HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

SORWAR HOSSAIN APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

Hossain v Minister for Immigration and Border Protection
[2018] HCA 34
15 August 2018
S1/2018

ORDER

The appeal is dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G O'L Reynolds SC with B M Zipser and D P Hume for the appellant (instructed by Mooney & Kennedy Solicitors)

C J Horan QC with T Reilly for the first respondent (instructed by Sparke Helmore Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Hossain v Minister for Immigration and Border Protection

Migration – Partner visa – Criteria prescribed for grant of visa – Where Minister for Immigration and Border Protection must refuse to grant visa if not satisfied that criteria prescribed for grant of visa met – Where delegate of Minister refused to grant visa – Review of decision by Administrative Appeals Tribunal – Where Tribunal not satisfied that visa application made within 28 days or that there were compelling reasons for not applying that criterion – Where Tribunal also not satisfied that visa applicant did not have outstanding debts to the Commonwealth or that appropriate arrangements had been made for payment of debts – Where Tribunal made error of law by assessing whether compelling reasons existed as at time of visa application instead of as at time of Tribunal's decision – Whether error of law in relation to one criterion was jurisdictional error where another criterion was not met.

Words and phrases – "compelling reasons", "discretion to refuse relief", "error of law", "error of law on the face of the record", "fundamental error", "independent basis", "jurisdictional error", "materiality", "non-jurisdictional error", "reasonably and on a correct understanding and application of the applicable law", "residual discretion", "satisfied", "void", "voidable".

Migration Act 1958 (Cth), s 65.
Migration Regulations 1994 (Cth), Sched 2, cll 820.211, 820.223, Sched 4, public interest criterion 4004.

1 KIEFEL CJ, GAGELER AND KEANE JJ. The Federal Circuit Court[1], exercising "the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution" conferred on it under s 77(i) of the Constitution by s 476(1) of the *Migration Act* 1958 (Cth), made an order in the nature of certiorari, setting aside a decision of the Administrative Appeals Tribunal which had affirmed a decision of a delegate of the Minister for Immigration and Border Protection to refuse to grant a visa, and an order in the nature of mandamus, remitting the subject matter of that decision to the Tribunal for redetermination. The Federal Circuit Court made those orders consequent on finding a jurisdictional error constituted by an error of law in the reasoning of the Tribunal which led to the decision.

2 The Federal Circuit Court was correct to find an error of law in the reasoning of the Tribunal which led to the decision; indeed, the error of law was conceded. The Federal Circuit Court was incorrect to characterise that error as a jurisdictional error. That is because, on the facts found by the Tribunal, the Tribunal had a duty to affirm the decision of the delegate in any event. The Tribunal had not exceeded its jurisdiction by making the decision which it made.

3 The Full Court of the Federal Court[2], by majority, allowed an appeal and set aside the orders of the Federal Circuit Court. The majority was correct to do so, although not exactly for the reasons which it gave. This appeal from the judgment of the Full Court must accordingly be dismissed.

The Tribunal

4 Mr Hossain, a citizen of Bangladesh, made a valid application for a partner visa. The application was considered by a delegate of the Minister. Not being satisfied that criteria prescribed by the Migration Regulations 1994 (Cth) for the grant of the visa had been met, the delegate refused to grant the visa.

5 Mr Hossain then applied to the Tribunal for merits review of the delegate's decision. The Tribunal affirmed the decision of the delegate because it was not itself satisfied that two prescribed criteria had been met. One was a criterion which related to the timing of the making of the application. Relevantly to the circumstances of Mr Hossain, it required that the application be validly made within 28 days of the applicant ceasing to hold a previous visa "unless the Minister is satisfied that there are compelling reasons for not applying [that

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1 *Hossain v Minister for Immigration and Border Protection* [2016] FCCA 1729.

2 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31.

criterion]"[3]. The other was a public interest criterion expressed in terms that the visa applicant "does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment"[4].

6 The Tribunal was not satisfied on the evidence before it that either criterion was met. On that basis, the Tribunal affirmed the decision of the delegate.

7 In relation to the criterion relating to the timing of the making of the application, the Tribunal found that Mr Hossain had not applied within 28 days of ceasing to hold a previous visa and was satisfied that there were no compelling reasons as at the time of the application for not applying the criterion.

8 In relation to the public interest criterion, the Tribunal noted in its reasons for decision that Mr Hossain had admitted in evidence before the Tribunal that he had an outstanding debt to the Commonwealth which he had made no arrangements to pay, but which he said he intended to pay. The Tribunal also noted that at the time of its decision, more than a week after he had appeared before it, Mr Hossain had provided no evidence that he had taken steps to pay the debt in the interim. The Tribunal recorded that it was not convinced that his stated intention to pay the debt was genuine and that it was not satisfied that appropriate arrangements had been made for payment.

The Federal Circuit Court

9 Mr Hossain applied to the Federal Circuit Court for judicial review of the Tribunal's decision. By the time that application came to be heard by the Federal Circuit Court, Mr Hossain had fully paid his debt to the Commonwealth.

10 The Minister conceded before the Federal Circuit Court that the Tribunal had erred in law in attempting to apply the criterion which related to the timing of the making of the application. The conceded error lay in the Tribunal having addressed the question of whether there were compelling reasons for not applying the criterion as at the time of the application for the visa rather than as

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3 Clause 820.211(2)(d)(ii) of Sched 2 to the Migration Regulations, read with criterion 3001 in Sched 3 to the Migration Regulations.

4 Clause 820.223(1)(a) of Sched 2 to the Migration Regulations, read with public interest criterion 4004 in Sched 4 to the Migration Regulations.

at the time of its own decision[5]. The Minister argued that the conceded error was not a jurisdictional error, because the Tribunal's failure to be satisfied that the public interest criterion was met at the time of its decision provided an independent basis on which the Tribunal was bound to affirm the delegate's decision.

