HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M70/2023

BETWEEN:

LPDT
Appellant

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

Administrative Appeals Tribunal
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. The first issue presented by this appeal is whether, in assessing the materiality of each of the errors in the Administrative Appeals Tribunal's decision, the Full Federal Court erred in undertaking the requisite counterfactual inquiry by reference to the Tribunal's findings and reasons (**counterfactual inquiry issue**).[1]

3. The second issue is whether the Full Court was required to assess the materiality of the errors in the Tribunal's decision "cumulatively", where each error was found by the Full Court to be an error within jurisdiction, and whether, if it was required to do so, the Full Court undertook such an assessment and, even if it did not do so, any appealable error is shown to exist in this case (**cumulative assessment issue**).[2]

Part III: Notice under s 78B of the *Judiciary Act 1903* (Cth)

4. The first respondent considers that no notice is required to be given in accordance with s 78B of the *Judiciary Act 1903* (Cth).

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1 Cf appellant's submissions dated 2 November 2023 (**AS**), [2(a)-(b)].

2 Cf AS [2(c)].

Part IV: Facts

5. The material facts set out at AS [6]-[20] are not contested.[3] The relevant factual background is set out in the reasons for judgment of the primary judge[4] at [1]-[7] and [16]-[18] and the reasons for judgment of the Full Court[5] at [4]-[35].

Part V: Argument

Principles

Materiality and the counterfactual inquiry

6. For an error in administrative decision-making to be jurisdictional, the error must be shown to be material. To establish materiality, an applicant on judicial review must show that the error deprived the applicant of a realistic possibility that, absent that error, the decision could have been different.[6] A reviewing court must consider the nature of the error by identifying the "historical facts" leading to the decision (that is, "how the decision that was in fact made was in fact made").[7] The reviewing court must then consider, "as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined", whether the decision that was in fact made could have been different if the relevant condition on the exercise of decision-making power had been complied with.[8] In *MZAPC*, Kiefel CJ, Gageler, Keane and Gleeson JJ described this as a "counterfactual inquiry".[9]

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3 Insofar as the appellant has referred, at AS [12]-[20], to "aspects" of the Tribunal's reasons (as well as aspects of the Full Court's reasons), it is necessary to consider those reasons as a whole and in their broader context.

4 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 810 [see also CAB 58-91].

5 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 [see also CAB 105-152].

6 *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 (***Nathanson***) at [1], [2], [32] (Kiefel CJ, Keane and Gleeson CJ), [45]-[46] (Gageler J), [63] (Gordon J); *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 (***MZAPC***) at [2], [38]-[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ), [101] (Gordon and Steward JJ), [164] (Edelman J); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at [45] (Bell, Gageler and Keane JJ) *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [31] (Kiefel CJ, Gageler and Keane JJ), [72] (Edelman J).

7 *MZAPC* at [38]-[40] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

8 *Nathanson* at [32] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* at [38]-[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

9 *MZAPC* at [52] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

7. The applicant bears the burden of proving on the balance of probabilities the historical facts necessary to enable a reviewing court to be satisfied of the realistic possibility that a different decision could have been made if there had been compliance with the relevant condition on the exercise of decision-making power.[10]

8. In *MZAPC*, Kiefel CJ, Gageler, Keane and Gleeson JJ referred to the principle of statutory interpretation that a statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance, and observed that this principle might be described as "a common sense guide to what a Parliament in a liberal democracy is likely to have intended".[11] Their Honours explained that:[12]

> 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" 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" will deprive a decision of statutory force.

9. In *SZMTA*, Bell, Gageler and Keane JJ found that there had been an invalid notification under s 438 of the *Migration Act 1958* (Cth) and observed that, while a reviewing court must be careful not to intrude into the fact-finding function of the Tribunal, "the court must be alive to the potential for a document or information, objectively evaluated, to have been of *such marginal significance* to the issues which arose in the review that the Tribunal's failure to take it into account could not realistically have affected the result".[13]

Materiality in review of evaluative decision-making

10. As explained in *MZAPC* and *Nathanson*, a reviewing court's task is to consider "how the decision that was in fact made was in fact made".[14] In particular, in

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10 *Nathanson* at [32] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* at [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

11 *MZAPC* at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

12 *MZAPC* at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ) (citations omitted).

