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Materiality of Error – A Criterion of Jurisdictional Error

Minister for Immigration and Border Protection v SZMTA [2019] HCA 3 (***SZMTA***); and

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (***Hossain***)

A. INTRODUCTION

Two recent decisions of the High Court support the view that the materiality of an error of law is critical to the finding of jurisdictional error in the judicial review of administrative decisions. On 13 February 2019, the High Court unanimously allowed an appeal in *SZMTA* and unanimously dismissed appeals in *CQZ15* and *BEG15*. In ***SZMTA***, the High Court considered the effect on a review by the Administrative Appeals Tribunal (the "**Tribunal*")*** under Pt 7 of the Migration Act (Cth) (the "**Act**"), of a notification to the Tribunal from the Secretary of the Department of Immigration and Border Protection that s 438 of the Act applies in relation to a document or information.

In all three cases in ***SZMTA***, the applicant applied to the Tribunal for review of a decision by a delegate of the Minister for Immigration and Border Protection (the "**Minister**"). Pursuant to s 418(3) of the Act, the Secretary of the Department gave to the Tribunal, documents considered relevant to the review. Subsequently, the Tribunal was notified that s 438 of the Act applied to certain information in the documents. Section 438 applies to a document or information either if the Minister has lawfully certified that disclosure of any matter in the document or of the information would be contrary to the public interest, or if the document, any matter in the document or the information was given to the Minister or the Department in confidence. If a Tribunal is notified that s 438 applies to a document or information, the Tribunal may have regard to any matter in the document or to the information, and, in certain circumstances, it may disclose to the applicant for review any such matter or the information[1].

[1] *High Court of Australia, Judgment Summary, 13 February 2019*

The fact of the purported s 438 notification was not disclosed to any of the three applicants. In *CQZ15* and *BEG15*, s 438 did not apply to any documents or information before the Tribunal, and so the notification was invalid. In *SZMTA,* s 438 did not apply to at least some of the documents or information before the Tribunal, and so the notification was invalid to at least that extent. In each case, the Tribunal affirmed the decisions under review. The applicants sought judicial review of the Tribunal's decisions in the Federal Circuit Court of Australia. In the High Court, the plurality of Bell, Gageler and Keane JJ held that:

(i) the fact of notification triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review.

(ii) breach of the obligation of procedural fairness constitutes jurisdictional error on the part of the Tribunal if, and only if, the breach is material.

(iii) the breach is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome.

(iv) an incorrect notification results in jurisdictional error if, and only if, the incorrect notification is material, in the sense that it operates to deprive the applicant of the possibility of a successful outcome.

(v) the question of materiality, is a question of fact in respect of which the applicant for judicial review bears the onus of proof.[2]

In ***Hossain***, the High Court considered whether it was an inherent contradiction for the Full Court to conclude that the Tribunal made a jurisdictional error and still hold that the Tribunal's error had not stripped the Tribunal of the Authority to make the decision to affirm the delegate's decision. In that case, the Tribunal affirmed the decision of a delegate of the Minister to refuse to grant a visa to the appellant. The Tribunal gave two reasons for its decision. The first decision involved an error of law and the second reason did not involve an error of law but would have been fatal to the case. The conceded error of law lay in the Tribunal having

[2] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *at [4]*

addressed, pursuant to clause 820.211(2)(d)(ii), Schedule 2 of the Migration Regulations 1994, the question of whether there were compelling reasons for not applying the schedule 3 criteria as at the time of the application rather than at the time of decision. The second reason revolved around the public interest criterion 4004 in schedule 4 of the Migration Regulations and the fact that at the time of decision the appellant still had outstanding debts to the Commonwealth. Hence, the question was whether you could find Jurisdictional error in circumstances where the case would be fatal on another independent ground.

The High Court held that (i) the Federal Circuit Court was incorrect to characterise the conceded error as a jurisdictional error because the Tribunal had a duty to affirm the decision of the delegate in any event and as such had not exceeded its jurisdiction[3]. (ii) The Full Court was right to set aside the Federal Circuit Court decision but not for the same reasons. (iii) The Tribunal's error in construing and applying the criterion relating to the timing of the making of the application did not rise to the level of a jurisdictional error.

B. JURISDICTIONAL ERROR

In ***Hossain***, Kiefel CJ, Gageler and Keane JJ defined Jurisdiction as scope of the authority that is conferred on a repository, the scope of the authority, which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It includes all the preconditions and all the conditions expressed or implied by statute in the decision making process[4]. A decision made within jurisdiction is a decision, which sufficiently complies with the statutory preconditions and conditions to have such force and effect as is given to it by the law pursuant to which it was made[5]. On the other hand, jurisdictional error refers to a failure to comply with one or more statutory preconditions or conditions *to an extent* which results in a decision which has been made in fact lacking

[3] *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 *at [2].*

[4] *Ibid at [23].*

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

characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it[6].

The use of the phrase “to an extent” suggest that not all failure to comply with a statutory pre-condition or condition would lead to a decision being deemed to be made outside jurisdiction. In ***Minister for Immigration and Multicultural Affairs v Yusuf***[7], McHugh, Gummow and Hayne JJ reiterated that for an error to be jurisdictional what “is important” is that the error is made “*in a way that affects the exercise of power*”. In ***Wei v Minister for Immigration and Border Protection***[8], the High Court held that "*jurisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the Migration Act, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act*".

To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction[9]. From the foregoing, it can be inferred that a decision made outside jurisdiction equates jurisdictional error and whether a decision is made outside jurisdiction is dependent on the way the error affects the exercise of the statutory power. It is apparent from the authorities that characterization of the error of law is achieved by construing the effect of the error of law on the exercise of the power, or in other parlance, the manner in which the error affected the exercise of the power. The effect on the exercise of power must be such that compliance with the condition would have resulted in the making of a different decision. Hence, a breach of the pre-condition or condition of a statutory power cannot be material unless compliance with the condition could have resulted in the making of a different decision.

