellant's attention that the Minister had raised a new issue based on para 13.1.1(1)(b), namely, that the evidence of domestic violence was to be viewed "very seriously" in assessing the nature and seriousness of the appellant's conduct for the purpose of the primary consideration of protection of the Australian community. Nor did the Tribunal take

any steps to give the appellant any opportunity to address the new issue. The appellant did not address the new issue in his closing submissions.

16 On 4 April 2019, the Tribunal affirmed the delegate's decision. Relevantly, the Tribunal found that the appellant had been involved in two incidents of violent conduct against his wife within the family home, respectively in 2012 and 2016, and that the wife had declined to press charges but obtained an interim Violence Restraining Order against the appellant in 2016. The Tribunal made detailed findings concerning this conduct including that the appellant accepted that two domestic violence incidents had occurred in his home. The Tribunal found, having regard to the general principles expressed in Direction 79, that the conduct was to be regarded "seriously". More generally, the Tribunal found that the appellant had a history of repeated violent offences. The Tribunal concluded that the "nature of the [appellant's] offending is very serious" and strongly weighed against exercising the discretion to revoke the cancellation of the visa. The Tribunal further found that, were the appellant to continue to engage in violent conduct within the family home, the potential physical and psychological damage to his spouse and children would be serious. The Tribunal also found that, whilst under the influence of drugs, the appellant engages in violent behaviour but that at least one incident of family violence was committed in 2012 before the appellant said he began taking drugs. The Tribunal considered that this "leaves open the risk that the [appellant] may engage in violent conduct within the home even in the absence of a drug addiction".

17 Ultimately, the Tribunal found that its findings regarding the protection of the Australian community and the expectations of the Australian community weighed strongly in favour of the Tribunal refusing to revoke the visa cancellation. It formed the opinion that the "primary obligations" of protection of the Australian community and the expectations of the Australian community outweighed the other considerations that were in favour of revocation of the decision to cancel the visa, namely, the best interests of minor children, the strength, nature and duration of the appellant's ties to Australia and the extent of the impediments to the appellant if he were removed from Australia. The Tribunal concluded that, having regard to all of the relevant considerations in Direction 79, it would not be appropriate for the Tribunal to exercise the discretion to revoke the mandatory cancellation of the appellant's visa.

Primary judgment and identification of the Tribunal's error

18 On 18 October 2019, a single judge of the Federal Court of Australia (Colvin J) dismissed the appellant's application for judicial review of the Tribunal's

decision. The primary judge found that the course taken by the Tribunal was procedurally unfair but did not constitute jurisdictional error[12].

19 More particularly, the primary judge made the following findings. Until the Minister's closing submissions, the Tribunal hearing had been conducted on the basis that the Minister did not rely upon violent conduct by the appellant against his wife or children for the purpose of addressing the consideration of protection of the Australian community and, particularly, the nature and seriousness of the appellant's conduct. Prior to closing submissions, the appellant was not informed of an issue raised by the Minister pursuant to para 13.1.1(1)(b) of Ministerial Direction 79. To the contrary, at the start of the Tribunal hearing, the Tribunal member reassured the appellant that the changes to the Direction were "of minor relevance". The Tribunal did not know what the appellant may have been able to present by way of further evidence and submissions in answer to the Minister's new point. Fairness required the Tribunal to give the appellant an opportunity to address the issue, by presenting further evidence and making further submissions to the Tribunal, before making findings on the point adverse to the appellant. Having failed to give the appellant that opportunity, the Tribunal's subsequent course was procedurally unfair[13].

20 The primary judge also found that the Tribunal's characterisation of the nature of the appellant's offending as "very serious" derived from the Tribunal's consideration of the evidence of domestic violence and did not accept that the same characterisation would have been reached by the Tribunal without regard to that evidence[14].

21 Even so, the primary judge concluded that the Tribunal's decision was not affected by jurisdictional error because the appellant had failed to point to a "sufficient factual basis" upon which the Court could conclude that the breach was material[15]. His Honour stated that the appellant did not identify any particular evidence or any particular submission that might have been presented to the Tribunal if he had been afforded procedural fairness and which might have caused the Tribunal to reach a different conclusion about the seriousness of the appellant's conduct and, consequently, a different outcome[16]. By way of example, the primary

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12 *Nathanson v Minister for Home Affairs* [2019] FCA 1709 at [59]-[62].

13 *Nathanson* [2019] FCA 1709 at [56].

14 *Nathanson* [2019] FCA 1709 at [28].

15 *Nathanson* [2019] FCA 1709 at [62].

16 *Nathanson* [2019] FCA 1709 at [60]-[61].

judge noted that there was "no indication of the different perspective that might have been presented to the Tribunal concerning the evidence of domestic violence"[17]. Accordingly, in the circumstances of the case, which included the appellant's awareness that the police reports concerning domestic violence were in issue and the appellant's acceptance that the conduct described in the reports had occurred, the Tribunal's procedural unfairness was only material, in the primary judge's opinion, "if there was something that could have been put to the Tribunal that might have resulted in a different outcome on that aspect".[18] The primary judge considered that the appellant failed to demonstrate this to be the case[19].

Full Court's reasons for concluding that the procedural unfairness was immaterial

22 A Full Court of the Federal Court of Australia (Steward and Jackson JJ, Wigney J dissenting) dismissed the appellant's appeal[20]. The primary judge's finding of error by the Tribunal, being a finding of denial of procedural fairness, was not in issue. Steward and Jackson JJ concluded that the primary judge was correct to find that the unfairness was not material[21]. In dissent, Wigney J found that the Tribunal's error was material and would have allowed the appeal and set aside the Tribunal's decision[22].

23 The majority noted that it was "effectively common ground" that the standard of materiality articulated in *Minister for Immigration and Border Protection v SZMTA*[23] was determinative of whether there was jurisdictional error in this case[24]. In *SZMTA*, a majority comprising Bell, Gageler and Keane JJ held that "[a] breach is material to a decision only if compliance could realistically have resulted in a different decision" and that "the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant [for judicial

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17 *Nathanson* [2019] FCA 1709 at [61].

18 *Nathanson* [2019] FCA 1709 at [62].

19 *Nathanson* [2019] FCA 1709 at [62].

20 *Nathanson* (2020) 281 FCR 23.

21 *Nathanson* (2020) 281 FCR 23 at 56 [138].

22 *Nathanson* (2020) 281 FCR 23 at 43 [78].

23 (2019) 264 CLR 421.

24 *Nathanson* (2020) 281 FCR 23 at 52 [121].

review] bears the onus of proof"[25]. The Full Court's decision was delivered before this Court's judgment in *MZAPC v Minister for Immigration and Border Protection*[26], in which a majority of this Court affirmed the explanation of materiality in *SZMTA*[27].

24 The Full Court majority identified three particular circumstances which, they considered, meant that it was incumbent on the appellant to identify before the primary judge a matter or matters that could have been put before the Tribunal, from which the primary judge could infer that there was a realistic possibility of a different outcome[28]. The first was the general importance of the allegations of domestic violence, which was, or should have been, apparent to the appellant from before the commencement of the Tribunal hearing. Their Honours considered that it must have been apparent to the appellant that the question of his character and propensity to engage in violence was going to be important and that the allegations of domestic violence would be relevant to that question.

25 The second relevant circumstance was the letter of support from the appellant's wife to the Tribunal which dealt with domestic violence allegations. Although it did not address the allegations directly and did not indicate whether the appellant's wife accepted they occurred, the majority considered that the statement tended to confirm the state of mind that was the first relevant circumstance. Further, it was said, the statement presented bases on which the Tribunal might have found that the allegations were of lesser importance than they might otherwise appear.

26 The third relevant circumstance was the appellant's admissions to the Tribunal concerning the two incidents of domestic or family violence recorded in the police reports. Even though the admissions were qualified because the appellant said that he could not remember the incidents, the appellant did not doubt that his wife had given an accurate account to the police. The Full Court majority held that this qualification did not provide a basis for the Tribunal failing to find that the incidents had occurred and those findings would always be viewed as serious by the Tribunal.

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25 (2019) 264 CLR 421 at 445 [45]-[46].

26 (2021) 95 ALJR 441; 390 ALR 590.

27 (2021) 95 ALJR 441 at 449 [2]-[3]; 390 ALR 590 at 592.

28 *Nathanson* (2020) 281 FCR 23 at 53-54 [127]-[130].

27 In the light of these three circumstances, the majority concluded that "the scope for the court to infer that [the appellant] could have produced further evidence, or said something more which could possibly have changed the outcome, [was] substantially curtailed"[29]. Their Honours considered that the valuable nature of the opportunity lost by the appellant was "not obvious" and, whether or not he needed to adduce evidence, the appellant "did at least need to articulate ... a specific course of action which could realistically have changed the result"[30]. This, the majority concluded, the appellant had failed to do[31].

28 The majority also rejected the appellant's contention that there were three things he could have done if given a fair hearing. The first of those things was to adduce evidence from the appellant's wife. The majority said that there was no basis to infer that she may have said anything different from what she had included in her letter to the Tribunal and it could "readily be inferred that if she had said more, she may have been cross-examined in a way that made matters worse for her husband"[32]. The second thing was to submit that the appellant's domestic violence should not be viewed as being "very seriously" adverse to his interests in the review because he had not been charged with or convicted of any crime in respect of that conduct. The majority observed that the Tribunal was already aware of that point[33]. The third thing was to submit that, even if his domestic violence was to be viewed very seriously in relation to protection of the Australian community, that conduct should not diminish the weight to be given to the best interests of the appellant's children. The majority considered that, as the appellant was on notice of the relevance of the domestic violence issues to the question of his children's best interests, "it is difficult to see what more he would have said" to change the Tribunal's conclusion on that issue[34].