13 *SZMTA* at [48] (Bell, Gageler and Keane JJ) (emphasis added). See also *Nathanson* at [76] (Gordon J), citing *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at [39] (Allsop CJ). See further *SZMTA* at [72] (Bell, Gageler and Keane JJ) and *Nathanson* at [53] (Gageler J).

14 *Nathanson* at [32] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* at [38]-[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

MZAPC at [38]-[39], Kiefel CJ, Gageler, Keane and Gleeson JJ stated (citations omitted; original emphasis) that:

> The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of the decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence. And like other counterfactual questions in civil proceedings as to what could have occurred – as distinct from what would have occurred – had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.
>
> Bearing the overall onus of proving jurisdictional error, the plaintiff in an application for judicial review must bear the onus of proving on the balance of probabilities all the historical facts necessary to sustain the requisite reasonable conjecture. The burden of the plaintiff is not to prove on the balance of probabilities that a different decision *would* have been made had there been compliance with the condition that was breached. But the burden of the plaintiff is to prove on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition.

11. There is no structural or other impediment to the conduct of this counterfactual inquiry in respect of a decision of an evaluative nature. Indeed, so much was contemplated by this Court in *Nathanson*. There, Kiefel CJ, Keane and Gleeson JJ explained that a decision of the Administrative Appeals Tribunal not to revoke the cancellation of the appellant's visa was in fact 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".[15] Their Honours concluded that, in the particular circumstances of that case, "additional

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[15] *Nathanson* at [38] (Kiefel CJ, Keane and Gleeson JJ). See also *Nathanson* at [58] (Gageler J). See further *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488 (***Thornton***) at [75]-[81] (Gordon and Edelman JJ).

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 appellants conduct and, ultimately, the outcome of the Tribunal's review".[16]

12. To reach that conclusion, it was necessary for the Court to have regard to the actual path of decision-making, and then to consider the "counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached".[17] In *Nathanson*, that breach was described by Gageler J as having "borne centrally on the evaluative and discretionary decision which the Tribunal went on in fact to make",[18] and by Gordon J as "infecting" various stages of the Tribunal's reasoning.[19]

13. There have been numerous decisions of the Full Federal Court in which such an analysis has been applied to the review of evaluative decisions.[20] Before the Full Court, and in this appeal,[21] the appellant has referred to *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[22] In that case, Mortimer and Bromwich JJ observed that, where there is error in the reasons given by a decision-maker, the counterfactual inquiry "cannot simply be done by taking the reasons and findings as they stand, because those reasons are a product which incorporates the misunderstanding".[23]

14. As a statement of general principle about the nature of the counterfactual inquiry, so much may be accepted. But it also says nothing more than what was enunciated in *MZAPC* and *Nathanson*. By necessity, in undertaking the counterfactual inquiry, a reviewing court "must be careful not to assume the function of the decision-

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16 *Nathanson* at [39] (Kiefel CJ, Keane and Gleeson JJ).

17 *MZAPC* at [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

18 *Nathanson* at [56] (Gageler J).

19 *Nathanson* at [72]-[74] (Gordon J).

20 See, for example, *PQSM v Minister for Home Affairs* (2020) 269 FCR 175 at [140] (Banks-Smith and Jackson JJ), *XFCS v Minister for Home Affairs* [2020] FCAFC 140 at [48]-[50] (Moshinsky, SC Derrington and Colvin JJ), and *Kwatra v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCAFC 194 at [30] (Markovic, Cheeseman and Hespe JJ).

21 See AS [31]-[32].

22 (2020) 276 FCR 75 (***Chamoun***). In this matter, the Full Court gave detailed consideration to *Chamoun* at CAB 130-132 [78]-[83].

23 *Chamoun* at [70] (Mortimer and Bromwich JJ).

maker".[24] It cannot be said, however, that where a reviewing court *does* take that care in undertaking the counterfactual inquiry, every error in the making of an evaluative decision will necessarily be found to have deprived an applicant of the possibility of a successful outcome.

