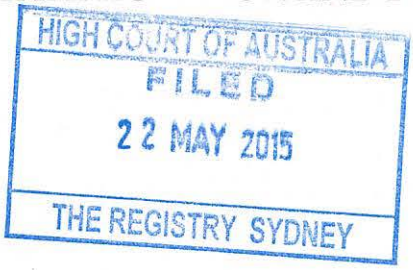
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S85 of 2015

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant



and

10 **WZARH**
First Respondent

ADOLFO GENTILE
IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

20 2. This appeal gives rise to two issues.

3. First, whether procedural unfairness results merely because an independent merits reviewer has adopted a procedure that is "different" from, and "inferior" to, a "legitimate expectation".

4. Secondly, whether, in the circumstances of the present case, it was procedurally unfair for the second respondent (**Reviewer**) to make a recommendation to the appellant (**Minister**) without informing the first respondent (**respondent**) that the review had been reconstituted and:

   a) inviting him to make submissions as to how the review should proceed; and/or

   b) offering to him a further oral hearing.

30 ### Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The Minister has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

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Part IV: Citations

6. This appeal is from orders made by the Full Court of the Federal Court of Australia (**Full Federal Court**) on 20 October 2014 in *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389; [2014] FCAFC 137. That was an appeal from orders made by the Federal Circuit Court of Australia (**Federal Circuit Court**) on 14 October 2013 in *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1680. Special leave to appeal from orders 1 and 2(i) made by the Full Federal Court was granted by Hayne and Gageler JJ on 17 April 2015 in *Minister for Immigration and Border Protection v WZARH* [2015] HCATrans 92.

Part V: Facts

Background

7. The respondent, a national of Sri Lanka, entered Australian territory by entering the Territory of Christmas Island, by boat, on 7 November 2010. At that time, Christmas Island was an "excised offshore place", and the respondent was an "offshore entry person", as defined in s 5(1) of the *Migration Act 1958* (Cth) (**Act**). As the respondent did not hold a visa to enter Australia, he was an unlawful non-citizen as defined in s 14(1) (read with s 13(1)) of the Act. Upon his arrival at Christmas Island, the respondent was taken into detention pursuant to s 189(3). On 12 December 2010, an officer within the Minister's department (**Department**) conducted an entry interview with him.

8. As the respondent was an offshore entry person and s 46A of the Act, therefore, prevented him from making a valid application for a Protection (Class XA) visa, on 21 January 2011 he requested that the Department conduct an assessment as to whether he was a person to whom Australia owed protection obligations under the Refugees Convention as amended by the Refugees Protocol (**refugee status assessment** or **RSA**).[1] This was a process of the kind described by this Court in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 343 [41]-[44]. The respondent claimed that he was owed protection because he feared harm at the hands of the Eelam People's Democratic Party (**EPDP**) and the Sri Lankan authorities on the basis of his Tamil ethnicity, his perceived support for the Liberation Tigers of Tamil Eelam, and his having campaigned on behalf of a particular politician.

9. A departmental officer interviewed the respondent for the purpose of his RSA and determined, on 29 April 2011, that he was not a person to whom Australia owed protection obligations.

10. On 20 May 2011, the respondent requested an independent merits review (**IMR**) of his RSA. Like the RSA process, this was also a process of the kind described by this Court in *Plaintiff M61* at 344 [45]-[49]. The respondent, through his then representatives,

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1 The "Refugees Convention" means the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951*; the "Refugees Protocol" means the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*.

provided to the Department written submissions in support of his IMR on 27 October 2011.

11. On 20 January 2012, the respondent attended an interview before an independent merits reviewer, Ms Sydelle Muling (**Previous Reviewer**). At that interview, the respondent was given an opportunity to give evidence and make further submissions, and he did so. The Previous Reviewer commenced the interview by saying that she would "undertake a fresh re-hearing of [the respondent's] claims", "mak[e] a recommendation as to whether [he is] found to be a refugee" and that "this will be given to the Minister ... for consideration". She concluded the interview by saying that she would consider "all the information that [the respondent has] provided" and "any further articles or information", then "make [her] recommendatio[n]".

12. Sometime after the interview, the Previous Reviewer became unavailable and the Reviewer was appointed to continue with, and complete, the review. The respondent was not informed that these events had occurred. There was no evidence as to why the Previous Reviewer was unable to complete the review.

13. Nonetheless, the respondent provided further written submissions on 20 January 2012 and 4 May 2012, the latter pertaining to the complementary protection criterion in s 36(2)(aa) of the Act, which was enacted by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) and commenced on 24 March 2012.

14. On 25 July 2012, the Reviewer recommended to the Minister that the respondent should not be recognised as a person to whom Australia owes protection obligations.

Federal Circuit Court

15. The respondent sought judicial review of the Reviewer's recommendation in the Federal Circuit Court, but was unsuccessful. Before the primary judge, the respondent contended that the recommendation was not made according to law for two reasons. First, the Reviewer denied the respondent procedural fairness by not "grant[ing] a further hearing" (at [11]). Secondly, the Reviewer failed to take into account the respondent's "visible scarring ... due to his mistreatment by the EPDP" (at [18]).[2]

16. The primary judge rejected both grounds and dismissed the application, with costs.

Full Federal Court

17. The respondent appealed from the primary judge's orders to the Full Federal Court. Their Honours (Flick and Gleeson JJ (**plurality**); Nicholas J agreeing, giving his own reasons) allowed the respondent's appeal, with costs, set aside the primary judge's orders and made a declaration that the Reviewer's recommendation was affected by an error of law, namely, that, in recommending to the Minister that the respondent should not be recognised as a refugee, the Reviewer had denied the respondent procedural fairness.

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2 The respondent abandoned the remainder of this ground in the Federal Circuit Court.

18. On appeal, the respondent, again, raised two arguments. First, he asserted that he was denied procedural fairness because there had been a departure from the procedure that the Previous Reviewer said would be adopted, that is, that she would consider the respondent's claims and make a recommendation to the Minister. (The argument was put in terms of departure from representations, not "legitimate expectations". There was no discussion of "legitimate expectations" during the hearing in the Full Federal Court or in the parties' submissions.) Secondly, he said that he was denied procedural fairness because the Reviewer did not see his scars, or that the Reviewer failed to take them into account as a mandatory relevant consideration (in the *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 sense). Had the Reviewer seen those scars, the respondent submitted, the result of the review may have been different.