11 The Federal Circuit Court rejected the Minister's argument, refusing to engage in what it described as an "unbundling" of the Tribunal's reasons for decision into "impeachable" and "unimpeachable" parts[6]. Holding that the Tribunal's error was a jurisdictional error, the Federal Circuit Court found no discretionary reason to withhold the relief which Mr Hossain sought under s 476 of the *Migration Act*[7].

The Full Court of the Federal Court

12 On appeal to the Federal Court, the Minister repeated substantially the same argument which he had put to the Federal Circuit Court.

13 The majority in the Full Court of the Federal Court comprised Flick and Farrell JJ. They rejected the Minister's argument in form. They chose to characterise the Tribunal's error as "jurisdictional". They nevertheless accepted the Minister's argument in substance, holding that the Tribunal's error had not stripped the Tribunal of authority to make the decision to affirm the delegate's decision[8].

14 The dissentient, Mortimer J, also thought that the Tribunal's error, being an error in the construction and application of a visa criterion, warranted the label of "jurisdictional". Noting that "it is difficult to discern a consistent approach throughout the authorities as to the appropriate outcome where there is more than one basis for a Tribunal's decision on review under the *Migration Act*", Mortimer J thought that the correct approach was "to accept an error of this kind is jurisdictional and then to ask whether there is utility in the grant of relief to an

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5 Applying *Waensila v Minister for Immigration and Border Protection* (2016) 241 FCR 121.

6 [2016] FCCA 1729 at [20], using language drawn from *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1198 [29]; 235 ALR 609 at 618-619; [2007] HCA 26.

7 [2016] FCCA 1729 at [25]-[29].

8 (2017) 252 FCR 31 at 39-40 [27]-[30].

applicant, because of a second basis for the decision on review"[9]. Approaching the matter as one of discretion, she concluded that the orders made by the Federal Circuit Court were not futile because the fact that the debt to the Commonwealth had been repaid meant that, on reconsideration by the Tribunal, Mr Hossain's meeting of the public interest criterion would no longer be in issue[10].

15 Mortimer J indicated that, if she were wrong about the correct approach, she would have inclined to the alternative view that the two visa criteria in issue before the Tribunal were not entirely independent of each other. The connection between them which she postulated was that if the Tribunal had been satisfied that there were compelling reasons for not applying the criterion relating to the timing of the making of the application, the Tribunal, properly instructed, might have been persuaded to delay making its decision until such time as Mr Hossain was able to satisfy it that he had either paid his debt to the Commonwealth (as he had told the Tribunal he intended to do and as in fact he later did) or entered into an arrangement with the Commonwealth for payment to occur[11].

This appeal

16 On appeal by special leave to this Court, Mr Hossain relies on arguments which develop the themes reflected in the reasoning of Mortimer J. The Minister repeats the substance of the argument which he put to the Federal Circuit Court and to the Full Court of the Federal Court.

Jurisdiction and jurisdictional error

17 The term "jurisdiction", Frankfurter J once wrote, "is a verbal coat of too many colors"[12]. The terminological tangle in which the Full Court entwined itself in the decision under appeal shows how readily the terminology of jurisdiction, and the associated terminology of jurisdictional error, can be misunderstood. Yet, as Frankfurter J elsewhere recognised, in an administrative

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9 (2017) 252 FCR 31 at 49 [69]-[70].

10 (2017) 252 FCR 31 at 56-57 [100].

11 (2017) 252 FCR 31 at 51 [75]-[76].

12 *United States v L A Tucker Truck Lines Inc* 344 US 33 at 39 (1952).

law context there can be circumstances in which "new formulas attempting to rephrase the old are not likely to be more helpful than the old"[13].

18 Professor Jaffe responded to Frankfurter J. He characterised criticism of the language of jurisdiction as "barrenly semantic" in failing to face the question of why a court denominates some questions as jurisdictional and others as not[14]. The answer he proffered was that the language of jurisdiction is a traditional expression of the function of a court, acting within the limits of its own jurisdiction where no statutory mode of review existed, of ensuring that a repository of statutory power did not strain the statutory limits of that power. "In short," he suggested, "the concept is almost entirely functional: it is used to validate review when review is felt to be necessary."[15]

19 Professor Jaffe continued by way of explanation[16]:

> "There will be situations in which the apparent or stated intention of the legislature is to limit review to certain gross errors, and in which the notion of jurisdiction, familiar as it is to judges and lawyers, will be as good as any to express the scope of review. There are other situations, too – organizational or procedural mistakes – in which the lapse is so serious that judges will want a concept which enables them to declare the order 'void.'"

He concluded:

> "If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified."

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13 *Universal Camera Corp v National Labor Relations Board* 340 US 474 at 489 (1951).

14 Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 962-963.

15 Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 963.

16 Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 963.

20 Six members of this Court picked up that language of Professor Jaffe, and more importantly gave effect to that underlying conception of jurisdiction and of jurisdictional error, when they chose in *Kirk v Industrial Court (NSW)*[17] to express the constitutionally entrenched minimum content of the supervisory jurisdiction of a State Supreme Court to enforce "the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court" in terms of the "distinction between jurisdictional and non-jurisdictional error". Faced with the privative clause in s 474 of the *Migration Act*, six members of the Court had previously given effect to the same conception in invoking the same distinction in *Plaintiff S157/2002 v The Commonwealth*[18] to explain the constitutionally entrenched minimum content of the jurisdiction conferred on the Court by s 75(v) to enforce the limits on the exercise of Commonwealth executive or judicial power by officers of the Commonwealth.

21 Had statutory mechanisms for judicial review (such as that contained in the *Administrative Procedure Act* 1946 (US) or the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)) been enacted to cover judicial review of statutory decision-making more comprehensively, the terminology of jurisdiction and of jurisdictional error in its application to administrative action may well have fallen into desuetude in Australia. Indeed, there was a time in the 1980s and 1990s when the terminology was little used, and doubts were expressed even afterwards as to its continuing utility[19].

