

# HIGH COURT OF AUSTRALIA

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

---

MZAPC

APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER  
PROTECTION & ANOR

RESPONDENTS

*MZAPC v Minister for Immigration and Border Protection*  
[2021] HCA 17  
*Date of Hearing: 5 March 2021*  
*Date of Judgment: 19 May 2021*  
M77/2020

## ORDER

*Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

### Representation

D J Hooke SC with S H Hartford Davis, S G Lawrence and D J Reynolds for  
the appellant (instructed by Conditis Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with  
M A Hosking for the first respondent (instructed by Clayton Utz)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to  
formal revision prior to publication in the Commonwealth Law  
Reports.



## **CATCHWORDS**

### **MZAPC v Minister for Immigration and Border Protection**

Immigration – Refugees – Application for protection visa – Where appellant applied to Refugee Review Tribunal ("Tribunal") for review of first respondent's decision to refuse protection visa under *Migration Act 1958* (Cth) ("Act") – Where s 438 notification issued under Act in relation to material including appellant's criminal record – Where Tribunal did not disclose existence of s 438 notification to appellant – Where first respondent conceded failure to disclose amounted to breach of procedural fairness – Where information covered by s 438 notification not referred to in reasons for decision – Whether breach material – Whether Tribunal in fact took s 438 notification information into account in making decision – Whether Federal Court erred by erecting presumption that Tribunal did not take s 438 notification information into account – Whether disclosure to appellant of fact of s 438 notification could realistically have led to different decision – Whether appellant or first respondent bore onus of proof of materiality – Whether Federal Court erred by confining materiality consideration to offence of dishonesty to exclusion of other offences.

Words and phrases – "counterfactual inquiry", "credit", "discharging the burden of proof", "failure to disclose", "judicial review", "jurisdictional error", "lost opportunity to present legal and factual argument", "materiality", "onus of proof", "opportunity to be heard", "practical injustice", "presumption", "procedural fairness", "realistic possibility", "reasonable conjecture", "statutory interpretation", "subconscious impact", "threshold of materiality".

*Migration Act 1958* (Cth), Pt 7, s 438.



1 KIEFEL CJ, GAGELER, KEANE AND GLEESON JJ. This appeal raises issues concerning the content and proof of the element of materiality identified in *Hossain v Minister for Immigration and Border Protection*<sup>1</sup> as ordinarily required to exist for a breach of an express or implied condition of a conferral of statutory decision-making authority to result in jurisdictional error.

2 Materiality was subsequently explained in *Minister for Immigration and Border Protection v SZMTA*<sup>2</sup> to involve a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred. Existence or non-existence of a realistic possibility that the decision could have been different was explained to be a question of fact in respect of which the plaintiff in an application for judicial review of the decision on the ground of jurisdictional error bears the onus of proof.

3 The explanation in *SZMTA* is sound in principle and consistent with precedent. *SZMTA* ought not to be revisited.

4 *SZMTA* was correctly applied in the result in the decision under appeal<sup>3</sup> to hold that a breach of an implied condition of procedural fairness by the Refugee Review Tribunal ("the Tribunal") in the conduct of a review under Pt 7 of the *Migration Act 1958* (Cth) ("the Act") did not result in jurisdictional error in the decision of the Tribunal which affirmed a decision of a delegate of the Minister for Immigration and Border Protection to refuse the appellant a protection visa. The breach was constituted by a failure on the part of the Tribunal to disclose to the appellant the existence of a notification by the Secretary of the Department of Immigration and Border Protection under s 438(2)(a) that s 438(1)(b) applied to information contained in documents given to the Tribunal by the Secretary under s 418(3) of the Act.

### **Facts and procedural history**

5 The appellant is a citizen of India. He arrived in Australia in 2006 on a student visa which expired in 2008. He applied in 2007 for a further student visa which a delegate of the Minister refused in 2012. He then applied to the Migration Review Tribunal ("the MRT") for merits review of the decision of that delegate under Pt 5 of the Act. The MRT decided that it lacked jurisdiction because the

---

1 (2018) 264 CLR 123.

2 (2019) 264 CLR 421.

3 *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024.

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

2.

application was lodged out of time. He then applied to the Federal Circuit Court for judicial review of the decision of the MRT. The Federal Circuit Court dismissed that application in 2013.

6 Having failed to obtain a further student visa, the appellant applied in 2014 for a protection visa. Amongst the claims he made in support of that application was a claim to fear that his uncle would kill him on his return to India in connection with a dispute between his uncle and his father over land in Punjab. He claimed that he was his father's oldest son and that his uncle had threatened to kill him if the land went under his name. He claimed that he had been kidnapped when visiting Punjab from Delhi in 2004. The kidnappers demanded that his father sign papers putting the land in their names. They released him after his father paid them a settlement amount.

7 Another delegate of the Minister refused the protection visa in June 2014. The appellant then applied to the Tribunal for merits review of that decision under Pt 7 of the Act.

8 As required by s 418(3) of the Act, the Secretary gave to the Tribunal documents within the Secretary's possession or control which the Secretary considered to be relevant to the review by the Tribunal. Accompanying the documents so given was a letter notifying the Tribunal under s 438(2)(a) that s 438(1)(b) applied to information contained in specified documents on a specified departmental file. By way of advice under s 438(2)(b), the letter expressed the view that the information should not be disclosed to the appellant or his representative because the information had been "shared by Victoria Police with the Department for investigative purposes only".

9 The documents specified in the notification included a "Court Outcomes Report" which indicated that the appellant had been convicted of offences in the Dandenong Magistrates' Court in September 2011. The offences of which he had been convicted were three counts of drink driving, eight counts of driving while disqualified, three counts of using an unregistered vehicle on a highway, two counts of using a vehicle not in a safe and roadworthy condition, one count of removing a defective vehicle label, one count of failing to wear a seat belt and one count of an offence described as "state false name". There is no dispute between the parties to the appeal that the offence described as "state false name" was an offence of dishonesty.

10 Neither the existence of the notification nor any of the information contained in the documents specified in the notification was disclosed to the appellant by the Tribunal.

3.

11 Proceeding on the mistaken understanding that the appellant had been invited to a scheduled hearing and had failed to attend, the Tribunal made an initial decision in September 2014, affirming the decision of the delegate. The Tribunal's statement of reasons for that initial decision stated that it had "considered all the material before it relating to [the] application". The statement of reasons went on relevantly to explain that, on the "limited and vague evidence", the Tribunal did not accept the appellant's claim to fear harm in connection with the dispute over land in Punjab. The statement of reasons made no reference to the notification or to any information contained in any of the documents specified in the notification.

12 When later it emerged that the appellant had not been notified of the time of the scheduled hearing, the Tribunal accepted advice that the initial decision was affected by jurisdictional error<sup>4</sup> and re-opened the review. The Tribunal, constituted by the same member who had made the initial decision, conducted a rescheduled hearing in October 2014 which the appellant attended. The Tribunal made a final decision in November 2014, again affirming the decision of the delegate.

13 The Tribunal's statement of reasons for that final decision set out the member's findings in relation to the appellant's claim to fear harm in connection with the dispute over land in Punjab as follows:

"Despite some concerns about the applicant's credibility, I am willing to accept that there was a dispute between his father and his uncle over land in Punjab. I accept that when the applicant visited Amritsar in 2003 or 2004, he was taken to a house by his cousin (though not actually threatened as he stated at the hearing), drugged and held there until his father arrived and paid the amount of \$AUD3500 for his release. I accept that the applicant stopped going to the Punjab after this until he came to Australia in 2006.

I do not accept that the applicant has been subject to continuing threats in relation to the land dispute because he is the eldest son of his father. The applicant was able to reside in Delhi, India for 2-3 years after the Amritsar incident without facing any further harm from his uncles and his relatives. The Amritsar incident was 12-13 years ago and resolved when the father made payment to his uncle. Furthermore, on the applicant's oral evidence at hearing, in recent times his father has been pressured but not actually harmed or threatened by the relatives despite his father refusing to sign over the land through an affidavit. I do not accept that if the relatives wanted to

---

4 cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

4.

harm the applicant over the land that they would not be threatening or harming his father in circumstances where the dispute originates in relation to the father and the father has the ability to sign a document giving them the land. I do not accept as credible or plausible that simply because his father was in Delhi and not Amritsar that this would completely deter the relatives from undertaking threatening or violent action against his father to obtain legal ownership of the land. The applicant stated at the hearing that his mother's brother was a policeman, which I accept. However, I do not accept as credible or plausible that the relatives would not threaten or harm his father (but would threaten or harm the applicant) because his mother's brother was a policeman. In all the circumstances, I do not accept that the relatives have a continuing adverse interest in the applicant.

Considering all the circumstances, I find that the applicant does not face a real chance of persecution in the reasonably foreseeable future in India for any reason ... from his relatives over the land dispute."

14 Like the statement of reasons for the initial decision, the statement of reasons for the final decision made no reference to the notification or to any information contained in any of the documents specified in the notification.

15 The appellant in due course applied to the Federal Circuit Court for judicial review of the final decision of the Tribunal. The Federal Circuit Court dismissed that application in 2016.

16 The appellant next appealed to the Federal Court. The appeal was held in abeyance pending the decision in *SZMTA*. Following that decision, the notice of appeal to the Federal Court was amended by consent to comprise a single ground of challenge to the final decision of the Tribunal. The single ground of challenge, which had not been raised before the Federal Circuit Court, was that the decision "was affected by jurisdictional error, in that the Tribunal failed to comply with the rules of procedural fairness".

17 There was no dispute between the appellant and the Minister before the Federal Court that the Tribunal's failure to disclose to the appellant the existence of the notification had breached an implied condition of procedural fairness identified in *SZMTA*. The parties to the appeal were at issue only as to the materiality of that breach to the final decision made by the Tribunal.

### **Reasoning in the Federal Court**

18 The Federal Court was constituted for the hearing of the appeal by Mortimer J alone. Her Honour recognised that the issue of materiality turned on



5.

whether disclosure to the appellant of the existence of the notification could realistically have resulted in the Tribunal having made a different decision<sup>5</sup>.

19 Noting that the information covered by the undisclosed notification had been potentially contrary to the interests of the appellant, Mortimer J went on to accept that she could not conclude that disclosure of the notification could realistically have resulted in the Tribunal having made a different decision without first finding that the Tribunal had in fact taken information covered by the notification into account in making the decision<sup>6</sup>. That accords with the approach taken by the Full Court of the Federal Court earlier in *MZAOL v Minister for Immigration and Border Protection*<sup>7</sup> and more recently in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CQZ15*<sup>8</sup>.

20 Focusing on the potential for the offence of dishonesty referred to in the Court Outcomes Report covered by the notification to have borne on the Tribunal's rejection of the appellant's claim to fear harm in connection with the dispute over land in Punjab, and unable to find on the evidence before her that the offence of dishonesty had in fact been taken into account by the Tribunal in its findings in relation to that claim<sup>9</sup>, Mortimer J dismissed the appeal.

21 Mortimer J arrived at that result with evident reluctance. Echoing concerns she had already raised<sup>10</sup> and was later to repeat<sup>11</sup> about the need to find materiality at all in order to establish jurisdictional error where a breach of a condition of procedural fairness has been found, her Honour described the explanation of materiality in *SZMTA* as "difficult to understand and apply" and described the

---

5 [2019] FCA 2024 at [39].

6 [2019] FCA 2024 at [50].

7 [2019] FCAFC 68.

8 [2021] FCAFC 24.

9 [2019] FCA 2024 at [52]-[58].

10 *DPII7 v Minister for Home Affairs* (2019) 269 FCR 134 at 160-163 [96]-[107].

11 *PQSM v Minister for Home Affairs* (2020) 382 ALR 195 at 196-203 [1]-[28].

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

6.

process of reasoning required to find materiality as "convoluted" and "confusing"<sup>12</sup>. To an aspect of her Honour's criticism it will be necessary to return.

### **Appeal to this Court**

22 In his appeal by special leave to this Court, the appellant does not go so far as to challenge the need to find materiality at all in order to determine that a breach of an implied condition of procedural fairness has resulted in jurisdictional error. He confines his attention to the content of materiality and its proof.

23 By his principal ground of appeal, the appellant disputes that he needed to prove that the Tribunal in fact took information covered by the notification into account in making the decision in order to establish that the failure to disclose the notification was material to the decision. He argues that the explanation of materiality in *SZMTA* properly understood demanded no more of him than that he demonstrate by way of reasonable conjecture that the Tribunal could have taken information covered by the notification into account adversely to him in making the decision and that, if it did, it could have been persuaded by him to make a different decision if it had disclosed the notification to him. He argues that demonstration of the reasonableness of that conjecture caused the onus to shift to the Minister, as the party to the application for judicial review seeking to uphold the decision of the Tribunal, to prove that disclosure of the notification could not in fact have resulted in the Tribunal having made a different decision. He argues that *SZMTA* should be re-opened and overruled if that understanding of its proper application is incorrect.

24 By his principal ground of appeal, the appellant also contends that Mortimer J independently erred by erecting and acting on a presumption of fact that the Tribunal did not take information covered by the notification into account in making the decision and casting the onus on him to displace that presumption. He argues that *SZMTA* should likewise be re-opened and overruled if and to the extent that it supports erection of that presumption.

25 By an additional ground of appeal, the appellant contends that Mortimer J was wrong to confine her consideration of the materiality of the non-disclosure of the notification to the potential for the offence of dishonesty to have borne on the Tribunal's findings in relation to the appellant's claim to fear harm in connection with the dispute over land in Punjab to the exclusion of consideration of the potential for the other offences referred to in the Court Outcomes Report covered

---

12 [2019] FCA 2024 at [40], [48].

7.

by the notification to have borne on the Tribunal's final decision. That additional ground of appeal raises no additional question of principle.

26       The two strands of the appellant's argument on his principal ground of appeal are best addressed sequentially. To address the first strand necessitates examination of the content and proof of materiality at the level of principle. To address the second necessitates examination of contextual considerations bearing on proof of the materiality of a failure to disclose a notification under s 438(2)(a) of the Act.

### **Materiality and its proof**

27       To understand materiality, it is necessary first to understand jurisdictional error. Though the concept of jurisdictional error is rooted in our constitutional history, only in this century has jurisdictional error come to be articulated as an explanation of the scope of the constitutionally entrenched original jurisdiction of this Court to engage in judicial review of the actions of Commonwealth judicial and executive officers<sup>13</sup>, and hence the scope of the statutory jurisdiction conferred in identical terms on other courts created by the Commonwealth Parliament<sup>14</sup>, and as an explanation of the scope of the constitutionally entrenched supervisory jurisdiction of State Supreme Courts to engage in judicial review of the actions of State judicial and executive officers<sup>15</sup>.

28       Our contemporary understanding of jurisdictional error is the product of acceptance of propositions embraced incrementally in decisions of this Court beginning in the final decade of the last century. In their application to an administrative decision made by an executive officer whose decision-making authority is conferred by statute, those core propositions can be expressed as follows.

29       The constitutionally entrenched jurisdiction of a court to engage in judicial review of the decision, where that jurisdiction is regularly invoked, is no more and no less than to ensure that the decision-maker stays within the limits of the decision-making authority conferred by the statute through declaration and

---

13   *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

14   Relevantly, s 476 of the Act.

15   *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gleeson J

8.

enforcement of the law that sets those limits<sup>16</sup>. To say that the decision is affected by jurisdictional error is to say no more and no less than that the decision-maker exceeded the limits of the decision-making authority conferred by the statute in making the decision. The decision for that reason lacks statutory force. Because the decision lacks statutory force, the decision is invalid without need for any court to have determined that the decision is invalid<sup>17</sup>.

30 The statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation<sup>18</sup>. Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation<sup>19</sup>.

31 Having expounded the contemporary understanding of jurisdictional error in substantially those terms<sup>20</sup>, Kiefel CJ, Gageler and Keane JJ, who constituted the plurality in *Hossain*, proceeded to enunciate a common law principle of statutory interpretation. The principle enunciated is that a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition which the statute expressly or impliedly requires to be observed in the course of a decision-making process. The statute is instead "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance"<sup>21</sup>.

---

16 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39]. See earlier *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35.

17 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

18 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]. See earlier *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

19 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1.

20 (2018) 264 CLR 123 at 130-134 [17]-[27].

21 (2018) 264 CLR 123 at 134-135 [29]-[30].

32 The principle of statutory interpretation enunciated in *Hossain* reflects what was there described as a "qualitative judgment[]" 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"<sup>22</sup>. The principle might equally be described as "a common sense guide to what a Parliament in a liberal democracy is likely to have intended"<sup>23</sup>. The principle accommodates determination of the limits of decision-making authority conferred by statute to the reality that "[d]ecision-making is a function of the real world"<sup>24</sup> by distinguishing the express and implied statutory conditions of the conferral from the statutory consequences of breach and by recognising that the legislature is not likely to have intended that a breach that occasions no "practical injustice"<sup>25</sup> will deprive a decision of statutory force. Having been enunciated, and subject always to being revisited, the principle can be treated as "a working hypothesis ... upon which statutory language will be interpreted"<sup>26</sup>.

33 The qualification "ordinarily", and the focus on conditions required to be observed in the course of a decision-making process, are important. The threshold of materiality was not expressed to be additionally required to be met for every breach of every condition of a conferral of statutory decision-making authority to result in a decision-maker having exceeded the limits of the authority conferred by statute in the absence of an affirmative indication of a legislative intention to the contrary. There are conditions routinely implied into conferrals of statutory decision-making authority by common law principles of interpretation which, of their nature, incorporate an element of materiality, non-compliance with which will result in a decision exceeding the limits of decision-making authority without

---

22 (2018) 264 CLR 123 at 134 [28].

23 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21].

24 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 [28], quoting *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.

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

26 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gleeson J

10.

any additional threshold needing to be met. The standard condition that a decision-maker be free from actual or apprehended bias is one example<sup>27</sup>. The standard condition that the ultimate decision that is made lie within the bounds of reasonableness is another<sup>28</sup>.

34 Beyond observing that the threshold of materiality will not ordinarily be met in the event of a failure to comply with a condition of a conferral of statutory decision-making authority "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"<sup>29</sup>, the plurality in *Hossain* did not elaborate on the content of materiality. Nor was there occasion in *Hossain* to examine the onus of proof of materiality in an application for judicial review of an administrative decision.

35 Occasion both to examine the content of materiality and to consider the onus of its proof in an application for judicial review of an administrative decision arose in *SZMTA*. There the majority constituted by Bell, Gageler and Keane JJ held that "[a] breach is material to a decision only if compliance could realistically have resulted in a different decision"<sup>30</sup> and that "the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant [for judicial review] bears the onus of proof"<sup>31</sup>.