29 In dissent, Wigney J was satisfied that, if given a fair hearing, the appellant may have been able to persuade the Tribunal to make a decision in the appellant's favour[35]. Given the gravity of the consequences of the Tribunal's decision for the

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29 *Nathanson* (2020) 281 FCR 23 at 54 [131].

30 *Nathanson* (2020) 281 FCR 23 at 54 [131].

31 *Nathanson* (2020) 281 FCR 23 at 54 [131].

32 *Nathanson* (2020) 281 FCR 23 at 54 [132].

33 *Nathanson* (2020) 281 FCR 23 at 54 [133].

34 *Nathanson* (2020) 281 FCR 23 at 55 [134].

35 *Nathanson* (2020) 281 FCR 23 at 26 [5].

appellant, his Honour readily inferred that the appellant would have addressed the new issue if given the opportunity[36]. Wigney J identified ways in which the appellant may have done so and which could have made a difference to the outcome. First, he may have given further evidence himself, whether about the incidents themselves, or about the context and circumstances in which the incidents occurred to provide some explanation about how and why they occurred. The appellant may also have been able to adduce further evidence about his subsequent reconciliation with his wife so as to provide support for a submission that those sorts of incidents would not be repeated in the future[37]. Secondly, the appellant may have called his wife to give evidence about the same sort of matters[38]. Thirdly, the appellant may have made submissions as to why, in all the circumstances, the incidents did not relevantly engage para 13.1.1(1)(b) of Ministerial Direction 79 and should not otherwise be used against him. As to this last matter, Wigney J expressed doubts about the applicability of para 13.1.1(1)(b) in the absence of any conviction of the appellant for a domestic violence offence[39].

Content and proof of materiality of a denial of procedural fairness

30 In *Hossain v Minister for Immigration and Border Protection*[40], a majority comprising Kiefel CJ, Gageler and Keane JJ enunciated a common law principle of statutory interpretation. That principle is that a statute conferring decision-making authority is "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance"[41]. It is well recognised that, generally speaking, legislation should be construed to discourage unnecessary litigation, to reduce wasting time and cost and to preserve the dignity of the law[42]. And, in particular, in relation to the Act, this Court has declined to attribute to the

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36 *Nathanson* (2020) 281 FCR 23 at 40 [62].

37 *Nathanson* (2020) 281 FCR 23 at 40 [63].

38 *Nathanson* (2020) 281 FCR 23 at 40 [64].

39 *Nathanson* (2020) 281 FCR 23 at 40 [65].

40 (2018) 264 CLR 123.

41 *Hossain* (2018) 264 CLR 123 at 134 [29].

42 Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at 313-315 [9.4].

legislation the impractical intention that an error in process, which cannot have affected the outcome of the process, requires that the process be repeated[43].

31 In *MZAPC*, a majority comprising Kiefel CJ, Gageler, Keane and Gleeson JJ explained the evolution of the contemporary understanding of jurisdictional error that supported that principle of interpretation[44]. Their Honours further explained[45]:

> "The principle accommodates determination of the limits of decision-making authority conferred by statute to the reality that '[d]ecision-making is a function of the real world'[46] by distinguishing the express and implied statutory conditions of the conferral from the statutory consequences of breach and by recognising that the legislature is not likely to have intended that a breach that occasions no 'practical injustice'[47] will deprive a decision of statutory force."

32 As explained in *MZAPC*, the materiality of a breach requires consideration of "the basal factual question of how the decision that was in fact made was in fact made"[48]. This question is determined by proof of historical facts on the balance of probabilities. Then, 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"[49]. The burden falls on the plaintiff to prove "on the balance of probabilities the historical facts necessary to enable the court to be

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43 *Hossain* (2018) 264 CLR 123 at 134-135 [30]-[31], 146-148 [67]-[72].

44 *MZAPC* (2021) 95 ALJR 441 at 452 [27]-[30]; 390 ALR 590 at 596-597.

45 *MZAPC* (2021) 95 ALJR 441 at 453 [32]; 390 ALR 590 at 598.

46 *Hossain* (2018) 264 CLR 123 at 134 [28], quoting *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.

47 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37]. See also *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 640 [35].

48 (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

49 *MZAPC* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition"[50].

33 There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on an issue that required consideration[51]. The standard of "reasonable conjecture" is undemanding. It recognises that a fundamental purpose of affording procedural fairness is to afford an opportunity to raise relevant matters which are not already obvious, or not liable to be advanced by the apparently persuasive "story" of the opposing party[52]. Where a Tribunal errs by denying a party a reasonable opportunity to present their case, "reasonable conjecture" does not require demonstration of how that party might have taken advantage of that lost opportunity[53]. Nothing said in *MZAPC* denies this. To the contrary, the standard of "reasonable conjecture", correctly applied, proceeds on assumptions that are derived from the rationale for procedural fairness, namely that, if given a fair opportunity to present their case, a party will take advantage of that opportunity and that, by doing so, the party could achieve a favourable outcome.

Proof of materiality in this case

34 This case is analogous to *Stead v State Government Insurance Commission*[54]. There, the record before the intermediate appellate court showed that the plaintiff's counsel was stopped by the trial judge from submitting that a witness's evidence should be disbelieved. The witness had given evidence that there was no causal link between the plaintiff's personal injury and a motor vehicle accident. In his judgment, the trial judge accepted the witness's evidence and rejected the plaintiff's case on causation. The realistic possibility of a different outcome was demonstrated on the face of those elements of the appellate record of the trial, without any evidence as to what counsel could have said if he had been

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50 *MZAPC* (2021) 95 ALJR 441 at 454 [39] (emphasis in original); 390 ALR 590 at 600.

51 cf *Lam* (2003) 214 CLR 1 at 13-14 [36]-[38].

52 *Kioa v West* (1985) 159 CLR 550 at 633; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 380 [143]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 107 [186].

53 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-343 [60].

54 (1986) 161 CLR 141.

allowed to complete his submission. Similarly, in this case the only historical facts that the appellant was required to prove appeared from the Tribunal's reasons for decision.

35 The Minister correctly acknowledged 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. The Minister submitted that, because of the "quite particular circumstances" of this case, the appellant was required to adduce evidence of how the question of domestic violence could have been addressed by him or his wife in further material. The "particular circumstances" were said to be that the topic of domestic violence had already been addressed in the evidence to some degree, albeit in relation to a different issue.

36 Further, the Minister accepted that if, when the Minister sought to rely on the material about domestic violence in connection with the consideration of protection of the Australian community, the appellant had been invited to address that new issue by way of further evidence or submissions, the appellant would have taken that opportunity to address the new issue by leading evidence and/or presenting submissions to the Tribunal.

37 It may be accepted that, the Minister having raised the issue of domestic violence by the appellant as it affected the best interests of the appellant's children, the appellant had strong reasons to rebut the material before the Tribunal on that issue, to the extent that he could, or otherwise to negate or minimise its significance in relation to that consideration. It may also be accepted that the appellant addressed the issue raised by the Minister by providing the wife's letter to the Tribunal. It is reasonable to infer that the letter was prepared in response to the police reports obtained by the Minister under summons. It may also be accepted that the appellant was afforded an opportunity to address the issue raised by the Minister through cross-examination and questions from the Tribunal at the hearing. Further, it may be accepted, given that the appellant accepted the correctness of the police reports, that it is extremely unlikely that the appellant could have said or done anything to avoid findings that the two incidents of domestic violence described in those reports did occur.

38 As the Minister put it, had the appellant been afforded procedural fairness, the best he probably could have done was to place the domestic violence incidents in some context that might have persuaded the Tribunal that they were less serious than they appeared from the police reports or otherwise that they should not be viewed "very seriously" in connection with the consideration of protection of the Australian community. The Minister argued that this possibility was immaterial because the incidents, as recorded in the police reports and explored in cross-

examination, were objectively serious; the wife's letter already sought to contextualise the appellant's conduct and to stress their mutual commitment to their relationship; and the appellant's case was that he was remorseful for everything he had done and was a "changed man".

39 The Minister's argument must be rejected. As explained in *MZAPC*, it is necessary to consider how the Tribunal's decision was in fact made. That decision was made by weighing the range of considerations in Ministerial Direction 79 that were of relevance to the appellant, following an evaluation of the appellant's history, circumstances and prospects as appropriate, in order to make findings about each of those considerations. In that context, additional evidence and submissions directed to mitigating the significance of the evidence of domestic violence could realistically have affected the Tribunal's evaluative fact finding concerning the nature and seriousness of the appellant's conduct and, ultimately, 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. As a matter of reasonable conjecture, and as Wigney J reasoned, the appellant may have been able to present evidence on his own behalf or from his wife, and to make submissions that could have led to a different characterisation by the Tribunal of the nature of the appellant's offending. That evidence and those submissions may have provided more detail about the domestic violence incidents, placing them in the relevant context or providing relevant detail. The possibility that the appellant could have presented more to the Tribunal about how the incidents were to be evaluated could not be foreclosed by what was already before the Tribunal.