22 For so long as there remains a necessity for courts to fall back on constitutionally entrenched minimum jurisdictions to engage in judicial review of administrative action, however, the traditional distinction between jurisdictional and non-jurisdictional error cannot be avoided[20]. The traditional distinction can be explained in more modern language. But an attempt to reframe the distinction in entirely new language is unlikely to be helpful.

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17 (2010) 239 CLR 531 at 580 [98], 581 [100]; [2010] HCA 1.

18 (2003) 211 CLR 476 at 482-483 [5], 513-514 [103]-[104]; [2003] HCA 2.

19 Eg *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1185-1186 [119]-[123], 1191 [154]; 198 ALR 59 at 85-86, 94; [2003] HCA 30; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 184 [129]; [2008] HCA 32.

20 Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-25 [76]-[77]; [2003] HCA 6.

23 Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have "such force and effect as is given to it by the law pursuant to which it was made"[21].

24 Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction[22]. A decision made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law[23]. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes

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21 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46]; [2002] HCA 11.

22 Eg *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 606 [17].

23 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46]; *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 at 16 [42].

of the law pursuant to which it was purported to be made as "no decision at all"[24]. To that extent, in traditional parlance, the decision is "invalid" or "void"[25].

25 To return to the explanation of Professor Jaffe, jurisdictional error is an expression not simply of the existence of an error but of the *gravity* of that error. In the language of Selway J, the unavoidable distinction between jurisdictional errors and non-jurisdictional errors is ultimately "a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised"[26].

26 Although ultimately correct in the result, the majority in the Full Court was therefore wrong to distinguish between a decision involving jurisdictional error and a decision wanting in authority. They are one and the same.

27 Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute[27]. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.

28 The common law principles which inform the construction of statutes conferring decision-making authority[28] reflect longstanding qualitative judgments

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24 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 615 [51].

25 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 157; [1909] HCA 90; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 264 [63]; 351 ALR 225 at 241; [2018] HCA 4.

26 Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues", (2002) 30 *Federal Law Review* 217 at 234, quoted in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 25 [77].

27 Cf *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 640 [35]; [2009] HCA 37.

28 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; [2012] HCA 31.

about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary[29]. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that "[d]ecison-making is a function of the real world"[30].

29 That a decision-maker "must proceed by reference to correct legal principles, correctly applied"[31] is an ordinarily (although not universally[32]) implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.

30 Whilst a statute on its proper construction might set a higher or lower threshold of materiality[33], the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome"[34], or where a decision-maker failed to take

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29 Robertson, "Is Judicial Review Qualitative?", in Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance*, (2016) 243.

30 *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.

31 *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*) (2010) 243 CLR 319 at 354 [78]; [2010] HCA 41.

32 Eg *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248; 351 ALR 225.

33 Cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; [2005] HCA 24.

34 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 [56]; [2015] HCA 40, quoting *Stead v State Government Insurance*

(Footnote continues on next page)

into account a mandatory consideration which in all the circumstances was "so insignificant that the failure to take it into account could not have materially affected" the decision that was made[35].

31 Thus, as it was put in *Wei v Minister for Immigration and Border Protection*[36], "[j]urisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act". Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision.

Absence of jurisdictional error

32 The Tribunal, in reviewing the delegate's decision under s 348 of the *Migration Act*, was obliged by s 349(1) to form its own conclusion on the material before it as to the proper performance of the duty imposed on the Minister by s 65. The Tribunal's own conclusion as to the proper performance of the duty imposed on the Minister by s 65 was then to be reflected in a decision under s 349(2), relevantly, either to affirm the decision of the delegate or to set aside the decision of the delegate and to substitute its own decision, which would then be taken by force of s 349(3) to be a decision of the Minister.

33 The operation of s 65 of the *Migration Act* was explained in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*[37]:

> "The decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts – to grant the visa under s 65(1)(a), or to refuse to grant the visa under s 65(1)(b) – depending on the existence of one or other of two mutually exclusive states of affairs (or

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Commission (1986) 161 CLR 141 at 147; [1986] HCA 54. Eg *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 637-638 [78]; [2015] HCA 22.

35 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; [1986] HCA 40. Cf *Martincevic v Commonwealth* (2007) 164 FCR 45 at 64-65 [67]-[68].

36 (2015) 257 CLR 22 at 32 [23]; [2015] HCA 51.

37 (2014) 255 CLR 179 at 188-189 [34]; [2014] HCA 24 (footnote omitted).

'jurisdictional facts') – the Minister's satisfaction of the matters set out in each of the sub-paragraphs of s 65(1)(a), or the Minister's non-satisfaction of one or more of those matters."

The matters set out in the sub-paragraphs of s 65(1)(a) centrally include that the criteria prescribed by the *Migration Act* and the Migration Regulations for the visa for which a valid application has been made have been met.

34 Formation of the Minister's state of satisfaction or of non-satisfaction is in each case conditioned by a requirement that the Minister or his or her delegate, or the Tribunal forming its own conclusion on review, must proceed reasonably and on a correct understanding and application of the applicable law[38], which includes the criteria prescribed by the *Migration Act* and the Migration Regulations for the visa in question.

35 Here the Tribunal breached that implied condition by misconstruing and misapplying the criterion which related to the timing of the making of the application. The breach, however, could have made no difference to the decision which the Tribunal in fact made to affirm the decision of the delegate. That was because the Tribunal was not satisfied that the public interest criterion was met, and, on the findings which the Tribunal made, the Tribunal could not reasonably have been satisfied that the public interest criterion was met. The Tribunal in those circumstances had no option but to affirm the decision of the delegate.

36 The suggestion of Mortimer J in dissent, that the Tribunal might have delayed making its decision to allow Mr Hossain time to meet the public interest criterion had it not erred in construing and applying the criterion relating to the timing of the making of the application, rises no higher than conjecture. The Tribunal was not asked to delay making its decision and, in any event, did not believe Mr Hossain when he said that he intended to pay his outstanding debt to the Commonwealth.