A proclamation of jurisdictional error is an affirmation not simply of the existence of an error but the gravity of the error[10]. Therefore, the gravity of the error is critical to the finding of

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[6] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[24].*

[7] *(2001) 206 CLR 323 at 351 [82]; [2001] HCA 30*

[8] *(2015) 257 CLR 22 at 32 [23]*

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

[10] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[25].*

jurisdictional error. The decision in ***Hossain*** supports the notion that a decision made in breach of an implied condition is not fatal or stripped of legal force as the statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance[11]. This suggests that the finding of jurisdictional error inherently incorporates a finding of materiality of the relevant error of law. The question whether jurisdictional error is made out is to be found in the statute[12]. Likewise, the question whether a statute sets a lower or higher threshold of materiality turns on the proper construction of the statute. The threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition, if compliance could have made no difference to the decision.[13]

Consequently, there are two possible outcomes that attach to a decision infected by an error of law. If the error of law is *material* it will ground in jurisdictional error. If the decision is infected with jurisdictional error, it is not a nullity but remains a *decision in fact* which may yet have some status in law. However for the purpose of the law pursuant to which it was purported to be made, such a decision is "no decision at all''. It is invalid and void. Secondly, if the error is non-material, the error is not jurisdictional, the decision maker retains jurisdiction and the decision is not invalidated by the error. Basically, if the error of law does not deprive the decision-maker of authority, then the decision will have legal foundation.[14]

On another view, the decision in ***Hossain*** supports the proposition that the existence of a ground that is fatal to the judicial review of an administrative decision is not compatible with a finding of jurisdictional error

C. MATERIALITY

The concept of materiality applies to the question whether an error of law is fatal to the validity of an administrative decision. Materiality is satisfied if there is a material breach of a precondition to exercise of power. Materiality implies that a decision will not be invalid or

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[11] *Ibid at [29].*

[12] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *at [83].*

[13] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[30].*

[14] *Ibid at [62].*

beyond authority where the error could not have affected the result of the decision[15]. This is illustrated in the decision of the High Court in SZIZO[16]; Notably, the role of materiality as a criterion of jurisdictional error is a reflection that the legislature does not intend that a decision be rendered invalid by an immaterial error[17].

In essence, materiality is concerned with when an action by a decision maker will go beyond power. It is implied in the decisions that an error of law is jurisdictional error and invalidates the decision maker's order if the decision maker's exercise or purported exercise of power is thereby affected by the error. In that case, the Tribunal exceeds its authority or power[18]. As noted earlier, for an error of law to be jurisdictional error, the error must be made in a way that affects the exercise of power[19].

From the foregoing, it can reasonably be inferred that the question of materiality is one, which, precedes the finding of jurisdictional error. The question whether an error of law is material is a question of construction of the implied and express terms of the statute. An error will not usually be material in the sense of affecting the exercise of power unless there is a possibility that it could have changed the result of the exercise of power. Materiality will generally require the error to deprive a person of the possibility of a successful outcome.[20]

In SZMTA[21] the High Court held that breach of an obligation of procedural fairness constitutes jurisdictional error on the part of the Tribunal if, and only if, the breach is material. The breach is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome[22]. Furthermore, the High Court held as follows: (i)where materiality is put in issue in

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[15] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[69].*

[16] *Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 27; [2009] HCA 37*

[17] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[67].*

[18] *Ibid at [70].*

[19] *Minister for Immigration and Cultural Affairs v Yusuf (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30*

[20] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[72].*

[21] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *at [2].*

[22] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *at [2].*

an application for judicial review of a decision of the Tribunal, it is a question of fact in respect of which the applicant for judicial review bears the onus of proof.(ii) materiality is essential to the existence of jurisdictional error. (iii) A breach is material to a decision only if compliance could realistically have resulted in a different decision [23]. (iv) the question of the materiality of the breach is a question of fact, (*except in a case where the decision made was the only decision legally available to be made*) and the applicant bears the onus of proof. It is a question of fact to be determined by inferences drawn from evidence adduced on the application[24].

D. RESIDUAL DISCRETION

The court retains a residual discretion to refuse to issue a writ of certiorari even where a jurisdictional error is established[25]. The consideration of materiality is separate and different from considering the possible exercise of the residual discretion. Materiality looks backwards to whether the error could have made any difference to the result[26]. On the other hand, residual discretion looks to the utility of another hearing.[27] The court may exercise the discretion to refuse a writ of certiorari where (i) no useful result could ensue (ii) the party has been guilty of unwarrantable delay; (iii) there has been bad faith on the part of the applicant[28].

In conclusion it would appear that if in the course of the judicial review of an administrative decision an error of law is identified, the second question is whether the relevant breach of a provision of a statute expressly or impliedly are to be treated as depriving the decision-maker of power[29]. The second question is geared towards establishing jurisdictional error and the question of materiality arises in the course of considering the second question. The third question that arises is whether the decision, although infected with error, has some legal

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[23] *Ibid at [45].*

[24] *Ibid at [46].*

[25] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[72].*

[26] *Ibid at [72].*

[27] *Ibid at [74].*

[28] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd at [86]*

[29] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[67].*

consequence. The third question deals with the legal and factual consequences of the decision and this will depend upon the statute[30]. The last question is whether to exercise the residual discretion to refuse relief after jurisdictional error has been established, if no useful result could ensue[31].

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[30] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *at [84].*

[31] *Hossain v Minister for Immigration and Border Protection [2018] HCA 34* at *[20].*