15. In any event, *Chamoun* was not concerned with an error in the decision-maker's evaluation of what weight might be given or not given to particular factors. The Full Court in the present case, with respect correctly, distinguished *Chamoun* on the basis that, there, the decision-maker "misunderstood the very power to be exercised" [CAB 135 [96]]. In *Chamoun*, the Minister's error was described as his misunderstanding about whether he had power to seek further information in relation to matters the subject of his decision.[25]

16. More relevantly analogous for present purposes is, as the Full Court identified below, a case in which an error has been made with respect to a piece of evidence that provides further support for a finding that is otherwise supported by strong evidence [CAB 131-132 [82]]. As the Full Court observed, such an error might be found not to be material.[26] In *Mackie – Appeal*, the Full Federal Court (Rares, Mortimer and O'Sullivan JJ) affirmed such a finding made by the primary judge (Besanko J). There, the Full Court referred to the principles enunciated in the plurality reasons in *MZAPC* at [38]-[39][27] and, applying those principles, found that a reviewing court is required to weigh the totality of the "historical facts" as represented by the reasons of the decision-maker and then make a judgment about the possibility of a different result if the error had not been made.[28]

Counterfactual inquiry issue

Subparagraph 8.1.1(1)(a) of Direction 90

17. Subparagraph 8.1.1(1)(a) of *Direction No 90 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under*

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24 *MZAPC* at [51] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

25 See *Chamoun* at [61]-[66].

26 CAB 131-132 [82], citing *Mackie v Minister for Home Affairs* [2021] FCA 1326 at [55] (Besanko J), affirmed on appeal in *Mackie v Minister for Home Affairs* [2022] FCAFC 120 (***Mackie – Appeal***) at [62] (Rares, Mortimer and O'Sullivan JJ).

27 *Mackie – Appeal* at [60].

28 *Mackie – Appeal* at [62].

section 501CA stated that:

> In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:
>
> (a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:
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> (i) violent and/or sexual crimes;
>
> (ii) crimes of a violent nature against women or children, regardless of the sentence imposed;
>
> (iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

18. The Tribunal found that subparagraph 8.1.1(1)(a) "militates strongly in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" [CAB 25 [71]].

19. The Full Court found that the Tribunal's approach to subparagraph 8.1.1(1)(a) involved error [CAB 127 [64]-[65]]. In this regard, the Full Court found that the Tribunal's reasons "[did] not expose any chain of reasoning at all, let alone a comprehensible one, between the features of the Appellant's evidence referred to and the conclusion that sub-paragraph (a) 'militates strongly in favour of a finding that the [Appellant's] criminal offending has been of a very serious nature'" [CAB 127 [64]].

20. Having made that finding, the Full Court then considered whether the error was material. For that purpose, it "[took] the Appellant's case at its highest" and assumed that the subparagraph should have been wholly irrelevant to the Tribunal's task [CAB 135 [93]-[94]].[29] The Full Court concluded that the error was not material.

21. In undertaking that exercise, the Full Court observed that the counterfactual inquiry articulated in *MZAPC* at [38]-[39] requires an assessment of whether an error has deprived an applicant of the realistic possibility of a different outcome [CAB 131-132 [81]-[83], 134 [92]].

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[29] This was the approach contended for by the appellant before the Full Court [see CAB 135 [93]].

22. The Full Court was mindful of the caution to be applied in undertaking the counterfactual inquiry [CAB 130-131 [78], 132 [83]]. In respect of that task, the Full Court was aware of the need to take care in relying on reasons given by a decision-maker where those reasons may be affected by the error in question [CAB 130-131 [78]].[30] As the Full Court recognised [at CAB 130 [77]], the counterfactual inquiry must nonetheless be "take[n] up and resolve[d]", must be undertaken "on the basis of the evidence and inferences available", and will necessarily involve some consideration of the decision-maker's reasons.[31]

23. There is no error in the Full Court's conclusion that, even if the Tribunal had treated subparagraph 8.1.1(1)(a) as neutral, there was not a realistic possibility of a different outcome.

24. *First*, what is a "realistic" possibility in a given case will necessarily require consideration of the "common sense" or "real world" features of the decision the subject of review.[32] The standard of realistic possibility also connotes that to label an error "jurisdictional" is to reflect on its gravity [see CAB 131 [80]-[81]].[33]

25. Contrary to what is asserted at AS [38], the Full Court was correct to conclude that, even if the Tribunal had found that the appellant's offending was "serious" rather than "very serious", and had therefore afforded less weight to the first primary consideration in the Direction, there was no realistic possibility of a different outcome [see CAB 137 [103]].