37 The Tribunal's error in construing and applying the criterion relating to the timing of the making of the application did not rise to the level of a jurisdictional error.

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38 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137]; [1999] HCA 21; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5; *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at 904 [57]; 347 ALR 350 at 363-364; [2017] HCA 33; *Wilkie v The Commonwealth* (2017) 91 ALJR 1035 at 1055 [109]; 349 ALR 1 at 26; [2017] HCA 40.

Kiefel CJ
Gageler J
Keane J

Orders

38 The appeal is to be dismissed with costs.

39 NETTLE J. I agree with Edelman J that the appeal should be dismissed, substantially for the reasons his Honour gives.

40 With respect, however, I wish to observe that there may be a number of circumstances in which an error is jurisdictional despite not depriving a party of the possibility of a successful outcome. Edelman J has referred[39] to one such circumstance: where respect for the dignity of the individual may mean that a denial of procedural fairness should be regarded as a jurisdictional error regardless of the effect it may have had on the result reached by the decision maker[40]. Another such circumstance is where a decision maker is required to make a decision by reference to a single specified criterion and, in error, addresses himself or herself to the wrong criterion. In such a case, the decision maker's error will be a jurisdictional error – a failure to exercise the jurisdiction of deciding the question according to the applicable criterion – regardless of whether one can say that, if properly directed and having determined the application by reference to the correct criterion, the decision maker would have been bound to make the same decision[41].

41 It is different in this case because, although the Administrative Appeals Tribunal misdirected itself as to the test to be applied in relation to cl 820.211(2)(d)(ii) of Sched 2 to the Migration Regulations 1994 (Cth), and thereby made an error of law, the Tribunal retained jurisdiction and was bound to determine the application, as it did, on the separate and wholly independent basis that the appellant did not meet public interest criterion 4004 for the purpose of cl 820.223(1)(a) of Sched 2 to the Migration Regulations (due to the appellant's outstanding debt to the Commonwealth at the time of the Tribunal's decision). More specifically, since the Tribunal's error in relation to cl 820.211(2)(d)(ii) was separate from and independent of the decision which the Tribunal was required to make in relation to cl 820.223(1)(a), and could not possibly have affected the Tribunal's decision in relation to cl 820.223(1)(a), the error in relation to cl 820.211(2)(d)(ii) was not a jurisdictional error.

42 Given the broad range of decisions in which errors are apt to be made, and the large variety of circumstances and statutory schemes which may attend them, it is impossible to divine an *a priori* classification of the jurisdictional errors that do not deprive a party of the possibility of a successful outcome. Perhaps the most that can or should be said on the subject is that, if an error is jurisdictional,

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39 At [72].

40 See *R (Osborn) v Parole Board* [2014] AC 1115 at 1149 [68] per Lord Reed JSC.

41 See for example *Kabir v Minister for Immigration and Citizenship* (2010) 118 ALD 513.

in the scheme of things it will not infrequently be the case that it will deprive a party of a possibility of a successful outcome.

43 I wish also to observe that the exercise of residual discretion to refuse relief in a case of jurisdictional error may, in an appropriate case, depend on a backward-looking test of whether there could possibly have been a different outcome[42]. Much depends on the circumstances of the case. But as the Tribunal's error in this case was not a jurisdictional error, it is unnecessary and undesirable to say anything further on the residual discretion.

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42 See and compare *Giretti v Commissioner of Taxation* (1996) 70 FCR 151 at 165 per Lindgren J (Jenkinson J agreeing at 152); *Kabir v Minister for Immigration and Citizenship* (2010) 118 ALD 513 at 520-521 [44]-[53].

EDELMAN J.

Introduction

44 The Administrative Appeals Tribunal ("the Tribunal") affirmed the decision of a delegate of the Minister to refuse to grant a visa to the appellant. The Tribunal did so for two independent reasons. The first reason for decision involved an error of law. The second reason did not. The Federal Circuit Court of Australia quashed the decision of the Tribunal on the basis that the error of law was a jurisdictional error. A majority of the Full Court of the Federal Court of Australia allowed the appeal on the basis that, although the error in relation to the first reason for decision involved a jurisdictional error, the Tribunal retained jurisdiction because the second reason disclosed no error.

45 The essence of the appellant's ground of appeal in this Court, and his submissions on the appeal, was that it was an inherent contradiction for the Full Court to conclude that the Tribunal (i) made a jurisdictional error, meaning that it lacked authority to make its decision, and (ii) retained authority to make its decision. That submission should be accepted. However, the simplicity with which this submission was expressed conceals deep fissures and uncertainties underlying the notion and nature of jurisdictional error. In 1929, Gordon observed in relation to jurisdiction that "in no branch of English law is there more confusion and conflict"[43]. This case illustrates that, nearly a century later, there is still significant difficulty.

46 The Minister filed a notice of contention alleging that the decision of the Full Court should be upheld on the basis that the error of law by the Tribunal was not "jurisdictional" because the Tribunal's decision was not affected by the error. In the alternative, the Minister said that the Full Court should have withheld the exercise of its discretion to grant relief because the error did not affect the Tribunal's decision. The notice of contention should be upheld on the first ground: the error of law was not material because it was neither a fundamental error nor an error that could have affected the Tribunal's decision. The lack of materiality meant that the error was not a jurisdictional error. The appeal must be dismissed.

Background and legislative provisions

47 The appellant is a citizen of Bangladesh. He came to Australia in May 2003, holding a student visa. That visa expired on 7 November 2005. In the meantime, the appellant had applied for a protection visa, which was refused. After exhausting all available applications and appeals, the appellant was

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43 Gordon, "The Relation of Facts to Jurisdiction", (1929) 45 *Law Quarterly Review* 459 at 459.

unsuccessful. He attempted to make another application for a protection visa in 2008, but it was deemed invalid. Between September 2008 and January 2013, the appellant was in Australia as an unlawful non-citizen. In January 2013, the appellant made another application for a protection visa. This application was refused by a delegate of the Minister, which refusal was affirmed by the Refugee Review Tribunal. Subsequent requests for ministerial consideration were refused.