Orders

40 The appeal should be allowed and the first respondent should pay the appellant's costs of the appeal. Orders 1 to 4 of the Full Court of the Federal Court of Australia dated 9 October 2020 should be set aside and, in lieu thereof, it be ordered that: (1) the appeal to the Full Court of the Federal Court of Australia be allowed; (2) the orders made by Colvin J dated 18 October 2019 be set aside and, in lieu thereof, it be ordered that: the application for review be allowed; the decision of the Tribunal dated 4 April 2019 be set aside; the application be remitted to the Tribunal to be heard and determined according to law; and the first respondent pay the applicant's costs; and (3) the first respondent is to pay the appellant's costs of the appeal to the Full Court of the Federal Court of Australia.

41 GAGELER J. In *Minister for Immigration and Border Protection v WZARH*[55] a denial of procedural fairness was found to have been established by a failure to afford an applicant for a refugee status assessment a reasonable opportunity to be heard in light of a significant change in the decision-making procedure of which he was not informed. Noting that denials of procedural fairness can take different forms in different contexts, Gordon J and I said[56]:

> "There are cases in which conduct on the part of an administrator in the course of a hearing can be demonstrated to have misled a person into refraining from taking up an opportunity to be heard that was available to that person in accordance with an applicable procedure which was otherwise fair. To demonstrate that the person would have taken some step if that conduct had not occurred is, in such a case, part of establishing that the person has in fact been denied a reasonable opportunity to be heard.
>
> Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given."

That statement has since often been quoted and applied in the Federal Court[57]. Wigney J relied on it in dissent in the decision now under appeal[58].

42 The statement in *WZARH* was formulated in response to, and in rejection of, an argument put by the Minister in that case. The argument sought to rely on the observation of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[59] that the concern of procedural fairness is "to avoid practical injustice". The argument was that *Lam* should be treated as "authority for the proposition that it is incumbent on a person who seeks to

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55 (2015) 256 CLR 326.

56 (2015) 256 CLR 326 at 342-343 [59]-[60] (footnotes omitted).

57 See *Wilson Transformer Co Pty Ltd v Anti-Dumping Review Panel [No 2]* [2022] FCAFC 30 at [25] and the cases there cited.

58 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 38 [58].

59 (2003) 214 CLR 1 at 14 [37].

establish denial of procedural fairness always to demonstrate what *would* have occurred if procedural fairness had been observed"[60].

43 That argument re-emerged in a mutated form in the argument put by the Minister on the hearing of the present appeal. The Minister argued that sometimes it is incumbent on an applicant who seeks to establish the materiality of a denial of procedural fairness to demonstrate by evidence how an opportunity to be heard would have been used had it been afforded.

44 The appearance of that new strain of a previously rejected argument, in combination with the division of opinion in the Full Court of the Federal Court in the decision under appeal, suggests that some elaboration of what was said in *WZARH* may be warranted in light of the subsequent decisions in *Minister for Immigration and Border Protection v SZMTA*[61] and *MZAPC v Minister for Immigration and Border Protection*[62].

45 *SZMTA* and *MZAPC* are together authority for two cumulative propositions. The first is that a denial of procedural fairness results in a decision being affected by jurisdictional error, so as to be capable of justifying the grant of curial relief, only if that denial is shown by the applicant to have been material to the decision. The second is that the materiality of a denial of procedural fairness is shown by the existence of a realistic possibility that the decision could have been different had procedural fairness been observed.

46 *SZMTA* and *MZAPC* do not hold that, in order to meet the threshold of materiality, an applicant for relief must establish any part of what *would* have occurred on the balance of probabilities had a fair opportunity to be heard been afforded. The onus which the applicant bears to establish materiality is no greater than to show that, as a matter of reasonable conjecture within the parameters set by the historical facts established on the balance of probabilities, the decision *could* have been different had a fair opportunity to be heard been afforded.

47 Establishing that threshold of materiality is not onerous. The explanations in *MZAPC*[63] of the materiality of the denials of procedural fairness which had been found in *Stead v State Government Insurance Commission*[64] and in *Re Refugee*

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60 (2015) 256 CLR 326 at 342 [58] (emphasis added).

61 (2019) 264 CLR 421.

62 (2021) 95 ALJR 441; 390 ALR 590.

63 (2021) 95 ALJR 441 at 455-457 [45]-[50], 457-458 [55]-[58]; 390 ALR 590 at 601-604.

64 (1986) 161 CLR 141.

Review Tribunal; Ex parte Aala[65] are consistent with the observation that "[i]t is no easy task for a court ... to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome"[66].

48 The denial of procedural fairness found in *Stead* occurred in the course of final submissions in a trial when counsel was stopped from submitting that the trial judge should disbelieve certain evidence which had been adduced at the trial. The evidence, which had been given by a doctor, was to the effect that there was no causal link between a motor vehicle accident and the appellant's condition. The trial judge had gone on in a reserved judgment to accept the evidence of the doctor and to find that there was no such causal link. The holding in *Stead* as explained in *MZAPC* was that those historical facts, which were established by nothing more than the appellate record, "should have been sufficient to satisfy the intermediate appellate court that there was a realistic possibility that the trial judge could have found a causal link between the accident and the appellant's condition had counsel been permitted to complete his submission"[67]. The explanation continued[68]:

> "There was no need for the appellant to lead evidence of what counsel would have submitted to the trial judge about why the evidence of the doctor should not have been believed and there was no need for the appellant to prove on the balance of probabilities that the trial judge would have found the submission of counsel persuasive."

49 The denial of procedural fairness found in *Aala* was deprivation of an opportunity to lead evidence and present argument to answer inferences of fact which had resulted in the Refugee Review Tribunal making findings adverse to credit in concluding that the applicant did not have a well-founded fear of persecution. McHugh J in dissent found that the Tribunal would still have concluded that the applicant did not have a well-founded fear of persecution given

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65 (2000) 204 CLR 82.

66 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145, quoted in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104].

67 (2021) 95 ALJR 441 at 456 [48]; 390 ALR 590 at 602.

68 (2021) 95 ALJR 441 at 456 [48]; 390 ALR 590 at 602.

the overwhelming weight of evidence from independent sources[69]. The majority[70] was unable to reach that finding. Gleeson CJ explained[71]:

> "It is possible that, even if the [applicant] had been given an opportunity to deal with the point, the Tribunal's ultimate conclusion would have been the same. But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive."

50 The approach to the assessment of the reasonableness of a conjecture that a decision could have been different had a fair opportunity to be heard been afforded – exemplified by both the holding in *Stead* and the view taken by the majority in *Aala* – has been informed by the cumulation of curial experience. "[T]he path of the law is strewn with examples of open and shut cases which, somehow, were not; ... of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change[72]."

51 That approach also accords with one of the main justifications underlying the existence of the common law principle of statutory interpretation by operation of which procedural fairness is implied as a condition of the conferral of statutory decision-making authority: reduction of the risk of the decision-maker reaching an unsound conclusion and thereby reduction of the associated risks of injustice and inefficiency[73]. The importance of ensuring that a person whose interests are affected by a decision be given an opportunity to be heard before the decision is made is never greater than in those cases where there is a danger of thinking that nothing the person would be able to say could make any difference to the decision[74].

52 The emphasis in *SZMTA* and *MZAPC* on the need for a denial of procedural fairness to meet the threshold of materiality in order to give rise to jurisdictional error does not ignore that curial experience or depart from that underlying

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69 (2000) 204 CLR 82 at 128 [122].

70 (2000) 204 CLR 82 at 88-89 [3]-[4], 116-117 [80], 131-132 [133], 144 [172], 154-155 [211].

71 (2000) 204 CLR 82 at 89 [4].

72 (2000) 204 CLR 82 at 117 [81], quoting *John v Rees* [1970] Ch 345 at 402.

73 See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 380 [143].

74 See *Kioa v West* (1985) 159 CLR 550 at 633; *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52 at 71.

justification for the implication of a condition of procedural fairness. In each of *SZMTA*[75] and *MZAPC*[76] the denial of procedural fairness was a failure on the part of the Administrative Appeals Tribunal to inform the applicant of the triggering of a procedural impediment to the Tribunal considering information forwarded by the Secretary of the Department of Immigration and Border Protection to the Registrar of the Tribunal.

53 In *SZMTA*[77] it was established that some of the information, if considered, had the potential to have borne on the decision of the Tribunal in a manner favourable to the applicant. However, the applicant in *SZMTA* failed to show that the denial of procedural fairness was material in that procedural context because, although it was to be inferred as an historical fact on the balance of probabilities that the Tribunal did not consider the potentially favourable information in making the decision, the information was "of such marginal significance" that it was not reasonable to conjecture that considering the information could realistically have made a difference to the decision[78].

54 Conversely, the information in *MZAPC* had the potential to have borne adversely on the credit of the applicant. The applicant in that case still failed to show that the denial of procedural fairness was material. That was because no inference was able to be drawn on the balance of probabilities that the Tribunal in fact took the potentially adverse information into account in making the decision[79]. A majority nevertheless readily accepted as realistic the possibility that the decision of the Tribunal could have been different had the Tribunal in fact taken the information into account in assessing the credit of the applicant[80].

55 Returning to the statement in *WZARH*, and now explaining it in light of *SZMTA* and *MZAPC*, the starting point is to highlight its foundational proposition that where the procedure adopted by an administrator can be shown on the balance of probabilities itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness will be established by nothing more than that failure. Building on that foundation, the statement can be taken to underscore that the denial of procedural fairness so established on the balance of probabilities will

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75 See (2019) 264 CLR 421 at 440-441 [27]-[31], 450 [64]-[66].

76 See (2021) 95 ALJR 441 at 458-459 [61]-[62]; 390 ALR 590 at 605-606.

77 As distinct from *CQZ15* and *BEG15*, which were heard and determined concurrently with *SZMTA*.

78 (2019) 264 CLR 421 at 452-453 [72].