26. The Tribunal considered the application of each of the four "primary considerations" (set out in section 8 in the Direction) and the "other considerations" (set out in section 9 of the Direction). In particular:

    26.1. the Tribunal considered that the second primary consideration ("whether the conduct engaged in constituted family violence") and the third primary consideration ("the best interests of minor children in Australia") were

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30 Citing *Chamoun* at [70] (Mortimer and Bromwich JJ).

31 See also *PQSM v Minister for Home Affairs* (2020) 279 FCR 175 at [151] (Mortimer, Banks-Smith and Jackson JJ).

32 Cf *MZAPC* at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also *Chamoun* at [66], where Mortimer and Bromwich JJ stated that "[i]n our opinion, the adjective 'realistic' in the statements of principle by the majority in the High Court in *Hossain* and [*SZMTA*] is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable …".

33 Citing *Hossain* at [25].

irrelevant, and therefore neutral [CAB 47 [164]];

26.2. the Tribunal considered that the first primary consideration ("protection of the Australian community from criminal or other serious conduct") and the fourth primary consideration ("expectations of the Australian community") weighed "strongly in favour of non-revocation" [CAB 47 [164]];

26.3. the Tribunal gave only "slight weight" in favour of revocation to two of the "other considerations", with the other two found to be "neutral" [CAB 46 [162]]; and

26.4. the Tribunal determined that the combined weight of those two other considerations did not outweigh the "strong, combined and determinative" weight that it attributed to the first and fourth primary considerations [CAB 47 [164]].[34]

27. It is in that context that it was for the appellant to show that, absent the Tribunal's erroneous approach to subparagraph 8.1.1(1)(a), there was a realistic possibility of the Tribunal having given such lesser weight to the first primary consideration that the outcome of the Tribunal's final weighing exercise might have been different.

28. The Full Court was correct to determine that there was no realistic possibility of that occurring, given that, whatever lesser weight might have been given to the first primary consideration, the Tribunal had found that the fourth primary consideration weighed strongly in favour of non-revocation and the two relevant other considerations weighed only slightly in favour of revocation [CAB 137 [103]].[35] Further, as the Full Court recorded [at CAB 116-117 [22]-[26]], the Tribunal's findings on the matters in paragraph 8.1.1(1) *all* pointed against revocation. Even if the Tribunal had found that subparagraph 8.1.1(1)(a) did not apply, there was no realistic possibility of the Tribunal finding that the first primary consideration did not weigh in favour of non-revocation.

29. At AS [39], the appellant asserts that the Full Court engaged in "impermissible reconstruction" in finding [at CAB 136 [100]] that the Tribunal gave significant weight to the matters in subparagraphs 8.1.1(1)(c) to (e) relating to the sentences

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[34] See also CAB 119 [34]-[35]. Further, paragraph 7(2) of the Direction stated that "[p]rimary considerations should generally be given greater weight than the other considerations".

[35] See also CAB 137-138 [101] and [104].

imposed, the frequency and any trend of increasing seriousness in the offending, and the cumulative effect of repeated offending. But that is the obvious inference to be drawn from the way in which the Tribunal dealt with subparagraphs 8.1.1(1)(c) to (e) [see CAB 25-27 [75]-[81]]. The point of the counterfactual inquiry, by reference to a standard of reasonable conjecture, is to accommodate "the reality that '[d]ecision-making is a function of the real world'".[36] That does not prohibit the drawing of inferences based on the relevant historical facts, provided that care is taken by a reviewing court not to engage in merits review. The Full Court was aware of the need for, and exercised, that care.

30. *Second*, at AS [41]-[48], the appellant takes issue with the Full Court's reasoning in respect of the Tribunal's assessment that the weight to be given to the relevant other considerations favouring revocation was "slight". The Full Court found that this language revealed that "the Tribunal did not consider there to be much force in the only considerations that countervailed against the conclusion driven by the conclusions reached on Primary Considerations 1 and 4" [CAB 137 [101]]. That finding was correct.