48 In 2010, the appellant met the woman who, in 2013, became his de facto partner. In May 2015, he applied for a Partner (Temporary) (Class UK) visa. A delegate of the Minister refused that application. The appellant sought review of the decision by the Tribunal.

49 In order to be granted a visa, the appellant had to satisfy the decision maker that he satisfied requirements including the "criteria ... prescribed by ... the regulations"[44]. The two relevant criteria were prescribed by cll 820.211 and 820.223 of Sched 2 to the Migration Regulations 1994 (Cth).

50 First, cl 820.211(1)(b) relevantly provided that an applicant was required to meet the requirements of various sub-clauses. Clause 820.211(2)(d)(ii) required an applicant who is not the holder of a substantive visa and did not enter Australia holding a diplomatic visa or special purpose visa to satisfy criteria 3001, 3003 and 3004 in Sched 3 to the Migration Regulations, unless the decision maker is satisfied that there are compelling reasons for not applying those criteria. As the appellant was not the holder of a substantive visa, a diplomatic visa, or a special purpose visa, he was required by criterion 3001 to lodge his application for a visa within 28 days after the "relevant day". If he failed to do so, the appellant could only satisfy the criteria in cl 820.211 if, by cl 820.211(2)(d)(ii), the decision maker "is satisfied that there are compelling reasons for not applying [the Sched 3] criteria".

51 Secondly, cl 820.223(1)(a) of Sched 2 to the Migration Regulations required that an applicant must satisfy various public interest criteria. One of those, public interest criterion 4004, contained in Sched 4 to the Migration Regulations, provided as follows:

> "The applicant does not have outstanding debts to the Commonwealth unless the [decision maker] is satisfied that appropriate arrangements have been made for payment."

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44 *Migration Act* 1958 (Cth), s 65(1)(a)(ii).

The decisions below

The Tribunal

52 The Tribunal affirmed the decision of the delegate of the Minister not to grant a visa to the appellant. Two reasons were given, respectively relating to the relevant criteria set out above.

53 First, the Tribunal found that the last day that the appellant held a substantive visa was 7 November 2005, when his student visa expired. That was the "relevant day" for criterion 3001. The Tribunal therefore concluded that the application for a partner visa, made in May 2015, was made more than 28 days after the relevant day. The Tribunal then turned to whether there were any "compelling reasons" not to apply criterion 3001. The Tribunal held that the compelling reasons must exist at the time of the application. After considering all the circumstances at that time, including the appellant's immigration history, many aspects of his relationship with his partner and her children, and his and his partner's medical evidence, the Tribunal concluded that it was not satisfied that there were compelling reasons not to apply criterion 3001.

54 The second reason given by the Tribunal for affirming the decision of the delegate of the Minister was that the appellant had not satisfied public interest criterion 4004. In oral evidence before the Tribunal, the appellant confirmed that he had an outstanding debt to the Commonwealth following his visa applications and applications for judicial review. He said that he intended to repay the debt but had not made any arrangements to do so. The appellant's representative suggested that the appellant was waiting for a "final bill", and that the appellant would make arrangements to repay the debt when all bills were combined. However, in circumstances where the first debt accrued more than a decade earlier, the Tribunal did not accept that the appellant had any intention to repay the debt. The Tribunal also observed that "some days after the [appellant] attended the hearing, he has not presented any evidence that he has made the repayments or that he had made any arrangements to repay the debt".

55 The Tribunal's decision was delivered on 25 February 2016. In May 2016, the appellant repaid his debt to the Commonwealth.

The Federal Circuit Court and the Full Court of the Federal Court

56 In the Federal Circuit Court, as in the Full Court of the Federal Court and in this Court, it was common ground that the Tribunal had made an error of law in relation to criterion 3001 by considering whether compelling circumstances existed at the time of the application. The Tribunal erred because it should have considered whether compelling circumstances existed at the time of its decision.

57 The Federal Circuit Court (Judge Street) held that this error was a jurisdictional error, notwithstanding that the Tribunal's decision was

independently supported by its conclusion that the appellant had not satisfied public interest criterion 4004. Judge Street held that the grant of a writ of certiorari was not inutile and should not be denied in the exercise of discretion. His Honour pointed to the payment of the debt by the appellant following the decision of the Tribunal[45]. The application for judicial review was therefore allowed and writs of certiorari and mandamus were issued, quashing the decision of the Tribunal and requiring the Tribunal to determine the review application according to law.

58 The Full Court, by majority, allowed the Minister's appeal. The majority (Flick and Farrell JJ) held that the Tribunal's error in relation to criterion 3001 was a jurisdictional error[46]. Nevertheless, their Honours allowed the appeal because they held that the Tribunal retained jurisdiction to determine the separate issue concerning public interest criterion 4004[47].

59 In contrast, Mortimer J would have dismissed the appeal. Her Honour held that in determining whether an error is jurisdictional it is not possible to isolate an error of law from the ultimate decision on the review[48]. As will be seen below, that view of jurisdictional error is correct. A jurisdictional error cannot be so isolated because a finding of jurisdictional error means that the ultimate decision was made without authority. However, her Honour considered that, notwithstanding the existence of an independent ground for the decision, the error of law by the Tribunal was of sufficient gravity that it should be treated as jurisdictional[49]. Alternatively, her Honour said, the error of law by the Tribunal had infected the Tribunal's reasoning concerning public interest criterion 4004. This meant that the error of law should be treated as jurisdictional because it might have led to a different result concerning public interest criterion 4004[50]. Neither of these alternatives should be accepted.

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45 *Hossain v Minister for Immigration and Border Protection* [2016] FCCA 1729 at [28].