36 Those holdings of the majority were determinative of the outcome in *SZMTA*. In the judgment under appeal in that case, a judge of the Federal Court had found jurisdictional error in a decision of the Tribunal having regard to the "prospect" that the Tribunal had not taken certain documents and information into account in making its decision under review. The majority held the finding to have been erroneous in precisely delineated respects. One was that "his Honour failed to make a finding as to whether the Tribunal had in fact failed to take such documents and information into account in reaching its decision". Another was that, "in the event of finding that the Tribunal had failed to take such documents and information into account, his Honour erred in not going on to determine

---

27 See *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 151 [47], 155 [70], 164 [129]; 375 ALR 47 at 59, 64, 76.

28 *Tsvetnenko v United States of America* (2019) 269 FCR 225 at 245-246 [96]-[101].

29 (2018) 264 CLR 123 at 134-135 [30].

30 (2019) 264 CLR 421 at 445 [45].

31 (2019) 264 CLR 421 at 445 [46].

whether the Tribunal's decision could have been different if the Tribunal had taken the documents and information into account"<sup>32</sup>.

37 Subsequently, in *CNY17 v Minister for Immigration and Border Protection*<sup>33</sup>, Kiefel CJ and Gageler J referred to the determination of materiality by a court as involving "a question of counter-factual analysis to be determined by the court as a matter of objective possibility as an aspect of determining whether an identified failure to comply with a statutory condition has resulted in a decision that has in fact been made being a decision that is wanting in statutory authorisation". The same point was made in different language by the Full Court of the Federal Court in *BDY18 v Minister for Immigration and Border Protection*<sup>34</sup>, where it said that "[m]ateriality is concerned with the significance of the failure to conform to the statutory task entrusted to the decision-maker" and that "[t]he inquiry is backward looking and concerns what the decision-maker did in the particular case".

38 The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings<sup>35</sup>, the facts as to what occurred in the making of the decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence. And like other counterfactual questions in civil proceedings as to what could have occurred – as distinct from what would have occurred – had there been compliance with a legal obligation that was in fact breached<sup>36</sup>, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.

---

32 (2019) 264 CLR 421 at 451 [69].

33 (2019) 94 ALJR 140 at 151 [47]; 375 ALR 47 at 59.

34 (2020) 273 FCR 170 at 187 [87]-[88].

35 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350, referring to *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 639-640, 642-643.

36 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 639-640, 642-643. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gleeson J

12.

39 Bearing the overall onus of proving jurisdictional error<sup>37</sup>, the plaintiff in an application for judicial review must bear the onus of proving on the balance of probabilities all the historical facts necessary to sustain the requisite reasonable conjecture. The burden of the plaintiff is not to prove on the balance of probabilities that a different decision *would* have been made had there been compliance with the condition that was breached. But the burden of the plaintiff is to prove on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition.

40 There is no reason to consider that the burden placed on the plaintiff of proving on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with the condition that has been breached is significantly more onerous than the burden indisputably borne by the plaintiff of proving on the balance of probabilities the historical facts necessary to enable the court to be satisfied that the condition has in fact been breached. And especially in a case such as the present, where the principle in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*<sup>38</sup> prevents a decision-maker appearing as an active party in a proceeding for judicial review of one of its decisions, there is no reason to consider that the burden would more fittingly be borne by the active defendant in a proceeding for judicial review to prove the historical facts necessary to enable the court to be satisfied that a different decision could not have been made.

41 In support of his argument that the onus should shift to the Minister to disprove materiality, the appellant relies on several decisions of this Court before *Hossain* and *SZMTA*. Neither individually nor cumulatively do those decisions indicate that a different analysis is warranted.

42 *Balenzuela v De Gail*<sup>39</sup>, the earliest of the decisions on which the appellant relies, concerned the grant of a new trial at common law where evidence was found to have been wrongly rejected in a trial before a civil jury. The principles governing the grant by a court of a new trial at common law can at best be applied by analogy

---

37 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67], 623 [91]-[92]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [24]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1100 [38]; 373 ALR 196 at 205.

38 (1980) 144 CLR 13 at 35-36.

39 (1959) 101 CLR 226.



to the discernment by a court of jurisdictional error. Because those principles concern the legal consequence for an ultimate decision of a legal error in the process that led to that decision, however, the analogy is close.

43 In *Balenzuela*<sup>40</sup>, Dixon CJ endorsed the view expressed by Higgins J in *Robinson & Vincent Ltd v Rice*<sup>41</sup> that at common law, as under the judicature rule, a court would not grant a new trial on the ground of improper rejection of evidence unless satisfied that "some substantial wrong or miscarriage [had] been thereby occasioned". Dixon CJ went on to hold that it was enough for a court to be satisfied of a substantial wrong or miscarriage that "evidence definitely material to the determination of the case" was wrongly excluded at the instance of the successful party<sup>42</sup>. In referring to evidence "definitely material to the determination of the case", his Honour was referring to evidentiary material within the category of evidentiary materials he had earlier referred to as "evidentiary materials by which it is not an unreasonable hypothesis to suppose the judgment of the jury might be affected, even if illogically"<sup>43</sup>. The "basal fact" warranting the grant of a new trial in the case was that "material evidence was erroneously excluded from the consideration of the jury". Outside the province of the court in deciding that a new trial was warranted was either "to inquire into the effect which the evidence if admitted would produce upon the [c]ourt if the [c]ourt were the tribunal of fact" or "to speculate on the effect which it would have produced on the jury"<sup>44</sup>. Taylor J referred similarly to "material evidence"<sup>45</sup>.

44 The Court in *Dairy Farmers Co-operative Milk Co Ltd v Acquilina*<sup>46</sup> was constituted by Justices who included all other Justices who had constituted the Court in *Balenzuela*. The unanimous reasons for judgment of the Court in *Acquilina* referred to the law laid down in *Balenzuela* as no different from that laid

---

40 (1959) 101 CLR 226 at 235.

41 (1926) 38 CLR 1 at 10.

42 (1959) 101 CLR 226 at 237.

43 (1959) 101 CLR 226 at 236.

44 (1959) 101 CLR 226 at 236-237.

45 (1959) 101 CLR 226 at 238.

46 (1963) 109 CLR 458.

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

14.

down more than one hundred years earlier in *Crease v Barrett*<sup>47</sup>. There it had been said that a court would be justified in refusing to grant a new trial in a case where evidence was improperly rejected "where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence". The Court added in *Acquilina* that "clear" from *Balenzuela* was "that a new trial ought not to be ordered if the Court is satisfied that if the rejected evidence had been received it could not have affected the jury's verdict"<sup>48</sup>. After a detailed examination of the evidence that had been led at the trial in that case, the Court in *Acquilina* was satisfied that reception of the wrongly rejected evidence could not have affected the jury's verdict and on that basis concluded that there was no justification for a new trial to have been ordered.

45        *Stead v State Government Insurance Commission*<sup>49</sup>, the next of the decisions on which the appellant relies, concerned the grant of a new trial by an appellate court on an appeal by way of rehearing where procedural unfairness had occurred in the conduct of a trial before a judge alone. Because procedural unfairness can result in jurisdictional error, the analogical force of the reasoning in *Stead* is especially strong, as was recognised in *SZMTA*<sup>50</sup>.

46        The unanimous holding in *Stead* was captured in the statement of the Court that, to obtain an order for a new trial, "[a]ll that the appellant needed to show was that the denial of natural justice deprived him of the *possibility* of a successful outcome" and that "[i]n order to *negate that possibility*, it was ... necessary for the [intermediate appellate court] to find that a properly conducted trial could not possibly have produced a different result"<sup>51</sup>. It may be said immediately that it would plainly be wrong to understand that statement as conveying that the appellant did *not* need to show that the denial of procedural fairness had deprived him of the possibility of a successful outcome in order to obtain an order for a new trial. To say that a demonstration that the appellant had been deprived of the opportunity of a successful outcome is an aspect of proof of procedural unfairness

---

47    (1835) 1 C M & R 919 at 933 [149 ER 1353 at 1359].

48    (1963) 109 CLR 458 at 463.

49    (1986) 161 CLR 141.

50    (2019) 264 CLR 421 at 445-446 [49]. cf *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [26].

51    (1986) 161 CLR 141 at 147 (emphasis added).

is necessarily to accept that procedural unfairness is a matter of practical injustice, so that a demonstration of a bare or merely technical denial of procedural fairness alone is not sufficient to establish an entitlement to a new trial.

47 Fully to appreciate the content of that statement about the need for an unnegated possibility, it is necessary to appreciate the procedural and factual context in which the statement was made. Necessary to appreciate is that the context was a contested appeal before an intermediate appellate court. The record before the appellate court showed that, in the trial of an action for damages for personal injury arising out of a motor vehicle accident, counsel for the appellant plaintiff had in fact sought to submit to the trial judge that evidence given by a doctor to the effect that there was no causal link between the accident and the appellant's condition should not be believed. The record showed that counsel had in fact been stopped by the trial judge from making that submission. The record further showed that the trial judge had gone on in a reserved judgment to accept the evidence of the doctor and to find that there was no causal link between the accident and the appellant's condition.

48 Plainly, what was being said in *Stead* was that those facts, appearing starkly on the face of the appellate record, should have been sufficient to satisfy the intermediate appellate court that there was a realistic possibility that the trial judge could have found a causal link between the accident and the appellant's condition had counsel been permitted to complete his submission. There was no need for the appellant to lead evidence of what counsel would have submitted to the trial judge about why the evidence of the doctor should not have been believed and there was no need for the appellant to prove on the balance of probabilities that the trial judge would have found the submission of counsel persuasive.

49 But equally, what was being acknowledged in *Stead* was that there might have been other facts disclosed by the appellate record that undermined the realistic possibility of the trial judge having found a causal link between the accident and the appellant's condition had counsel been permitted to complete his submission. Within the forensic contest of the appeal, it was open to the respondent in argument to seek to identify those facts and to persuade the appellate court that the possibility was not realistic. That might have been a tall order given the centrality of the issue on which counsel had not been permitted to complete his submission, but not an inherently impossible one. Whether the appellate court was or was not satisfied that the appellant had been deprived of the realistic possibility of the trial judge having found a causal link would then fall to be determined at the end of the whole of the argument on the appeal having regard to inferences available to be drawn from the whole of the appellate record.

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

16.

50 Once it is acknowledged that the inquiry postulated by *Stead* was as to whether or not the appellate court was ultimately to be satisfied that the outcome of the trial could realistically have been different had the procedural error that in fact occurred not occurred, what becomes apparent is that the inquiry postulated by *Stead* was not different in substance from the inquiry postulated by *Balenzuela* as explained in *Acquilina*. What also becomes apparent is that, although directed to determining whether an error in a decision-making process engaged in by a court should result in an order for a new trial, the inquiries postulated by *Balenzuela* and *Stead* are not different in substance from the inquiry postulated by *SZMTA* directed to determining whether an error in a decision-making process engaged in by an administrator has resulted in jurisdictional error.

51 Just as a court called upon to determine whether a new trial should be ordered must be careful not to assume the function of the primary trier of fact (whether it be a judge or a jury), so a court called upon to determine whether jurisdictional error has occurred must be careful not to assume the function of the decision-maker. Faced with a procedural irregularity having been shown to have occurred in a decision-making process, the court is nevertheless in each case charged with the responsibility of determining for itself whether the result in fact arrived at by the decision-maker in the decision-making process could realistically have been different had that procedural irregularity not occurred.

52 To the extent that there can be said to be a difference between the approach that *Balenzuela* and *Stead* indicate is to be taken to the grant of a new trial and the approach that *SZMTA* indicates is to be taken to the determination of jurisdictional error, the difference lies not in the substance of the counterfactual inquiry that must be undertaken but in the identification of the factual foundation on the basis of which the counterfactual conjecture of a realistic possibility falls to be assessed. In an application for a new trial, the decision-making process in fact engaged in by a court will almost invariably appear on the face of the appellate record. In an application for judicial review of an administrative decision, the decision-making process in fact engaged in by the decision-maker will inevitably need to be proved by inferences drawn from admissible evidence to the extent that it is in controversy.

53 The substantial correspondence between the *Balenzuela* and *Stead* approach to the grant of a new trial and the *SZMTA* approach to the determination of jurisdictional error was presaged in *Nobarani v Mariconte*<sup>52</sup>, which was decided on the same day as *Hossain*. *Balenzuela* and *Stead* were there stated to reflect a requirement that "the error must usually be material in the sense that it must

---

52 (2018) 265 CLR 236 at 247 [38].

deprive the party of the possibility of a successful outcome". By reference to the holding in *Hossain*, the same requirement was said to be reflected also in the ordinary requirement for an error to be considered jurisdictional.

54       Next chronologically in the decisions of this Court preceding *Hossain* and *SZMTA* on which the appellant relies is *Kioa v West*<sup>53</sup>. The appellant seeks to support a more limited fact-finding role by a court by parsing some of the reasoning of some members of the Court in relation to the facts. *Kioa v West* was a landmark decision in the development of our understanding of the content and provenance of obligations to afford procedural fairness in the context of statutory decision-making. Having arisen under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), however, *Kioa v West* has nothing to say about jurisdictional error.

55       Much more to the point is the appellant's reliance on *Re Refugee Review Tribunal; Ex parte Aala*<sup>54</sup>. *Aala* was not only a case about jurisdictional error; it was the case that established that non-compliance with a statutory obligation to afford procedural fairness can result in jurisdictional error attracting relief in the constitutionally entrenched original jurisdiction of this Court. One of the arguments put to the Court in *Aala* was cast in terms that, to attract relief, the non-compliance "must be sufficiently serious to allow the process to be characterised as beyond power, as involving procedural ultra vires"<sup>55</sup>. The argument was dealt with differently in the reasoning of different members of the Court. Notably, all the responses to the argument invoked *Stead*.

56       McHugh J foreshadowed *Hossain* and *SZMTA* in emphasising that not every denial of procedural fairness occurring in a decision-making process necessarily affects the decision that results from that process<sup>56</sup>. Satisfied that there was "no realistic possibility" that the decision-maker could have been persuaded to take a different view of the prosecutor's credibility had the prosecutor been afforded procedural fairness, his Honour would have dismissed the application for judicial review on the basis that the denial of procedural fairness had not deprived the prosecutor of the possibility of a successful outcome<sup>57</sup>. His view of the facts,

---

53   (1985) 159 CLR 550.

54   (2000) 204 CLR 82.

55   (2000) 204 CLR 82 at 87.

56   (2000) 204 CLR 82 at 122 [104].

57   (2000) 204 CLR 82 at 127-128 [121]-[122].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gleeson J

18.

however, was a minority view. Separately analysing the facts, Gleeson CJ<sup>58</sup>, Kirby J<sup>59</sup> and Callinan J<sup>60</sup> each expressed themselves to be satisfied that the decision-maker could have taken a different view of the prosecutor's credibility had the prosecutor been afforded procedural fairness and that a decision favourable to the prosecutor could have been reached had the decision-maker accepted the prosecutor's credibility.

57 The reasoning of Gaudron and Gummow JJ, with which Hayne J relevantly agreed, was more complex. The reasoning contains passages that can be read as stating that even a "trivial" denial of procedural fairness amounts without more to a jurisdictional error and as relegating any consideration of the significance of the denial of procedural fairness to the decision that was made to be taken into account by a court, if at all, in exercising discretion to grant relief once jurisdictional error has been found<sup>61</sup>. Tellingly, however, after undertaking their own factual analysis of the decision-making process that had occurred, their Honours borrowed from the language of *Stead* to conclude that "the denial of natural justice deprived [the prosecutor] of the possibility of a successful outcome"<sup>62</sup>.

58 Despite differences in emphasis and expression, the reasoning of all members of the Court in *Aala* to the result in that case was ultimately not inconsistent with the prosecutor having borne the onus of establishing that compliance with procedural fairness could realistically have resulted in a different decision.

59 Finally, the appellant places reliance on *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>63</sup> and on reasoning of Gageler and Gordon JJ in *Minister for Immigration and Border Protection v WZARH*<sup>64</sup>. Whilst it may be accepted that the breach of procedural fairness found to have occurred in *VEAL* was not analysed in terms of materiality, having regard

---

58 (2000) 204 CLR 82 at 88-89 [3]-[4].

59 (2000) 204 CLR 82 at 130-132 [130]-[134].

60 (2000) 204 CLR 82 at 153-155 [211].

61 (2000) 204 CLR 82 at 101 [41], 106-110 [51]-[62].

62 (2000) 204 CLR 82 at 116-117 [80].

63 (2005) 225 CLR 88.

64 (2015) 256 CLR 326.

to the centrality and prejudicial nature of the undisclosed information which had in fact been taken into account by the decision-maker despite being said to have been given "no weight", it is not at all difficult to regard the outcome in that case as consistent with a requirement for a breach of procedural fairness to be material in order to result in jurisdictional error. The reasoning in *WZARH* on which the appellant places reliance was introduced with citation to *Stead* by express recognition that breach of the condition of procedural fairness implied into the statutory power in issue in that case would have been "material" only if it deprived the applicant of "the possibility of a successful outcome"<sup>65</sup>. Implicit in the characterisation of the case as one in which "practical injustice" lay in the denial of "an opportunity which in fairness ought to have been given"<sup>66</sup> was that the case was one in which that previously identified threshold of materiality was met<sup>67</sup>.

60           Accordingly, the decisions on which the appellant relies provide no support for the shift in onus for which he contends. Where materiality of a breach of an express or implied condition of a conferral of statutory decision-making authority is in issue in an application for judicial review of a decision on the ground of jurisdictional error, the onus of proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different had the breach not occurred lies unwaveringly on the plaintiff.

**Proof of materiality of a failure to disclose a notification under s 438(2)(a) of the Act**

61           Necessary next is to consider the more specific question of what historical facts a plaintiff in an application for judicial review must prove in order to establish the materiality of a breach of procedural fairness constituted by failure on the part of the Tribunal, in the conduct of a review under Pt 7, to disclose the existence of a notification by the Secretary under s 438(2)(a) that s 438(1)(b) applied to information contained in documents given to the Tribunal by the Secretary pursuant to the procedural obligation imposed on the Secretary by s 418(3).

---

65   (2015) 256 CLR 326 at 341 [55]-[56].

66   (2015) 256 CLR 326 at 343 [60].

67   (2015) 256 CLR 326 at 343-345 [62]-[69].

62 The automatic statutory consequences of a notification under s 438(2)(a), spelt out in *SZMTA*<sup>68</sup>, are that the Tribunal has no power to take information covered by the notification into account in making its decision unless it affirmatively exercises the discretion conferred by s 438(3)(a) and has no power to disclose that information to the applicant for review unless it affirmatively exercises the discretion conferred by s 438(3)(b). Also spelt out in *SZMTA*<sup>69</sup> is that the Tribunal is obliged to exercise those discretions within the bounds of reasonableness and is obliged to perform its procedural obligations under ss 424AA, 424A and 425 to the maximum extent permitted by the reasonable exercise of the discretion conferred by s 438(3)(b). It is precisely because a notification has those statutory consequences that the implied condition of procedural fairness requiring the Tribunal to give the applicant for review notice of the notification was held in *SZMTA* to arise<sup>70</sup>. Armed with notice of the notification, the applicant for review becomes equipped to exercise the general entitlement that he or she has under s 423 specifically to present legal and factual argument to the Tribunal for a favourable exercise of the discretions conferred by s 438(3)(a) and (b)<sup>71</sup>.