31. In this regard, the appellant argues at AS [43] that "the weight that the Tribunal in fact accorded to particular considerations was relative to the weight that the Tribunal accorded to other considerations". But that is not what the Tribunal did. Rather, the Tribunal relevantly reasoned that:

31.1. "the strength, nature and duration of the Applicant's ties to Australia weigh slightly, and certainly not determinatively, in favour of the restoration of his visa status …" (emphasis added) [CAB 45-46 [158]]; and

31.2. in relation to the appellant's overall links to the Australian community, "the totality of the evidence points to slight, and certainly not determinative weight, in favour of the Applicant" (emphasis added) [CAB 46 [161]].[37]

32. That is, in each case the Tribunal's finding was that the weight to be given to the relevant other consideration was "slight". The Tribunal then described the consequence of ascribing that weight to the relevant consideration in the context of the decision as a whole (that is, that it was not "determinative"). The language

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36 *MZAPC* at [32] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

37 See also CAB 44 [148].

adopted by the Tribunal, read in context, does not support a conclusion that the weight given by the Tribunal to the relevant other considerations somehow depended on the weight given by the Tribunal to the relevant primary considerations. The Tribunal's language only reveals the Tribunal's satisfaction that, having found that each of those relevant other considerations should be given "slight" weight, they could not outweigh the first and fourth primary considerations, each of which was found to weigh "strongly" against revocation. This was a statement of the obvious.

33. The question for a reviewing court is, recognising that these matters were given "slight" weight, whether they could, as a matter of reasonable conjecture, possibly outweigh the primary considerations (assessed as part of the counterfactual inquiry).

34. The appellant refers at AS [45] to the Full Federal Court decision in *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs*.[38] In that case, Colvin, Stewart and Jackson JJ observed at [28] that:[39]

> … compliance with the Direction is not achieved by focussing upon individual considerations and attributing some form of "weight" to that consideration viewed in isolation. The real burden of the task to be undertaken by a decision-maker who must comply with the Direction is to bring together the considerations as part of a single evaluation of their relative significance thereby weighing them all together. A task of that kind cannot be performed by fragmenting the consideration into an evaluation of individual considerations, attributing to each of them some form of individual abstract term purporting to be a measure of their significance, and then aggregating by some form of calculus each of those individual assessments. To undertake the task in that manner is not to comply with the Direction.

35. That analysis does not limit the way in which materiality principles apply to a decision of an evaluative nature. It is also consistent with the Full Court's observation [at CAB 136 [99] (emphasis added)] that:

> The way in which the Appellant advanced his argument highlighted that the Direction requires decision-makers to adopt a structured approach,

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

39 See also *CRNL* at [35].

> but tended to lose sight of the fact that the matters set out in sections 8 and 9 are matters that the decision-maker must "take into account … where relevant to the decision"; *those matters are not integers in a mathematical formula*.

36. Nothing said in *CRNL* alters the proper role of a reviewing court where, on identifying an error in relation to a matter of marginal significance in an evaluative decision, the court must determine whether that error deprived the applicant of the realistic possibility of a different outcome. Whether such a determination is made will, necessarily, turn on reasonable conjecture having regard to the relevant "historical facts".

37. In the present case, whether directly or indirectly, the Tribunal considered that each of subparagraphs 8.1.1(1)(a), (b), (c), (d), (e), (f) and (g) favoured non-revocation [CAB 24-28 [68]-[92]]. In this regard, and as the Full Court recognised [see, for example, CAB 136 [100]], subparagraph 8.1.1(1)(a) must be understood in the context of the Direction as a whole. Under paragraph 8.1.1, there are seven matters to which a decision-maker must have regard in considering the "nature and seriousness" of a non-citizen's offending or other conduct. Subparagraph 8.1.1(1)(a) goes to only one of those seven matters. Further, the matter the subject of paragraph 8.1.1 (namely the "nature and seriousness" of the conduct) is itself but one matter to which a decision-maker must "give consideration" when considering the "protection of the Australian community from criminal or other serious conduct" under paragraph 8.1. The "protection of the Australian community" is itself but one of four "primary considerations" set out in section 8.