46 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31 at 39 [27].

47 (2017) 252 FCR 31 at 40 [30].

48 (2017) 252 FCR 31 at 49 [67].

49 (2017) 252 FCR 31 at 49 [66].

50 (2017) 252 FCR 31 at 49-50 [71]-[72].

The basis for the writ of certiorari to quash a decision

60 On the application to the Federal Circuit Court for judicial review of the Tribunal's decision, the Federal Circuit Court had, with some exceptions discussed below, the same original jurisdiction as that which this Court has under s 75(v) of the Constitution[51]. The original jurisdiction conferred upon the High Court by s 75(v) extends to matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Despite the omission of certiorari in s 75(v), a writ of certiorari is available in original jurisdiction at least where it is ancillary to writs of mandamus or prohibition[52]. In the Federal Circuit Court, the appellant was granted a writ of mandamus in addition to a writ of certiorari, and it was assumed by all parties that the latter was ancillary to the former (although mandamus had not apparently been sought by the appellant). Hence, it is unnecessary to consider whether certiorari might be available in wider circumstances, including whether it could be seen as an application of the essential meaning of s 75(v) or, put another way, as a "species of the same genus"[53] as the other remedies in s 75(v), when those remedies are properly understood[54] without the erroneous assumption that certiorari involves appellate jurisdiction[55]. Nevertheless, this appeal requires consideration of the reasons that a writ of certiorari is generally ordered in respect of a decision made under statute, so as to appreciate the nature of the requirement of materiality that was the focus of the appeal.

61 Where the unlawfulness of a decision made under statute arises from an error by the statutory decision maker, there are two overlapping categories of

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51 *Migration Act* 1958 (Cth), s 476(1).

52 *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 655; [1966] HCA 69; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14]; [2000] HCA 57; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 507 [81]; [2003] HCA 2; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 672-673 [61]-[64]; [2007] HCA 14. Cf Aitken, "The High Court's Power to Grant Certiorari – The Unresolved Question", (1986) 16 *Federal Law Review* 370 at 374.

53 Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction But No Certiorari?", (2014) 42 *Federal Law Review* 241 at 251.

54 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 977 [47]; 190 ALR 601 at 615; [2002] HCA 30.

55 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, (2012) at 250; Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction But No Certiorari?", (2014) 42 *Federal Law Review* 241 at 243.

error that can lead to a writ of certiorari. The first category comprises errors that have the consequence that the decision maker had no authority to make the decision. The second comprises errors that appear on the face of the record, irrespective of whether the decision maker had authority to make the decision. The categories overlap because an error in the second category could mean that the decision itself was unlawful and without authority. But an error might also fall within the second category if a step in the process by which the decision was reached was unlawful, even where the decision was made with authority.

62 The first category of error, which results in a lack of authority for the decision, is sometimes described as having the consequence that the decision was beyond power. Its consequence has been said, in terms that create difficulty[56], to be that the decision is a nullity or void. Nevertheless, it is established that the effect of an error of that type is that the "decision ... lacks *legal* foundation and is properly regarded, in law, as no decision at all"[57] (emphasis added). In contrast, if an error of law on the face of the record does not deprive the decision maker of authority, then the decision will have legal foundation. In a passage described by Wade as "the one usage which is based on an intelligible distinction"[58], Dr Rubinstein attempted to illustrate the difference in consequences between (i) an error that has the effect that a decision was made without authority, and (ii) other errors of law on the face of the record, by using the contrasting labels of a "void" and a "voidable" decision[59]. Those labels have been deprecated[60] but they have the benefit of highlighting the contrast between a decision that has no legal foundation, and one that is unlawfully made although it has a lawful foundation until set aside.

63 The essential difference of principle in Australian law is not between the overlapping categories of decisions made without authority and all decisions that

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56 Leeming, "The riddle of jurisdictional error", (2014) 38 *Australian Bar Review* 139 at 148-149; Wade, "Unlawful Administrative Action: Void or Voidable?", (1967) 83 *Law Quarterly Review* 499.

57 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51]; [2002] HCA 11. See also Forrest, "The physics of jurisdictional error", (2014) 25 *Public Law Review* 21 at 29.

58 Wade, "Unlawful Administrative Action: Void or Voidable?", (1967) 83 *Law Quarterly Review* 499 at 520, see also at 521 discussing *Director of Public Prosecutions v Head* [1959] AC 83 at 110-112.

59 Rubinstein, *Jurisdiction and Illegality: A Study in Public Law*, (1965) at 4-5.

60 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46].

involve errors of law on the face of the record. Instead, the distinction of principle is between errors characterised as jurisdictional errors and errors characterised as non-jurisdictional errors of law on the face of the record.

64 There are some different consequences that arise from errors that deprive a decision maker of authority compared with errors that do not. The most significant of these is the constraint upon State legislative power to exclude review of jurisdictional errors[61]. However, there are significant commonalities between the unlawfulness involved in jurisdictional errors and non-jurisdictional errors of law on the face of the record. Where the decision maker is exercising statutory power the legal requirements from which both errors are established arise by construction of the statute. That exercise of construction is not dependent solely on the literal text. Rather, the statute is construed in light of the background principles and history of judicial review[62], as well as common law principles[63], including the principle that the consequences of an error that a legislature will be taken to intend will usually depend on the gravity of the error[64]. If an error of either type has been committed, an order in the nature of certiorari operates "to remove the legal consequences [in cases of non-jurisdictional error of law on the face of the record], or purported legal consequences [in cases of jurisdictional error], of an exercise or purported exercise of power which has, at the date of the order, a discernible or apparent legal effect upon rights"[65].

65 In England, where a distinction between jurisdictional error and non-jurisdictional error has been reduced almost to vanishing point[66], one focus has

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61 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100]; [2010] HCA 1. See also *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 271-272 [92]-[94]; 351 ALR 225 at 251-252; [2018] HCA 4.