19. As to the first argument, the plurality held that the respondent had been denied procedural fairness because he did not attend any interview before the Reviewer (at [6]-[7]). Their Honours said that the respondent had a "legitimate expectation" either that the Previous Reviewer would make a recommendation to the Minister as to his refugee status or that, if she became unavailable, a different reviewer would first conduct an interview or oral hearing with him (at [8] and [17]). This legitimate expectation was said to be founded upon "the fact that an oral hearing was conducted before the [Previous Reviewer]" and "the substance of what was said by [her]" (at [18]). The latter was a reference to the Previous Reviewer's opening and closing statements during the interview, which were to the effect that she would consider the respondent's evidence and submissions and make a recommendation to the Minister as to whether he was entitled to Australia's protection. Those statements are set out at [23] of the plurality's reasons and [11] of these submissions above.

20. Their Honours then articulated, at [24], what can only be described as statements of principle (given their generality), albeit without explaining their legal foundation:

a) Where an applicant has been led to believe, both by statements made by a reviewer and his or her conduct in conducting a hearing or interview, that he or she will consider the applicant's claims, the applicant has a legitimate expectation that the process will be completed by that person.

b) An applicant who has participated in an administrative process whereby an oral hearing or interview has been conducted has a legitimate expectation that any recommendation made to the Minister will be a recommendation made following the same administrative process.

c) If a reviewer becomes unavailable, an applicant is, at the very least, entitled to be heard before his or her legitimate expectation is defeated, by being given an opportunity to make submissions as to how the review process should continue.

21. Their Honours purported to identify the unfairness or "practical injustice"[3] that was suffered by the respondent at [25]-[29]. The plurality considered that the respondent had been "stripped of the benefit" of a review process whereby he could put his claims in person to the Reviewer and that that was unfair because he "received a different and

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3 An expression used by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]-[38].

inferior review from the review that he had been led to expect would be conducted" (at [25]). Their Honours also said that the prejudice suffered by the respondent was "exposed by the very fact that those administering the review process did not do what they had said they would" (at [27]), that is, that his expectation as to the procedure that would be followed had been defeated. The review process, their Honours further held, was procedurally unfair because the respondent did not have "an opportunity to impress upon the [Reviewer] the merits and genuineness of his claims" (at [28]). Had that opportunity been given and accepted, their Honours suggested, the outcome of the review might have been affected (also at [28]). And, at [29], their Honours said that the detriment that the respondent suffered by reason of the "fundamental change" to the administrative process employed could have been overcome had he been alerted to it and asked how the review should proceed.

22. At [32]-[37], the plurality rejected the respondent's second argument. Their Honours observed that the Reviewer had accepted the respondent's claims as to the circumstances in which he sustained his scars.[4] Thus, the respondent did not suffer any prejudice by not being given the opportunity to show his scars to the Reviewer.

23. Justice Nicholas agreed with the plurality but published separate reasons. At [48], his Honour said that the respondent "was reasonably entitled to expect that his claims would be considered by the person by whom he was interviewed and that, if for some reason that might not occur, he would at least be told of that fact so that he might seek the oral hearing that he thought he had already received." His Honour considered that the unfairness arose not from the respondent's not having had an oral hearing before the Reviewer, but, rather, the "depriv[ation] ... of the opportunity to apply for an oral hearing" before the Reviewer (at [48]; see also [57]). In this connection, Nicholas J considered it unnecessary to determine whether the Reviewer would have been required to grant an oral hearing had one been requested.

24. His Honour acknowledged, at [49], that the respondent had not adduced any evidence to indicate what he would have done had he been offered an oral hearing before the Reviewer. Despite the absence of such evidence, his Honour "infer[red] that it [wa]s more likely than not that the [respondent] would have sought an oral hearing before the [Reviewer]" had he been told that the Previous Reviewer was no longer available to complete the review (at [49]).

25. His Honour accepted the Minister's submission that demeanour did not play any part in the Reviewer's assessment of the respondent's credibility (at [50] and [56]), but considered that the Reviewer's findings "related to matters upon which demeanour might reasonably be expected to have had some bearing had it been open to the [Reviewer] to take demeanour into account" (at [50]; see also [53] and [56]).

26. There was no finding that the respondent was entitled to any oral hearing in the course of the review process, and the Full Court expressly stated that it did not have to decide whether the respondent would be entitled to such a hearing before the Reviewer – at least if no legitimate expectation had been conferred (see at [8] (first dot point), [9] and

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4 Independent Merits Review Statement of Reasons dated 25 July 2012 at [82]-[83].

[48]). Nor did the Full Federal Court decide whether, as a matter of law, the Previous Reviewer was required to offer to the respondent an oral hearing.

Part VI: Argument

27. Procedural fairness in the circumstances of this case did not require the respondent to be told of the change in the constitution of the review, to be asked to make submissions as to how the review should proceed, or to be invited to attend a face-to-face interview before the Reviewer (even if it were sought). Neither the plurality, nor Nicholas J, presented any sound basis for concluding that disappointment of the respondent's "legitimate expectation" resulted in procedural unfairness or practical injustice.

Legitimate expectations

28. The concept of "legitimate expectation", although used in the area of administrative law for 45 years since it first appeared in the judgment of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149,[5] "has been used in different ways."[6] It is unhelpful, therefore, to speak, as the plurality did below, of "legitimate expectation" as though it is an expression that has an identified and fixed content.

29. When the expression was first used, it "was a device that permitted the courts to invalidate decisions made without hearing a person who had a reasonable expectation, but no legal right, to the continuation of a benefit, privilege or state of affairs."[7] In *Schmidt*, for example, Lord Denning MR used legitimate expectation to identify cases in which a decision-maker "should give a person an opportunity to make representations – distinguishing ... between aliens whose permit was to be cancelled before expiry and those whose permit was not to be renewed."[8] The former, his Lordship considered, had "a legitimate expectation of being allowed to stay for the permitted time" and, thus, a right "to be given an opportunity of making representations".[9] The latter, on the other hand, had no right or legitimate expectation of being allowed to stay in the country. Consequently, they had no right to be given an opportunity to make representations.

30. The doctrine was then "extended" to apply to cases "where a public official had undertaken that he or she would act in a certain way in making a decision."[10] That is, legitimate expectation was used to explain "why a decision-maker might be required to receive representations before departing from some policy or intended course of conduct which it had announced."[11] The decision of the Judicial Committee of the

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5 In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310, McHugh J said that the doctrine was "invented" by Lord Denning MR.

6 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 36 [116] per Hayne J.

7 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311 per McHugh J.