38. As the Full Court observed [at CAB 136 [100]]:

> In other words, positing that the Tribunal ought to have disregarded sub-paragraph (a) entirely, that would only have affected one aspect of an ultimate decision that brought in many considerations. The Tribunal reached its view on the seriousness of the Appellant's offending by an analysis that clearly gave significant weight to the matters stated in sub-paragraphs (c) to (e) relating to the sentences imposed, the frequency and any trend of increasing seriousness in the offending, and the cumulative effect of repeated offending: see TR [75]-[81].

39. The Full Court was correct to conclude that, irrespective of any error by the Tribunal in its application of subparagraph 8.1.1(1)(a), a fair reading of its decision

revealed that the Tribunal "plainly considered that the Appellant's offending was very serious" [CAB 136 [97]-[98]]. And as the Full Court further observed [at CAB 136 [97]]:

> … even if the Tribunal had concluded that sub-paragraph (a) was entirely irrelevant and moved on, we do not consider that there is a realistic possibility that the Tribunal could have considered the conduct to be merely serious, or (if it did) that the weighing exercise could have had a favourable outcome.

40. *Third*, at AS [49], the appellant seems to suggest that, having regard to the Tribunal's reference to the "strong, combined and determinative weight" given to the first and fourth primary considerations, there was a realistic possibility of a different outcome, absent error affecting the first primary consideration. That suggestion is not borne out, however, on a fair reading of the Tribunal's reasons as a whole. The Tribunal's conclusion about the fourth primary consideration concerned the expectations of the Australian community in relation to, relevantly, the appellant's convictions for "multiple serious offences on separate occasions over an extended period of time" [CAB 36 [112]]. That factual characterisation of the appellant's offending had nothing to do with subparagraph 8.1.1(1)(a) of the Direction. Error in respect of subparagraph 8.1.1(1)(a) for the first primary consideration did not affect the Tribunal's consideration of the fourth primary consideration.

41. As Kiefel CJ, Gageler, Keane and Gleeson JJ explained in *MZAPC*, in considering whether an error is jurisdictional, "the court is nevertheless in each case charged with the responsibility of determining for itself whether the result in fact arrived at by the decision-maker in the decision-making process could realistically have been different …".[40] And as the Full Court recognised [at CAB 131 [78]], this is not simply a matter of a decision-maker's errors being "neatly excised". The counterfactual inquiry must be undertaken in order to determine whether the error is material.

42. *Fourth*, and, finally, the submission at AS [50] proceeds on the faulty assumption that considerations were evaluated on a relative basis. For the reasons explained in paragraphs 31 and 32 above, that is not what in fact occurred. As already observed,

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[40] *MZAPC* at [51] (Kiefel CJ, Gageler, Keane and Gleeson JJ) (emphasis added).

the requisite counterfactual inquiry relies on consideration of "how the decision that was in fact made was in fact made".[41] The relevant other considerations were only considered relative to the relevant primary considerations after they had been accorded "slight" weight.

Subparagraph 8.1.1(1)(b) of Direction 90

43. Subparagraph 8.1.1(1)(b) of Direction 90 relevantly provided that, in considering the nature and seriousness of the non-citizen's criminal offending or other conduct, decision-makers must have regard to the matter of the Australian Government and the Australian community considering "crimes committed against vulnerable members of the community" to be serious.

44. The Tribunal found that subparagraph 8.1.1(1)(b) "militates in favour of a finding that the [appellant's] criminal offending has been of a very serious nature" [CAB 25 [73]].

45. The Full Court found that the Tribunal erred in its assessment of subparagraph 8.1.1(1)(b) [CAB 141 [119]]. However, the Full Court found that that error was not material [CAB 142 [124]]. The Full Court stated that, "[f]or all of the reasons we have already set out in relation to sub-paragraph [8.1.1(1)(a)], we are not satisfied that, with so little weighing in the Appellant's favour (arising from the Other Considerations), there is any realistic possibility that the Tribunal's weighing exercise could have reached a different outcome had the Tribunal disregarded sub-paragraph (b)" [CAB 142 [124]]. By reason of the matters set out at paragraphs 17-43 above, no error is shown to attend this finding of the Full Court.