63 The materiality of a failure to disclose a notification under s 438(2)(a) must in that context turn on the potential for information covered by the notification to have borne on the decision which the Tribunal in fact made on the review and on how the Tribunal in fact dealt with that information in making that decision. The potential for information covered by the notification to have had some subconscious impact on the Tribunal in making the decision can for a moment be deferred. As to the potential for information covered by the notification to have impacted on the Tribunal's conscious deliberation if taken into account in making the decision, two categories of case have been shown to have arisen.

64 The first category of case, illustrated by *SZMTA*, is where information covered by the undisclosed notification might have the potential to have borne on the decision in a manner helpful to the applicant. Logically, disclosure of the notification in a case in that first category could not have resulted in the Tribunal making a different decision if the Tribunal did in fact take the information into account in making the decision that it did. Hence, it was emphasised in *SZMTA*

---

68 (2019) 264 CLR 421 at 439 [23]-[24].

69 (2019) 264 CLR 421 at 439 [24].

70 (2019) 264 CLR 421 at 440-441 [29]-[30].

71 (2019) 264 CLR 421 at 441 [30]-[31].



21.

that a necessary but not sufficient step in establishing the materiality of non-disclosure in that case was proof on the balance of probabilities that the Tribunal did not take the potentially supportive information into account in making its decision.

65       The second category of case, illustrated by the circumstances giving rise to this appeal, as well as by *MZAOL* and *CQZ15*, is where information covered by the undisclosed notification might have the potential to have borne on the decision in a manner adverse to the interests of the applicant. Logically, disclosure of the notification in a case in that second category could not have resulted in the Tribunal making a different decision if the Tribunal did not in fact take the information into account in making the decision that it did. Hence, as was recognised by Mortimer J and emphasised by the Full Courts in both *MZAOL* and *CQZ15*, a necessary but not sufficient step in establishing non-disclosure to have been material in a case in that category is proof on the balance of probabilities that the Tribunal did take the potentially adverse information into account in making its decision.

66       There is no reason to think that the ease or difficulty of discharging the burden of proof should in practice be the same for a plaintiff in each category of case. To the contrary, the statutory consequences of giving a notification for the procedure to be adopted by the Tribunal provide reason to think that in practice an inference that the Tribunal did not take potentially helpful information into account in making its decision will more readily be drawn on the balance of probabilities than will an inference that the Tribunal did take potentially adverse information into account in making its decision. That is because, as the majority observed in *SZMTA*<sup>72</sup>, "[t]he drawing of inferences can be assisted by reference to what can be expected to occur in the course of the regular administration of the Act". The majority continued:

"[T]he Tribunal can be expected in the ordinary course to treat a notification by the Secretary that the section applies as a sufficient basis for accepting that the section does in fact apply to a document or information to which the notification refers. Treating the section as applicable to a document or information, the Tribunal can then be expected in the ordinary course to leave that document or information out of account in reaching its decision in the absence of the Tribunal giving active consideration to an exercise of discretion under s 438(3). Absent some contrary indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence, a court on judicial review of a decision of the Tribunal can therefore be justified in

---

72   (2019) 264 CLR 421 at 445 [47].

inferring that the Tribunal paid no regard to the notified document or information in reaching its decision."

67 That observation of the majority was singled out for criticism by Mortimer J in the judgment under appeal as appearing to require a court on judicial review of a decision of the Tribunal to apply a "presumption" that the Tribunal did not take information covered by a notification into account in making the decision<sup>73</sup>. The observation was not so stated and should not be so interpreted. The observation is no different in its significance or its generality from the routinely cited and routinely illustrated observation in *Minister for Immigration and Multicultural Affairs v Yusuf*<sup>74</sup> to the effect that the obligation imposed on the Tribunal by s 430(1)(c) to set out its findings on material questions of fact entitles a court to infer that a matter not mentioned by the Tribunal in the statement of the reasons that it in fact gives for its decision was not considered by it to be material.

68 The plaintiff on an application for judicial review of a decision of the Tribunal faces no presumptive impediment to the discharge of his or her burden of proof. Whether or not the plaintiff has discharged the burden of proving on the balance of probabilities that particular information covered by a particular notification was or was not taken into account by the Tribunal in making the decision under review falls to be determined at the end of the day by reference to inferences appropriate to be drawn from the totality of the evidence adduced on the application.

69 Before turning to examine whether the appellant discharged his burden of proving on the balance of probabilities that the Tribunal took potentially adverse information covered by the notification into account in making its final decision in the present case, it is appropriate to return to the topic of the potential for information covered by a notification to have had a subconscious impact on the Tribunal even if the Tribunal did not consciously take that information into account. The potential arises from the availability of an inference, which the appellant seeks to call in aid, that the Tribunal can be expected in the conduct of a review at least to look at information covered by a notification for the purpose of considering exercise of the discretions conferred by s 438(3)(a) and (b).

70 Quite apart from practical difficulties inhering in proof of a subconscious impact, there is a conceptual difficulty in fathoming how the potential for information covered by a notification to have had an impact on the subconscious

---

73 [2019] FCA 2024 at [43].

74 (2001) 206 CLR 323 at 346 [69].

of a member who constitutes the Tribunal can properly bear on the legal consequence of a failure to discharge the procedural obligation that it breaches through non-disclosure of a notification. As was noted in *Minister for Immigration and Border Protection v SZSSJ*<sup>75</sup>, whilst "compliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power", "[o]rdinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry". There is an oddity in conceiving of the opportunity to be heard of which the appellant was deprived by non-disclosure of the notification as a lost opportunity to present legal and factual argument to the Tribunal directed to the Tribunal's subconscious. There is a similar oddity in thinking that the Tribunal was required to examine its own subconscious in considering the exercise of the discretions conferred by s 438(3)(a) and (b).

71 Best is to conceive of the potential for information covered by a notification to have had a subconscious impact on the Tribunal not as bearing on the statutory consequence of non-compliance with the Tribunal's procedural fairness obligation to give notice of the notification but rather as having the potential to bear on the discharge of the Tribunal's distinct obligation of procedural fairness to ensure that what occurs in the conduct of the review "is never such that a fair-minded lay observer properly informed as to the nature of the procedure for which [Pt 7] provides might reasonably apprehend that the [Tribunal] might not bring an impartial and unprejudiced mind to the resolution of the factual and legal questions that arise for its decision in the conduct of a review"<sup>76</sup>.

72 In the case of potentially adverse information covered by a notification that has not been proven to have been taken into account by the Tribunal in making its decision, a question for a court on judicial review in an appropriate case can still remain whether the information was so "highly prejudicial" to the applicant for review that "the fair-minded lay observer, acting reasonably, would not dismiss the possibility that the [Tribunal] may have been affected by [the information]

---

75 (2016) 259 CLR 180 at 206-207 [82]-[83].

76 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 146-147 [17]; 375 ALR 47 at 52.

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

24.

*albeit* subconsciously"<sup>77</sup>. So much was illustrated by the approach taken in *CQZ15*. The Full Court there found that a breach by the Tribunal of its procedural fairness obligation to give notice of a notification did not result in jurisdictional error because the Tribunal did not in fact take the highly prejudicial information covered by the notification into account in making the decision. The Full Court nevertheless went on to find that the decision was affected by jurisdictional error on the basis that "[t]he fair-minded lay observer might entertain the possibility that, having read the information for the purpose of considering the discretion in s 438(3), the Tribunal might have been subconsciously influenced by the prejudicial information ... in making its decision"<sup>78</sup>. The structure of that analysis undertaken by the Full Court was sound in principle.

### **Failure of proof of materiality**

73        Turning to the circumstances of the present case, there would be no difficulty in accepting as a realistic possibility that the final decision of the Tribunal could have been different had the Tribunal in fact taken the offence of dishonesty referred to in the Court Outcomes Report covered by the undisclosed notification into account in assessing the appellant's credit to reject the appellant's claim to fear harm in connection with the dispute over land in Punjab.

74        The determinative question is whether the Tribunal in fact so took the offence into account. The answer is that there is simply no basis in the evidence to find on the balance of probabilities that it did.

75        The fact that the Tribunal breached one procedural obligation by failing to disclose to the appellant the existence of the notification provides no foundation in the circumstances of the case for inferring that it had breached others. Nothing in its statement of reasons for the final decision, or elsewhere in the evidence, contains any hint that the Tribunal failed to heed the automatic statutory consequences of the notification or that the Tribunal made a choice affirmatively to exercise the discretion conferred by s 438(3)(a) to take the offence of dishonesty into account but not the discretion conferred by s 438(3)(b) to draw the information that it had about that offence to the attention of the appellant. The general reference

---

77    *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 148-149 [29]; 375 ALR 47 at 55, quoting *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at 552 [75].

78    [2021] FCAFC 24 at [116].

in the statement of reasons for the Tribunal's initial decision to it having considered all the material before it cannot sensibly be read as indicating otherwise.

76 And nothing in the Tribunal's findings in relation to the appellant's claim to fear harm in connection with the dispute over land in Punjab set out in the statement of reasons for its final decision suggests that it took an adverse view of his credit that was incapable of explanation other than by reference to the Tribunal having treated him with distrust because he had been convicted of the offence of dishonesty. On a fair reading of the statement of reasons, the Tribunal did not disbelieve the appellant's account of the historical circumstances of the dispute. The Tribunal's scepticism was directed to the appellant's account of the ongoing consequences of the dispute. What the Tribunal found in substance was that those ongoing consequences did not provide an objective basis for the appellant to entertain a reasonable fear.

77 Notwithstanding any weight Mortimer J may have accorded to what she wrongly characterised as a "presumption" emerging from the observation of the majority in *SZMTA* in the passage of which she was critical, her Honour was undoubtedly correct in finding that the Tribunal's statement of reasons "[did] not disclose any real assessment of the appellant's honesty at all, let alone an assessment of a kind that might suggest its reasoning was affected by the presence of the 'State false name' conviction in the ... notification information"<sup>79</sup>. Her Honour's conclusion that the appellant had failed to discharge the onus of proving that the Tribunal in fact took the offence of dishonesty into account in making the final decision was not affected by appealable error.

### **No error in not considering other offences**

78 Left to last is the appellant's argument that Mortimer J was wrong to confine her consideration of materiality to the offence of dishonesty to the exclusion of consideration of the other offences referred to in the Court Outcomes Report.

79 The Minister points out that the argument contradicts the appellant's position before Mortimer J that the offence of dishonesty was the only offence rationally capable of affecting the final decision. That would be a compelling reason to revoke special leave to appeal on the additional ground. The Minister, however, does not seek that revocation. The additional ground of appeal stands. The merits of the appellant's argument on it must therefore be addressed.

---

79 [2019] FCA 2024 at [57].

*Kiefel* CJ  
*Gageler* J  
*Keane* J  
*Gleeson* J

26.

80 The short and complete answer to the argument is an extrapolation from what has already been said about the failure of the appellant to prove that the Tribunal in fact took the offence of dishonesty into account. There is simply no basis in the evidence to find on the balance of probabilities that the Tribunal took any part of the information covered by the notification into account in making the decision.

81 The appellant has not sought to argue that the information about the offences was cumulatively so highly prejudicial to the appellant as to lead to the conclusion that a fair-minded lay observer might reasonably apprehend that the Tribunal might not have brought an impartial and unprejudiced mind to the conduct of the review. The nature of the offences, in any event, provides no foundation for such an argument. The offences are not so serious that their accumulation might reasonably be argued to be capable of leading a fair-minded lay observer to think that the Tribunal might not bring an impartial and unprejudiced mind to bear on its determination of the merits of any claim in issue in the review.

### **Disposition**

82 The appeal must be dismissed with costs.

83 GORDON AND STEWARD JJ. This appeal concerns judicial review of administrative action for jurisdictional error. The Court has recently divided about the content of the applicable principles<sup>80</sup>. Identifying those principles demands attention to the significance of the fact that the Court is concerned with the exercise of public power by the State against an individual and the consequences for the administration of justice.

84 The applicable principles should now be restated. Non-compliance with an express or implied condition of an exercise of power will result in a decision exceeding the limits of the decision-making authority conferred by statute *unless* compliance with the condition *could not* have made a difference to the decision that was made in the circumstances in which the decision was made.

85 There are evidently two steps. First, it is necessary for an applicant for judicial review to identify an error and establish that the identified error *could* realistically have resulted in a different decision. This sets a low bar. It would be a mistake to describe this as an evidentiary onus. The task of demonstrating that a decision could realistically have been different had an error not occurred is better understood as directed at the quality or severity of the error and what, as a matter of logic and common sense, might have resulted. It necessarily calls for an assertion as to how a decision might have been different and an explanation as to why that is so. But because the bar is low, a court should hesitate to reject a sensible and reasonable postulation about what the result could have been. Naturally, speculation and conjecture will not be sufficient. More is needed. But it is not necessarily a task which is determined by leading evidence and by demonstrating what is possible on the balance of probabilities. That is because the subject matter of the inquiry is hypothetical; it is not a matter of *proving* what could have happened. Rather, the task is one of persuasion, based upon the nature of the breach and the claims that have been made, as well as logic and common sense. Put in different terms, precisely what must be shown will depend upon the nature of the alleged error. In some cases, however, an error will be jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker.

86 If the applicant cannot establish such an error, the judicial review application fails. If, however, the applicant does establish such an error, the issue of materiality is then raised. It then is necessary for the respondent to establish that that error was immaterial – that compliance with the condition could not have made a difference to the decision that was made – in order to establish that

---

80 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928; 383 ALR 407.

non-compliance with the condition did not lead to jurisdictional error. It is convenient to refer to this second aspect of the rule as an issue about "materiality".

87 The two steps are different. The two steps are directed at different ends. The first step is for the applicant to establish a connection or relationship between the identified default and the course of decision-making actually followed. It does not require the applicant to predict or conjecture about what the decision-maker could or might have done if there had been no error. (And, as has been observed, there will be cases where the error made is of such a kind that the error will be jurisdictional regardless of its effect on the outcome of the particular case.) The second step, if it is reached, requires the *decision-maker* to show that the error could not have made a difference.

88 The restated principles differ from the approach adopted by the majority in this Court in *Minister for Immigration and Border Protection v SZMTA*<sup>81</sup>. There the majority said that the applicant bore the onus of showing that the error was material. But the question of onus was not the subject of submissions and was not decisive of the result<sup>82</sup>. This is the first case in which the Court has considered the issue of onus with the benefit of argument. As these reasons will show, the restated approach is both principled and practical.

### Public power

89 We are concerned with the application of public power to individuals. That always requires justification. The justification here is statute. It must now be accepted that breach of a condition regulating the exercise of a statutory power does not always mean that the exercise of power is invalid and of no effect<sup>83</sup>.

90 Fundamental principle requires the conclusion that, subject to contrary legislative intention, where an applicant shows a decision-maker to have failed to comply with a statutory condition, and where that failure *could* realistically have affected the outcome, it is for the respondent (the Executive) to establish that compliance with the condition could not have made a difference to the outcome.

---

81 (2019) 264 CLR 421.

82 *SZMTA* (2019) 264 CLR 421 at 444 [41]; cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-440.

83 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391 [91]-[93]; *Hossain* (2018) 264 CLR 123 at 134-135 [29]-[30], 136 [39], 145 [65]; *SZMTA* (2019) 264 CLR 421 at 433 [2]-[3], 458 [90]; *ABT17* (2020) 94 ALJR 928 at 948 [72], 954-955 [110]; 383 ALR 407 at 429-430, 438-439.



It is not for the individual affected by the wrongful exercise of power to establish that it could have made a difference to the outcome.

91 The *Constitution* "is framed upon the assumption of the rule of law"<sup>84</sup>. The precise meaning of the rule of law may be, and often is, contested. But what is in issue in this appeal takes the content of the rule of law at its narrowest. That one "cardinal principle" of the rule of law, the irreducible minimum about which there is not and cannot be any debate, is "that Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen"<sup>85</sup>. As Sir John Laws has written, the "agreed beginning" for debates about the rule of law is "that State power must be exercised in accordance with promulgated, non-retrospective law made according to established procedures"<sup>86</sup>.

92 Section 75(v) of the *Constitution* – which confers jurisdiction on the High Court in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth – "secures [that] basic element of the rule of law"<sup>87</sup>. The individual who is subject to the exercise of public power is "provided with a mechanism to challenge the lawfulness of the exercise of official power"<sup>88</sup>.

93 In Australia, the separation of the judicial power of the Commonwealth from executive and legislative powers by Ch III of the *Constitution* recognises the "deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the *Constitution*"<sup>89</sup>.

---

84 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31]. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40], 25-26 [44].

85 Stephen, "The Rule of Law" (2003) 22(2) *Dialogue* 8 at 8. See also Laws, *The Constitutional Balance* (2021) at 13, 15.

86 Laws, *The Constitutional Balance* (2021) at 15.

87 *Plaintiff S157* (2003) 211 CLR 476 at 482-483 [5].

88 French, "Administrative Law in Australia: Themes and Values Revisited", in Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (2014) 24 at 29. See also *Plaintiff S157* (2003) 211 CLR 476 at 482-483 [5].

89 *Magaming v The Queen* (2013) 252 CLR 381 at 400 [63].

Chapter III of the *Constitution* "reflects and protects"<sup>90</sup> that relationship, recognising that Ch III is the "only general guarantee of due process" in a controversy between the Executive and the individual<sup>91</sup>. Where, as here, the law is concerned with the exercise of executive power, "judicial review is a principal engine of the rule of law"<sup>92</sup>.

94 As Brennan J said in *Church of Scientology v Woodward*<sup>93</sup>:

"Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law *and the interests of the individual are protected accordingly*". (emphasis added)

95 Judicial review ensures that the Executive does not exceed its powers<sup>94</sup>. It ensures that decision-makers "obey the law and neither exceed nor neglect any jurisdiction which the law confers on them"<sup>95</sup>. In particular, it ensures that

---

90 *Magaming* (2013) 252 CLR 381 at 401 [67].

91 *Magaming* (2013) 252 CLR 381 at 400 [64], quoting *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580. See also *Plaintiff S157* (2003) 211 CLR 476 at 513-514 [104]; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 at 981-982 [56]; *In re McGuinness* [2021] AC 392 at 415 [64].

92 *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2011] QB 120 at 137 [34]. See also *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663 at 680 [30]; *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 543 [116], 571 [190]; Gageler, "The Constitutional Dimension", in Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (2014) 165 at 175.