62 Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review", (1996) 55 *Cambridge Law Journal* 122 at 135.

63 Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues", (2002) 30 *Federal Law Review* 217 at 226-228, contrasting the approaches of Mason J and Brennan J.

64 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 570-571 [64].

65 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 257 [28]; 351 ALR 225 at 232.

66 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, as explained in *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 701-702. See also *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 683 [39], 702 [110].

become whether the error is "material"[67]. However, ultimately, "[b]oth tribunals and the courts are there to do Parliament's bidding"[68]. Likewise, in Australia, the requirement of materiality is a common restriction upon the issue of a writ of certiorari for both types of error. In cases of decision makers acting under statute, it will usually be implied from the statute that any error of law on the face of the record does not render a decision liable to be set aside unless, as a pre-condition, the error was material in the sense that it "affected" the decision[69]. The related nature of the two categories means that it would be curious if there were a usual implication of materiality for non-jurisdictional errors of law on the face of the record but no such usual implication for jurisdictional errors. However, on this appeal, it is unnecessary to explore the operation of a requirement of material error in the context of a non-jurisdictional error of law on the face of the record. The decision of the Tribunal, being one that fell within s 474(3)(b) of the *Migration Act* 1958 (Cth), was a "privative clause decision"[70], which has the effect that a writ of certiorari from the Federal Circuit Court was available only for jurisdictional error[71]. The essential question on this appeal is whether a non-material error by the decision maker was a jurisdictional error.

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67 *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1314 [31], [33], 1325 [69]; [2011] 4 All ER 975 at 993, 1004; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 275 [68], 312 [207]; *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 702 [110]. See also *HK (Turkey) v Secretary of State for the Home Department* [2007] EWCA Civ 1357, discussed in Stern, "The Rationale for the Grant of Relief by Way of Judicial Review and Potential Areas for Future Development", in Williams (ed), *Key Issues in Judicial Review*, (2014) 194 at 196-197.

68 *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 683 [37].

69 *Craig v South Australia* (1995) 184 CLR 163 at 176; [1995] HCA 58; *Victoria Pre Cast Pty Ltd v Papazisis* [2003] VSC 208 at [8]; *Wilson v County Court of Victoria* (2006) 14 VR 461 at 471 [43]; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172 at 204-205 [121]; *Combined Enterprises Pty Ltd v Brister* [2016] VSC 807 at [21]. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353, 384; [1990] HCA 33.

70 See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]-[77]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100].

71 *Migration Act* 1958 (Cth), s 476(1); *ARP15 v Minister for Immigration and Border Protection* [2015] FCA 1220 at [43]. See also *Bhullar v Minister for Immigration and Citizenship* [2010] FCA 1337 at [5].

Certiorari for material breach of a pre-condition to exercise of power and residual discretion

Jurisdictional error requires materiality

66 In *Attorney-General (NSW) v Quin*[72], Brennan J said that in Australia the development and expansion of judicial review had "been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power". The broad test for determining whether an implied legislative condition is jurisdictional was set out by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*[73]. Their Honours said that it was necessary to "ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".

67 A close examination of legislation will usually have the effect that not every express or implied condition must be construed in a binary way. A legislative condition need not be construed as (i) always depriving a decision maker of power, or (ii) never doing so, no matter how it is breached. The question is always one of construction of the legislation: which breaches of a provision does the legislation, either expressly or, more commonly, impliedly[74], treat as depriving the decision maker of power? Just as it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power[75], so too it is unlikely to be an intention that the legislature is taken to have that a decision be rendered invalid by an immaterial error.

68 An illustration of this point is the decision of this Court in *Minister for Immigration and Citizenship v SZIZO*[76]. In that case, the Refugee Review Tribunal failed to comply with the requirements of ss 441A and 441G of the

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72 (1990) 170 CLR 1 at 36; [1990] HCA 21.

73 (1998) 194 CLR 355 at 390 [93]; [1998] HCA 28.

74 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; [2012] HCA 31.

75 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; [1997] HCA 27; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126]; [1999] HCA 21; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [15]; 259 ALR 429 at 433; [2009] HCA 39; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350-351 [28], 362 [63], 370 [88]; [2013] HCA 18.

76 (2009) 238 CLR 627; [2009] HCA 37.

Migration Act because it sent notice of the hearing to the first applicant only, instructing him to inform the other applicants of the hearing. All of the applicants attended the hearing and had the opportunity to participate. This Court said that the "admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from *any* of the procedural steps leading up to the hearing"[77] (emphasis added).

69 The decision in *SZIZO* illustrates a common manner in which this concept of materiality is part of the implication that a decision will not be invalid or beyond authority where the error could not have affected the result of the decision. Another example was contemplated in the joint judgment in this Court in *Kirk v Industrial Court (NSW)*[78]. In that case, the erroneous reversal of the onus of proof was a jurisdictional error. However, the joint judgment observed that there may be some departures from the rules of evidence that would not warrant the grant of relief in the nature of certiorari[79]. In other words, the joint judgment contemplated that a non-material departure from the rules of evidence might not be either a jurisdictional error or a material error of law on the face of the record.

70 This approach to materiality as part of the implication concerning when an action by a decision maker will go beyond power can also be seen in the classic description by this Court of the range of possible jurisdictional errors in *Craig v South Australia*[80]. In that case, the Court gave examples of errors of law by an administrative tribunal that could be jurisdictional errors: identifying the wrong issue; asking the wrong question; ignoring relevant material; relying upon irrelevant material; and, in some circumstances, making an erroneous finding or reaching a mistaken conclusion. Speaking of the usual implication that arises from the statute, the Court said that if one of these errors is made:

> "*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." (emphasis added)

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77 (2009) 238 CLR 627 at 640 [35].

78 (2010) 239 CLR 531.

79 (2010) 239 CLR 531 at 565 [53].

80 (1995) 184 CLR 163 at 179.