Subparagraph 8.1.1(1)(g) of Direction 90

46. Subparagraph 8.1.1(1)(g) requires a decision-maker to have regard to:

> whether the non-citizen has re-offended since having been formally warned, or since otherwise being made aware in writing about the consequences of further offending in terms of the non-citizen's migration status (observing that the absence of such a warning is not considered to be in the non-citizen's favour).

47. The Tribunal found that this matter was "directly relevant in this case" [CAB 27 [86]], and that the appellant had "re-offended since having been formally warned

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[41] *MZAPC* at [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status" [CAB 28 [91]].

48. The Full Court found that those findings were affected by error [CAB 146-147 [140]-[146], 148 [150]]. The Full Court nonetheless held that the error was not material, because the correct application of subparagraph 8.1.1(1)(g) would have made no difference to the decision [CAB 150-151 [158]-[161]]. The Full Court observed [at CAB 150 [158]] that:

48.1. the Tribunal had found, as a matter of fact, that the appellant was aware that criminal offending could jeopardise his migration status, and he had engaged in further offending after becoming so aware [see CAB 28 [87]-[90]]; and

48.2. that factual finding had contributed to the Tribunal's "overall view that the nature and seriousness of the [appellant's] conduct can only be characterised as very serious" [see CAB 28 [92]].

49. The Full Court found that "[t]he possibility that the Tribunal, had it correctly identified that the warnings in question did not fall within subparagraph (g), would have entirely disregarded the fact of reoffending once migration consequences had been raised, is fanciful" [CAB 150 [159]].

50. As a matter of substance, the validity of the Tribunal's decision was not affected by the way in which it addressed this issue. The Tribunal considered relevant to its decision the matters set out in paragraphs 50.1 and 50.2 above. It was entitled to take those matters into account in making its decision. The fact that it erroneously found that those matters were relevant to subparagraph 8.1.1(1)(g) does not mean that, as a matter of reasonable conjecture having regard to the relevant historical facts, but for that error, it would, or even could, have ignored those matters.

51. Contrary to what is asserted at AS [56], this analysis does not rest on mere "conjecture", and does not involve re-writing the Tribunal's decision. It is, again, a principled assessment of "how the decision that was in fact made was in fact made". That was a decision in which the Tribunal was clearly motivated by the appellant's awareness of the fact that "his migration status was a relevant issue prior to his re-offending" [CAB 28 [90]].

52. The appellant misunderstands the reconstructive exercise that a reviewing court is mandated to perform. As the Full Court identified,[42] in order for the appellant to discharge his burden on materiality, it is necessary for him to establish that, absent error, there is a realistic possibility that the Tribunal's decision could have been different. That is, on the relevant counterfactual, the appellant must establish a realistic possibility that the Tribunal would not have taken into account these matters because they are not properly the subject of subparagraph 8.1.1(1)(g). Having regard to the Tribunal's reasons as a whole, the Full Court was correct to find that any such possibility is not a realistic one [see CAB 150 [159]].

53. The appellant observes at AS [57] that, before the Tribunal, it was the Minister's representative that "raised the reoffending under paragraph [8.]1.1(1)(g) and not independently of that sub-paragraph". But that observation does not assist the appellant. Once it is accepted that a relevant historical fact is that the Minister raised the matter in that way, the appellant must establish the realistic possibility that the Tribunal could have completely disregarded that matter, despite it having been raised, purely on the basis that it did not align with one of the sub-paragraphs of paragraph 8.1.1. As the Full Court correctly observed [at CAB 150 [159]], that possibility is fanciful. And even if the Tribunal had not had regard to these matters at all, by reason of the matters set out at paragraphs 17-44 above, there is not a realistic possibility that the outcome of the Tribunal's decision could have been different.

Cumulative assessment issue

No requirement for a cumulative assessment

54. As Kiefel CJ, Gageler and Keane JJ explained in *Hossain*, "jurisdictional error is an expression not simply of the existence of an error but of the *gravity* of that error".[43] That is, the court's task on judicial review is to consider the specific error alleged by an applicant and ascertain whether that error is made out, and then to determine by reference to the relevant "historical facts" whether, as a matter of reasonable conjecture, the decision could realistically have been different in the

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42 See, for example, CAB 130 [75]-[76], 131 [81], 134 [92], 135 [94], 142 [124], 151 [160].