93 (1982) 154 CLR 25 at 70. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 1]* (1997) 72 ALJR 574 at 577 [18]; 151 ALR 711 at 715; *Plaintiff S157* (2003) 211 CLR 476 at 492 [31], 513-514 [104]; *Combet v The Commonwealth* (2005) 224 CLR 494 at 579 [167]; *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at 411 [48]; *Graham* (2017) 263 CLR 1 at 24-26 [39]-[44].

94 *Plaintiff S157* (2003) 211 CLR 476 at 492 [31], 513-514 [104]. See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 535 [134], 546 [181]; 376 ALR 575 at 608-609, 622.

95 *Plaintiff S157* (2003) 211 CLR 476 at 514 [104]. See also Crawford and Boughey, "The Centrality of Jurisdictional Error: Rationale and Consequences" (2019) 30 *Public Law Review* 18 at 30-31, 34-35.

decision-makers stay within the limits (express or implied) of the decision-making power conferred by statute. Judicial review recognises the importance of the Executive acting within lawful authority: that public power is not to be exercised against an individual in a way that is contrary to law. It recognises that the executive power of the Commonwealth is "exercised at a functional level by Ministers and by other officers of the Executive Government" and that in the exercise of those powers, they can and do err<sup>96</sup>.

96 In addition, and of no less significance, it recognises that the Executive cannot itself authorise a breach of the law. Not only does the rule of law require that the Executive act within legal authority, but as this Court has repeatedly stated<sup>97</sup>, in various ways and in various contexts, "[i]t is fundamental to our legal system that the executive has no power to authorize a breach of the law"<sup>98</sup>.

97 In cases of the kind under consideration in this appeal, public power has been exercised in a way that disadvantages an applicant – an individual. Once the individual shows a departure from the lawful exercise of power and that the departure might realistically have affected the outcome of a decision, the individual cannot be expected or required to show that they would have obtained a favourable exercise of statutory power but for the departure. It is for the decision-maker to show that the individual would not have done so.

98 The relationship between members of the public and the Executive, and the idea that underpins it, was described by Boughey and Weeks as "government accountability": "one of the key 'values' or 'ideals' that administrative law is designed to uphold"<sup>99</sup>. It is said to encapsulate<sup>100</sup>:

---

96 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 95 [128]; see generally 92-96 [119]-[128].

97 *Clough v Leahy* (1904) 2 CLR 139 at 155-156; *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 117 at 189; *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170 at 187; *A v Hayden* (1984) 156 CLR 532 at 540, 550; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56]; *Ruddock v Taylor* (2005) 222 CLR 612 at 644-645 [120]; *Plaintiff M68* (2016) 257 CLR 42 at 98 [135].

98 *A v Hayden* (1984) 156 CLR 532 at 540.

99 Boughey and Weeks, "Government Accountability as a 'Constitutional Value'", in Dixon (ed), *Australian Constitutional Values* (2018) 99 at 99.

100 Boughey and Weeks, "Government Accountability as a 'Constitutional Value'", in Dixon (ed), *Australian Constitutional Values* (2018) 99 at 103.

"the basic idea that the executive branch and its delegates must be answerable, and as a general principle justify their actions, to the public, the Parliament, the courts or any administrative agency (ombudsmen, tribunals, anti-corruption agencies etc)."

99        Judicial review of administrative action derives its legitimacy and constitutional importance from the rule of law. Rule of law values provide principled support for the view that if an individual establishes error in an administrative decision, it should be for the Executive to establish that, even without the error, the same outcome would have been reached. Once it is accepted that the rule of law requires that the Executive must act within legal authority and that the purpose of judicial review is to provide individuals with a mechanism to challenge the lawfulness of the exercise of official power, it is conceptually difficult to understand why the individual would need to show anything more than that public power was exercised in a manner that exceeded a condition of the exercise of that power and that it is realistically possible that the error could have affected the result. To require an individual to show that executive power – public power – could have been exercised differently if preconditions on the exercise of that power had been met is to fail to understand the constitutional relationships between Parliament, the Executive and courts and the role of judicial power in seeking to ensure that executive power which exceeds the authority conferred on the Executive is controlled. The idea that breaches of statutory conditions by decision-makers should not lightly be seen to have no legal consequences for the decision may sometimes be described as "legality", but it is an idea more fundamental than the principle of statutory construction identified in *Potter v Minahan*<sup>101</sup>. As Professor Daly has rightly remarked, "[w]hereas one might be content to accept that the applicant bears the burden of proof generally in judicial review cases, one might nonetheless consider that putting the onus of proving materiality on the applicant does not adequately ensure that administrative decision-makers will comply with the law"<sup>102</sup>.

100        This Court has recognised that not every error of law will invalidate an exercise of statutory executive power<sup>103</sup>. But there may be cases where an error is

---

**101** (1908) 7 CLR 277. See Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372.

**102** Daly, "A Typology of Materiality" (2019) 26 *Australian Journal of Administrative Law* 134 at 144.

**103** *Project Blue Sky* (1998) 194 CLR 355 at 388-391 [91]-[93]; *Hossain* (2018) 264 CLR 123 at 134-135 [29]-[30], 136 [39], 145 [65]; *SZMTA* (2019) 264 CLR 421 at 433 [2]-[3], 458 [90]; *ABT17* (2020) 94 ALJR 928 at 948 [72], 954-955 [110]; 383 ALR 407 at 429-430, 438-439.

jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker and despite not depriving a party of the realistic possibility of a different result<sup>104</sup>. The cases may include<sup>105</sup> where a decision-maker is required to make a decision by reference to a single specified criterion and, in error, the decision-maker addresses a different and wrong criterion and where lack of respect for the dignity of the individual results in a denial of procedural fairness. That is not an exhaustive list.

101 The nature of the error has to be worked out in each case concerning a specific decision under a particular statute. In most cases, an error will only be jurisdictional (that is, will only exceed the jurisdiction conferred on the decision-maker by statute) if the error was "material" to the decision, in the sense that there has been an error relevant to the actual course of the decision-making and the decision-maker has not shown that the error could not have made a difference to the outcome actually reached. Recognising a criterion of materiality before an error is treated as jurisdictional is a mechanism for drawing a line between those cases where a supervising court has jurisdiction to remedy an error made by an administrative decision-maker and those cases where it does not<sup>106</sup>. In the United Kingdom, this has been explained by reference to the demands placed on the administrative state: "a certain level of error is acceptable in a legal system which has so many demands upon its limited resources"<sup>107</sup>. In the literature, it has been described as a "control mechanism" for determining which errors of law are amenable to judicial intervention<sup>108</sup>.

102 But acceptance that the law will permit an immaterial error of law to stand against an individual who has been subject to an exercise of State power – indeed, acceptance that a supervising court may have limited power to remedy an immaterial (non-jurisdictional) error of law – must necessarily be of significance

---

104 See *Hossain* (2018) 264 CLR 123 at 137 [40], 147-148 [72].

105 *Hossain* (2018) 264 CLR 123 at 137 [40], 147-148 [72].

106 The ability of a reviewing court to remedy a non-jurisdictional error of law is limited: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36. See the discussions in Crawford and Boughey, "The Centrality of Jurisdictional Error: Rationale and Consequences" (2019) 30 *Public Law Review* 18 at 21, 23-27; Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 *Public Law Review* 281 at 281-282.

107 *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 684 [42].

108 Knight, "Clarifying Immateriality" (2008) 13 *Judicial Review* 111 at 111 [2]-[3], 114 [14].

when considering who *ought*, as a matter of *principle*, to bear the onus of establishing immateriality.

103 Fundamental principles – namely, the rule of law; the constitutional relationship between the Executive and the judicial branch; the relationship between individuals and the State; and, in particular, the role of the judicial branch in the protection of the individual against incursions of executive power – together weigh decisively in favour of a conclusion that it is the respondent (the Executive) in an application for judicial review who should and must bear the onus of establishing immateriality of error.

104 The rule that, if an applicant has demonstrated error and the loss of a possibility of a successful outcome, it is for the respondent to establish immateriality of error is entirely coherent with the way in which the law operates, including in other areas in which the power of the State is applied to the individual. The application of a rule that it is for the respondent to establish immateriality of error in the exercise of public power in cases of the kind under consideration in this appeal is not unique. It takes its place in the broader application of the stated rule in accordance with the rule of law and is one which is practically sensible. The contrary approach is at odds with the way the law operates elsewhere.

105 These considerations make it all the more important to apply the ordinary rule for the allocation of burden of proof in connection with the application of statutes. That rule was stated in *Vines v Djordjevitch*<sup>109</sup> as follows: "in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, *ground of defeasance* or *exclusion* which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter" (emphasis added). Here, the applicant identifies departure from a condition of the exercise of public power. The restated rule acknowledges that the decision is invalid and of no effect only if the departure was "material". The requirement of materiality "assumes the existence of the general or primary grounds from which the [applicant's] ... right arises but denies the right ... in [the] particular case by reason of additional or special facts"<sup>110</sup>.

---

109 (1955) 91 CLR 512 at 519-520. See also *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257.

110 *Djordjevitch* (1955) 91 CLR 512 at 519.

## Onus in public law

106 Although we consider that the rule to be applied should be restated, it is essential, as was noted in *SZMTA*, to take account of past decisions of this Court – including, in particular, *Stead v State Government Insurance Commission*<sup>111</sup>, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>112</sup> and *Minister for Immigration and Border Protection v WZARH*<sup>113</sup>. Those cases, and the many decisions that have followed them<sup>114</sup>, recognise that although the exercise of public power against the individual arises in different contexts, the balance of the relationship between the individual and the State is best protected by the State having to show why a departure from the legal constraints on the exercise of public power was immaterial to the outcome that was reached. The decisions recognise that, although the onus of proof in judicial review may fall generally upon an applicant, courts "expect public authority defendants to explain themselves"<sup>115</sup>. As Edelman J demonstrates<sup>116</sup>, *Stead*<sup>117</sup> and *Balenzuela v De Gail*<sup>118</sup> do not support the rule stated by the plurality in this case.

---

111 (1986) 161 CLR 141.

112 (2005) 225 CLR 88.

113 (2015) 256 CLR 326.

114 See especially *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88-89 [4], 116-117 [80], 153-154 [211]; *Nobarani v Mariconte* (2018) 265 CLR 236 at 247 [38]. See also, eg, *Applicant VBB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1141 at [24]; *King v Delta Metallics Pty Ltd* [2013] FCAFC 93 at [59]; *Boyd v Thorn* (2017) 96 NSWLR 390 at 403-404 [60]; *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1 at 15 [73]; *Livers v Legal Services Commissioner* [2018] NSWCA 319 at [82]; *Gambaro v Mobycom Mobile Pty Ltd* (2019) 271 FCR 530 at 544 [49]; *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 147 ACSR 227 at 239 [58], but cf 240 [59].

115 Fordham, *Judicial Review Handbook*, 7th ed (2020) at 587 [42.2]; see also 56-57 [4.1.13], 587-590 [42.2.1]-[42.2.19].

116 Reasons of Edelman J at [188]-[196].

117 (1986) 161 CLR 141.

118 (1959) 101 CLR 226.

107 In *Stead*<sup>119</sup>, in an appeal by way of rehearing, having noted the difficulty for a court of appeal asked to conclude that compliance with the requirements of natural justice could have made no difference to the outcome in the particular case, the Court said that "[a]ll that the appellant needed to show was that the denial of natural justice deprived [the appellant] of the possibility of a successful outcome" and it was for the respondent to demonstrate "that a properly conducted trial could *not possibly* have produced a different result" (emphasis added).

108 The decisions in *VEAL* and *WZARH* are not inconsistent with the restated rule. In *VEAL*, this Court found, on the particular facts, that a denial of procedural fairness occasioned by a failure to disclose adverse information constituted a jurisdictional error which warranted setting aside the decision below, notwithstanding that the reasons of the Tribunal had contained an affirmative statement that it had given the adverse information in question "no weight"<sup>120</sup>. In *WZARH*, where a procedure adopted by an administrator was shown to have failed to afford a fair opportunity to be heard, not only was the rule stated in similar terms but the practical significance of the rule was recognised as follows<sup>121</sup>:

"[A] denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it *can be shown* that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given". (emphasis added)

109 The restated rule is consistent with approaches taken in other areas of public law, including:

- (1) where there is unreasonable delay in the making of an administrative decision, it is for the respondent to establish a satisfactory justification for the delay<sup>122</sup>;

---

**119** (1986) 161 CLR 141 at 147. See also *Balenzuela* (1959) 101 CLR 226 at 232-235.

**120** (2005) 225 CLR 88 at 92 [5].

**121** (2015) 256 CLR 326 at 342-343 [60].

**122** *Thornton v Repatriation Commission* (1981) 35 ALR 485 at 492, but cf 489; *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455 at 476; *Oliveira v The Attorney General (Antigua and Barbuda)* [2016] UKPC 24 at [43]. See also *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at 434 [59].



37.

- (2) in an application for habeas corpus, provided that the detainee has established probable cause or a case fit to be considered, the person directing detention must prove the lawfulness of the detention<sup>123</sup>; and
- (3) where material is unlawfully seized by a public official in purported execution of a warrant, the onus is on the respondent to establish a basis for a court to refuse discretionary remedies<sup>124</sup>.

110 The proposition also sits comfortably with the operation of the "proviso" to the common form criminal appeal provisions<sup>125</sup>. That is, in short, once an appellant has made out an error or irregularity under the second or third appeal criterion – namely, a wrong decision on a question of law or a miscarriage of justice – the onus shifts to the Crown to satisfy the court that there has been no substantial miscarriage of justice<sup>126</sup>.

### Other areas

111 Other areas of law are replete with examples of the onus being placed on, or shifted to, one party once a prima facie case has been made out by another party. This can be seen in cases concerning, among others:

---

123 *Liversidge v Anderson* [1942] AC 206 at 245; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299 [39].

124 *Smethurst* (2020) 94 ALJR 502 at 535 [134], 566 [278]; 376 ALR 575 at 608-609, 649. See also *Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397 at 405.

125 *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), s 158(1)-(2); *Criminal Code* (Qld), s 668E(1)-(1A); *Criminal Appeals Act 2004* (WA), s 30(3)-(4); *Criminal Code* (Tas), s 402(1)-(2); *Criminal Code* (NT), s 411(1)-(2); *Supreme Court Act 1933* (ACT), s 37O(2)-(3).

126 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *KBT v The Queen* (1997) 191 CLR 417 at 434; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63]; *Lindsay v The Queen* (2015) 255 CLR 272 at 294 [64]; *GBF v The Queen* (2020) 94 ALJR 1037 at 1042 [24]; 384 ALR 569 at 575.

- (1) negligence, where a defendant who seeks to argue that a plaintiff's injury was caused by a condition which pre-existed a negligent act bears the onus of proof<sup>127</sup>;
- (2) unlawful imprisonment, where, if imprisonment is found to have occurred, the defendant has to justify the lawfulness of the imprisonment<sup>128</sup>;
- (3) fraudulent misrepresentation, where, if a false statement is made with the intention of inducing a person to enter a contract and that person enters that contract, the defendant bears the onus of disproving inducement<sup>129</sup>;
- (4) bailment, where, once a bailor establishes that goods bailed pursuant to a contract of bailment were lost or damaged, a bailee must disprove negligence<sup>130</sup>;
- (5) the admissibility of improperly or illegally obtained evidence, where, if a party seeking to exclude evidence establishes that the evidence was improperly or illegally obtained, the party seeking its admission must persuade the court that the desirability of admission outweighs any undesirability<sup>131</sup>; and
- (6) nuisance, where the onus lies on a defendant relying on the defence of statutory authority to establish that the nuisance was authorised by statute

---

**127** *Watts v Rake* (1960) 108 CLR 158 at 163-164; *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

**128** *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 751 [24]; 381 ALR 375 at 382, citing *Brown v Lizars* (1905) 2 CLR 837 at 853-854, *Watson v Marshall* (1971) 124 CLR 621 at 626 and *Ruddock* (2005) 222 CLR 612 at 631 [64], 650-651 [140].

**129** *Gould v Vaggelas* (1985) 157 CLR 215 at 238; see also 219, 262.

**130** *Tozer Kemsley & Millbourn (A'Asia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384 at 397-398; *Pitt Son & Badgery Ltd v Proulefc* (1984) 153 CLR 644 at 646.

**131** *Evidence Act 1995* (Cth), s 138; *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at 500-501 [28]; 252 ALR 619 at 626; *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440 at 445 [17]; *R v Mokbel* (2012) 35 VR 156 at 184 [309].

and was an inevitable consequence of the performance of a statutory activity or duty or the exercise of a statutory power<sup>132</sup>.

112 None of this is exhaustive. It reflects what was said in *Djordjevitch*<sup>133</sup>, as explained above: namely, that the ordinary rule is for the burden of proof to be allocated to the party seeking to rely on an "additional or special matter" in support of a ground of defeasance or exclusion to deny a right to another party in a particular case.

### Practical considerations

113 Requiring a decision-maker to establish that compliance with a statutory condition of an exercise of power could not have made a difference to the decision that was made in the circumstances in which the decision was made also is practical and works practicably. The reverse is not and does not. There are three independent, but related, practical considerations.

114 First, predicting how the outcome of a decision-making process might have differed if an error had not occurred is not an easy task even for those legally trained. That difficulty was recognised in *Stead* when this Court said that "[i]t is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial"<sup>134</sup>. In *SZQGA v Minister for Immigration and Citizenship*<sup>135</sup>, Barker J explained that predicting how the outcome of a decision-making process might have differed if an error had not occurred is fraught. His Honour put the point in these terms<sup>136</sup>:

"It will often be extremely difficult to say what decision might have been made by an administrative decision-maker if there had been no denial of procedural fairness in a given case – and it is not for the review court to speculate. To try to reconstruct a decision-making process or to rework the apparent basis upon which a decision has been made, in order to state with

---

132 *Benning v Wong* (1969) 122 CLR 249 at 308-309; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 310-311 [118]-[125].

133 (1955) 91 CLR 512 at 519-520.

134 (1986) 161 CLR 141 at 145-146.

135 (2012) 204 FCR 557.

136 *SZQGA* (2012) 204 FCR 557 at 591 [157].

any confidence what the result might have been or would have been but for denial of procedural fairness, is likely to be a speculative and unproductive task and certainly one likely to lead to injustice, because the judicial reviewer is not equipped and is not charged with responsibility to make the sort of administrative decision that the primary decision-maker has been set up to determine."