8 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 36 [116] per Hayne J.

9 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 171. See also at 173 per Widgery LJ.

10 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311 per McHugh J.

11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 37 [117] per Hayne J.

Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 was one such case.[12] In that case, there had been a departure from a publicly announced policy regarding the exercise by the Director of Immigration of Hong Kong of a power in s 19(1)(b)(ii) of the Immigration Ordinance 1971 (HK) (as amended) to deport people in certain circumstances. Those who were "affected by the policy or intended course of conduct were said to have a legitimate expectation of having a hearing before the decision-maker decided whether to alter that policy or course of conduct."[13] That was said to be because, when a public authority promises that a particular procedure will be followed in making a decision, fairness or a general duty of "good administration"[14] requires that it be held to that promise. This Court, however, has said that "good administration" is not, itself, sufficient to require the imposition of a duty of procedural fairness,[15] and that this Court's jurisdiction under s 75(v) of the Constitution "does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration."[16]

31. Another example of the extension of the doctrine is this Court's decision in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648. In that case, a legitimate expectation was held to be founded in the Minister's policy statement tabled in the House of Representatives as to what would guide the exercise by him of the statutory power of deportation in the then s 12 of the Act. The policy indicated that a deportee had the right to seek review of a decision to deport him or her (pursuant to the then s 66E) in the Administrative Appeals Tribunal (**AAT**). The AAT had the power to affirm the Minister's decision or to remit it for consideration in accordance with its recommendations. The policy further provided that recommendations of the AAT "should be overturned by the Minister only in exceptional circumstances and only when strong evidence can be produced to justify his decision".[17] The Minister had made a decision to deport the appellant and, on review, the AAT remitted the matter to the Minister, recommending that the order for deportation be revoked. The Minister rejected the AAT's recommendation without seeking any representations from the appellant. This Court held that procedural fairness demanded that the appellant be given an opportunity of being heard on the questions whether the AAT's recommendation should be overturned by reason of exceptional circumstances and whether strong evidence could be produced to justify the Minister's action.[18] That was

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12 Others include *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299 at 308 per Lord Denning MR and *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564 at 589-592 per Fisher, Wilcox and Spender JJ.

13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 37 [117] per Hayne J.

14 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at 637-638 per Lord Fraser of Tullybelton. That is how this case was explained in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 660 per Dawson J, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 20-21 per Mason CJ, 56-57 per Dawson J and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 [33] per Gleeson CJ.

15 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 56 per Dawson J.

16 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 [32] per Gleeson CJ.

17 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 657 per Dawson J. See also at 655 per Deane J, 665 per Toohey J, 671 per Gaudron J, 677 per McHugh J.

18 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 655 per Deane J, 665, 671 per Toohey J, 684-685 per McHugh J. Justices Dawson and Gaudron dissented (at 662-663 and 675-676, respectively).

said to be because the appellant had a legitimate expectation that the Minister would adopt the AAT's recommendation unless his case fell outside of the scope of the policy. It is significant, however, that the breach of procedural fairness in *Haoucher* was, ultimately, that the appellant was not heard on the questions whether the circumstances were so exceptional, and the evidence was so strong, as to warrant the AAT's recommendation not being followed.[19] That conclusion could well have been reached absent any reference to legitimate expectation. In any event, in the present case, that element of the affected person not being heard as to an adverse decision, or as to relevant issues, was not found below and is not established.

10 32. In the United Kingdom, the doctrine of legitimate expectations has been extended so as to give rise to substantive rights. In *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, Lord Woolf MR held (at 242 [57]) that, where a court "considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, ... [it] will in a proper case decide whether to frustrate the expectation [would be] so unfair that to take a new and different course will amount to an abuse of power."[20] [Emphasis in original.] Australian law, however, does not recognise the substantive enforcement of legitimate expectations.[21]

33. The concept of legitimate expectation has often been criticised by this Court.[22] In *South*
20 *Australia v O'Shea* (1987) 163 CLR 378, for example, Brennan J (as his Honour then was) said that legitimate expectation was a notion which, "if taken as a criterion, is apt to mislead for it tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect" (at 411). In the same case, Deane J said that it was an "unsatisfactory phrase" (at 417).

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19 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 655 per Deane J, 671 per Toohey J, 684-685 per McHugh J.

20 See also at 243-251 [61]-[82]. *Coughlan* was cited with apparent approval in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 at 358 [34] per Lord Hoffmann and *YL v Birmingham City Council* [2008] 1 AC 95 at 139 [120] per Lord Mance. While not referring to *Coughlan*, the House of Lords espoused the notion of legitimate expectations of substantive benefits in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] 1 AC 1003 at 1015-1017 [26]-[31] per Lord Scott of Foscote, 1025 [59] per Lord Mance.

21 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 651-652 per Deane J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 23-24 per Mason CJ, 41 per Brennan J, 60 per Dawson J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 per Mason CJ and Deane J, 299, 302 per Toohey J, 313 per McHugh J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 21-25 [65]-[77] per McHugh and Gummow JJ, 48 [148] per Callinan J. Chief Justice Gleeson and Hayne J tended to agree (at 9-10 [28] and 38 [122], respectively), but their Honours did not consider it necessary to decide the issue.

22 See, for example, *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404 per Barwick CJ; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 412-413 per Brennan J; *Kioa v West* (1985) 159 CLR 550 at 617-618, 621-622, 627 per Brennan J; *South Australia v O'Shea* (1987) 163 CLR 378 at 411 per Brennan J, 417 per Deane J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 651-652 per Deane J, 659-660 per Dawson J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 34-41 per Brennan J, 54-56 per Dawson J; *Annetts v McCann* (1990) 170 CLR 596 at 604-607 per Brennan J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591-592 per Brennan J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-314 per McHugh J; *Sanders v Snell* (1998) 196 CLR 329 at 348 [45] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 352-353 [53]-[54] per Callinan J; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 990 [125] per McHugh J. It was also recently criticised by the Full Federal Court in *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 542-543 [28(a)] per Jagot, Griffiths and Davies JJ (overturned, on different grounds, in *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15).

In *Haoucher*, Dawson J also said that the expression was "apt to mislead" (at 659). His Honour made the same observation in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 54, and, at 55, said that the expression was "superfluous and confusing" when the expectation was of a fair procedure itself. In the same case, Brennan J said, at 39, that the notion could only be useful if it were seen "merely as indicating 'the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded' to accord procedural fairness to an applicant". Later, in *Teoh*, McHugh J questioned the need for the doctrine if courts adopted the approach—which they do[23]—that the rules of procedural fairness require decision-makers "to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it" (at 311). At 312, his Honour said that, if the doctrine of legitimate expectations can be put to one side, the question becomes, "what does fairness require in all the circumstances of the case?"