71 In *Minister for Immigration and Multicultural Affairs v Yusuf*[81], McHugh, Gummow and Hayne JJ reiterated the usual implication that for an error to be jurisdictional, what "is important" is that the error is made "in a way that affects the exercise of power". More recently, in a context relevant to the availability of relief under s 75(v) of the Constitution in light of s 474 of the *Migration Act*, Gageler and Keane JJ described jurisdictional error as "a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act"[82].

72 In summary, although the issue will always be one of construction of the express or implied terms of the statute, an error will not usually be material, in this sense of affecting the exercise of power, unless there is a possibility that it could have changed the result of the exercise of power. In other words, materiality will generally require the error to deprive a person of the possibility of a successful outcome[83]. There may be unusual circumstances where an error is so fundamental that it will be material whether or not a person is deprived of the possibility of a successful outcome. One circumstance, for reasons that could include respect for the dignity of the individual[84], may be an extreme case of denial of procedural fairness[85]. Another may be the circumstance discussed by Nettle J, where a decision maker fails to exercise jurisdiction to decide a question according to the applicable criterion. No such circumstances arise on this appeal.

Residual discretion

73 It is also necessary to distinguish the concept of materiality from the residual discretion to refuse relief, which was also the subject of submissions on this appeal. The concept of materiality, whether it is express or implied, is necessary for a conclusion that (i) a decision is beyond power or (ii) whether or not the decision is beyond power, there is an actionable error of law on the face of the record. In contrast, the residual discretion arises if certiorari would otherwise be available for one of those reasons.

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81 (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30.

82 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32 [23]; [2015] HCA 51.

83 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 [56]; [2015] HCA 40. See also *Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54.

84 *R (Osborn) v Parole Board* [2014] AC 1115 at 1149 [68].

85 See *DWN042 v Republic of Nauru* (2017) 92 ALJR 146 at 151 [21]; 350 ALR 582 at 588; [2017] HCA 56.

74 There has long been a residual discretion to refuse to issue a writ of certiorari even where a jurisdictional error is established. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[86], this Court said that discretion might be exercised to refuse a writ of certiorari "if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made". Reference to the potential exercise of discretion where no useful result could ensue thus looks forward to the utility of another hearing. Although the residual discretion is not confined to being "forward looking", it contrasts with the usual consideration of materiality, discussed above, which looks backwards to whether the error would have made any difference to the result.

Materiality is a requirement for jurisdictional error in s 65(1)(a)(ii)

75 As set out above, s 65(1)(a)(ii) of the *Migration Act* required the appellant to fulfil requirements including the "criteria ... prescribed by ... the regulations". To grant a visa, the decision maker had to be so satisfied[87]. On review, the Tribunal could "exercise all the powers and discretions"[88] conferred on the decision maker by the Act, and had power, among other things, to affirm or vary the decision, or set aside the decision and substitute its own[89].

76 The context and terms of s 65 require the usual implication that an immaterial error will not invalidate a decision made under that section. The essential issue is whether an error by the Tribunal in its reasoning on one criterion was material, and jurisdictional, if the error could not have affected the other criterion on which the visa was refused.

77 The appellant, relying in part upon the reasoning of Mortimer J, submitted that the error of law made by the Tribunal in relation to criterion 3001 was not independent of the Tribunal's consideration of public interest criterion 4004. In oral submissions, the appellant submitted that it was possible to infer that absent the error of law by the Tribunal, and consistently with the requirements of public

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86 (1949) 78 CLR 389 at 400; [1949] HCA 33. See also *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1197-1198 [28]; 235 ALR 609 at 618; [2007] HCA 26.

87 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 188-189 [34]; [2014] HCA 24.

88 *Migration Act* 1958 (Cth), s 349(1).

89 *Migration Act* 1958 (Cth), s 349(2).

interest criterion 4004, the appellant would have repaid his debt or would have satisfied the Tribunal that he had made appropriate arrangements to repay the debt before the Tribunal gave its decision. This inference was said to arise from: (i) the fact of the amount of the debt, $7,404; (ii) the fact that the appellant's partner had an income; and (iii) the fact that the debt was repaid in May 2016.

78 The error in this submission is that an assessment of whether an error was material, in the sense that it affected the exercise of power by depriving a person of the possibility of a successful outcome, does not take place in a universe of hypothetical facts. The materiality of the error is assessed against the existing facts before the Tribunal. Those existing facts were that the appellant had not repaid his debt nor had he made arrangements to do so. As the Tribunal observed, (i) these requirements had not been satisfied at the time of the hearing before it and (ii) nine days later, at the time of its decision, the appellant had not presented any evidence that he had repaid, or made arrangements to repay, the debt. There is no evidence that the appellant sought any adjournment of the hearing before the Tribunal, or that he requested any delay before the Tribunal delivered its decision, to file any evidence about repayment of his debt or arrangements he had made to repay his debt.

79 The error of law by the Tribunal in relation to criterion 3001 therefore did not deprive the appellant of the possibility of a successful outcome. On the contrary, the Tribunal was required to affirm the decision of the delegate of the Minister because the appellant had not satisfied public interest criterion 4004. One requirement for the grant of a visa, contained in s 65(1)(a)(ii), was that criteria prescribed by the Migration Regulations are satisfied. That requirement was not met because public interest criterion 4004 was not satisfied. As a matter of construction of the *Migration Act*, the error of law made by the Tribunal in relation to criterion 3001 could not have deprived the Tribunal of its authority to make a decision that it was required to make due to its conclusion in relation to public interest criterion 4004. The error of law by the Tribunal was immaterial. It was not a jurisdictional error.

Conclusion and orders

80 The only errors by the Tribunal that could be reviewed were those that were jurisdictional. The absence of a jurisdictional error by the Tribunal meant that there was no power to issue a writ of certiorari to quash the decision of the Tribunal[90]. The appeal must be dismissed with costs.

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90 *Migration Act* 1958 (Cth), s 476; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]-[77].