115 The observations apply with greater force if the task must be undertaken by the applicant (and especially in respect of unrepresented applicants). As was explained in *ABT17 v Minister for Immigration and Border Protection*<sup>137</sup>:

"To require an individual to show that executive power – public power – would have been exercised differently if preconditions on the exercise of that power had been met is to fail to understand [the constitutional relationships between Parliament, the Executive and courts] and the role of judicial power. It places the onus on an individual to show why public power should be re-exercised, rather than protecting that individual from exercises of public power which are contrary to the law. *And, it must be observed, at least in some cases it places the onus on an individual to show why public power should be re-exercised, without the necessary facts, or the ability to obtain the necessary facts.*" (emphasis added)

116 That leads to the second, related, consideration. The decision-maker, the person whose decision is in issue, is "free to assist"<sup>138</sup> in discharging the onus of establishing why the absence of the identified error, their error, would not have led to a different result. The respondent in a judicial review application enjoys distinct advantages as the decision-maker responsible for the decision-making process which has led to the impugned decision. The respondent will have access to the departmental files and records relevant to the impugned decision. Indeed, in a case of the kind here in issue, where a tribunal has committed an error by failing to disclose the existence of a notification under s 438 of the *Migration Act 1958* (Cth) to an applicant, the Minister is usually the only party to the dispute capable of adducing evidence that the error has occurred<sup>139</sup>. This observation should not be taken to suggest that a tribunal on judicial review of one of its

---

<sup>137</sup> (2020) 94 ALJR 928 at 954 [109]; 383 ALR 407 at 438.

<sup>138</sup> *Guo v The Commonwealth* (2017) 258 FCR 31 at 56 [83].

<sup>139</sup> See, eg, *SZMTA* (2019) 264 CLR 421 at 446 [50], 447 [55]-[57], 467 [121]; *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [11].

decisions should become a "protagonist" in the judicial review proceeding<sup>140</sup>. Rather, it recognises that, in law and effect, where an administrative tribunal has made a decision in substitution of the decision of the primary administrative decision-maker, that decision "becomes the decision of the Executive Government"<sup>141</sup>. The tribunal stands in the shoes of the decision-maker whose decision is under review<sup>142</sup>.

117 The advantages enjoyed by public authorities and officers have been explained in other contexts when addressing the fact that the onus of proof is on the decision-maker. In *R v Southwark London Borough Council; Ex parte Ryder*<sup>143</sup>, Dyson J emphasised that the decision-maker whose decision was impugned in that case said that she took a point into account that "[p]rima facie ... was irrelevant", and "[i]n the absence of details as to how and why [the decision-maker] took it into account", his Lordship was "driven to conclude that [the decision-maker] may well have relied upon it in a material sense". Although Dyson J did not expressly refer to matters of practicality in his Lordship's decision, it is self-evident that if details about how and why a decision-maker took a particular matter into account were not set out in the reasons for a decision, then they would be solely within the knowledge of the decision-maker or, perhaps, in records held by the government.

118 The same basic proposition explains why the onus is on the decision-maker to demonstrate why a delay in making a decision is not an unreasonable delay. In decisions on unreasonable delay as a ground of judicial review, considerable weight is attached to the evidence offered by the public authority justifying the delay. In such cases, ordinarily the only evidence which could be adduced by an applicant relevant to materiality would be the *fact* of the delay or length of time since lodging the relevant application. Determination of the matter would then depend on an inference or evaluative conclusion being drawn by a court on application for judicial review that the length of time was unreasonable. In contrast, as is evident from the Privy Council's treatment of this issue in *Oliveira v The Attorney General (Antigua and Barbuda)*<sup>144</sup>, a public authority is in a

---

140 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

141 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 299 [40]; *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51].

142 *Frugtniet* (2019) 266 CLR 250 at 271 [51].

143 (1996) 28 HLR 56 at 67.

144 [2016] UKPC 24 at [43].

position to adduce a range of relevant evidence, including documentary evidence that might (for instance) identify a backlog or unavoidable procedural delays. In short, it is the decision-maker (not the individual in respect of whom the decision is made) who is capable of explaining the reason for a lengthy period of inactivity<sup>145</sup>.

119 Likewise, in respect of applications for habeas corpus, Allsop CJ has recently explained that the Minister and Department ultimately responsible for the conduct of prisons and detention centres should "be in a position to justify the lawful nature of a person's detention, at any time. If that depends upon proof of someone's state of mind and the reasonable foundation for it that proof should be readily available whether from the officers who are responsible for the detention, or otherwise by reference to clear records"<sup>146</sup>.

120 In relation to the tort of unlawful imprisonment, courts have rejected the argument that the Commonwealth should not bear the "impracticality and inconvenience" of having to prove the existence and subsistence of the required state of mind on the part of the detaining officer or officers<sup>147</sup>. In *Guo v The Commonwealth*<sup>148</sup>, Jagot J said "proof sufficient to establish the lawfulness of immigration detention involves matters of fact and of inference from fact. The Commonwealth is free to assist itself in discharging the onus of proof by the implementation of whatever systems, processes and safeguards it sees fit and by the calling of such evidence in any particular case as it sees fit."

121 Finally, there is a difficulty which is both legal and practical: the risk that a review court will ask itself the wrong question by erroneously considering for itself questions of fact which were determined by a primary decision-maker. This risk was adverted to by Dixon CJ in *Balenzuela*<sup>149</sup>:

"Care must be taken lest in exercising an authority to decide whether an error of law occurring at the trial is likely to have influenced the result, what is really done is to examine the evidence as if the court were forming

---

**145** *Wei* (1991) 29 FCR 455 at 476. See also *AQM18* (2019) 268 FCR 424 at 434 [59].

**146** *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405 at 407 [5].

**147** *Guo* (2017) 258 FCR 31 at 55 [80], 56 [83], 77 [151].

**148** (2017) 258 FCR 31 at 56 [83]. See also *Burgess v The Commonwealth* (2020) 276 FCR 548 at 567 [68].

**149** (1959) 101 CLR 226 at 235.

a conclusion of fact for itself. The basal distinction between the court's duty and the function of the jury cannot be confused in this way."

122 All the judges of this Court in *SZMTA* were alive to the same possibility. Bell, Gageler and Keane JJ said that in the case of an invalid notification purportedly made under s 438 of the *Migration Act*, "where the court on judicial review of a decision of the Tribunal can infer that the Tribunal left the notified document or notified information out of account in reaching its decision, the question that still remains is whether there is a realistic possibility that the Tribunal's decision could have been different if it had taken the document or information into account"<sup>150</sup>. But their Honours immediately cautioned that "[t]he court must be careful not to intrude into the fact-finding function of the Tribunal"<sup>151</sup>. Similarly, the minority said that: "to shift the onus of proof would fundamentally change the nature of judicial review. Instead of a court concluding that an act or omission constitutes an error going to jurisdiction ... [judicial review] would become a form of merits review where jurisdictional error is found only if the breach is material to the applicant for review because it has denied that applicant the possibility of a successful outcome"<sup>152</sup>. The risk that a review court will erroneously consider for itself questions of fact determined by the primary decision-maker highlights the potential practical injustice that could flow from requiring applicants to do anything more than establish a relevant error (that is, one which could realistically have resulted in a different decision).

123 The practical difficulties are real: for those legally trained and those not legally trained. But one side or the other must bear the onus and the issue is which. In some cases, the respondent will enjoy practical advantages which mean that the respondent is best placed to answer the question of what would have occurred but for the error. In many other cases, the respondent may not enjoy any such advantage. We accept that there may be cases where all either party may have is the decision-maker's reasons and the material before the decision-maker. But there needs to be a stated rule which is principled and practical. The question that arises is: why should the task of establishing that an error would have affected the outcome fall to the applicant once they have established that a breach of the law has occurred and that the error *could* realistically have denied them the possibility of a successful outcome? The answer is, it should not. Once error is identified by an applicant, the onus of proving that the error is immaterial to the decision that

---

150 *SZMTA* (2019) 264 CLR 421 at 445 [48].

151 *SZMTA* (2019) 264 CLR 421 at 445 [48].

152 *SZMTA* (2019) 264 CLR 421 at 460 [95]. See also *Quin* (1990) 170 CLR 1 at 35-36; *ABT17* (2020) 94 ALJR 928 at 948 [72], 954 [105]; 383 ALR 407 at 429-430, 437; *PQSM v Minister for Home Affairs* (2020) 382 ALR 195 at 211 [75], 228 [150].

was reached is on those who seek to affirm the decision's validity – namely, the Executive.

## MZAPC

124 The appellant is an Indian citizen who validly applied for a protection visa on 22 January 2014<sup>153</sup>. A delegate of the first respondent, the Minister for Immigration and Border Protection, refused the application on 4 June 2014.

125 The appellant applied to the Refugee Review Tribunal, now the Administrative Appeals Tribunal ("the Tribunal"), for review of that decision. The appellant made two central claims in support of his protection visa application. The first arose out of a land dispute with relatives; the second was that he became stateless when his family disowned him for changing his religion, cutting his hair and adopting an Australian lifestyle.

126 On 5 June 2014, a delegate of the Minister issued a notification to the Tribunal under s 438 of the *Migration Act* in respect of the appellant's protection visa application. The information to which the notification applied was contained in the following documents:

- (1) an "Immigration Status Service Report" dated 31 March 2012, which stated, among other things, that an officer of Victoria Police had advised the then Department of Immigration and Citizenship ("the Department") that the appellant "has over 28 pages of offences and is currently on a suspen[d]ed sentence until Sept 2012";
- (2) a screenshot of a "Client Detail" page for the appellant, which set out information such as the appellant's name, date of birth and address;
- (3) a facsimile cover sheet for a ten-page facsimile message from Victoria Police to the Department dated 31 March 2012; and
- (4) the remaining nine pages of the facsimile message, which was a Victoria Police court outcomes report in relation to the appellant, which showed that he had been convicted of a number of driving-related offences on 30 September 2011.

---

153 When the appellant arrived in Australia on 22 January 2006, he held a student visa which ended on 15 March 2008. The appellant applied for a different class of student visa on 30 August 2007, which was refused, and he made an invalid protection visa application on 31 October 2013, before making his valid protection visa application.



127 The court outcomes report revealed that on 30 September 2011 the appellant received a three-month suspended term of imprisonment for one count of drink driving and one count of driving while disqualified. On the same day, he received non-custodial punishments for the following additional convictions: seven counts of driving while disqualified; two counts of drink driving; three counts of using an unregistered vehicle; two counts of using a vehicle not in a safe and roadworthy condition; one count of "state false name"; one count of removing a defective vehicle label; and one count of failing to wear a seatbelt in a moving vehicle.

128 The appellant was not told that the s 438 notification had been issued or that the court outcomes report was provided to the Tribunal. On 4 November 2014, the Tribunal affirmed the decision of the delegate not to grant the appellant a protection visa.

129 In relation to the land dispute claim, although the Tribunal had "some concerns about the [appellant's] credibility", it accepted there had been a dispute between the appellant's father and uncle over land in Punjab and that the appellant had been taken to a house in Amritsar by his cousin, drugged and held there until his father paid the amount of A\$3,500 in exchange for the appellant's release.

130 However, the Tribunal did not accept the appellant's claim that he had been subject to continuing threats from his relatives in relation to the land dispute, saying:

*"I do not accept that the [appellant] has been subject to continuing threats in relation to the land dispute because he is the eldest son of his father. The [appellant] was able to reside in Delhi, India for 2-3 years after the Amritsar incident without facing any further harm from his uncles and his relatives. The Amritsar incident was 12-13 years ago and resolved when the father made payment to his uncle. Furthermore, on the [appellant's] oral evidence at hearing, in recent times his father has been pressured but not actually harmed or threatened by the relatives despite his father refusing to sign over the land through an affidavit. I do not accept that if the relatives wanted to harm the [appellant] over the land that they would not be threatening or harming his father in circumstances where the dispute originates in relation to the father and the father has the ability to sign a document giving them the land. I do not accept as credible or plausible that simply because his father was in Delhi and not Amritsar that this would completely deter the relatives from undertaking threatening or violent action against his father to obtain legal ownership of the land. The [appellant] stated at the hearing that his mother's brother was a policeman, which I accept. However, I do not accept as credible or plausible that the relatives would not threaten or harm his father (but would*

threaten or harm the [appellant]) because his mother's brother was a policeman. *In all the circumstances, I do not accept that the relatives have a continuing adverse interest in the [appellant].*" (emphasis added)

131 In relation to the claim that he had been disowned by his family, the Tribunal accepted that the appellant's family had disowned him but did not consider that being "disowned" constituted significant harm for an adult, 29-year-old man. The Tribunal also noted that the appellant did not claim to have been threatened for adopting an Australian lifestyle, and that the Tribunal had not identified any "recent reports of Sikhs in India being harmed because they have cut their hair, adopted Western lifestyles or drank alcohol". The Tribunal made no reference in its reasons to any of the matters contained in the information and documents the subject of the s 438 notification.

132 The appellant sought judicial review of the Tribunal's decision in the Federal Circuit Court of Australia. On 17 May 2016, the Federal Circuit Court (Judge Hartnett) dismissed the appellant's application. The appellant was unrepresented and his application essentially sought to challenge the merits of the Tribunal's decision, rather than asserting any jurisdictional error. The primary judge considered whether any jurisdictional error arose on the face of the Tribunal's reasons, but dismissed the application.

133 The appellant appealed to the Federal Court of Australia. While the matter was pending in the Federal Court, two significant developments occurred: first, the Minister filed an affidavit which disclosed for the first time the existence of the s 438 notification; and second, the matter was held in abeyance pending the decision of this Court in *SZMTA*.

134 On 4 December 2019, the Federal Court (Mortimer J) dismissed the appellant's appeal. Mortimer J observed that the Minister had conceded, in light of the decision in *SZMTA*, that the failure by the Tribunal to disclose the existence of the notification given by the Secretary of the Department ("the Secretary") under s 438(2) to the appellant "constituted a denial of procedural fairness"<sup>154</sup>. However, her Honour concluded that the appellant had failed to show, as her Honour considered was required by *SZMTA*, that there was a realistic possibility that he could have succeeded in the Tribunal if he had been told of the s 438 notification and the documents that had been sent to the Tribunal<sup>155</sup>. This conclusion was said to follow from her Honour's finding that "the Tribunal's

---

154 *MZAPC* [2019] FCA 2024 at [35].

155 *MZAPC* [2019] FCA 2024 at [56]-[58].

reasoning was not in fact affected by the potentially adverse information in the first place"<sup>156</sup>.

*Issues on appeal*

135 There were two issues on appeal in this Court. The first was the issue of principle discussed above: namely, who does, and who ought to, bear the onus of establishing materiality or immateriality in an application for judicial review of administrative action<sup>157</sup>. The second issue on appeal concerned how the applicable principles were to be applied where, as here, an applicant for a protection visa is denied procedural fairness by reason of the Tribunal's failure to disclose that a notification has been issued under s 438 of the *Migration Act*.

*The restated principle applied*

136 Applying the restated rule, the root of the analysis is one of statutory construction<sup>158</sup>. In the present appeal, the applicable statutory framework is a review under Pt 7 of the *Migration Act* of the delegate's refusal to grant the appellant a protection visa in circumstances where the Tribunal has received a notification under s 438 of the Act in respect of information that is potentially adverse to the appellant and where the Tribunal has failed to disclose to the appellant the existence of the notification.

137 As has been observed, the Minister accepted that the failure by the Tribunal to disclose the existence of the Secretary's notification under s 438(2) to the appellant constituted a denial of procedural fairness.

138 The question which then arises is whether that breach of procedural fairness constitutes jurisdictional error. In this case, the Tribunal's failure to provide procedural fairness could realistically have deprived the appellant of the possibility of a successful outcome. To establish as much, the appellant was not required to demonstrate that the Tribunal in fact exercised its discretion under s 438(3)(a). It is enough that the Tribunal *could* realistically have exercised the s 438(3)(a) discretion and that the s 438 information *could* realistically have contributed to the Tribunal's ultimate decision. The question then is whether the Minister

---

156 *MZAPC* [2019] FCA 2024 at [58].

157 See [89]-[123] above.

158 *Project Blue Sky* (1998) 194 CLR 355 at 388-391 [91]-[93]. cf *Hossain* (2018) 264 CLR 123 at 134 [29], 145 [65]; *SZMTA* (2019) 264 CLR 421 at 444 [44], 458-459 [90]; *MZAOL v Minister for Immigration and Border Protection* [2019] FCAFC 68 at [75].

demonstrated that affording procedural fairness to the appellant, by disclosing the fact that the s 438 notification had been made to the Tribunal, would not have resulted in a different outcome.

139       The appellant rightly accepted that if the Minister established that the s 438 information was not taken into account by the Tribunal, then the Minister would have established that the error – the breach of procedural fairness – was immaterial and did not constitute jurisdictional error. The issue is to be decided by the ordinary processes of fact finding, which start with the relevant statutory framework – here, Pt 7 of the *Migration Act* and the proper construction of s 438 – and, against that legislative framework, then look to the record and the evidence adduced on the application, and inferences to be drawn from that material. As the Minister accepted, the issue is not to be decided by applying an irrebuttable presumption about what the Tribunal did or did not do. Nor is it to be decided by applying some rebuttable presumption about what the Tribunal did or did not do. In this case, the Minister demonstrated that compliance with the statutory requirements would not have led to a different outcome. It is necessary to explain how and why and to begin by considering the relevant statutory framework.

140       The appellant applied to the Tribunal under Pt 7 of the *Migration Act* for review of the dismissal of his application for a protection visa<sup>159</sup>. If a valid application is made, then, subject to a presently irrelevant exception, the Tribunal must review the decision<sup>160</sup> within 90 days of the Secretary giving the Registrar of the Tribunal ("the Registrar") the documents that s 418(2) requires<sup>161</sup>. The Tribunal may, for the purposes of the review, exercise all the powers and discretions conferred by the *Migration Act* on the decision-maker and may, among other things, affirm the decision, vary the decision, or set aside the decision and substitute a new decision<sup>162</sup>. Such a decision is a decision of the Minister<sup>163</sup>.

141       Significantly, if an application for review is made to the Tribunal, the Registrar must, as soon as practicable, give the Secretary written notice of the application and, within ten working days of such notice, the Secretary must give to the Registrar a statement about the decision that sets out the findings of fact made by the decision-maker, refers to the evidence on which those findings were

---

159 *Migration Act*, s 412.

160 *Migration Act*, s 414.

161 *Migration Act*, s 414A (as it stood at the relevant time).

162 *Migration Act*, s 415(1)-(2).

163 *Migration Act*, s 415(3).

based and gives the reasons for the decision<sup>164</sup>. In addition, the Secretary must give to the Registrar "each other document, or part of a document, that is in the Secretary's possession or control and is *considered by the Secretary to be relevant to the review of the decision*"<sup>165</sup> (emphasis added). The exercise of the Tribunal's powers is addressed in Div 3 of Pt 7. In exercising its powers, the Tribunal is to pursue the stated objective of "providing a mechanism of review that is fair, just, economical, informal and quick"<sup>166</sup>. The Tribunal is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case<sup>167</sup>.

142        The conduct of the review is addressed in Div 4 of Pt 7. The natural justice hearing rule is exhaustively<sup>168</sup> addressed in s 422B, which provides that, in applying Div 4, the Tribunal must act in a way that is fair and just<sup>169</sup>. Both an applicant for review, and the Secretary, may give the Registrar prescribed documents<sup>170</sup>. An applicant may give a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider and written arguments relating to the issues arising in relation to the decision under review<sup>171</sup>. The Tribunal may "get any information that it considers relevant" and, if it does so, it must have regard to that information in making the decision on review<sup>172</sup>. In addition, subject to some limited exceptions, the Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review<sup>173</sup>.