79 (2021) 95 ALJR 441 at 461 [74]-[76]; 390 ALR 590 at 609.

80 (2021) 95 ALJR 441 at 461 [73]; 390 ALR 590 at 609.

result in a finding of jurisdictional error if the applicant for relief establishes nothing more than the reasonableness, within the parameters set by the historical facts established on the balance of probabilities, of the conjecture that the decision *could* have been different had a fair opportunity to be heard been afforded. Unless there is something in the historical facts established on the balance of probabilities upon which to base an inference that the decision could not have been different had a fair opportunity to be heard been afforded, establishing the reasonableness of that conjecture will not be difficult.

56 In the present case, the circumstances of which are fully described by Kiefel CJ, Keane and Gleeson JJ, the denial of procedural fairness lay in the failure of the Tribunal to afford the appellant a fair opportunity to be heard on a decision-making criterion. The appellant had already presented some evidence and made some submissions concerning events which related to that criterion. But he had presented that evidence and made those submissions without having had his attention adequately drawn to the significance of that decision-making criterion and therefore without having been put on notice of the possible significance of those events to that criterion. That decision-making criterion was shown by the Tribunal's reasons to have borne centrally on the evaluative and discretionary decision which the Tribunal went on in fact to make adversely to the appellant.

57 Nothing in the historical facts established on the balance of probabilities concerning the course of the proceeding before the Tribunal casts doubt on the reasonableness of the conjecture that the appellant would have taken up the denied opportunity to be heard on that decision-making criterion had it been afforded to him. The reasonable conjecture is that he would have done so at least to the extent of making further submissions directed specifically to the significance of already adduced evidence to the newly introduced decision-making criterion. Quite properly, senior counsel for the Minister conceded as much in the course of oral argument on the appeal.

58 What is more, there is nothing in the historical facts established on the balance of probabilities, concerning the applicable decision-making criterion or the reasons for the decision which the Tribunal in fact made, that casts doubt on the reasonableness of the conjecture that, had the Tribunal afforded the appellant procedural fairness, the Tribunal may have been influenced by the appellant's further evidence or submissions to form a different evaluative judgment in respect of the relevant decision-making criterion so as to arrive at a different decision.

59 With these additional observations, I agree with the reasoning and orders proposed by Kiefel CJ, Keane and Gleeson JJ.

60 GORDON J. Mr Nathanson's visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) on character grounds ("the cancellation decision"). A delegate of the Minister for Home Affairs ("the Minister") decided not to revoke the cancellation decision under s 501CA(4) of the *Migration Act*. Mr Nathanson sought review of that decision by the Administrative Appeals Tribunal ("the Tribunal") under s 500(1)(ba) of the *Migration Act*. It is not in dispute that Mr Nathanson was denied procedural fairness before the Tribunal, in that he was not given an opportunity to give or adduce evidence or to make submissions on the way in which two domestic violence incidents should affect the Tribunal's consideration of the primary consideration of the protection of the Australian community under *Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 79"). Direction 79, given by the then Minister for Immigration, Citizenship and Multicultural Affairs under s 499 of the *Migration Act*[81], came into force after Mr Nathanson lodged his review application but before the application was heard by the Tribunal.

61 Direction 79 replaced *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 65"). Direction 79 prescribed the same primary and other considerations as Direction 65[82]. A critical difference between the directions was, however, that Direction 79 introduced a new sub-para (1)(b) to para 13.1.1, under the sub-heading "[t]he nature and seriousness of the conduct", in relation to the primary consideration of the "[p]rotection of the Australian community from criminal or other serious conduct"[83]. Paragraph 13.1.1(1)(b) provided that, "[i]n considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including ... [t]he principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed".

62 Mr Nathanson was on notice that domestic violence incidents were relevant to a different primary consideration, namely, "[t]he best interests of minor children in Australia"[84]. He was not on notice that the incidents were relevant to the primary

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81 Section 499 of the *Migration Act* relevantly provides that the Minister may give written directions to a person or body having functions or powers under the *Migration Act* about the performance of those functions or exercise of those powers and that a person or body must comply with such a direction.

82 See Direction 65, paras 13(2) and 14(1); Direction 79, paras 13(2) and 14(1).

83 Direction 79, para 13(2)(a); see also para 13.1.

84 Direction 79, para 13(2)(b); see also para 13.2.

consideration of the protection of the Australian community. In fact, he was misled by the Tribunal, which told him at the commencement of the Tribunal hearing that the changes resulting from Direction 79 were "minor" and were of "minor relevance" to him. When it became apparent that the domestic violence incidents were in fact to be relied upon by the Minister in relation to the primary consideration of the protection of the Australian community, no step was taken by the Tribunal to remedy the situation. Then, without warning Mr Nathanson, the Tribunal relied upon the incidents in relation to that consideration in undertaking the evaluative decision-making process mandated by s 501CA(4).

63 The question arising in this appeal is: was the admitted denial of procedural fairness "material", in the sense that it deprived Mr Nathanson 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? The answer is "yes": the fundamental nature of the error – the denial of procedural fairness – means that there was no additional or separate onus on Mr Nathanson to demonstrate that the error could realistically have resulted in a different decision.

64 The Minister accepted in oral argument that the practical consequence of the Minister's position in this case was that, in order to establish jurisdictional error, Mr Nathanson would have had to adduce evidence to show what he would have done if he had been afforded a fair hearing so as to demonstrate how that could have led to a different outcome. That submission is wrong and should be rejected. This case presents a very important opportunity (foreshadowed by a majority in *MZAPC v Minister for Immigration and Border Protection*[85]) for "revisit[ing]", and modifying, the principle that the applicant in an application for judicial review must bear the onus of proving on the balance of probabilities the historical facts necessary to enable a court to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with a condition that was breached[86].

Nature of the error

65 The starting point is the error in issue in this case – an admitted denial of procedural fairness of a serious nature. Mr Nathanson was denied the opportunity to give or adduce evidence or to make submissions in relation to an important issue affecting the evaluative decision required to be made under s 501CA(4) of the *Migration Act*. Four matters are significant.

66 First, the Tribunal misled Mr Nathanson at the Tribunal hearing. The Tribunal told him that the changes resulting from Direction 79 were

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85 (2021) 95 ALJR 441 at 453 [32]; 390 ALR 590 at 598.

86 *MZPAC* (2021) 95 ALJR 441 at 454 [39]; 390 ALR 590 at 600.

"only minor changes". It told him that most of the changes related to "how we treat crimes where women and children are involved" or "charges in relation to convictions and offences in relation to women and children", and those changes were of "minor relevance" given Mr Nathanson's "conviction history". That was, no doubt, a reference by the Tribunal to the fact that Mr Nathanson had never been charged, let alone convicted, of any crimes of a violent nature against women or children. Mr Nathanson was given "false comfort" by the Tribunal's assurances, which were uncontradicted by the Minister's representative.

67 Second, the Minister introduced a new issue in oral closing submissions to the Tribunal. The context for the introduction of the new issue is important. The decision of the delegate, which was the subject of the review application, made no reference at all to incidents of domestic violence. The reasons for a decision under review (here, the delegate's decision) are usually the point at which to begin the identification of issues arising in relation to the review and, "unless some other additional issues are identified by the Tribunal ..., it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant"[87].

68 Third, the Minister's Statement of Facts, Issues and Contentions – which relevantly was required to set out the issues that remained in dispute between Mr Nathanson and the Minister[88] – did not give Mr Nathanson any notice that the Minister would contend that the incidents of domestic violence involved "extremely serious conduct" to be taken into account when considering the nature and seriousness of his offending or other conduct to date for the purposes of the primary consideration of the protection of the Australian community. And, in oral opening, the Minister's representative did not give any indication that they would, in closing submissions, contend that the changes resulting from Direction 79 were engaged in Mr Nathanson's case because he had been involved in incidents of domestic violence.

69 Fourth, the first indication given to Mr Nathanson that domestic violence incidents might be relevant to the assessment of the primary consideration of the protection of the Australian community was in the Minister's oral closing submissions. In oral closing, the Minister's representative referred to Mr Nathanson having been involved in "violent conduct against his wife" and said that "notwithstanding the fact that [Mr Nathanson's] wife chose not to press

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87 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 163 [35].

88 See *Administrative Appeals Tribunal Act 1975* (Cth), s 18B; Administrative Appeals Tribunal, *General Practice Direction: Direction given under section 18B of the Administrative Appeals Tribunal Act 1975* (28 February 2019) at 13 [4.31].

charges against [Mr Nathanson] ... that conduct is extremely serious conduct, especially having regard to the new directions in Direction 79 that any violent conduct against a female is serious, regardless of the sentence imposed".

70 The problems presented by this last-minute introduction of a new issue were not rectified by the Tribunal. Once the new issue was raised in the Minister's closing submissions, the Tribunal did not: (1) explain to Mr Nathanson that what he had been told about Direction 79 at the beginning of the hearing by the Tribunal was wrong; (2) explain the potential relevance of the incidents of domestic violence to para 13.1.1(1)(b) of Direction 79; or (3) afford Mr Nathanson any opportunity to make submissions or to give or adduce further evidence in relation to the new issue. Each of those things needed to be (but were not) done to "unscramble th[e] situation".