34. Still later, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, Hayne J observed, at 38 [121], that the doctrine "poses more questions than it answers", such as "[w]hat is meant by 'legitimate'" (though the overwhelming weight of authority suggests that it is synonymous with "reasonable"[24]), "[i]s 'expectation' a reference to some subjective state of mind or to a legally required standard of behaviour", and "[i]f it is a reference to a state of mind", then "whose state of mind is relevant" and "[h]ow is it established"? In coming to the view, at [8] and [17], that the respondent had a "legitimate expectation" either that the Previous Reviewer would make the recommendation to the Minister or that, if she became unavailable, any different reviewer who made the recommendation would, first, conduct an interview or oral hearing with the respondent, the plurality did not engage with any of the questions posed by Hayne J. In the same case, his Honour said that, if the procedure that is adopted is fair, "reference to expectations, legitimate or not, is unhelpful" (at 36 [111]). The Minister respectfully agrees with his Honour's observations. Justice Callinan, like Dawson J in *Haoucher* and *Quin*, considered that the expression was "an unfortunate one, and apt to mislead" (at 45 [140]). Justices McHugh and Gummow suggested that, while the doctrine had served a useful role in the evolution and expansion of the circumstances that attract the rules of natural justice, it remained "of limited utility elsewhere" (at 16 [47]). At the same time, however, their Honours said that the statements by McHugh J in *Teoh* at 311-312 and Brennan J in *Quin* at 39 "should be accepted as representing the law in Australia" (at 28 [83]).

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23 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 598-599 [9] per French CJ and Kiefel J, referring to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 per Northrop, Miles and French JJ.

24 *Kioa v West* (1985) 159 CLR 550 at 563 per Gibbs CJ, 583 per Mason J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652 per Deane J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 per Mason CJ and Deane J, 302 per Toohey J, 313-314 per McHugh J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 11 [32], 13 [35] per Gleeson CJ, 20 [61]-[62], 30-31 [92] per McHugh and Gummow JJ. See also *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at 636, where Lord Fraser held that, because "legitimate" means "reasonable", legitimate expectations "are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis." Contrast *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404, where Barwick CJ held that "legitimate" means "entitlement or recognition by law" and, therefore, "adds little, if anything, to the concept of a right".

35. More recently, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, four Justices of this Court (Gummow, Hayne, Crennan and Bell JJ) said that, for the reasons given in *Lam* by McHugh and Gummow JJ, Hayne J and Callinan J,[25] "the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded" (at 658 [65]).

36. The Minister respectfully agrees with this Court's observations in *Plaintiff S10/2011* and would add that the plurality's references throughout their judgment to what were said to be the respondent's "legitimate expectations" are unhelpful and apt to distract from the critical questions in this case, namely, what did procedural fairness require in the circumstances of this case and were those requirements complied with.

The requirements of procedural fairness

37. The Minister accepts that, in making a recommendation to him, the Reviewer was required to conduct a review that was procedurally fair, since the Minister's decision to consider whether he should exercise his powers under ss 46A or 195A of the Act directly affected the respondent's rights and interests.[26] The content of the rules of procedural fairness, however, is not fixed; it depends upon the circumstances of the particular case.[27] That is not to say that fairness is "an abstract concept".[28] It is, as Gleeson CJ observed in *Lam* at 14 [37], "essentially practical" and "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

38. Critical issues and adverse conclusions: Although no universal rule can be laid down to determine what is procedurally fair in every case, there are some basic requirements with which administrative decision-makers must comply. Thus, in *Kioa v West* (1985) 159 CLR 550 at 629, Brennan J said that, in the ordinary case, an opportunity should be given to a person affected by a decision to deal with the substance of any adverse information that is "credible, relevant and significant".[29] Justice Mason considered that

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25 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 20 [61]-[63], 27-28 [81]-[83], 36-38 [116]-[121], 45-48 [140]-[148].

26 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 352-354 [74]-[78] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, referring to *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360 per Mason J, *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

27 *Kioa v West* (1985) 159 CLR 550 at 612 per Brennan J. See also *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475 at 503-504 per Kitto J; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553 per Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 526 per Gibbs J; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 444 per Stephen J; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 314-316 per Gibbs CJ, 319-320 per Mason, Wilson and Dawson JJ, 326 per Brennan J; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156] per Hayne, Crennan, Kiefel and Bell JJ.

28 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37] per Gleeson CJ.

29 See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ, referring to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 per Northrop, Miles and French JJ.

the common law required the decision-maker "to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it."[30]

39. Similarly, in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, French CJ and Kiefel J observed, at 599 [9], that the natural justice hearing rule requires a decision-maker "to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power" and to "advise of any adverse conclusion which would not obviously be open on the known material."[31] However, a decision-maker is not "otherwise required to expose his or her thought processes or provisional views for comment before making the decision."[32]

40. Oral hearings: There is no rule at common law that an administrative decision-maker must, in every case, afford to the person affected by his or her decision an oral hearing (that is, a hearing at which the person is both seen and heard).[33] In fact, most administrative decisions are made without oral hearings. And it is obvious that considerable cost (and, sometimes, considerable inconvenience or delay) would be involved if every administrative decision that was not favourable to an applicant needed to be preceded by an oral hearing.

41. Whether an oral hearing is required in a particular case will depend on the circumstances of that case. It may be that findings based on demeanour or presentation cannot be made without such a hearing.[34] An oral hearing may be required where a person would be disadvantaged by being limited to putting his or her claims in writing, perhaps because he or she is unable to prepare written submissions or seek assistance in doing so,[35] although, even then, a face-to-face hearing (as opposed to some other means of being heard orally, such as by telephone or video-link)[36] may not be necessary. An oral hearing may also be required where the decision-maker is unable to resolve

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30 *Kioa v West* (1985) 159 CLR 550 at 587. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311 per McHugh J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 27 [81] per McHugh and Gummow JJ, 49 [150] per Callinan J.

31 See also *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-592 per Northrop, Miles and French JJ.

32 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 599 [9] and the cases cited therein.