143        In the present matter, against the background of the Secretary's general obligation under s 418(3) to provide the Tribunal with relevant documents,

---

**164** *Migration Act*, s 418(1)-(2).

**165** *Migration Act*, s 418(3).

**166** *Migration Act*, s 420(1) (as it stood at the relevant time).

**167** *Migration Act*, s 420(2) (as it stood at the relevant time).

**168** *Migration Act*, s 422B(1).

**169** *Migration Act*, s 422B(3).

**170** *Migration Act*, s 423; see also s 418(2)-(3).

**171** *Migration Act*, s 423(1).

**172** *Migration Act*, s 424(1).

**173** *Migration Act*, s 425; see also ss 425A and 426.

the Secretary also provided to the Registrar documents and information under s 438 of the *Migration Act*<sup>174</sup>. Section 438(2) requires that, in giving the documents and information, the Secretary must notify the Tribunal that s 438 applies in relation to the specific document or information and *may* give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information. The nature and contents of the documents and the information provided in this appeal have been described.

144 Section 438(3) is important. It provides that if the Tribunal is given a document or information and is notified under s 438(2) that the section applies to it, the Tribunal *may*, for the purpose of the exercise of its powers, have regard to any matter contained in the document or to the information and *may*, if the Tribunal thinks it appropriate to do so, disclose any matter contained in the document or the information to the applicant.

145 *SZMTA* established that when the Secretary notified the Tribunal in writing under s 438(2)(a) that s 438(1)(b) applied to certain information given to the Department, the Tribunal incurred an obligation of procedural fairness to disclose the fact of that notification<sup>175</sup>. But, as we have seen, the fact that such notice was not given did not necessarily give rise to jurisdictional error. The question was whether that error was immaterial to the outcome. That is a question of fact and one in respect of which the Minister discharged the onus of demonstrating that the error was immaterial.

146 The documents and information provided by the Secretary under s 438 were adverse to the appellant and included reference to the appellant's conviction for giving a false name. It was common ground before Mortimer J that the nature of the "state false name" offence could contribute to a decision-maker forming an adverse view of the appellant's honesty.

147 Where the Tribunal makes its decision on review, the Tribunal must make a written statement that, among other things, sets out the decision of the Tribunal; sets out the reasons for the decision; sets out the findings on any material questions of fact; and refers to the evidence or other material on which the findings of fact were based<sup>176</sup>.

---

**174** See *SZMTA* (2019) 264 CLR 421 at 436 [15].

**175** (2019) 264 CLR 421 at 433 [2], 440 [27], 440-441 [29], 442-443 [34]-[38], 447 [57], 452 [72], 454 [78], 466 [115], 466-467 [117].

**176** *Migration Act*, s 430(1).

148 The Tribunal's reasons for decision do not refer to the Tribunal, "for the purpose of the exercise of its powers, hav[ing] regard to any matter contained in the document[s], or to the information"<sup>177</sup>. There is no reference, express or implied, to the documents or the information. As Mortimer J observed in the decision below, there is nothing to indicate "that the Tribunal even turned its mind to the exercise of the powers under s 438(3)"<sup>178</sup>.

149 Moreover, as Mortimer J stated, the Tribunal's reasons do not disclose any real assessment of the appellant's honesty at all<sup>179</sup>. In conducting its review, the Tribunal accepted many aspects of the appellant's claims. Critically, it accepted that there was a dispute between the appellant's father and uncle over land in Punjab and that when the appellant visited Amritsar in 2003 or 2004, he was taken to a house by his cousin, drugged and held there until his father arrived and paid an amount for his release. The Tribunal also accepted that after this event and until he came to Australia, the appellant stopped going to Punjab. What the Tribunal did not accept was that the appellant had been subject to *continuing* threats in relation to the land dispute or that his relatives had a *continuing* adverse interest in him. As the Minister submitted, the Tribunal provided three independent reasons for that finding: the appellant was able to reside in Delhi for two or three years after the kidnapping without facing any further harm from his relatives; by the time of the Tribunal's decision, some 12 or 13 years had passed since he was kidnapped; and the appellant's evidence to the Tribunal had been that, in more recent times, his father had been pressured but not actually harmed or threatened by the relatives even though he had refused to sign over the land.

150 As the Minister submitted, the Tribunal reasoned that where the land dispute had originated with the appellant's father and it was the appellant's father who had the ability to sign over the land, then if the relatives had actually wanted to harm the appellant, they would also have threatened or harmed the appellant's father. In reaching that finding, the Tribunal rejected as not "credible or plausible" the appellant's two alternative explanations for the absence of any threats of harm made against the father. The Tribunal accepted the facts relied upon by the appellant – that the father had moved to Delhi and his maternal uncle was a policeman – but found that the alternative explanations were not credible because they were not plausible. That is, the Tribunal did not accept that because the father was in Delhi rather than Punjab, this would deter the relatives from threatening or taking violent action against the father to obtain the land and, secondly, that the

---

177 *Migration Act*, s 438(3).

178 *MZAPC* [2019] FCA 2024 at [52].

179 *MZAPC* [2019] FCA 2024 at [57].

relatives would refrain from threatening the father (but would threaten or harm the appellant) because the appellant's maternal uncle was a policeman.

151 Therefore, the Tribunal's rejection of the appellant's claim that he had been subject to *continuing* threats in relation to the land dispute or that his relatives had a *continuing* adverse interest in him did not result from the Tribunal making any adverse finding regarding the appellant's honesty. As Mortimer J stated, "[t]his was a review where the Tribunal largely accepted the appellant's narrative, and his claimed circumstances, but rejected the visa application because it was not satisfied the appellant's fears were well-founded"<sup>180</sup>. It therefore is unnecessary to decide whether Mortimer J erred in holding that only "dishonesty offences" were capable of impacting upon the credibility of the appellant before the Tribunal.

152 The Minister thus established that the denial of procedural fairness was immaterial: compliance with the condition would not have made a difference to the decision that was made.

### **Conclusion and orders**

153 The appeal is dismissed with costs.

---

**180** MZAPC [2019] FCA 2024 at [56].



EDELMAN J.

## Introduction

154 I have had the considerable benefit of reading both the joint reasons of Kiefel CJ, Gageler, Keane and Gleeson JJ and the joint reasons of Gordon and Steward JJ. The central issue of distinction between those reasons, and the principal point of law in issue on this appeal, concerns the party who bears the onus of proof in relation to the materiality of non-compliance with a statutory condition. Kiefel CJ, Gageler, Keane and Gleeson JJ conclude that the onus of proof is borne by the party seeking to prove that the non-compliance was material and therefore was jurisdictional. Gordon and Steward JJ conclude that the onus of proof is borne by the party asserting immateriality and denying that the non-compliance was jurisdictional.

155 For reasons of history, authority, principle, and coherence, I consider that the better approach to the onus of proof in this case, concerning a denial of procedural fairness in a review under Pt 7 of the *Migration Act 1958* (Cth), is that of Gordon and Steward JJ. Given the strength with which the opposing views have been expressed, it is necessary to explain why the same reasons of history, authority, principle, and coherence that require the usual implication of a requirement of materiality before a court will conclude that non-compliance with a statutory condition will lead to invalidity also usually require that the onus of proof is upon the party asserting immateriality.

156 Ultimately, however, my different conclusion from that of Kiefel CJ, Gageler, Keane and Gleeson JJ on the onus of proof might have little practical effect for three reasons. First, any conclusion on onus of proof is not capable of universal generalisation. Just as the source of a statutory condition upon a duty, power, or function is derived expressly or impliedly from the statute, so too is the requirement of materiality and the onus of proof for materiality derived expressly or impliedly from the statute. As the courts of the United States have long recognised, the location of the onus will depend upon the terms and context of the statute. In criminal cases in the United States, like Australia, it has been held that the onus lies upon the government to prove immateriality because the result will "deprive an individual of his liberty"<sup>181</sup>. In civil cases in the United States, unlike Australia, the general approach is that the person "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted"<sup>182</sup>. But there are no "hard-and-fast standards governing the

---

181 *Shinseki v Sanders* (2009) 556 US 396 at 410.

182 *Palmer v Hoffman* (1943) 318 US 109 at 116.

allocation of the burden of proof in every situation"<sup>183</sup>. The different general rule on onus of proof in civil and administrative cases in the United States might not apply depending "on the statutory setting or specific sort of mistake made"<sup>184</sup>.

157 Secondly, irrespective of the location of the onus, as was observed more than a half century ago in the United States, the court still has the duty "to determine whether the error affected the judgment"<sup>185</sup>. A similar point was made in this Court by Dixon CJ<sup>186</sup>. In this context, the question of onus may not usually be one that has any real consequence and might make little difference to the outcome of any case. It makes no difference to the result in this case. And in many other cases the low bar to establishing materiality means that, on the approach of Kiefel CJ, Gageler, Keane and Gleeson JJ, it will be sufficient to point to any role that non-compliance with a statutory condition played in the decision-making process to ground the conclusion that the result reached by the decision-maker was not inevitable.

158 Thirdly, even in cases where the location of the onus of proof might make a difference, such as a rare case where evidence is necessary to establish the effect that non-compliance would have had upon the decision-making process, a review court will usually apply the general principle that the extent of an onus will depend upon the capacity of a party to adduce evidence<sup>187</sup>. "[S]light evidence may be enough"<sup>188</sup>.

### **The distinction between a threshold for a ground of review and "materiality"**

159 As Gordon and Steward JJ explain<sup>189</sup>, there are evidently two steps that must be taken before a conclusion of jurisdictional error is reached. This section of these reasons is concerned with the first step. Before any issue of materiality can arise an applicant must establish that there has been non-compliance with a statutory condition or, put more loosely, that there has been an error capable of

---

183 *Keyes v School District No 1* (1973) 413 US 189 at 209.

184 *Shinseki v Sanders* (2009) 556 US 396 at 415.

185 Traynor, *The Riddle of Harmless Error* (1970) at 26, suggesting that this must be done "without benefit of such aids as presumptions or allocated burdens of proof".

186 *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235.

187 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See *G v H* (1994) 181 CLR 387 at 391-392; *Russo v Aiello* (2003) 215 CLR 643 at 647 [10].

188 *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371.

189 At [85]-[86].

being a jurisdictional error. There will often be a threshold requirement of injustice before it is concluded that there has been non-compliance with a statutory condition. For instance, a statutory condition that requires a decision-maker to have regard to mandatory relevant considerations usually involves a threshold which material must cross before it reaches the standard of relevance. To take one definition of relevant material, it must be material that "if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding"<sup>190</sup>. Once relevance is established, a decision-maker's failure to consider such material will meet the threshold of injustice so as to be capable of being a jurisdictional error.

160 The statutory condition of procedural fairness is another example of a condition that contains a threshold requirement before there will be failure to comply. Any procedural irregularity must reach a threshold of sufficient injustice before procedural unfairness will be found to exist. For instance, a person "does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance"<sup>191</sup>. The threshold of injustice that is necessary for an obligation of procedural fairness can be understood as a need to establish that an irregularity is *capable* of causing "practical injustice"<sup>192</sup>. Without the possibility of practical injustice, a procedural irregularity will not involve procedural unfairness.

161 An applicant bears the onus of proving procedural unfairness and therefore must bear the onus of proving that an irregularity constitutes procedural unfairness. It will usually be sufficient to point to the seriousness of the irregularity to establish that it is capable of producing practical injustice. This is, emphatically, not an inquiry into whether the actual result might have been different. It is an inquiry into whether the irregularity reached the threshold of "error". The same principle applies to irregularities in civil trials: the capacity to cause practical injustice is established once it is concluded that evidence that was admitted was inadmissible, and the party against whom it was tendered has "a prima-facie right to a new trial", with a separate, and different, question being whether that right can be "displaced"

---

**190** *Evidence Act 1995* (Cth), s 55.

**191** *Kioa v West* (1985) 159 CLR 550 at 628.

**192** *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37]-[38]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443 [38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1104 [66]; 373 ALR 196 at 212; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 95 ALJR 292 at 300 [22], 303 [39], [41], 304 [42(2)].

if "the evidence erroneously admitted cannot reasonably be supposed to have affected the result"<sup>193</sup>.

162 The same principle also applies to errors of law or miscarriages of justice in criminal trials. Again, the capacity for practical injustice is inherent in the rules which establish when an irregularity is an error of law. But, once the threshold is reached, the appellant has a prima facie right to have the appeal allowed; a separate question is whether the error could not have affected the result<sup>194</sup>. Again, a miscarriage of justice, not falling within the category of an "error of law", still requires the capacity for practical injustice: a "departure from [a] trial according to law"<sup>195</sup>. Expressed in different terms, but amounting to the same thing, this can be shown by demonstration that something "has gone wrong and which was *capable* of affecting the result of the trial", which, again, is separate from a question of whether "that potentially adverse effect on the result may *actually*, that is, in reality, have occurred"<sup>196</sup>. As Gleeson CJ explained during oral argument in *Weiss v The Queen*<sup>197</sup>, the erroneous admission of evidence of a fact is a miscarriage of justice, with a separate question being whether the miscarriage is shown not to be substantial, or material, such as where the accused later gives evidence admitting the same fact.

163 There is room to doubt whether the irregularities identified in *Minister for Immigration and Border Protection v SZMTA*<sup>198</sup> were really circumstances where there was a capacity to cause practical injustice so that procedural unfairness existed. In two of the appeals considered by this Court in *SZMTA* it was assumed by the Minister<sup>199</sup> that it was procedurally unfair for the Tribunal not to disclose to the applicant the mere fact that the Tribunal had been notified by the Secretary that s 438 of the *Migration Act* applied to certain information or documents which the Secretary had given the Tribunal. The notification that was not disclosed to the applicants contained no relevant information concerning their claims.

---

193 *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 554.

194 *Mraz v The Queen* (1955) 93 CLR 493 at 514. See also *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18].

195 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18].

196 *R v Matenga* [2009] 3 NZLR 145 at 158 [31] (emphasis in original). See also *Cesan v The Queen* (2008) 236 CLR 358 at 392-393 [116]-[122], 393-396 [123]-[132].

197 (2005) 224 CLR 300 at 302.

198 (2019) 264 CLR 421.

199 (2019) 264 CLR 421 at 428, 432.

The "procedural context" was undoubtedly altered<sup>200</sup> but it might be questioned whether that procedural irregularity was capable of producing practical unfairness. Equally, there might be room to doubt whether the failure to notify in this case was really a circumstance that was capable of producing practical injustice. But, since it was common ground that the failure to notify in this case was a denial of procedural fairness, this point need not be further considered.

164        Once an applicant establishes that an administrative action has involved non-compliance with a statutory condition there is a further issue to consider before that non-compliance will lead to invalidity. This further issue is materiality. The concept of materiality – or harmless error, as it is sometimes described in the United States – is not concerned with whether there has been non-compliance with an express or implied statutory condition. Instead, it is concerned with whether Parliament intended that non-compliance will have the effect that a decision is beyond power and thus invalid. Where the statutory condition is not fundamental then the usual focus is upon whether the non-compliance might possibly have affected the decision<sup>201</sup>. For instance, if a mandatory consideration is not intended to be a fundamental condition then non-compliance in a trivial way will not invalidate a decision. As Mason J said, a mandatory consideration "might be so insignificant that the failure to take it into account could not have materially affected the decision"<sup>202</sup>.

165        The concept of materiality has applied for more than a century in relation to whether a new civil or criminal trial should be ordered after a miscarriage of justice. In those areas, and subject to statutory provision to the contrary, it has long been settled that the usual position is that the onus is upon the party asserting that the miscarriage of justice was immaterial so that no new trial should be granted. Once the reason for the implication of materiality is appreciated, it can be seen that the same approach should be taken to administrative decisions.

### **The implication of materiality as a requirement for invalidity**

#### *Implication of statutory conditions upon power generally*

166        More than a century ago, Isaacs J explained that an implication "is included in what is expressed" and, on a proper interpretation, is to be understood to have

---

**200** (2019) 264 CLR 421 at 440-441 [29]-[31].

**201** *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 147-148 [72]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1104-1105 [66]; 373 ALR 196 at 212.

**202** *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

been "meant by what is actually said, though not so stated in express terms"<sup>203</sup>. In this sense, like the "same rules which common sense teaches every one to use", statutory meaning also includes many assumptions because "[h]owever minutely we may define, somewhere we needs must trust at last to common sense and good faith"<sup>204</sup>. This use of statutory assumptions does not differ from our ordinary use of language. As Professor Pinker has observed<sup>205</sup>, "language itself could not function if it did not sit atop a vast infrastructure of tacit knowledge about the world and about the intentions of other people". For instance, "[w]hen the shampoo bottle says 'Lather, rinse, repeat', we don't spend the rest of our lives in the shower; we infer that it means 'repeat once'".

167 Coke was referring to such assumptions when he wrote that the "surest construction of a Statute is by the rule and reason of the Common Law"<sup>206</sup>, that "it is a good exposition of a Statute, when the reason of the Common Law is pursued"<sup>207</sup> and that "in construction of Statutes, the reason of the Common Law give[s] great light, and the Judges, as much as may be, follow the rule thereof"<sup>208</sup>.

168 The "reason" of the common law as a statutory assumption was the foundation for the celebrated decision of Byles J in *Cooper v Wandsworth Board of Works*<sup>209</sup>, when he said of the rules of procedural fairness that "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". As decisions in this Court have explained, that passage described how the common law, as part of the "matrix of legislation", is an assumption upon which legislative

---

**203** *Merchant Service Guild of Australasia v Newcastle and Hunter River Steamship Co Ltd [No 1]* (1913) 16 CLR 591 at 624. See also *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113 at 118; *R v Rigby* (1956) 100 CLR 146 at 151; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [120].

**204** Lieber, *Legal and Political Hermeneutics*, enlarged ed (1839) at 28, 30-31. See also Goldsworthy, "Implications in Language, Law and the Constitution", in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in honour of Professor Leslie Zines* (1994) 150 at 157-161.

**205** Pinker, *The Blank Slate* (2002) at 210-211.

**206** Coke, *Institutes of the Laws of England* (1628), pt 1, bk 3, ch 8, s 464 at 272.

**207** Coke, *Institutes of the Laws of England* (1642), pt 2, *Marlebridge*, ch 25 at 148.

**208** Coke, *Institutes of the Laws of England* (1642), pt 2, *Glocester*, ch 5 at 301.

**209** (1863) 14 CBNS 180 at 194 [143 ER 414 at 420].

intention is based<sup>210</sup>. Hence, conditions upon statutory powers have long been recognised as a matter of statutory implication. Examples include conditions that require a decision-maker: to afford procedural fairness<sup>211</sup>; to take into account relevant considerations<sup>212</sup>; and not to exercise powers, including making decisions, unreasonably<sup>213</sup>.