71 Then, the very issue that Mr Nathanson did not have his mind directed to was relied upon as critical to the Tribunal's reasoning in respect of an evaluative judgment, weighing against revocation of the cancellation decision. That last statement needs explanation. The Tribunal's task under s 501CA(4) of the *Migration Act* was evaluative. In deciding whether there is "another reason" why a visa cancellation decision should be revoked, a decision-maker must evaluate representations made in response to an invitation issued under s 501CA(3)(b)[89], assess and weigh relevant evidence and material, and weigh and balance considerations for and against revocation[90]. As this Court recognised in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*[91], "[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".

72 In this case, the Tribunal accepted the submission made by the Minister's representative in oral closing submissions that the incidents of domestic violence should be considered as falling within para 13.1.1(1)(b) of Direction 79 and that Mr Nathanson's conduct should therefore be viewed "seriously". The Tribunal's finding about the seriousness of the incidents of domestic violence then infected the Tribunal's reasoning at different stages of its evaluation.

73 First, it infected the Tribunal's ultimate finding as to the primary consideration of the protection of the Australian community. The Tribunal

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89 See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at 508 [24]; 400 ALR 417 at 425.

90 See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13 at 18 [15]; 395 ALR 403 at 407.

91 (2021) 96 ALJR 13 at 18 [15]; 395 ALR 403 at 407.

concluded, in respect of the protection of the Australian community, that while some of his offences were "relatively minor", on balance, the nature of Mr Nathanson's offending was "very serious and strongly weigh[ed] against exercising the discretion to revoke the cancellation of the visa". It is not in dispute that the Tribunal's characterisation of Mr Nathanson's conduct as "very serious" rested at least to a considerable degree upon reasoning by reference to the terms of Direction 79 and, in particular, para 13.1.1(1)(b). Nor is it in dispute that it cannot be said that the same characterisation would have been reached by the Tribunal without regard to the evidence of domestic violence.

74 Second, the Tribunal's finding about the seriousness of the incidents of domestic violence also infected the Tribunal's ultimate conclusion not to revoke the cancellation decision. The Tribunal concluded that the primary considerations of "protection of the Australian community and the expectations of the Australian community outweigh[ed] the other considerations that [were] in favour of the revocation of the decision to cancel the visa, namely the best interests of minor children; the strength, nature and duration of ties; and the extent of the impediments if removed". Having weighed and balanced each of the primary and other considerations, the Tribunal was of the view that it would not be appropriate to revoke the cancellation decision.

75 To use the language adopted by a majority in *MZAPC*[92], those are the relevant "historical facts" as to what occurred in the making of the Tribunal's decision.

"Materiality" established by the nature of the error in this case

76 A majority in *MZAPC* acknowledged that there are certain categories of error which necessarily result in "a decision exceeding the limits of decision-making authority without any additional threshold [of materiality] needing to be met" by an applicant[93]. One such category is where the error is so egregious that it will be jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker[94]. A serious denial of procedural fairness involving a denial of an opportunity to be heard in relation to an important issue in the context of an evaluative decision (as occurred in this case) falls into that category. Put in different terms, "the quality or severity of the error", as a matter of logic and common sense, necessarily gives rise to the conclusion

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92 (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

93 *MZAPC* (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598.

94 cf *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 147-148 [72]; *MZAPC* (2021) 95 ALJR 441 at 465 [100]; 390 ALR 590 at 614.

that it does not matter whether the "decision could realistically have been different had [the] error not occurred"[95]. Here, the "gravity of the consequence of the decision", together with "[h]uman experience and plain common sense", compel the inference that Mr Nathanson would, if fairly put on notice of the issue, have addressed it and said all that he could have about the domestic violence incidents in the context of the primary consideration of the protection of the Australian community[96].

77 Where such an error is established by an applicant, or otherwise admitted, there is no additional or separate onus on the applicant to demonstrate that the error "could realistically have resulted in a different decision"[97]. The very nature of the error demonstrates that an inherently valuable opportunity has been lost because of the denial of a fair hearing[98]. The process of review by the Tribunal miscarried fundamentally[99]. The Tribunal erred in this fundamental way in performing its statutory task, a task which obliged it to afford Mr Nathanson procedural fairness[100].

78 Plainly, as *MZAPC*[101], *Minister for Immigration and Border Protection v SZMTA*[102] and *Minister for Immigration and Border Protection v WZARH*[103] demonstrate, not all denials of procedural fairness fall within the category of cases just described. It is unnecessary to chart the metes and bounds of the types of

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95 *MZAPC* (2021) 95 ALJR 441 at 462 [85]; 390 ALR 590 at 610-611.

96 cf *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at 466 [39].

97 *MZAPC* (2021) 95 ALJR 441 at 453 [35]; 390 ALR 590 at 598-599, quoting *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45]; cf (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598.

98 cf *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-343 [60].

99 cf *Wilde v The Queen* (1988) 164 CLR 365 at 373, cited in *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]-[46]; *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [35], citing *Maher v The Queen* (1987) 163 CLR 221 at 234; *Do Young Lee v The Queen* (2014) 253 CLR 455 at 472 [48].

100 See *Kioa v West* (1985) 159 CLR 550 at 627; *WZARH* (2015) 256 CLR 326 at 341 [53].

101 (2021) 95 ALJR 441; 390 ALR 590.

102 (2019) 264 CLR 421.

103 (2015) 256 CLR 326.

fundamental denials of procedural fairness that do fall within that category. There are no bright lines to be drawn; it will depend on the case – "[t]he nature of the error has to be worked out in each case concerning a specific decision under a particular statute"[104].

79 My conclusion reflects what Gageler J and I said in *WZARH*[105]. In that case, we explained that "[t]he concern of procedural fairness, which here operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes"[106]. A fundamental failure on the part of the Tribunal to give an applicant the opportunity to be heard which a reasonable Tribunal ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the Tribunal's statutory powers of consideration[107]. The fundamental nature of the error means that it does not need to be established by an applicant that the breach is "material", so as to give rise to jurisdictional error, and therefore it is unnecessary to show that it operates to deprive the applicant of the possibility of a successful outcome.

80 That inexorably follows from the fact that the concern of procedural fairness is to "avoid practical injustice"[108]. "The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given"[109]. It is not incumbent on a person who seeks to establish denial of procedural fairness always to demonstrate what *would*[110] – or, now, *could*[111] – have occurred if procedural fairness had been observed[112]. What must be shown by a person seeking to

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104 *MZAPC* (2021) 95 ALJR 441 at 465 [101]; 390 ALR 590 at 615.

105 (2015) 256 CLR 326.

106 *WZARH* (2015) 256 CLR 326 at 341 [55].

107 *WZARH* (2015) 256 CLR 326 at 341 [55].

108 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; see also [38].

109 *WZARH* (2015) 256 CLR 326 at 343 [60], citing *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 at 525 [58].

110 *WZARH* (2015) 256 CLR 326 at 342 [58].

111 Reasons of Gageler J at [53], [55].

112 *WZARH* (2015) 256 CLR 326 at 342 [58].

establish a denial of procedural fairness will depend upon the precise defect alleged to have occurred in the decision-making process[113].

81 Where the error is not fundamental in the sense described, but where the procedure adopted can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure and jurisdictional error is made out unless it can be shown by a respondent to a judicial review application that the failure did not deprive the person of the possibility of a successful outcome[114]. That jurisdictional error is established in those cases reflects the primacy of the statutory rules and the separation of powers by which courts respect those rules. It reflects that judicial power is, and must be, exercised in a way which seeks to ensure that the values that underpin our democracy are upheld, including that power will not be exercised against an individual contrary to law and, at a more human level, that such exercises of power respect the integrity and the dignity of individuals who are subject to that power[115].

82 Two further matters should be noted. The Minister submitted that the present case is an "unusual" denial of procedural fairness case. The Minister pointed both to the fact that the lost opportunity here concerned a topic that had already received some attention, albeit in a different context, and to the evaluative nature of the decision-maker's task. Contrary to the Minister's submissions, these matters demonstrate how serious the denial of procedural fairness was. The proposition advanced by the Minister that this was an "unusual case" is as startling as it is wrong.

83 Next, even if (contrary to my view), notwithstanding the serious nature of the admitted error, there was an additional or separate onus on an applicant – here, Mr Nathanson – to establish materiality, the Minister's submissions regarding what was required to discharge that onus must be rejected. Mr Nathanson was not required to demonstrate, by submissions or evidence, precisely what submissions he would or could have made or what evidence he

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113 *WZARH* (2015) 256 CLR 326 at 342 [58].

114 cf *WZARH* (2015) 256 CLR 326 at 342-343 [60].

115 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 483 [107]; *MZAPC* (2021) 95 ALJR 441 at 463-466 [89]-[105]; 390 ALR 590 at 611-616. See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70; *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 1]* (1997) 72 ALJR 574 at 577 [18]; 151 ALR 711 at 715; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31], 513-514 [104]; *Combet v The Commonwealth* (2005) 224 CLR 494 at 579 [167]; *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at 411 [48]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24-26 [39]-[44].

would or could have given or adduced[116]. Nor was the judicial review court required to make findings as to what submissions Mr Nathanson would or could have made or what evidence he would or could have given or adduced and whether or not any such submissions or evidence could have persuaded the decision-maker. It is neither principled nor practical to require judicial review applicants effectively to run before a judicial review court the case that they would have run before an administrative decision-maker if they had not been denied a fair hearing. Rather, as Gageler J states, the question is whether the conjecture that the decision *could* have been different had a fair opportunity to be heard been afforded is reasonable[117]. The more serious the error, the more obvious it will be that the conjecture is both open and reasonable. And seldom will it not be reasonable.