33 *R v Local Government Board; Ex parte Arlidge* [1914] 1 KB 160 at 191 per Hamilton LJ; *Local Government Board v Arlidge* [1915] AC 120 at 133-134 per Viscount Haldane LC, 144-145 per Lord Parmoor; *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 at 567-568 per Viscount Dilhorne; *White v Ryde Municipal Council* [1977] 2 NSWLR 909 at 923 per Reynolds JA; *Daguio v Minister for Immigration and Ethnic Affairs* (1986) 71 ALR 173 at 179 per Ryan J; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 407 per French J; *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 at 597 per Black CJ, Lee and Heerey JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 75 ALJR 808 at 813 [27] per Kirby J; *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 359 at 365 [33] per Hely J; *Meerabux v Attorney-General of Belize* [2005] 2 AC 513 at 532 [39] per Lord Hope of Craighead; *Minister for Immigration and Multicultural and Indigenous Affairs v SZFDE* (2006) 154 FCR 365 at 391 [101] per French J. As to the position in the United States of America, see, for example, *Goldberg v Kelly* 397 US 254 (1970) at 278-279 per Black J (dissenting) and *Mathews v Eldridge* 424 US 319 (1976) at 344-346, 349 per Powell J (Burger CJ, Stewart, White, Blackmun and Rehnquist JJ agreeing). As to the position in Canada, see, for example, *Re Singh and Minister of Employment and Immigration* (1985) 17 DLR (4th) 422 at 464-465 per Wilson J (Dickson CJC and Lamer J agreeing).

34 *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 at 602 per Black CJ, Lee and Heerey JJ.

35 *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 at 602 per Black CJ, Lee and Heerey JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 75 ALJR 808 at 813 [27] per Kirby J.

36 *Eaton v Overland* (2001) 67 ALD 671 at 713 [147] per Allsop J.

inconsistencies between information available to him or her and the written submissions of the person concerned.[37]

42. On the other hand, an oral hearing may not be necessary where an administrative decision is made on the basis of the contents of documents.[38] As the plurality acknowledged at [13], it may not be required even where a person's credibility is in issue if adverse credibility findings are to be made on the basis of discrepancies or internal inconsistencies in his or her evidence, as opposed to his or her demeanour, sincerity or reliability (that is, the manner in which the person gives their evidence).[39] However, reliance upon demeanour in determining the credibility of a witness appearing before a decision-maker empowered to make decisions with respect to a person's migration status, particularly where the witness provides evidence in a foreign language through an interpreter, is discouraged by the courts and has sometimes been described as "unsafe".[40]

43. In some circumstances, it may be difficult for a decision-maker to make an assessment, particularly at the outset, as to whether or not a face-to-face hearing should be offered to the person likely to be affected by the decision. But that difficulty, itself, does not warrant the conclusion that the decision-maker must, as a matter of law, invite the affected person to a preliminary or truncated oral hearing to make submissions as to how the matter should proceed. If that were so, every affected person could always seek an oral hearing by saying that, by their demeanour, they might be able to impress the decision-maker when giving evidence and making submissions. Decision-makers, then, would be obliged to offer oral hearings to all such persons. As indicated above, this would have highly undesirable consequences: it would impose on decision-makers a procedure that is inefficient, costly and time-consuming. As French J (as his Honour then was) observed in *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 410, "courts should be reluctant to impose in the name of procedural fairness detailed rules of practice, particularly in the area of high volume decision-making involving significant use of public resources."[41]

44. In the same way that there is no rule that procedural fairness requires an administrative decision-maker to hold an oral hearing with an affected person, there is no rule that a decision-maker must always invite an applicant to make submissions—oral and/or

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37 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 408 per French J, referring to *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516 per Aickin J (Stephen and Mason JJ agreeing at 494). *Heatley*, however, was a case where the appellant had not been given a hearing *at all* prior to the respondent issuing to him a warning-off notice under s 39(3) of the *Racing and Gaming Act 1952* (Tas), which required him to refrain from entering any racecourse in Tasmania while the notice was in force. The appellant had not been given notice of the respondent's intention to issue the notice and, thus, did not have an opportunity to make representations. It is in that context that Aickin J's remarks at 516 need to be understood.

38 *Lloyd v McMahon* [1987] AC 625 at 696 per Lord Keith of Kinkel.

39 *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 at 602 per Black CJ, Lee and Heerey JJ. See also, in other contexts, *Abujoudeh v Minister for Immigration and Multicultural and Indigenous Affairs* (2001) 115 FCR 179 at 189 [31]-[32] per Ryan J; *MZXDH v Minister for Immigration and Multicultural Affairs* [2007] FCA 719 at [14]-[16], [19] per Finkelstein J; *Tinkerbell Enterprises Pty Ltd v Takeovers Panel* (2012) 208 FCR 266 at 298 [111] per Collier J; *MZYUM v Minister for Immigration and Citizenship* [2013] FCA 51 at [73] per Dodds-Streeton J.

40 *WAEJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 597 at 602 [17] per Lee, Hill and Marshall JJ.

41 See also *Local Government Board v Arlidge* [1915] AC 120 at 137-138 per Lord Shaw of Dunfermline.

written—as to what procedure should be adopted by him or her. Generally, it will be a matter for the decision-maker as to what procedure will be adopted in any given case. In cases where an earlier decision has been made, and the decision-maker's task is to conduct a review (as in this case), he or she may be in a position to decide whether an oral hearing is required by law on the basis of material such as the previous decision-maker's reasons and the affected person's oral and documentary evidence and submissions before that decision-maker. In other cases, particularly where an earlier decision has not been made, the decision-maker may not know whether any particular features exist that require an oral hearing to be held until the circumstances of the case before him or her unfold. Thus, the decision-maker may be in a position to make an assessment after an applicant has provided documentary evidence and written submissions in support of his or her case. Generally, it will be for an applicant to present such material and for the decision-maker to decide whether he or she is persuaded as to whether the criteria for whatever is sought have been made out.[42]

45. There may also be cases (such as the present) where a decision-maker has made a decision after another person has interviewed the affected person. There is no strict rule that, as a matter of procedural fairness, the person empowered to make a decision must also be the person who conducts a hearing with the affected person.[43] In those cases, too, the decision-maker will need to consider the material before him or her in order to determine whether an oral hearing is required. That material may comprise:

a) the affected person's documentary evidence and written submissions;

b) a tape recording and/or transcript of the person's oral evidence and submissions; and

c) (if the decision-maker is conducting a review of an earlier decision) the previous decision-maker's decision record and the affected person's oral and documentary evidence and submissions before that decision-maker.