43 *Hossain* at [25] (original emphasis in italics; underlined emphasis added), referring to Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1956) 70 *Harvard Law Review* 953 at 963.

absence of that error. Put another way, the question for the Court in relation to any allegation of jurisdictional error is whether there is an error and, if there is one, whether that error is within jurisdiction, having regard to the governing statute. That exercise can only occur on consideration of the specific error alleged and, if made out, the gravity of that specific error.

55. The appellant claims at AS [59] that logic and principle require that materiality "be addressed in light … of all the errors that a decision-maker makes". But neither logic nor principle provides support for that claim.

56. As a matter of logic, whether or not an error materially affects the outcome of a decision requires assessment of that particular error. There is no logical connection between the existence of multiple errors that go to different issues or aspects of a decision, and an assessment that would see those errors considered on a "compounded" basis. For example, there is no logical reason why an immaterial breach of the Tribunal's procedural fairness obligations, constituted by a failure to disclose a notification under s 438 of the *Migration Act 1958* (Cth), would necessarily heighten the gravity of a separate (also immaterial) error in construing a criterion for the grant of a visa.

57. As a matter of principle, requiring a reviewing court to consider the compounded effect of multiple errors, as proposed by the appellants, would be out of step with longstanding jurisprudence on jurisdictional error. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, McHugh, Gummow and Hayne JJ considered the nature of jurisdictional error (by reference to *Craig v South Australia* (1995) 184 CLR 163 at 179) and stated at [82] (citations omitted) that:

> It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the Tribunal)
>
> > "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it".

> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

58. That is, the question asked by a reviewing court is whether the error "affects the exercise of power" – in the words of the plurality in *Hossain*, an assessment of the gravity of the error. Where two or more separate errors are each of insufficient gravity to affect the exercise of power (such that each of them is an error within jurisdiction), there is no principled reason why their combined effect should more readily reveal jurisdictional error.

The Full Court conducted a cumulative assessment

59. In any event, in this case the Full Court *did* consider the cumulative effect of the errors that it accepted that the Tribunal had made. The Full Court referred to the approach actually taken by the Tribunal to the seriousness of the appellant's offending, and stated [at CAB 136 [100]] that:

> The Tribunal reached its view on the seriousness of the Appellant's offending by an analysis that clearly gave significant weight to the matters stated in sub-paragraphs (c) to (e) relating to the sentences imposed, the frequency and any trend of increasing seriousness in the offending, and the cumulative effect of repeated offending.[44]

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[44] See also CAB 137-138 [103]-[104], 142 [124]. The Tribunal also found that subparagraph 8.1.1(1)(f) weighed "in favour of a finding that the Applicant's offending is of a very serious nature". See CAB 27 [84].

60. That is, the Full Court was conscious of what decision could realistically have been made if subparagraphs 8.1.1(1)(a), (b) and (g) were deemed irrelevant to the review.[45]

A cumulative assessment does not reveal material error

61. Even if this Court were to consider that a cumulative assessment is necessary, and the Full Court failed to undertake such an assessment, the conduct of such an assessment in this case would not reveal material error.

62. Having regard to the relevant historical facts and the way in which the Tribunal's decision was in fact made (in particular, the matters set out in paragraphs 25-26 above), even if the Tribunal had found that the matters in subparagraph 8.1.1(1)(a), (b) and (g) did not weigh either in favour of or against revocation of the visa cancellation, and even if the Tribunal had found that the appellant's offending was "serious" (instead of "very serious"), there is not a realistic possibility that the decision could have been different [cf AS [22]].

Part VI: Estimated length of oral presentation

63. It is estimated that the first respondent will require 1½ hours for the oral presentation of his argument.

Dated 30 November 2023

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[45] See also, for example, CAB 132 [84].

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M70/2023

BETWEEN:

LPDT
Appellant

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

Administrative Appeals Tribunal
Second Respondent

ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

Pursuant to Item 3 of Practice Direction No 1 of 2019, the first respondent sets out the statutory provisions referred to in these submissions:

	Description	Version	Provision
1.	*Migration Act 1958* (Cth)	as at 7 July 2021	s 438
2.	*Direction No 90 under s 499 of the* Migration Act 1958 *(Cth) – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*	as at 7 July 2021	para 7, 8, 8.1, 8.1.1, 9