84 As a majority in *MZAPC*[118] recognised, "a court called upon to determine whether jurisdictional error has occurred must be careful not to assume the function of the decision-maker". Requiring judicial review applicants to adduce evidence and make submissions about what they would or could have done differently to demonstrate the materiality of an error has the inherent danger of leading to courts doing precisely what their Honours in *MZAPC* warned that they must not do – that is, to assume the function of the administrative decision-maker. The danger of "materiality" principles transforming judicial review into "a form of merits review"[119] is reason enough to reject the Minister's submission. But there is also a further practical reason to do so.

85 To require an applicant to show what evidence they would or could have given or adduced or what submissions would or could have been made had there not been a denial of procedural fairness will inevitably result in applicants erring on the side of caution and proceeding effectively to run the case they say they would have run before the decision-maker before the judicial review court. Further, it would seem almost inevitable that applicants would make self-serving arguments about the case they say they would have run that may or may not be consistent with what would have actually taken place. That is the inevitable consequence of requiring applicants and courts to undertake an entirely

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116 *MZAPC* (2021) 95 ALJR 441 at 462 [85]; 390 ALR 590 at 610-611. See also *WZARH* (2015) 256 CLR 326 at 342 [58]; *Degning* (2019) 270 FCR 451 at 465-466 [39].

117 Reasons of Gageler J at [55].

118 (2021) 95 ALJR 441 at 457 [51]; see also 470-471 [121]-[122]; 390 ALR 590 at 603; see also 621-622.

119 cf *SZMTA* (2019) 264 CLR 421 at 460 [95].

hypothetical inquiry – it is simply not possible to be confident as to what steps would or could have been taken.

86 Where there has been a fundamental failure on the part of the decision-maker to afford procedural fairness (as occurred in this case), nothing more is required from the applicant to make out the error. There has been no hearing of the kind which in fairness ought to have been given. Jurisdictional error is established. But, even if the error in this case was not "fundamental" (and it was), the case illustrates the difficulties, in principle and in practice, of requiring an applicant to do the very thing that should not be done on judicial review. Courts should not impose an obligation on an applicant to adduce evidence or make submissions about what would or could have been argued, or what evidence would or could have been adduced, had they been afforded a fair hearing. That is not judicial review and that is not principled or practical.

Conclusion and orders

87 I agree with the orders proposed by Kiefel CJ, Keane and Gleeson JJ.

EDELMAN J.

Procedural fairness and natural justice

88 Procedural fairness is based upon natural justice. One of the innate, or natural, elements of justice is that a person should have a reasonable opportunity to respond to adverse allegations. This basic requirement is so fundamental, and is such a strong expectation of a reasonable person to whom the relevant legislation applies, that it has repeatedly been held that the implication of procedural fairness in an administrative hearing can only be removed by Parliament using "plain words of necessary intendment"[120]. In simple terms, Parliament must be extremely, "unambiguously"[121], or "unmistakeabl[y]"[122] clear before defeating such a basic principle of justice. In a number of recent decisions, this Court has eroded the bedrock of natural justice that is ordinarily implied in statute as a reflection of reasonable and widespread expectations[123]. This appeal concerns the extent to which further erosion can be prevented.

89 One manner in which the implication of procedural fairness has been eroded is through the application by this Court of another general statutory implication concerned with the materiality of an error: an immaterial instance of denial of procedural fairness will not invalidate a decision. The implication concerning materiality is also based upon reasonable and widespread expectations of those to whom legislation applies. But those expectations are based upon weaker underlying values concerned with efficiency, or "good administration"[124], rather than the stronger values concerned with natural justice and respect for human dignity. The implication concerning materiality reduces the protection against a denial of procedural fairness by an inference that Parliament would not have intended a decision to be invalid where the denial of procedural fairness was immaterial.

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120 *Annetts v McCann* (1990) 170 CLR 596 at 598; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 73 [43]; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24], 61 [51]. See also *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396.

121 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 110.

122 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 496.

123 See, eg, *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; 390 ALR 590; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497; 400 ALR 417.

124 Daly, *Understanding Administrative Law in the Common Law World* (2021) at 16.

90 The broader the reach of the implication concerning materiality, and thus the broader the constraints upon findings of invalidity, the less scope there is for the protection of those who have suffered procedural unfairness and, correspondingly, the more likely it is that procedural fairness will depart from reasonable expectations founded upon natural justice and human dignity. Great care must therefore be taken to ensure that the efficiency-based implication concerning materiality is not applied in a manner that could overwhelm the value of human dignity protected by the more basic and fundamental implication of procedural fairness. If an administrative decision is made without procedural fairness, it should only be in an exceptional case that the decision remains valid.

91 There are two approaches which, in combination, can maintain the correct balance and preserve the exceptional nature of errors that will be treated as immaterial despite causing procedural unfairness. The first is to recognise, as is the case where a new trial is sought on a criminal appeal or a civil appeal, that there are serious denials of procedural fairness which, without more, will always be material and therefore sufficient for an administrative decision to be quashed. The second approach is for the party asserting that an error is immaterial to bear the onus of proof on that issue. Unfortunately, the first approach has not always been recognised and the second approach has recently been denied. This appeal squarely raises how to avoid the potential injustice and incoherence caused by ignoring the first approach and by denying the second.

92 I gratefully adopt the facts and background to this appeal as set out in the reasons of Kiefel CJ, Keane and Gleeson JJ. The issue on this appeal reduces to whether the decision that involved a serious denial of procedural fairness to Mr Nathanson should be set aside. If that serious denial is not treated as material based only on its seriousness, the question becomes: what more was Mr Nathanson required to do, beyond establishing a serious denial of procedural fairness, in order to have the decision set aside?

93 The regrettable premise required by the primary joint judgment of this Court in *MZAPC v Minister for Immigration and Border Protection*[125] is that an applicant for judicial review must bear the onus of proving materiality. On that premise, and in order to avoid the degeneration of procedural fairness into an instrument of injustice that does not accurately reflect the values underlying reasonable and widespread expectations, there can only be one answer to the question of what is required for an applicant to discharge the onus of proving materiality. The answer, however curious given the premise, must be "almost nothing". In this case, it sufficed for Mr Nathanson to make a "quadruple might" submission by speculating as follows: but for the denial of procedural fairness,

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125 (2021) 95 ALJR 441; 390 ALR 590.

there *might* have been things that he or his wife *might* have said at the hearing that *might* have assisted his case in a manner that *might* have led to a different result.

Three simple questions and the need to keep them separate

94 In *Hossain v Minister for Immigration and Border Protection*[126], following earlier decisions[127], this Court unanimously concluded that legislation will usually contain an implied requirement that an administrative decision will not be rendered invalid by an immaterial error. The implication, like its long-recognised express or implied counterparts in criminal law and appellate review, should only apply in exceptional cases to prevent a decision that involved procedural unfairness from being quashed[128]. Otherwise, the basis for recognition of the implication, namely an inference based upon reasonable expectations of efficiency, would undermine the more powerful inference of fairness, founded on natural justice. Indeed, if immateriality were not truly an exceptional circumstance, its very premise of efficiency could be undermined by administrative review itself descending further into a merits-based assessment of the result.

95 A simple approach to deciding this case, consistent with the basis of procedural fairness in natural concepts of justice, would have been to ask three questions:

(1) Had Mr Nathanson established that it was an irregularity capable of producing "practical injustice" for the Administrative Appeals Tribunal to fail to afford him an opportunity to present further evidence and submissions on the domestic violence issue? The requirement of establishing a threshold of practical injustice is common to many grounds of judicial review[129]. It is sometimes described as the "first" question or "threshold" question[130]. In the context of procedural fairness, it can be

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126 (2018) 264 CLR 123.

127 See (2018) 264 CLR 123 at 146 [68], 147 [71], citing *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32 [23].

128 See *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 481-482 [175]-[179]; 390 ALR 590 at 635-637.

129 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 477 [159]-[160]; 390 ALR 590 at 630.

130 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 462-463 [85], 477 [159]-[161]; 390 ALR 590 at 610-611, 630-631. See also *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 54 [66].

assessed by asking whether an irregularity could involve unfairness, which is sometimes understood as whether it was an irregularity of a type that was "capable" of affecting the result[131]. In short, the concept of procedural fairness "is essentially practical" – "the concern of the law is to avoid practical injustice"[132].

(2) If there was practical injustice, had Mr Nathanson established that the procedural unfairness was sufficiently serious that it was, without more, material?

(3) If the procedural unfairness was not of that degree of seriousness, had it been established that the denial of procedural fairness could not have made any difference to the result?

96 In the reasons below, I will refer to each of these questions as question 1, question 2, and question 3. One difficulty with some judicial review decisions concerned with "materiality" is that courts, including this Court, have not always kept these three questions separate. That has led to confusion. And it has led to error.

97 Sometimes question 1 has been mistakenly treated as question 3. For instance, although the decision of this Court in *Minister for Immigration and Border Protection v SZMTA* could easily have been resolved on the basis that the applicants for judicial review did not establish any practical injustice, the only question asked in the primary joint judgment was whether the applicants had established that the result of the case might have been different[133]. As Mortimer J later, and astutely, said, "it is important not to adopt too broad or literal a reading of what was said by [the primary joint judgment] in *SZMTA*"[134].

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131 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 477-478 [162]; 390 ALR 590 at 631, citing *R v Matenga* [2009] 3 NZLR 145 at 158 [31]. See also *Cesan v The Queen* (2008) 236 CLR 358 at 392-396 [116]-[132]; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 54 [66]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 462-463 [85]-[87]; 390 ALR 590 at 610-611.