46. If, however, there do not exist any circumstances that warrant an oral hearing, procedural fairness does not require a decision-maker to ask an applicant to comment on whether they do exist. The Minister is not aware of any authority that so suggests, absent statutory prescription. Indeed, it would seem odd that an applicant who is not, in fact, entitled to an oral hearing could have an administrative decision set aside upon the basis that he or she was not asked by the decision-maker as to whether such a hearing should be held. It will be for an applicant to show that certain circumstances exist such that it is unfair for a decision-maker to proceed without an oral hearing. The fact that he or she has not been asked as to whether an oral hearing is necessary is not such a circumstance, as that would import an obligation on decision-makers always to ask whether such a hearing is, in fact, necessary.

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42 Compare *Abebe v Commonwealth* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1918-1919 [55]-[58] per Gummow and Heydon JJ.

43 *White v Ryde Municipal Council* [1977] 2 NSWLR 909 at 923-924 per Reynolds JA (with whom Moffitt P agreed); *Whim Creek Consolidated NL v Colgan* (1991) 31 FCR 469 at 493-494 per O'Loughlin J (with whom Spender and French JJ agreed).

47. Departures from representations and undertakings: Sometimes, governments and/or decision-makers will give undertakings or representations that bear upon administrative decision-making. Those undertakings or representations may affect the content of the rules of procedural fairness in a particular case.[44] In some cases, procedural fairness may require decision-makers to give affected persons the opportunity to make submissions before departing from those undertakings or representations.[45]

48. However, a departure from an undertaking or a representation will not, itself, amount to a denial of procedural fairness.[46] As Gleeson CJ held in *Lam* at 13 [36], something more must be shown – for example, that the person "held [a] subjective expectation in consequence of which [he or she] did, or omitted to do, anything", "lost an opportunity to put any information or argument to the decision-maker" or "otherwise suffered any detriment".

49. It is noteworthy, in this respect, that in *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 609, Brennan CJ, Dawson and Toohey JJ held that, "[i]f the power must be exercised in conformity of the rules of natural justice, a failure by the repository to adhere to a declared procedure *may* constitute or result in a failure to accord natural justice." [Emphasis added.] That is not to say that it will, inevitably, have that effect. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, the review applicant had been mistakenly led to believe something relating to the manner in which he might, then, choose to conduct his case (namely, as to the material before the Refugee Review Tribunal (**RRT**)). That was the circumstance upon which the finding of procedural unfairness in that case was based.[47] In *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966, the denial of procedural fairness in relation to certain documents also rested upon the appellant being inadvertently misled as to what was before the RRT.[48] By contrast, no such element is present here. In *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, the breach of procedural fairness was that the RRT, despite its stated view that the arguments had been presented so inadequately that the review could not be completed, did, in fact, purport to complete the review, thereby breaching what was found to be its

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44 See, for example, *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564 at 592-593 per Fisher, Wilcox and Spender JJ; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 224-228 per Gummow J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 [34] per Gleeson CJ, 16-17 [48] per McHugh and Gummow JJ; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 9-10 [32]-[33] per McHugh, Gummow, Callinan and Heydon JJ.

45 See *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 609 per Brennan CJ, Dawson and Toohey JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1.

46 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 [34] per Gleeson CJ, 34-35 [105]-[106] per McHugh and Gummow JJ, 38-39 [122] per Hayne J, 48 [149] per Callinan J.

47 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88-89 [3]-[4] per Gleeson CJ, 115 [74], 116-117 [80] per Gaudron and Gummow JJ, 121-122 [100]-[103] per McHugh J, 130 [128] per Kirby J, 144 [172] per Hayne J, 156 [216] per Callinan J.

48 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 980 [63] per Gaudron J, 996 [171] per Gummow J, 999-1000 [194]-[195], [200]-[201] per Kirby J, 1009 [257] per Hayne J, 1017-1018 [307]-[309] per Callinan J.

duty to afford procedural fairness by considering the review applicant's arguments.[49] By contrast, in the present case, no suggestion was made below that the Reviewer did not consider the existing material to be sufficient to make a recommendation to the Minister.

Procedural fairness in this case

50. The respondent did not suffer any procedural unfairness in this case. He participated in a face-to-face interview with the Previous Reviewer at which he was given an opportunity, which he took up, to give evidence and make submissions in support of his claims for protection. The Reviewer listened to a recording of that interview and, in that sense, heard the respondent (albeit without sight and presence). The respondent was also given an opportunity to give evidence and make submissions in writing. He did so on three occasions on 27 October 2011, 27 January 2012 and 4 May 2012. The Reviewer considered each of those documents. The Reviewer further considered the notes of the respondent's entry interview and his written and oral evidence and submissions in relation to his refugee status assessment.

51. No point was taken by the respondent either in the Full Federal Court or the Federal Circuit Court that the important or critical issues on the review had not been drawn to his attention or that the Reviewer had not put to him for his comment adverse conclusions that were not obviously open on the known material. He was, therefore, given a reasonable opportunity to put his case on review. In those circumstances, the respondent cannot complain that he was not afforded procedural fairness. His complaint, rather, is that he was not given what Callinan J once described as a "further opportunity to repeat what he had already said, or to advance the same argument differently or more emphatically."[50]

52. All three members of the Full Federal Court attempted to identify some detriment to the respondent when they said that he lost the opportunity to impress upon the Reviewer and that, had he been invited to a face-to-face hearing, the outcome of the review may have been different (at [25], [28], [53] and [56]). The Full Federal Court's reasoning does not appreciate that any person could advance the argument that, had they had another opportunity to appear before a reviewer (or an opportunity to appear before a substitute reviewer), by their demeanour they could have persuaded or impressed the reviewer in such a way that the outcome of their case might have been different. Yet, it cannot be that an oral hearing is required in every case. Also, the fact that an applicant might do better if given another interview does not mean that he or she has not already been given a fair opportunity to be heard.

53. Further, with respect to the attempt referred to in the paragraph immediately above, the plurality sought to gain support from the joint judgment of Mason, Wilson, Brennan, Deane and Dawson JJ in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147, where it was held that, a breach of the rules of procedural fairness having been found, a new trial should have been granted where the breach "deprived [the

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49 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 10 [27], 12 [33] per McHugh, Gummow, Callinan and Heydon JJ.