169 The understanding of statutory conditions upon power as underlying assumptions was more than a century old when it was expressed in 1961 by its most famous proponent, Dr Wade, in terms which described statutory interpretation as being at the "heart" of determining conditions upon statutory power<sup>214</sup>. In *Walton v Gardiner*<sup>215</sup>, Brennan J acknowledged that he had adopted or applied Wade's approach in a line of decisions from 1982 onwards<sup>216</sup>. Wade's view was also adopted by Hayne, Kiefel and Bell JJ in 2013 in *Minister for Immigration and Citizenship v Li*<sup>217</sup>.

---

210 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 408. See also *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109-110; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 491; *Kioa v West* (1985) 159 CLR 550 at 610-615.

211 *Kioa v West* (1985) 159 CLR 550 at 610, 615; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 [39].

212 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505. See also *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49.

213 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126].

214 Wade, *Administrative Law* (1961) at 40.

215 (1993) 177 CLR 378 at 408.

216 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 409; *Coutts v The Commonwealth* (1985) 157 CLR 91 at 105; *Kioa v West* (1985) 159 CLR 550 at 609-611; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 34-36.

217 (2013) 249 CLR 332 at 364 [67].

*Implication that non-compliance with a statutory condition will invalidate an administrative decision*

170 An exercise of public power has long been held to be invalid if that exercise is beyond a statutory condition expressly or impliedly conferred upon the repository. As de Smith observed, the prerogative writ of certiorari had been used since the fourteenth century to keep inferior courts or tribunals "within their spheres of jurisdiction"<sup>218</sup>. In 1886, in the United States, Hawes cited many authorities for the proposition that if a court "acts without authority its judgments and orders are regarded as nullities"<sup>219</sup>.

171 Just as the conditions upon statutory power are to be discerned as a matter of legislative intention, so too is legislative intention the basis for discerning whether non-compliance with a condition upon statutory power will deprive a decision-maker of authority. These legal principles concerning the setting aside of decisions for non-compliance with a statutory condition did not change at Federation in 1901 by the inclusion of s 75(v) in the *Constitution*, a provision that conferred authority on this Court to act according to "the known principles of law"<sup>220</sup>. These known principles of law continued to be refined.

172 For centuries, judges spoke of discerning the validity of action purportedly authorised by statute by considering "the meaning and intention of the Legislature" and focusing upon a distinction between circumstances that were "of the essence

---

**218** de Smith, "The Prerogative Writs" (1951) 11 *Cambridge Law Journal* 40 at 46.

**219** Hawes, *The Law Relating to the Subject of Jurisdiction of Courts* (1886) §38 at 59, citing *Elliott v Peirsol* (1828) 26 US 328 at 340; *Lovejoy v Albee* (1851) 33 Me 414; 54 Am Dec 630; *Rodgers v Evans* (1850) 8 Ga 143; 52 Am Dec 390; *Horner v Doe* (1848) 1 Ind 130; 48 Am Dec 355; *Mercier v Chace* (1864) 9 Allen 242; *Miller v Brinkerhoff* (1847) 4 Denio 118; 47 Am Dec 242; *Attorney General v Lord Hotham* (1823) Turn & R 209 at 219 [37 ER 1077 at 1081]; *Briscoe v Stephens* (1824) 2 Bing 213 at 217 [130 ER 288 at 289].

**220** *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1883-1884 (Mr Barton). See also *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1878 (Mr Symon); Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 784. See further *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 139-140 [156]-[158]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 537 [143]-[144], 555 [229]-[230]; 376 ALR 575 at 610-611, 634.



of a thing required to be done" and those that were "merely directory"<sup>221</sup>. In the former category, non-compliance would lead to invalidity. In the latter category, non-compliance would lead to invalidity only if there had not been "substantial compliance with the requirement"<sup>222</sup>.

173 The language of "mandatory" and "directory" provisions, at least as an exclusive test, was disfavoured by the Court of Appeal of the Supreme Court of New South Wales in *Tasker v Fullwood*<sup>223</sup>. But it was nevertheless emphasised that the question was one of statutory interpretation: "to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done"<sup>224</sup>. When the approach in *Tasker v Fullwood* was adopted by this Court<sup>225</sup>, McHugh, Gummow, Kirby and Hayne JJ reiterated the focus upon legislative intention, saying that the test should be "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid"<sup>226</sup>.

174 Some of the circumstances that will be considered in assessing whether non-compliance with a statutory condition will lead to invalidity are: any public inconvenience that might be expected to arise from invalidity<sup>227</sup>; the imperative language of the provision<sup>228</sup>; and whether the statutory condition regulates the exercise of functions rather than "impos[ing] essential preliminaries to the exercise

---

221 *R v Loxdale* (1758) 1 Burr 445 at 447 [97 ER 394 at 395]. See also *R v The Justices of Leicester* (1827) 7 B & C 6 at 9 [108 ER 627 at 628]; *Montreal Street Railway Co v Normandin* [1917] AC 170 at 174-175; *Clayton v Heffron* (1960) 105 CLR 214 at 247.

222 *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 256.

223 [1978] 1 NSWLR 20.

224 [1978] 1 NSWLR 20 at 23-24.

225 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93]. See also at 375 [41].

226 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93].

227 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392 [97].

228 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321 [77], 344 [166], 354 [206].

of ... functions"<sup>229</sup>. In *Minister for Immigration and Citizenship v SZIZO*<sup>230</sup>, this Court considered that the absurdity of the outcome was a strong reason militating against treating as a source of invalidity the departure from any procedural steps leading up to the hearing. Related to this, and subject to any contrary intention, there will also be a usual implication that an act is not invalid if the non-compliance is immaterial. The basis for this usual implication, and the meaning of immateriality, lies in the long history of such an approach being taken to refusing to grant new civil or criminal trials following miscarriages of justice or legal error.

*Materiality as a condition for a new civil or criminal trial*

175        There is a long history to the requirement of materiality of a legal error before a new civil or criminal trial will be ordered<sup>231</sup>. The original rule, which existed in both civil and criminal cases in the Court of King's Bench<sup>232</sup>, as well as at Common Pleas<sup>233</sup>, and in Chancery when issues had been decided by a common law jury<sup>234</sup>, was that an erroneous ruling in relation to evidence would lead to a new trial unless no injustice resulted from the error. One instance where no injustice might arise was described by the Lord Chief Justice in *R v Teal*<sup>235</sup> as where the error "could have made no difference, at least it ought not to have made any difference in the verdict".

176        That original rule was displaced for a period of time by the "Exchequer rule", which was ushered in by the decision of the Court of Exchequer in *Crease v*

---

**229** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 391 [94].

**230** (2009) 238 CLR 627 at 640 [35].

**231** See the more detailed historical discussion in *Weiss v The Queen* (2005) 224 CLR 300 at 306-312 [12]-[30].

**232** *R v Ball* (1807) Russ & Ry 132 at 133 [168 ER 721 at 722]; *R v Treble* (1810) Russ & Ry 164 at 166 [168 ER 740 at 741].

**233** *Horford v Wilson* (1807) 1 Taunt 12 at 14 [127 ER 733 at 734]; *Doe v Tyler* (1830) 6 Bing 561 at 563, 564 [130 ER 1397 at 1398].

**234** *Pemberton v Pemberton* (1805) 11 Ves 50 at 52-53 [32 ER 1006 at 1007]; *Bullen v Michel* (1816) 4 Dow 297 at 319, 330 [3 ER 1171 at 1179, 1182]; *Barker v Ray* (1826) 2 Russ 63 at 75-76 [38 ER 259 at 263-264]; *Lorton v Kingston* (1838) 5 Cl & F 269 at 340 [7 ER 406 at 433].

**235** (1809) 11 East 307 at 312 [103 ER 1022 at 1024].

*Barrett*<sup>236</sup>. The Exchequer rule was that the admission of inadmissible evidence meant that the "losing party has a right to a new trial"<sup>237</sup>. But the Exchequer rule had little to commend it. Professor Wigmore described it as the "Exchequer heresy" and lauded the judges who did not comply with it as "refusing to bow the knee to the Baal-worship of the rules of Evidence"<sup>238</sup>.

177 The Exchequer rule was abolished in civil matters by a judicature rule enacted by the *Supreme Court of Judicature Act 1873*<sup>239</sup>: r 48 provided that a new trial shall not be granted for misdirection or improper admission of evidence unless the court considered that a "substantial wrong or miscarriage" had occurred. In a decision later approved in this Court<sup>240</sup>, Cussen J said in *Holford v The Melbourne Tramway and Omnibus Co Ltd*<sup>241</sup> that a substantial wrong or miscarriage in relation to jury misdirection existed where "the result of the case is such as to show that [the jury] may have been influenced in their verdict by the misdirection".

178 The Exchequer rule was abolished in criminal matters by the proviso to s 4(1) of the *Criminal Appeal Act 1907*<sup>242</sup>, which permitted the newly created Court of Criminal Appeal to dismiss an appeal despite an error of law or miscarriage of justice if "they consider that no substantial miscarriage of justice has actually occurred". In New South Wales in 1912, the *Criminal Appeal Act 1912* (NSW) permitted a new trial to be ordered if the Court of Criminal Appeal considered that a miscarriage of justice had occurred<sup>243</sup> but nevertheless also contained a proviso

---

236 (1835) 1 Cr M & R 919 [149 ER 1353]. And see the discussion in *Weiss v The Queen* (2005) 224 CLR 300 at 306-307 [13].

237 *Wright v Doe d Tatham* (1837) 7 Ad & El 313 at 330 [112 ER 488 at 495], quoted in *Weiss v The Queen* (2005) 224 CLR 300 at 307 [13].

238 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 368. This section reflected in large part his earlier writing: Wigmore, "New Trials for Erroneous Rulings upon Evidence; A Practical Problem for American Justice" (1903) 3 *Columbia Law Review* 433.

239 36 & 37 Vict c 66.

240 See *Balenzuela v De Gail* (1959) 101 CLR 226 at 233; *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 656 [38]; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 485 [66].

241 [1909] VLR 497 at 526.

242 7 Edw VII c 23.

243 *Criminal Appeal Act 1912* (NSW), s 8(1).

that permitted the appeal to be dismissed if the court considered that "no substantial miscarriage of justice has actually occurred"<sup>244</sup>.

179

It is therefore now long established that the general test for the refusal of a new civil trial under legislation or rules of court despite an error of law is that "the court might refrain from granting a new trial if it was affirmatively satisfied that the actual verdict returned could not have been affected"<sup>245</sup>. And as to new criminal trials, in *Weiss*<sup>246</sup> this Court explained that the common form proviso was enacted against the shared history of the grant of new civil and criminal trials following legal error. Like the condition for a new civil trial, it will usually be sufficient to engage the proviso if the error was immaterial in the sense that the appellant was not deprived of the possibility of acquittal<sup>247</sup> because conviction by the jury was "inevitable"<sup>248</sup>. And also like the conditions for a new civil trial, "some errors will establish a substantial miscarriage of justice even if the appellate court considers

---

<sup>244</sup> *Criminal Appeal Act 1912* (NSW), s 6(1).

<sup>245</sup> *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 563. See also *Balenzuela v De Gail* (1959) 101 CLR 226 at 234; *Nobarani v Mariconte* (2018) 265 CLR 236 at 247 [38], discussing the meaning of "substantial wrong or miscarriage" in *Uniform Civil Procedure Rules 2005* (NSW), r 51.53(1).

<sup>246</sup> (2005) 224 CLR 300 at 306-312 [12]-[30].

<sup>247</sup> *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 88 [71], 111 [136], 121 [160]. See also *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525; *R v Storey* (1978) 140 CLR 364 at 376; *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; *Filippou v The Queen* (2015) 256 CLR 47 at 54-55 [15]; *Lane v The Queen* (2018) 265 CLR 196 at 212 [56].

<sup>248</sup> *Collins v The Queen* (2018) 265 CLR 178 at 193 [41]; *OKS v Western Australia* (2019) 265 CLR 268 at 282-283 [38]-[39]. See also *Gallagher v The Queen* (1986) 160 CLR 392 at 412-413; *Wilde v The Queen* (1988) 164 CLR 365 at 372; *Festa v The Queen* (2001) 208 CLR 593 at 631 [121], 636 [140], 661 [226]; *Conway v The Queen* (2002) 209 CLR 203 at 226 [63]; *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 269 [62], 270-271 [68]-[69]; 203 ALR 259 at 275, 276-277; *Kamleh v The Queen* (2005) 79 ALJR 541 at 547 [29], 549 [39]; 213 ALR 97 at 104, 106; *Darkan v The Queen* (2006) 227 CLR 373 at 402 [95], 407 [117]; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33], 484 [40]; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4], 301-302 [86]; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65], 477 [81]; *R v Dickman* (2017) 261 CLR 601 at 605 [4]-[5], 620 [63]; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 88 [71], 121 [159]-[160]; *Lane v The Queen* (2018) 265 CLR 196 at 212 [56], 213 [59].

that conviction was inevitable"<sup>249</sup>. This Court in *Weiss* said that a "significant denial of procedural fairness at trial" was an example of such a fundamental error<sup>250</sup>.

*Materiality as a condition for a new administrative hearing*

180 Just as long-standing assumptions form the basis for an implication of statutory conditions upon power, so too do the long-standing assumptions about materiality form the basis for an implication that non-compliance with those conditions will not lead to invalidity unless the non-compliance is material. In *Nobarani v Mariconte*<sup>251</sup>, this Court recognised the equivalence of (i) the requirement of a "substantial wrong or miscarriage" before a new trial will be ordered and (ii) the materiality requirement in judicial review before non-compliance with a statutory condition will lead to invalidity of the decision. In both cases, the question is whether a new trial or hearing should not be granted despite the miscarriage or error of law.

181 In the same manner as the rules that have developed in relation to new civil or criminal trials, and subject to any express statutory provision to the contrary, some errors or failures to comply with statutory conditions will always involve a material breach irrespective of whether the result might have been inevitable. One type of statutory condition that will always involve material non-compliance is a duty to make the ultimate decision within the bounds of legal reasonableness<sup>252</sup>. A decision that is legally unreasonable will, by definition, involve an error that is not trivial or harmless.

182 A different type of statutory condition that will always involve material non-compliance is where the non-compliance is fundamental to the hearing process. For instance, just as it was said of new criminal trials in *Weiss*, it could be no answer to an extreme denial of procedural fairness in an administrative hearing to say that if the applicant had been given the opportunity to put their case then the

---

**249** *Lane v The Queen* (2018) 265 CLR 196 at 207 [38].

**250** (2005) 224 CLR 300 at 317 [45].

**251** (2018) 265 CLR 236 at 247 [38]. See also *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1104-1105 [66]-[68]; 373 ALR 196 at 212-213. See further *Wehbe v Minister for Home Affairs* (2018) 92 ALJR 1033 at 1037 [24]; 361 ALR 1 at 6; *OKS v Western Australia* (2019) 265 CLR 268 at 280-281 [34].

**252** Rather than other duties or powers: see *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [26]; 385 ALR 212 at 220; *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 958 [125]; 383 ALR 407 at 443.

case would inevitably have failed<sup>253</sup>. Nor could it be an answer to a hearing tainted by actual or apprehended bias to say that the case would inevitably have failed before an impartial decision-maker. In the language of the United States decisions, bias is a ground that is so fundamental that it will "defy harmless-error review"<sup>254</sup>.

### **The implication of the onus concerning materiality**

*The onus where a new civil or criminal trial is sought*

183 As a matter of principle, the role of legislative intention should not be limited to discerning the existence of statutory conditions and the requirement for non-compliance with statutory conditions to be material. It should also extend to discerning the party who bears the onus of proving materiality or immateriality. The consequence of the onus of proof being a matter of expression or implication of legislative intention is that the onus of proof of materiality or immateriality must depend on the statutory context. As explained in the introduction to these reasons, this is the position that has been reached in the United States.

184 Many statutes will contain little or no indication to guide a court as to which party bears the onus of proof. The legislative intention in these circumstances can only be based upon assumptions derived from the historical matrix of common law and statute. Like the history of the materiality requirement which established materiality as a usual assumption, the Australian history of the onus of proof has established that the onus is generally borne by the party opposing a new trial or a new hearing. That is, the onus is generally to prove immateriality, not to prove materiality.

185 The common law need not have taken this path. Indeed, the judicature rule, in its literal terms which provided that "[a] new trial shall not be granted ... *unless*"<sup>255</sup>, could have comfortably been understood as placing the onus upon the party seeking a new trial. But the onus of proof was not generally understood in this way. An early case involving the recognition that the onus is to prove immateriality and not for an applicant to prove materiality, described by Wigmore

---

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

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

255 *Supreme Court of Judicature Act 1873* (36 & 37 Vict c 66), Schedule, r 48 (emphasis added).

as a "model example"<sup>256</sup>, was the decision of Porter J in *People v Fernandez*<sup>257</sup>, where he said:

"there is no distinction between civil and criminal cases. The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same if the objectionable proof had been rejected, the error furnishes no ground for reversal."

186 In Australia it is established beyond doubt in relation to the common form proviso in criminal law that the onus of proof lies upon the State to establish that no substantial miscarriage of justice has occurred<sup>258</sup>. As McHugh J said in *TKWJ v The Queen*<sup>259</sup>:

"Cases on the proviso operate on the hypothesis that there has been a legal error that prima facie requires the conviction to be set aside. The issue then becomes whether the Crown has shown that no substantial miscarriage of justice occurred because the error could not have affected the result of the trial."

187 For a period of time, however, the opposite view prevailed in relation to civil trials. In *Holford*<sup>260</sup>, Cussen J said that it was sufficient for the party seeking a new trial to demonstrate that the jury may have been influenced by the misdirection and then continued:

"The plaintiffs' counsel contended that the *onus* of showing the miscarriage is on the party asking for the new trial. I think this is clearly right, but I think that *onus* is satisfied when the facts appear to be as above set out, and that unless the party opposing the grant of the order for a new trial can point to some further fact, the conclusion that there was a miscarriage must be drawn."

---

256 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 368.

257 (1866) 35 NY 49 at 59.

258 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63]; *Lindsay v The Queen* (2015) 255 CLR 272 at 294 [64].

259 (2002) 212 CLR 124 at 143 [63].

260 [1909] VLR 497 at 526 (italics in original).

188 This approach to the onus of proof, whilst conforming with the literal terms of the judiciary rule, did not last, at least in jurisdictions such as New South Wales which were governed by the common law rule rather than the judiciary rule. As Dixon CJ observed in *Balenzuela v De Gail*<sup>261</sup>, historically there had been cases, like *Holford*, that placed the onus upon the party seeking a new trial to establish that the error might possibly have affected the result. But there were many cases where the burden was upon the party resisting the new trial. The "accepted practice in New South Wales" was the latter<sup>262</sup>. In the passage from which Dixon CJ quoted, this accepted practice was described in terms that plainly placed the onus upon the party resisting the new trial<sup>263</sup>:

"[T]he court would as a rule grant a new trial where evidence had been improperly admitted: but that in its discretion the court might refrain from granting a new trial if it was affirmatively satisfied that the actual verdict returned could not have been affected by the inadmissible evidence."