132 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]. See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

133 See *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, discussed in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 478 [163]; 390 ALR 590 at 631.

134 *PQSM v Minister for Home Affairs* (2020) 279 FCR 175 at 181 [17].

98 Sometimes question 2 has been misunderstood or conflated with question 3[135]. For instance, it has been said that "[t]he standard condition that a decision-maker be free from actual or apprehended bias is one example" of a ground of review that, of its nature, incorporates an element of materiality and so does not require any further proof of materiality[136]. If the effect of this reasoning is to say nothing more than that actual or apprehended bias is so serious that it will always be material, then it could readily be accepted. But the reasoning might be understood as suggesting that a case of actual or apprehended bias "incorporate[d]"[137] a conclusion that the result of the case might have been different. The reasoning should not be understood in that manner. So understood, it would be plainly wrong as a matter of principle and demonstrably wrong as a matter of authority.

99 As a matter of principle, a manifestly hopeless application does not transform into one that has prospects of success if there is an apprehension of bias on the part of the decision-maker. Indeed, the apprehension of bias might not even arise until after the manifestly hopeless application has been presented. And as matter of authority, there are also numerous cases of apprehended bias on the part of the decision-maker in which the result would have been inevitable before any decision-maker. In such cases, the apprehended bias plainly could not have "incorporated" a conclusion that the result of the case might have been different without the apprehension of bias.

100 In *R (Al-Hasan) v Secretary of State for the Home Department*[138], Lord Brown (with whom Lord Bingham, Lord Rodger, Baroness Hale, and Lord Carswell agreed) said that it could not "sensibly be supposed ... that there could have been any different outcome to the adjudications whoever had heard them". Nevertheless, he entertained "not the slightest doubt" as to the correctness of the submission that the adverse disciplinary findings should be quashed due to the apprehension of bias on the part of the decision-maker.

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135 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342 [58].

136 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598. See also *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 95-96 [47].

137 (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598.

138 [2005] 1 WLR 688 at 702 [42]-[43]; [2005] 1 All ER 927 at 943. See further *R (National Association of Memorial Masons) v Cardiff City Council* [2011] EWHC 922 at [44]; *Paling v Ipswich Magistrates Court* [2021] EWHC 2739 at [21].

101 The same point had been made earlier by Lord Bingham (with whom Lord Nicholls, Lord Hope and Lord Scott agreed) in the course of quashing decisions reached by temporary sheriffs whose conduct was "impeccable". There was "nothing to suggest that the outcome of any of these cases would have been different" but the right to be tried by an independent and impartial tribunal is one that "cannot be compromised or eroded"[139].

102 In the United States, the same point is again made by treating apprehended bias as a ground that is so fundamental that it applies "[n]o matter what the evidence"[140]. It will be subject to "automatic reversal" and will "defy harmless-error review"[141]. So too, in Australia, as Lander J said in *Applicant A165 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs*[142], rejecting a submission that there could be any enquiry as to whether the outcome was inevitable once apprehended bias is established, "no further enquiry is necessary. All applicants are entitled to a hearing before an independent and impartial Tribunal. That is a fundamental right."

103 There are other examples where the answer to question 2 is that the jurisdictional error is so fundamental that question 3 concerning "materiality" does not arise. These examples might include where there is an extreme denial of procedural fairness[143], a failure to exercise jurisdiction with respect to the correct criterion[144], or where the jurisdictional error is an erroneous denial, or mistaken assertion, of jurisdiction over the matter or an important part of it[145].

104 Most recently, the conflation of question 1 and question 3 was one reason for the erroneous conclusion that applicants bear the onus of proof for question 3.

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139 *Millar v Dickson* [2002] 1 WLR 1615 at 1624 [16]; [2002] 3 All ER 1041 at 1050. See also at 1647-1648 [85]; 1072-1073 (Lord Clyde).

140 *Tumey v Ohio* (1927) 273 US 510 at 535. See also *Ward v Village of Monroeville* (1972) 409 US 57.

141 *Neder v United States* (1999) 527 US 1 at 8-9.

142 [2004] FCA 877 at [89].

143 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 147-148 [72].

144 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 148 [72].

145 *Purcell v The Director of Public Prosecutions* [2021] NSWCA 269 at [25]. See also *OKS v Western Australia* (2019) 265 CLR 268 at 281-282 [36], citing *Lane v The Queen* (2018) 265 CLR 196 at 210 [47]-[48].

In *MZAPC*[146], Kiefel CJ, Gageler, Keane and Gleeson JJ said of an earlier decision that "[i]mplicit in the characterisation of the case as one in which 'practical injustice' lay in the denial of 'an opportunity which in fairness ought to have been given' was that the case was one in which that previously identified threshold of materiality was met". That conflation was immediately followed by the statement that such decisions do not support a conclusion that the Minister must bear the onus of proof for question 3[147]. Of course they do not. But nor does the onus of proof on an applicant to establish practical injustice (question 1) support a conclusion that the applicant must bear the onus of proof of materiality (question 3). It is a different question.

A simple resolution of this case

105 In this case, the simple answer to question 1 is "yes". There was no controversy about that issue on this appeal. For the reasons given by Gordon J, it is also strongly arguable that the answer to question 2 is "yes". That would be the end of the enquiry. But, in circumstances in which the focus of this appeal has been on question 3, these reasons will focus on that question. By the application of only the slightest imaginable onus on Mr Nathanson to establish that there might have been a different result without the denial of procedural fairness, the answer to that question is also "yes".

Confusion in the state of the law on question 3

106 Although this Court was unanimous in the result in *MZAPC*, different approaches were taken to the question of who bears the onus of proving materiality in question 3. In the primary joint judgment of Kiefel CJ, Gageler, Keane and Gleeson JJ[148], their Honours held that the onus of proof was borne by the applicant for judicial review. By contrast, Gordon and Steward JJ in a joint judgment[149], with which I agreed and added further reasons[150], held that the onus of proof was borne by the Minister who alleged that the error was not material.

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146 See *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 458 [59]; 390 ALR 590 at 605, citing *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-345 [60], [62]-[69].

147 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 458 [60]; 390 ALR 590 at 605.

148 (2021) 95 ALJR 441 at 458 [60]; 390 ALR 590 at 605.

149 (2021) 95 ALJR 441 at 463 [86]-[87], 471 [123]; 390 ALR 590 at 611, 622.

150 (2021) 95 ALJR 441 at 476 [155]; 390 ALR 590 at 629.

107 As I pointed out in *MZAPC*[151], one of the problems with placing the onus of proof for question 3 upon an applicant for judicial review is that it is inconsistent with the decisions of this Court in *Stead v State Government Insurance Commission*[152] and *Re Refugee Review Tribunal; Ex parte Aala*[153]. The reasoning of all the Justices in those decisions expressly recognised that a new trial or new hearing would be granted to a party who established a denial of procedural fairness, without any onus upon that party to establish that the result of the case might otherwise have been different.

108 In *Stead*, the appellant was denied the opportunity of making submissions on the issue of which expert's evidence should be preferred on the question of causation. The appellant was not required to establish that any submissions that he might have made could have made a difference. All that the appellant was required to show, for question 1 to be answered in his favour, was "practical injustice" in the sense of loss of an "opportunity to advance his case"[154]. Put in different terms, the appellant needed to show that the error affected the "possibility of a successful outcome"[155]. As the Court then explained in *Stead*[156], addressing question 3, "[i]n order to *negate* that possibility, it was ... necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result". The appellant was not required to prove that anything that he might have said or done might have led to a different result. Once the appellant established practical injustice, the respondent could only *negate* that result by establishing that the proper procedure could not possibly have produced a different result.

109 In *Aala*, the applicant was "deprived of the opportunity to answer, by evidence and argument"[157], allegations that he had concocted evidence concerning his claim to refugee status. That involved practical injustice. It was "possible" that the result might not have been different but, as Gleeson CJ said, "no one [could] be sure of that"[158]. It was not for the applicant to prove that the result might have

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151 (2021) 95 ALJR 441 at 486 [197]; 390 ALR 590 at 642.

152 (1986) 161 CLR 141.

153 (2000) 204 CLR 82.

154 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]-[38].

155 (1986) 161 CLR 141 at 147.

156 (1986) 161 CLR 141 at 147 (emphasis added).

157 (2000) 204 CLR 82 at 88 [3].

158 (2000) 204 CLR 82 at 89 [4].

been different. The applicant did not need to make submissions or tender evidence concerning whether anything might have made a difference because, as Kirby J expressed the point, "the victim of the breach is ordinarily entitled to relief" and the court could only deny relief if an "affirmative conclusion" were reached that the breach "could have made no difference"[159]. Or, as Callinan J expressed the point, the court needed positively to "say that a different result would not have been reached"[160].

110 These two decisions are not isolated examples. There are numerous other cases in this Court which might have been decided differently if the party who established a denial of procedural fairness in an administrative hearing had been required also to prove that the result of the hearing might otherwise have been different. The existence of the multitude of authority is one reason why, even after the decision in *SZMTA*, counsel and this Court assumed that the onus of proof of materiality was borne by a respondent Minister rather than an applicant[161].

111 Another example is *Annetts v McCann*[162]. It was never suggested in that case that the appellants needed to establish anything more than having suffered a practical injustice by being denied the opportunity to make submissions at an inquest in relation to any adverse findings that might be made concerning their deceased child. The appellants did not need to show that anything they might have said might have affected the result of the inquest. Indeed, it was common ground that the findings could not have affected their own rights. But they had a right to be heard: "[t]he relationship of parent and child and the emotional consequences for the family of such a finding demand that such an opportunity be afforded"[163].