50 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 48 [149].

appellant] of the possibility of a successful outcome." In the present case, at [28], the plurality reasoned that, because the respondent had been "deprived ... of the possibility of a successful outcome", he was denied procedural fairness. The proposition for which *Stead* stands, however, is that, "*once a breach of the rules of natural justice is established*, an applicant is ordinarily entitled to relief unless the Court is persuaded that the breach could not have had any bearing on the outcome."[51] [Emphasis added.] It has no application to the circumstances of the present case, as the Minister did not argue below that relief should be withheld on discretionary grounds. It is one thing to say that the possibility of a different outcome should result in relief not being withheld, where procedural unfairness has been established; it is entirely another to say that, where a further opportunity to present one's case may result in a different outcome, denying that opportunity is a breach of procedural fairness.

54. Part of the problem with the reasoning below is that their Honours did not address a critical, anterior question, namely, why the Reviewer was required to invite the respondent to a face-to-face hearing in circumstances where he was not, as a matter of law, entitled to such a hearing in the first place. Certainly, the respondent did not attempt to demonstrate in either court below that he was entitled to an oral hearing before the Previous Reviewer at the time that he was given one. It was for him to show that, in the circumstances of this case, an oral hearing was, in fact, required. The respondent did not adduce any evidence going to this issue and neither the Federal Circuit Court nor the Full Federal Court made a finding with respect to it.

55. In circumstances where the respondent had no legal right to an oral hearing at the outset, but was given one gratuitously, it is difficult to see how he acquired a right to present his claims to the Reviewer in person – unless, of course, there were some additional fact that made it procedurally unfair for the Reviewer to complete the review without inviting the respondent to a face-to-face hearing. The Full Federal Court's reasons suggest that that fact could only have been that the review was not conducted in the manner outlined by the Previous Reviewer during her opening and closing statements.

56. It was not disputed below that there had been a departure from the Previous Reviewer's statements as to how the review would proceed. However, as Gleeson CJ said in *Lam* at 12 [34], "[n]ot every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation." Nothing in this Court's decision in *Applicant NAFF* detracts from that proposition; on the contrary, Kirby J cited *Lam* with approval at 21 [70]. While the plurality and Nicholas J acknowledged these remarks of Gleeson CJ at [25] and [47], respectively, accepting that disappointment of a legitimate expectation would not be sufficient, their Honours did not, in fact, identify any unfairness to the respondent as a result of the Reviewer's departure from that expectation. All that relevantly occurred in the present case was that the respondent's expectation that the Previous Reviewer would make a recommendation to the Minister had been disappointed. There had to be some factor in addition to the disappointment of that expectation for the rules of procedural fairness to have required the respondent to be told of the change in the review, to be invited to a face-to-face hearing before the

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51 *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 at 558 [96] per Lee, Goldberg and Weinberg JJ.

Reviewer, or to be invited to make submissions as to how the review should proceed. That additional factor was missing.

57. There was, as already noted, no evidence below to suggest that the respondent had been misled by the Previous Reviewer's statements, as had occurred in *Aala* and *Muin*. Nor was there any evidence to suggest that the respondent's circumstances were such as those that Gleeson CJ identified in *Lam* at 13-14 [36] and [38]. This was a case, unlike *Applicant NAFF*, where the respondent, to show unfairness, was required to adduce evidence as to what steps he took, or did not take, in reliance on the Previous Reviewer's statements, thereby causing him detriment.[52] He did not do so.

58. Furthermore, the respondent did not lose the opportunity to put any information or argument in support of his case, or otherwise suffer any detriment. In *Lam* at 13 [37], Gleeson CJ gave as an example of a common form of detriment the loss of an opportunity to make representations. This occurred in *Ng Yuen Shiu* and *Haoucher*. Neither case is apposite to the circumstances of the respondent. Unlike the appellants in those cases, the respondent was given the opportunity adequately to present his case, and did so. In the light of the circumstances set out at [50] above, where the plurality said that the respondent had a legitimate expectation that the Reviewer "would first hear from [him]" (at [17]), their Honours should be taken to have meant not only "hear from", but also "see", the respondent. But, being heard by a decision-maker is not the same as, and does not always require, being seen.

59. The plurality sought to test the existence of procedural unfairness by asking whether the review that the respondent received was "different" from, and "inferior" to, that which he expected to receive (at [25]). However, this is a conclusion stated without any analysis. Moreover, both words are imprecise and laden with judgment, but neither equates with "unfair". Even if the review process could be described as "inferior", their Honours did not explain why that was procedurally unfair. To say that the procedure adopted was "different" from the respondent's expectation is to say nothing more than that it was disappointed. And to say that a procedure is "inferior" to one that had been first indicated, without confronting whether procedural fairness required that procedure and without identifying any practical injustice in what was, in fact, done, is also to do no more than to find disappointment.

60. The proposition that the plurality ultimately, in fact, saw the departure from the respondent's expectation as, itself, sufficient to amount to procedural unfairness is illustrated by their Honours' statement at [27] that the "prejudice" that the respondent suffered was "exposed by the very fact that those administering the review process did not do what they had said they would". Further, at [29], the plurality said that "the change of the administrative process" resulted in a "detriment" or "practical injustice" to the respondent, but that "detriment" or "practical injustice" was only identified earlier, at [25], where the plurality said that the fact that the respondent was not given the opportunity to participate in an oral hearing before the Reviewer was unfair "*because* [he] received a different and inferior review from the review that he had been led to expect would be conducted." [Emphasis added.]

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52 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13 [36] per Gleeson CJ; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 10 [34] per McHugh, Gummow, Callinan and Heydon JJ.

61. These conclusions are not only inconsistent with the observations of Gleeson CJ in *Lam* at 12-14 [34]-[38],[53] but they give to the notion of legitimate expectations a status that it does not have in this country. While the plurality recognised, at [26], that the respondent's legitimate expectations were "as to the procedure to be followed or expectations as to what procedural fairness required" in this case, and were not substantive rights, this is not borne out by their Honours' reasons at [8] (third dot point), [17], [24] (third and fourth sentences), [25], [27]-[28] and [31]. Those parts of the plurality's reasons treat the respondent's expectations as requiring the Reviewer to act in a certain way—to invite him to a face-to-face hearing—"regardless of whether any disadvantage to [the respondent] result[ed] from a failure to take that course."[54] This, however, at least "comes very near to converting a matter of procedure into a matter of substance, and a matter of expectation into a matter of right."[55] Indeed, it does convert "legitimate expectation" into an entitlement to any procedure that is promised.

62. In other parts of the plurality's reasons (namely, [24] (final sentence) and [29]), and at [48] and [57] of Nicholas J's reasons, it was held that, if the respondent's expectation were to be defeated, procedural fairness required that he be told of the change in the constitution of the review so that he may have an opportunity to apply for a face-to-face hearing before the Reviewer. Again, with respect, this is a conclusion that is stated without any analysis.