189 The accepted practice in New South Wales had previously been applied by Dixon J, who spoke of how "the prima-facie right to a new trial is displaced" by an error that "cannot reasonably be supposed to have affected the result"<sup>264</sup>. In *Balenzuela*, whilst Dixon CJ doubted whether the question of onus of proof was really of any importance, he reiterated that the "true view" was that<sup>265</sup>:

"at common law it was necessary to grant a new trial unless the court felt some reasonable assurance that the error of law at the trial whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result".

190 It is plain beyond argument that in the passage above Dixon CJ was approving the accepted practice in New South Wales as the common law rule that the onus of proof lay upon a party asserting that there should be no new trial because the error could not reasonably be supposed to have influenced the result. Indeed, his Honour also observed that "the burden is the other way" in the language

---

**261** (1959) 101 CLR 226 at 233-234.

**262** (1959) 101 CLR 226 at 234, quoting *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 563 and citing *Macleod v Attorney-General (NSW)* (1890) 11 LR (NSW) 218; [1891] AC 455 and *Makin v Attorney-General (NSW)* [1894] AC 57.

**263** *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 563.

**264** *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 554.

**265** (1959) 101 CLR 226 at 234-235.



of the judicature rule, which suggested "an intention that the court should not grant a new trial ... unless it was persuaded that a substantial wrong or miscarriage had been occasioned by the error"<sup>266</sup>. The Chief Justice concluded his discussion of this point by saying that the location of the onus may form one distinction between the common law and the judicature rule. He endorsed the view in *Best on Evidence*<sup>267</sup> that the distinction between the common law and the judicature rule was that "[f]ormerly, where evidence had been improperly admitted or rejected, a new trial was granted, unless it was clear that the result would not have been affected; but this rule is reversed by the [judicature rule]".

191 In *Balenzuela*, Dixon CJ separately considered whether there was "[a]nother distinction" (ie a different distinction) between the judicature rule and the common law, being that "a rather more substantial wrong or miscarriage has been required under the judicature rule than had been required at common law"<sup>268</sup>. Unlike the distinction on the point of onus, Dixon CJ thought that this other alleged distinction was "doubtful" and considered that what Higgins J had said in *Robinson & Vincent Ltd v Rice*<sup>269</sup> was "justified in substance", namely that the position under the judicature rule was the same as that at common law before the *Common Law Procedure Act 1852*<sup>270</sup> as applied subsequently in England and New South Wales. The Chief Justice was here making a different point about the extent of a substantial miscarriage that was required. He was not contradicting what he had said immediately beforehand about the onus of proof being borne by the party alleging immateriality.

192 Nor did Dixon CJ directly contradict himself in relation to the distinction that he recognised between the common law and the judicature rule in the next paragraph when he said that a new trial should be ordered because the "basal fact is that material evidence was erroneously excluded from the consideration of the jury"<sup>271</sup>. His concern with "material evidence" was a concern with whether an error had been established at all, not with the materiality of the error. And as Dixon CJ said earlier in his reasons<sup>272</sup>:

---

266 (1959) 101 CLR 226 at 235.

267 Phipson and Best, *The Principles of the Law of Evidence*, 12th ed (1922) at 70.

268 (1959) 101 CLR 226 at 235.

269 (1926) 38 CLR 1 at 10.

270 15 & 16 Vict c 76.

271 (1959) 101 CLR 226 at 236.

272 (1959) 101 CLR 226 at 232.

"When material evidence has been erroneously rejected at the instance of the party who succeeds, then to deny nevertheless to the unsuccessful party the remedy of a new trial the Court must have some sure ground for saying that the reception of the evidence would not have affected the result or that it ought not to have done so."

193 The other Justices in *Balenzuela* all took the same approach as Dixon CJ, stating the rule in terms which effectively described it as one of an entitlement to a new trial *unless* the court was satisfied that the error could not have affected the verdict of the jury. In particular, Kitto J said that a new trial had to be granted unless the jury could not have been led by the rejected evidence to find for the plaintiff<sup>273</sup>. Windeyer J, who agreed with Dixon CJ, added that although questions of onus would not often be decisive, the position in New South Wales differed from the judicature rule – where the onus might be on the appellant – because in New South Wales an error of law "prima facie furnishes a ground for a new trial"<sup>274</sup>.

194 The general rule for the onus in civil cases was thus settled in *Balenzuela* and not doubted subsequently. It was borne by the appellant who successfully opposed a new trial in *McLellan v Bowyer*<sup>275</sup>. It was again borne by the appellant who successfully opposed a new trial in *Mann v Dumergue*<sup>276</sup>, where this Court accepted that a new trial must be granted unless the Court was prepared "to go so far" as to conclude that the wrongly rejected evidence could not have affected the verdict. *Balenzuela*, *McLellan*, and *Mann* were all cited by this Court in *Dairy Farmers Co-operative Milk Co Ltd v Acquilina*<sup>277</sup>, where the Court added that the position was the same as that laid down in *Crease v Barrett*<sup>278</sup>. The Court could not have meant, by its reference to *Crease v Barrett*, to resurrect the heretical Exchequer rule and to abolish the doctrine of trivial error. Its focus must instead have been upon the remarks of the Court in that case that however strong the Court's opinion may have been on the "propriety of the present verdict" it could

---

273 (1959) 101 CLR 226 at 237.

274 (1959) 101 CLR 226 at 244-245. See also at 238 (Taylor J), 239 (Menzies J).

275 (1961) 106 CLR 95.

276 Unreported, High Court of Australia, 22 August 1963 at 3-4.

277 (1963) 109 CLR 458 at 463.

278 (1835) 1 Cr M & R 919 [149 ER 1353].

not say – that is, the Court was not satisfied that it had been shown – that the wrongful exclusion of evidence "would have had no effect with the jury"<sup>279</sup>.

195 It was against this background that this Court decided *Stead v State Government Insurance Commission*<sup>280</sup>. In the course of ordering a new trial following a denial of procedural fairness, the Court said<sup>281</sup>:

"All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result."

It is not entirely clear what the Court meant by the suggestion that the appellant needed to show that the denial of natural justice had "deprived him of the possibility of a successful outcome". The most likely meaning is that by showing the possibility of a different outcome, the appellant could establish that what might otherwise be a mere procedural irregularity would amount to a failure of a statutory condition. If the failure in that case to allow the appellant the opportunity to make submissions had concerned a matter that was entirely trivial then the failure might not have reached the threshold of procedural unfairness. But since the submissions might have affected the outcome, the denial of that opportunity established procedural unfairness. The onus then was borne by the respondent to show immateriality, namely that "a properly conducted trial could not possibly have produced a different result".

196 The very next paragraph of the decision confirms this meaning. Referring to the passages of the decision of Dixon CJ in *Balenzuela*<sup>282</sup> discussed above in these reasons, their Honours said that a new trial was ordered in that case because "material evidence was wrongly rejected" (ie an error was established) but that it "would have been otherwise *had the respondent been able to demonstrate* that the rejected evidence could have made no difference to the result"<sup>283</sup>.

---

<sup>279</sup> *Crease v Barrett* (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359].

<sup>280</sup> (1986) 161 CLR 141.

<sup>281</sup> (1986) 161 CLR 141 at 147.

<sup>282</sup> (1959) 101 CLR 226 at 232, 235.

<sup>283</sup> *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147 (emphasis added).

*The onus in relation to materiality in judicial review*

197

Although the decision in *Stead* concerned an application for a new civil trial, it has been relied upon in hundreds of applications where an applicant for judicial review sought a new hearing on the basis of a decision-maker's failure to comply with an express or implied statutory condition. The approach taken in *Stead* was expressly adopted by all members of this Court in *Re Refugee Review Tribunal; Ex parte Aala*<sup>284</sup>. In that case, the issues for decision were clearly separated into two distinct questions. First, had there been a denial of procedural fairness? Secondly, was the breach material? All members of the Court concluded that there had been a denial of procedural fairness. And, although McHugh J concluded that the breach was not material, all members of the Court understood *Stead* to have imposed the onus of proof upon the party asserting that the non-compliance was immaterial. Hence, the various judgments expressed the approach to materiality in terms of: whether it could "be concluded" that the breach made no difference to the result<sup>285</sup> (Gleeson CJ); whether the court had "satisf[ie]d" itself that the breach made no difference to the result<sup>286</sup> (McHugh J); whether the "victim of the breach", who is "ordinarily entitled to relief", is to be denied that relief because the court had been "convince[d]" that the breach made no difference<sup>287</sup> (Kirby J); or whether the court can positively "say that a different result would not have been reached"<sup>288</sup> (Callinan J). Although Gaudron and Gummow JJ, with whom Hayne J agreed on this point<sup>289</sup>, did not expressly decide whether the condition on the statutory power requiring procedural fairness was one which denied jurisdictional error for a trivial breach or whether the triviality of breach led to refusal of relief as a matter of discretion<sup>290</sup>, the onus of proof in either case would have been the same. The onus of proof for the exercise of a discretion to refuse relief is upon the party so asserting<sup>291</sup>.

---

**284** (2000) 204 CLR 82.

**285** (2000) 204 CLR 82 at 88 [4].

**286** (2000) 204 CLR 82 at 122 [104].

**287** (2000) 204 CLR 82 at 130-131 [131].

**288** (2000) 204 CLR 82 at 155 [211].

**289** (2000) 204 CLR 82 at 144 [172].

**290** (2000) 204 CLR 82 at 109 [59].

**291** *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 459 [93].

198 Against all of these authorities stands a single sentence in a joint judgment of three members of this Court in *SZMTA*<sup>292</sup>, making a point which was not necessary for the decision and was not argued, meaning that the point cannot be authority<sup>293</sup>: "There is also no dispute between the parties that it is the applicant for judicial review of the decision of the Tribunal who bears the onus of proving that a jurisdictional error has occurred". That common assumption in *SZMTA* was incorrect.

### The circumstances of this case

199 Part 7 of the *Migration Act* was enacted within the common law context described above. In 2002, s 422B was inserted into the *Migration Act*<sup>294</sup> to provide that provisions including Div 4 of Pt 7, concerning the conduct of the review, "are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with". The provisions imply, by the long-standing assumptions sometimes loosely described as "a common law principle of interpretation"<sup>295</sup>, rules of procedural fairness, materiality, and onus of proof. No submission was made by the Minister to suggest that anything in the history or context of Pt 7 supported the onus of proof of materiality being borne instead by the applicant.

200 Strictly, the appellant is correct in relation to the first ground of appeal: Mortimer J, understandably following the approach of three Justices of this Court in *SZMTA*, was wrong to impose an onus of proof of materiality on the appellant. But, as the Minister submitted, the decision of Mortimer J should be upheld on the basis that her findings of fact were correct.

201 The Minister conceded before Mortimer J, as he did before this Court, that the failure to disclose the s 438 notification was a breach of the implied statutory condition of procedural fairness. But the Minister supported the conclusion of Mortimer J that the only manner in which any failure to afford procedural fairness could realistically have resulted in a different decision would be if disclosure of

---

292 (2019) 264 CLR 421 at 444 [41].

293 *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *Felton v Mulligan* (1971) 124 CLR 367 at 413; *Baker v The Queen* [1975] AC 774 at 787-789; *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161.

294 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth), Sch 1, item 6.

295 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 442 [34].

the notification might have led to the appellant making submissions about the documents or information, relevantly the Court Outcomes Report, that were the subject of that notification<sup>296</sup>. Whether those submissions would have made any difference depended upon whether the Tribunal had taken the Court Outcomes Report into account at all.

202 This is not a question which could realistically be affected by the location of the substantive onus of proof. Once the issue was raised by the Minister, the question was simply whether the Court Outcomes Report had any effect on the Tribunal's decision. If it did, then the decision might have been different. If it did not, then the decision would not have been different.

203 An assessment of whether the Court Outcomes Report had any effect on the Tribunal's decision is not affected by the application of any presumption. As Mortimer J correctly observed, the materiality issue would be convoluted and confusing, and a true obstacle to the appellant, if it were to be presumed that the absence of any mention of the appellant's criminal record meant that it had no effect on the Tribunal's decision<sup>297</sup>. Such a presumption, if recognised, is a standardised inference. It would permit inference from common experience that the failure by the Tribunal to refer to a matter meant that the matter had not been considered to have any effect at all on the decision<sup>298</sup>. No such common experience exists. Further, the obligation upon the Tribunal to set out reasons for decision and to make findings on any material question of fact<sup>299</sup> did not require the Tribunal to express in its reasons every matter that had any effect on its reasoning in a review, particularly for a review that, as was then provided, was required to be "fair, just, economical, informal and quick"<sup>300</sup>.

204 Nevertheless, the failure by the Tribunal to refer to a matter in its reasons is a circumstance from which an inference might be drawn that the matter had no effect on the Tribunal's reasons. In other words, the failure "*may* indicate that the

---

**296** *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [39].

**297** *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [48]-[49].

**298** See *Thorne v Kennedy* (2017) 263 CLR 85 at 101 [34], citing *Calverley v Green* (1984) 155 CLR 242 at 264.

**299** *Migration Act*, ss 430(1)(c), 430(1)(d). See, similarly, *DL v The Queen* (2018) 266 CLR 1 at 12 [32].

**300** *Migration Act*, s 420(1).

Tribunal did not consider the matter to be material"<sup>301</sup> and it would entitle, but would not require, the inference to be drawn<sup>302</sup>. In short, however, any inference must be based upon all of the circumstances.

205 In addition to the absence of any express reference by the Tribunal to the Court Outcomes Report, there are four other circumstances that support the inference that the Court Outcomes Report had no effect on the Tribunal's reasons. First, before the Tribunal could take the Court Outcomes Report into account it would have been required positively to exercise its discretion under s 438(3)(a) of the *Migration Act* to have regard to matters contained in a document that is the subject of a notification under s 438. The Tribunal made no mention of the exercise of that discretion. Secondly, the information in the Court Outcomes Report was of marginal relevance to the issues before the Tribunal. To the extent that the Court Outcomes Report had potential to impact upon the appellant's credibility, the "state false name" offence of dishonesty was, as Mortimer J said, "buried" in the Court Outcomes Report along with the appellant's other driving and alcohol-related offences<sup>303</sup>. Thirdly, the Tribunal did not reach any positive conclusion that the appellant lied in relation to any issue. As Mortimer J said, although the Tribunal rejected some of the appellant's evidence as not being "credible or plausible", this was a finding of objective unlikelihood of the evidence independently of any suggestion that the appellant was a person who should not be believed<sup>304</sup>. Fourthly, the Tribunal accepted significant parts of the appellant's evidence. The Tribunal accepted that there had been a dispute between the appellant's father and the appellant's uncle. The Tribunal accepted the appellant's evidence about being taken to a house by his cousin and drugged and held there until a ransom was paid for his release. The Tribunal accepted that the appellant's family had disowned him and accepted the evidence of the appellant that this was because he had cut his hair and had "adopted the Australian lifestyle and started drinking alcohol".

206 The appellant also relied upon the opening remarks made by the Tribunal in the initial, but later revoked, decision in September 2014 that the Tribunal had "considered all the material before it relating to [the appellant's] application".

---

**301** *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330 [5] (emphasis added).

**302** *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69].

**303** *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [55].

**304** *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [56].

This statement should not be taken to suggest a treatment by the Tribunal of the Court Outcomes Report as material that it had considered. Rather, the statement by the Tribunal that it had considered all the material before it demonstrated its consideration of whether it should decline to offer an interview to the appellant and should instead "decide the review in the [appellant's] favour on the basis of the material before it"<sup>305</sup>. Indeed, this initial decision, like the decision given after the appellant had been properly afforded the opportunity of an interview, contained no reference to the Court Outcomes Report. The Tribunal described the evidence before it as "extremely limited and vague".

207 The appellant relied upon the decision of this Court in *Kioa v West*<sup>306</sup> for the submission that even if relevant material had not been considered by the decision-maker, it was enough that the material was before the decision-maker for an obligation of procedural fairness to arise, entitling the appellant to make submissions about it. An issue in *Kioa v West* concerned s 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and whether Mr Kioa had been denied procedural fairness by not being given the opportunity to make submissions in relation to an adverse statement in material that had not affected the reasoning of the delegate. The language of s 5(1)(a) imports the usual principle of natural justice and hence the usual rules of procedural fairness. As Mason J said, the Act was not intended "to work a radical substantive change in the grounds on which administrative decisions are susceptible to challenge at common law"<sup>307</sup>. Brennan J also observed that "there is no reason to construe in a novel manner provisions which state in familiar terms the well-known grounds of judicial review"<sup>308</sup>.

208 The reasoning in *Kioa v West* is, however, inapt to the circumstances of this appeal. No issue of materiality was raised in *Kioa v West* by the Minister. The case was argued on the premise that if the rules of procedural fairness applied and were breached then the decision should be set aside<sup>309</sup>. It was not submitted that the result would inevitably have been the same if Mr Kioa had been given the opportunity to make submissions about the paragraph containing the adverse statement. In any event, such an argument would not likely have succeeded. The adverse statement was "extremely prejudicial"<sup>310</sup> and created "a real risk of

---

305 *Migration Act*, s 425(2)(a).

306 (1985) 159 CLR 550.

307 (1985) 159 CLR 550 at 577.

308 (1985) 159 CLR 550 at 625.

309 (1985) 159 CLR 550 at 603.

310 (1985) 159 CLR 550 at 588. See also at 602.



prejudice, albeit subconscious" such that it was "unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information"<sup>311</sup>. For the same reasons, information, albeit of a more prejudicial nature, was held by a majority of this Court to give rise to an apprehension of bias in *CNY17 v Minister for Immigration and Border Protection*<sup>312</sup>.

209 The appellant's second ground of appeal – that Mortimer J had erred in concluding that only dishonesty offences were capable of adversely impacting upon the credibility of the appellant before the Tribunal – can be dealt with briefly. Her Honour's conclusion that there was nothing in the Tribunal's reasons for decision that suggested that its reasoning was affected by the presence of the "state false name" dishonesty offence reflected the appellant's own "appropriately restrained" approach, which asserted that this was the only information the subject of the s 438 notification that might have made a difference<sup>313</sup>. But even if the appellant's case had been put more broadly, and had relied upon all of the information in the Court Outcomes Report as matters to which submissions by the appellant might have made a difference, that submission would have failed due to Mortimer J's correct conclusion that the Tribunal did not consider any of the Court Outcomes Report.

## Conclusion

210 The appeal must be dismissed with costs.

---

<sup>311</sup> (1985) 159 CLR 550 at 629.

<sup>312</sup> (2019) 94 ALJR 140; 375 ALR 47.

<sup>313</sup> *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [54], [57].