112 Yet another example is *Haoucher v Minister for Immigration and Ethnic Affairs*[164]. A majority of this Court quashed a decision of the Minister that had denied procedural fairness to the applicant despite the fact that, as Dawson J observed in the minority, it was "not suggested that there [was] any new material which could be placed before the Minister to lead him to a conclusion contrary to that which he in fact reached" so any "further hearing would result only in the

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159 (2000) 204 CLR 82 at 130-131 [131], quoting *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

160 (2000) 204 CLR 82 at 155 [211].

161 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 62 [33]; 385 ALR 212 at 222.

162 (1990) 170 CLR 596.

163 *Annetts v McCann* (1990) 170 CLR 596 at 620.

164 (1990) 169 CLR 648.

repetition of those matters which were already before the Minister"[165]. The applicant did not need to prove that there was a possibility of a different result. The decision was set aside irrespective of "[w]hether or not the [applicant] could have persuaded the Minister" to the contrary conclusion[166].

113 On one view, the primary joint judgment in this Court in *MZAPC* requires the rejection of the above-described reasoning, and perhaps also the result, in all of these cases. Their Honours in *MZAPC* said[167]:

> "the onus of proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different had the breach not occurred lies unwaveringly on the plaintiff".

114 Of course, if the relevant "historical facts" are no more than the record of the proceedings below together with the record of the procedural irregularities that occurred, then saying that an applicant bears the onus of establishing those matters is no more than confirming the long-established position that an applicant must establish the practical injustice required for an affirmative answer to question 1. In order to establish that a procedural irregularity involves practical injustice – that the error was not merely trivial and had the capacity to affect the result – it is plainly necessary for an applicant to prove the historical facts surrounding the irregularity.

115 But the primary joint judgment in *MZAPC* appeared to be saying more than this, insisting that an applicant for judicial review also bears the onus of establishing that the result might have been different but for the denial of procedural fairness. Their Honours had said earlier in their reasons that the applicant must discharge their burden to "enable the court to be satisfied of the realistic possibility that a different decision *could* have been made"[168]. And the primary joint judgment affirmed as correct the obiter dicta of Bell, Gageler and

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165 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 663.

166 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 684.

167 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 458 [60]; 390 ALR 590 at 605.

168 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 454 [39]; 390 ALR 590 at 600 (emphasis in original).

Keane JJ in *SZMTA*[169]. In that case, their Honours said that "[a] breach is material to a decision only if compliance could realistically have resulted in a different decision" and generally "the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof"[170].

Fidelity of the Federal Court to the apparent requirements of *MZAPC*

116 In this case, the primary judge (Colvin J) and the majority of the Full Court of the Federal Court of Australia (Steward and Jackson JJ) did exactly what the primary joint judgment in this Court in *MZAPC* appeared to require in the application of question 3.

117 The primary judge correctly observed that although the questions of practical injustice (question 1) and materiality (questions 2 and 3) may be distinct, these questions appeared to have been conflated in the primary joint judgment in *SZMTA*, with the effect of placing the onus on the applicant to demonstrate that there was a realistic possibility that the decision might have been different if the breach of procedural fairness had not occurred[171]. The primary judge, unsurprisingly, held that Mr Nathanson had not discharged that onus because he had not pointed to any particular evidence that he might have presented or any particular submission that he might have made that might have affected the decision of the Administrative Appeals Tribunal if he had been given the opportunity[172].

118 The majority of the Full Court upheld this reasoning. Mr Nathanson had established practical injustice, and therefore procedural unfairness, because the denial to him of the opportunity to present evidence or make further submissions on the issue of domestic violence was not trivial. It was capable of affecting the result. But the majority observed that Mr Nathanson adduced no evidence before the primary judge of what he would have done but for the denial of procedural fairness. In the absence of any such evidence, it could not be inferred simply from the record that he could have produced further evidence or said "something more"

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169 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 449 [2]-[3]; 390 ALR 590 at 592.

170 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45]-[46].

171 *Nathanson v Minister for Home Affairs* [2019] FCA 1709 at [45]-[46], [55].

172 *Nathanson v Minister for Home Affairs* [2019] FCA 1709 at [60]-[62].

that might have changed the result[173]. Since Mr Nathanson bore the onus on that point, his appeal was dismissed[174].

119 If the onus on Mr Nathanson to prove materiality were truly a substantive onus, involving a risk of non-persuasion[175], and *SZMTA* and *MZAPC* had not suggested otherwise in their novel recognition of that onus, then the reasoning of the primary judge and the majority of the Full Court on the issue of onus would be impeccable. If the onus were truly a substantive onus, Mr Nathanson could not have discharged that onus by doing and saying nothing of substance beyond pointing to the practical injustice he suffered. Otherwise, question 3 would add nothing to question 1.

120 The reasoning of the minority judge in the Full Court (Wigney J), at least in part, was concerned with the requirements of question 2. His Honour correctly responded to that question by relying in part upon the reasons of Gageler and Gordon JJ in a case that preceded *MZAPC*, saying that "it will not always be incumbent on a person who seeks to establish jurisdictional error on the basis of a denial of procedural fairness to demonstrate, by evidence, what would have, or may have, occurred had the denial of procedural fairness not occurred"[176]. Wigney J also correctly noted that such a focus on question 2 was a way of reconciling (albeit only in part), on the one hand, the apparently "unequivocal and unqualified statements" made by the primary joint judgment in *SZMTA* requiring an applicant to establish that the result might have been different and, on the other, statements in cases such as *Aala* that a decision might be quashed even for a "trivial" error[177]. His Honour concluded that materiality could "readily be inferred" in circumstances where Mr Nathanson was "effectively denied the opportunity to address, in evidence or submissions, a matter which turned out to be important, if not critical, to the Tribunal's adverse decision against him"[178].

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173 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 53 [125], 54 [131].

174 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 56 [138].

175 See, eg, Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 355. See also Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 283-286 §2485.

176 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 37 [54], citing *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342 [58].

177 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 38 [57]-[58], quoting *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [59]-[60].

178 *Nathanson v Minister for Home Affairs* (2020) 281 FCR 23 at 43 [77].

Injustice or incoherence in the application of question 3?

121 The legal rules concerning materiality, particularly the application of question 3, are not presently in a state of blinding lucidity. This Court requires a reviewing court to consider whether an applicant has overcome a "threshold of materiality" that is "ordinarily", but not always, required to be met[179]. In doing so, within the unspecified boundaries of ordinary cases, this Court has held that the reviewing court must direct its attention to whether the applicant has established a "counterfactual conjecture of a realistic possibility"[180] which allows "reasonable conjecture within the parameters set by the historical facts"[181].

122 These legal rules for question 3, as established by the primary joint judgments of this Court in *SZMTA* and *MZAPC*, are not merely difficult to apply. They have also presented the Federal Court with forensic difficulties and anomalies. In some cases, an applicant who is denied procedural fairness has relied upon evidence that might have been led, or submissions that might have been made, in order to prove as a matter of "reasonable conjecture" that the administrative decision could have been different. That evidence or those submissions have sometimes been held to be insufficient to discharge the applicant's onus[182]. Yet, in other cases, the applicant has not even attempted to discharge the onus but the obvious injustice of requiring an applicant to establish more than procedural unfairness has been avoided by an inference, which is sometimes a fiction, that the applicant "would have said whatever [they] could have said"[183].

123 There may come a point at which the confusion, forensic difficulties, and anomalies are so great that it is necessary to say that the efficiency-based implication concerning materiality has become, in its application, such a Frankenstein's monster of incomprehensibility that it is undermining the very basis for which it exists and should be abandoned. It suffices at present to say that some

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179 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598.

180 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 457 [52]; 390 ALR 590 at 603.

181 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

182 See, eg, *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 29.

183 See, eg, *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at 466 [39].

clarity can be achieved by a clear separation of the three questions set out earlier in these reasons. The focus of submissions in this case was upon question 3.

124 Assuming a positive answer to question 1, and putting to one side question 2, question 3 might be thought to present this Court with a choice between injustice if the appeal is dismissed, and incoherence if it is allowed.

125 On the one hand, if this appeal were dismissed, there would be plain injustice. Mr Nathanson would be refused relief despite the fact that, as Kiefel CJ, Keane and Gleeson JJ rightly observe, Mr Nathanson was denied procedural fairness on an issue that required consideration. An implication of procedural fairness, based upon reasonable expectations of justice, would be undermined by the overly broad application of an implication concerning materiality, based upon reasonable expectations of efficiency.

126 On the other hand, if this appeal were allowed on the basis that materiality had been established under question 3, it might be thought that incoherence would arise from a finding that Mr Nathanson could discharge an apparently substantive onus of establishing the possibility of a different result without making any submissions or leading any evidence to establish anything of substance that would have been said or done differently but for the denial of procedural fairness.

127 If it were necessary to choose between incoherence and injustice, I would choose incoherence. But the choice is not quite so stark. A resolution, for the present, lies in treating the onus of proof of materiality, where it arises, as being so slight[184] that it can be satisfied by an applicant establishing nothing more than a "quadruple might" at a high level of generality. To reiterate: there *might* have been things that Mr Nathanson or his wife *might* have said at the hearing that *might* have assisted his case in a manner that *might* have led to a different result.

Conclusion

128 I agree with the orders proposed in the joint judgment.

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184 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 476 [157]; 390 ALR 590 at 629.