63. The circumstances that would point in favour of, or militate against, an oral hearing being required by law may well exist prior to any interview being conducted. The circumstances of the present case were not such as to warrant such a hearing. There were, for example, no concerns raised by the RSA officer with respect to the respondent's credibility, including as to his demeanour.[56] (This circumstance would also point in favour of the Previous Reviewer not being required by law to offer to the respondent an oral hearing.) Nor were any such concerns raised by the Previous Reviewer during the interview with the respondent or in correspondence, whether internal or with the respondent. There were also no new issues arising with respect to the review that warranted input from the respondent as to how the review ought to proceed, including the matters raised in his written submissions with respect to his claims for complementary protection, which mirrored his other claims. There is nothing to show that the respondent was unsuited to the procedure, in fact, followed (for example, that he was unable to write) or that the Reviewer could not resolve the inconsistencies in the evidence without a further hearing. Indeed (though it is not necessary to go so far), the absence of any invitation from the Reviewer to the respondent to attend a further face-to-face hearing supported the inference—which ought to have been drawn by the Full Federal Court—that any questions that he had of

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53 See also *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 21 [72] per Kirby J.

54 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 10 [28] per Gleeson CJ.

55 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 per Mason CJ and Deane J.

56 Refugee Status Assessment Record dated 29 April 2011, pp 7, 10-12. Contrast *Bano v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 30 ALD 863 at 865-866, 868 per Beazley J, where it was held that the Minister's department was required to interview the applicant before making a decision, on the recommendation of the then Immigration Review Panel, not to grant to her a permanent entry permit, in the light of the doubts that the original decision-maker had with respect to the applicant's credibility.

the respondent had already been asked by the Previous Reviewer and that he considered that he could make a recommendation on the material before him (including because he could resolve the inconsistencies in the respondent's evidence and submissions).[57] In that sense, the present case can be seen to be the converse of *Applicant NAFF*.

64. As both the plurality and Nicholas J accepted at [27] and [50], respectively, the Reviewer's adverse credibility findings did not depend upon an assessment of the respondent's demeanour; rather, they turned upon contradictions in, and the inherent implausibility of, aspects of his documentary evidence and submissions,[58] including his self-contradictory evidence with respect to his claim that he supported a particular politician in the 2004 election in Jaffna – a claim which he had made since his arrival in Australia.[59] While it is true, as their Honours observed at [28], [50], [53] and [56], that, had the Reviewer conducted an oral hearing with the respondent, demeanour may have worked the other way, thereby leading to a different result, the possibility of that occurring does not reveal, or itself constitute, procedural unfairness. That a decision may be different if a person is given a further opportunity to give evidence and make submissions will always be possible, as is the possibility of a different person making a different evaluation. But a person need only be given a reasonable opportunity to advance their case, not "every opportunity … to present his or her best possible case and to improve upon the evidence."[60] That was done in the present case. Procedural fairness required no more and permitted no less, even if (as did not occur) the respondent had requested a further oral hearing.

65. The Full Federal Court's observations at [12], [14] and [54] as to the desirability of face-to-face hearings and the usefulness of assessing a witness's demeanour have relevance in curial proceedings which are adversarial and where witnesses are cross-examined, but not in administrative proceedings of the kind under consideration in the present case. In any event, even if one assumes that an oral hearing may have been desirable, and that the review that the respondent received was "different" from, and "inferior" to, that which he thought he would receive, it does not follow that there was any procedural unfairness in this case.

66. For the above reasons, each of the questions raised in Part II of these submissions should be answered in the negative.

Part VII: Authorities

67. The Minister relies upon those authorities set out in the List of Authorities filed with these submissions in accordance with Practice Direction No 1 of 2013.

68. Copies of ss 36, 46A, 195A of the Act, and any amending provisions, are contained in the Annexure to these submissions.

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57 Compare *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 408 per French J.

58 Independent Merits Review Statement of Reasons dated 25 July 2012 at [80]-[81], [83]-[91].

59 Independent Merits Review Statement of Reasons dated 25 July 2012 at [23], [30], [81].

60 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 368 [82] per Hayne, Kiefel and Bell JJ.

Part VIII: Orders sought

69. The Minister seeks the following orders:

1. Appeal allowed.

2. Set aside order 1 and order 2(i) (in so far as it set aside order 1 made by the Federal Circuit Court of Australia on 14 October 2013) made by the Full Court of the Federal Court of Australia on 20 October 2014 and, in their place, make the following order:

'1. Appeal dismissed.'

3. Appellant to pay the first respondent's costs in this Court.

Part IX: Oral argument

10 70. The Minister estimates that he will require approximately three hours for the presentation of his oral argument.

Dated: 22 May 2015

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20 Counsel for the appellant

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S85 of 2015

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

WZARH
First Respondent

ADOLFO GENTILE
IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

ANNEXURE

This Annexure contains copies of the following legislative provisions:

1. ***Pages 1-4***: Section 36 of the *Migration Act 1958* (Cth) (**Act**) as in force on 25 July 2012.
2. ***Pages 5-24***: The following provisions that have subsequently amended s 36 of the Act:
    a) ***Pages 5-8***: Sections 1-3 of, and items 7-8 of Schedule 1 to, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).
    b) ***Pages 9-14***: Sections 1-3 of, and items 1 and 7 of Schedule 3 to, the *Migration Amendment Act 2014* (Cth).
    c) ***Pages 15-24***: Sections 1-3 of, and items 6-9 and 19 of Schedule 2 and items 8-10 and 28 of Schedule 5 to, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).
3. ***Pages 25-27***: Section 46A of the Act as in force between 27 September 2001 (on which date the section commenced) and 31 May 2013.
4. ***Pages 28-43***: The following provisions that have subsequently amended s 46A of the Act:
    a) ***Pages 28-31***: Sections 1-3 of, and items 10-14 of Schedule 1 to, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).
    b) ***Pages 32-37***: Sections 1-3 of, and items 18F and 19 of Schedule 2 and item 13 of Schedule 6 to, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). (Sections 1-3 have been omitted to avoid duplication.)
    c) ***Pages 38-43***: Sections 1-3 of, and items 1-5 and 14-15 of Schedule 3 to, the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth).
5. ***Pages 44-47***: Section 195A of the Act as in force from 29 June 2005 (on which date the section commenced) to date.

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