When is a denial of procedural fairness 'material'?

Nathanson v Minister for Home Affairs [2022] HCA 26

By Boxun Yin[1]

In *Nathanson v Minister for Home Affairs* [2022] HCA 26, the High Court considered when a denial of procedural unfairness gave rise to jurisdictional error. It had previously been established that a judicial review applicant had to demonstrate that the denial of procedural fairness was 'material' in the sense that there was a realistic possibility of a different outcome had procedural fairness been observed.[2] The question here was how that materiality was to be established.

Mr Nathanson, a New Zealand citizen, arrived in Australia in 2010. He was granted a visa in 2013. Subsequently, he was found guilty of a serious criminal offence and was sentenced to two-and-a-half-years imprisonment. His visa was then mandatorily cancelled on the basis that he did not pass the character test. A delegate of the Minister decided not to revoke that cancellation. Mr Nathanson then applied to the Administrative Appeals Tribunal for a review of that decision.

Between the date of the Ministerial delegate's decision and the Tribunal hearing, the considerations which decision-makers were required to take into account had changed. The change was that the decision-maker additionally had

to consider 'the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed' as part of the primary consideration of 'the protection of the Australian community from criminal or other serious conduct.'

It was not in dispute that the Tribunal had to apply the changed considerations and ensure that Mr Nathanson was given a reasonable opportunity to present his case. Mr Nathanson had not been charged or convicted of such offences, but there were two police reports of family violence. His wife (who had made those reports) had submitted a letter of support but did not address the circumstances relating to her reporting of those incidents.

At the hearing, the Minister relied on the two police reports and submitted that this was 'extremely serious conduct' which (applying the changed considerations) should be 'viewed very seriously.' The Tribunal member gave Mr Nathanson a copy of the changed considerations highlighted with red markings, but said that these were 'only minor changes,' that they were of 'minor relevance,' and that they were mostly relevant to a person who had been charged or convicted with offences in relation to women and children. The Tribunal took no steps to draw this aspect of the Minister's submissions to Mr Nathanson's attention and did not take any steps to give him an opportunity to address those submissions.

The Tribunal affirmed the delegate's decision, finding that the domestic violence incidents considered with a history of other violence offences weighed strongly against revoking the visa cancellation.

In the Federal Court, Colvin J at first instance and Steward and Jackson JJ (Wigney J dissenting) on appeal accepted that Mr Nathanson had been denied procedural fairness but that there was no jurisdictional error since the procedural unfairness was not 'material.'

All six available members[3] of the High Court held that the materiality threshold had been satisfied. It is now clear that the threshold of materiality in a case of denial of procedural unfairness is low, and will be met where the applicant could have achieved a different outcome.

The plurality (Kiefel CJ, Keane and Gleeson JJ) held at [32], [33] and [39] that materiality is determined by asking whether, as a matter of reasonable conjecture, there was a realistic possibility that a different decision could have been made within the parameters of the historical facts proven on the balance of probabilities. Where there has been procedural unfairness, the standard of reasonable conjecture is 'undemanding' and does not require the applicant to demonstrate how he might have taken advantage of that lost opportunity by reference to additional evidence or submissions that he might have made. This is because the standard proceeds on the assumption that, if given such an opportunity, a person will take advantage of it and by doing so *could* achieve a favourable outcome. Gageler J agreed, emphasising at [46]-[47], [55] that the threshold of materiality is 'not onerous' and that it was sufficient for the applicant to show, as a matter of reasonable conjecture, that the decision 'could' – not would – have been different had procedural fairness been observed.

Gordon J went further, holding at [76]-[81] that 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 falls within the category of egregious error that will *always* be jurisdictional, regardless of the effect the error may have had on the decision-maker's conclusion. Thus, the applicant bears no additional onus to demonstrate that the error could realistically have resulted in a different decision. However, if such a requirement existed, her Honour at [83] agreed that the threshold was whether the decision *could* have been different.

Edelman J at [93] sought to go even further, and expressed serious doubt on the correctness of recent authority[4] requiring a judicial review applicant to prove materiality. However, accepting that premise, his Honour said that the answer to the question of what an applicant had to do to discharge the onus of proving materiality must be "almost nothing", and that:

> It sufficed … to make a 'quadruple might' submission by speculating as follows: but for the denial of procedural fairness, 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.

This decision has important implications for the concept of materiality as a principle of statutory interpretation. First enunciated (very recently) as an efficiency consideration,[5] the pendulum has now swung back in favour of judicial review applicants. It is now clear that the concept is not onerous in circumstances where procedural fairness has been denied. The question remains as to the scope and content of the concept in contexts outside breach of procedural fairness. In light of the strongly worded separate judgments of Gordon J and Edelman J, questions may additionally be raised as to the longevity of the principle. **BN**

ENDNOTES

1 Barrister, Banco Chambers.

2 *Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at [45]-[46] per Bell, Gageler and Keane JJ, affirmed in MZAPC v Minister for Immigration and Border Protection (2021) 95 ALJR 441 at [2]-[3] per Kiefel CJ, Gageler, Keane and Gleeson JJ .*

3 Steward J did not sit as he had been a member of the Full Court from which the appeal had been brought.

4 *MZAPC v Minister for Immigration and Border Protection (2021) 95 ALJR 441 per Kiefel CJ, Gageler, Keane and Gleeson JJ.*

5 *Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123 at [29] per Kiefel CJ, Gageler and Keane JJ.*