Judicial review in refugee law – an overview

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1. This paper offers a broad overview of judicial review in refugee law and provides some practical points in conducting judicial review assessments. It is to be read in conjunction with the presentation delivered at the LIV on 10 March 2016.

2. As practitioners we are often asked to consider or advise on a range of different matters in the area of refugee law, likely to include the following:

   ➔ AAT decision (in its Migration and Refugee Division) (dealt with under Part 7 of the ***Migration Act***).
   Formerly known as the Refugee Review Tribunal.

   ➔ Immigration Assessment Authority (IAA) (Part 7AA of the Act).
   Applies to people known as 'fast track applicants' – those who arrived in Australia by boat without a valid visa on or after 13 August 2012, but before 1 January 2014 and permitted by the Minister to make an application for a protection visa. It provides for a very different regime to that provided for by the AAT, even though the IAA sits within the same division of the Tribunal.
   Note also: some applicants are excluded from the process altogether and known as 'excluded fast track review applicants.'

   ➔ Decision of a delegate – primary stage.

   ➔ ITOA (international treaty obligations assessment) recommendation or Independent Merits Review ('IMR') or Independent Protection Assessor ('IPA').

   ➔ Federal Circuit Court ('FCC') decision or Federal Court ('FC') decisions.

Jurisdictional Issues

3. The first issue you should consider is jurisdiction, which really depends on the nature of the decision we are considering:-

   3.1 Federal Circuit Court ('FCC')

   ➔ Under s.75(v) of the Constitution the High Court has original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.'

   ➔ The FCC has the same original jurisdiction in relation to migration decisions as the High Court: s.476 of the Act. Note: proceedings commenced in the High Court, in which the FCC also has jurisdiction, will be remitted back to the FCC.

   ➔ AAT (refugee) decisions under Part 7 of the Act are commonly reviewed by the FCC.

- ➔ The FCC also has jurisdiction to deal with decisions made by the IAA see below, under Part 7AA of the Act (arguable that 'excluded fast track applicants' still retain a right of review at the AAT – hinges on definition of 'primary decision').

- ➔ The FCC also has jurisdiction to review with ITOA recommendations, and IMR and IPA recommendations.

- ➔ The FCC expressly has no jurisdiction in certain areas specified by s.476 including 'a primary decision' (see definition of 'primary decision') and character cancellation type decisions made personally by the Minister pursuant to sections 501, 501A, 501B or 501C of the Act.

- ➔ Application for judicial review must be filed in the FCC within 35 days of the date of the migration decision: s.477 (there is discretion to extend the period if its in the 'interest of the administration of justice to make the order.)

- ➔ Note: if you have reviewed an ITOA, or IPA or IMR recommendation, this is not subject to time limits. Of course, broad discretionary matters remain relevant so an applicant is best advised to file asap.

- ➔ The parties to an application are typically the Minister for Immigration and Border Protection and the AAT or the IAA: s.479.

- ➔ The Court must not name the applicant (applies to HC, FC and FCC): s.91X.

- ➔ See also *Federal Circuit Court of Australia Act* 1999; *Federal Circuit Court Rules* 2001.

3.2 The Federal Court

- ➔ The Court has original jurisdiction to entertain applications for constitutional writs: s39B(1) *Judiciary Act*.

- ➔ However, the Federal Court has limited original jurisdiction in relation to 'migration decisions', as outlined in s.476A.

- ➔ This Court typically deals with character cancellation type decisions under sections 501, 501A, 501B or 501C; see also s39B *Judiciary Act*.

  Note: the new revocation provisions under s.501CA are currently within the jurisdiction of the FCC under s.476 and the FC does not have express jurisdiction under s.476A. Until this somewhat anomalous situation is remedied, such decisions (eg refusal to revoke cancellation decisions) will be initiated in the FCC and typically transferred to the FC pursuant to

s.39(1) of the *Federal Circuit Court of Australia Act.*

- ➔ An application under s.476A must be made within 35 days, though in some circumstances ('necessary in the interest of the administration of justice') the Court can extend time.

- ➔ Section 24(1)(d) of the *Federal Court Act* gives the Court jurisdiction to hear and determine appeals from judgments of the Federal Circuit Court (note if judgment interlocutory then leave needs to first be granted).

- ➔ Rule 36.03 of the *Federal Court Rules 2011* provides that an appellant must file a notice of appeal within 21 days after the date on which the judgment appealed from was pronounced or the order made. An application for an extension of time may be made under r 36.05 of the *Federal Court Rules* and the application may be made during or after the period mentioned in r 36.03**.**

- ➔ The Court's appellate jurisdiction is fettered by section 476A of the Act which provides that an appeal may not be brought to the FC from: A judgment of the FCC to make or refuse to make an order under s.477(2) or a judgment of the FC ordering or refusing to make an order under 477A(2) (this relates to a Court's decision to refuse to extend the time for appealing). The only possible (though difficult) way around this is to invoke the Court's supervisory power pursuant to s39B(1) of the Judiciary Act which grants FC jurisdiction re any matter in which a writ of mandamus or prohibition or injunction is sought against an officer of the C/W and judges of FCC are such officers.

- ➔ Section 24 (1)(a) of the *Federal Court Act* also gives the Court jurisdiction to hear and determine appeals from judgments of the Court constituted by a single Judge exercising the original jurisdiction of the Court.

- ➔ See also: *Federal Court of Australia Act* 1976; *Federal Court Rules* 2011.

3.3 The High Court

- ➔ Delegate (*ie* 'primary') decision to be appealed to the High Court.

- ➔ The High Court has original jurisdiction pursuant to s.75 of the Commonwealth Constitution (FCC does not have jurisdiction re 'primary decisions').

- ➔ Otherwise, appellate jurisdiction, special leave is required.

General approach to judicial review

4. Be aware of judicial review limits but equally approach your task with close critical analysis and creativity.

5. Ensure you have the material that will assist you in forming an opinion. In a typical AAT refugee review application, this will ordinarily consist of the following:

    - ➔ Tribunal decision.
    - ➔ Earlier decision of the delegate.
    - ➔ All statements and/or representations made by the applicant or on his/her behalf.
    - ➔ Recording of hearing.
    - ➔ It is always useful to apply for the file pursuant to FOI.

6. Start by clearly identifying:

    - ➔ The applicant's factual claims.
    - ➔ The material before the Tribunal.
    - ➔ The refugee grounds relied upon.
    - ➔ The Tribunal's findings and the reasons for it's findings.

7. Then consider critically some of the following questions:

    - ➔ Has the Tribunal considered and dealt with the applicant's claims?
    - ➔ Has the Tribunal considered relevant material before it?
    - ➔ Is there anything unusual or potentially unfair about the procedural process of the Tribunal (eg witnesses not called or an adjournment not granted)?
    - ➔ Does it appear that matters were raised with the applicant (either at hearing or in s.424A correspondence)?
    - ➔ Has the Tribunal correctly applied the law?
    - ➔ Has the Tribunal complied with the provisions of the *Migration Act* (make sure you are familiar with some of the recent and significant changes to this Act)?

8. Remember: "reasons of administrative decision maker are meant to inform and not to be scrutinised upon over-zealous judicial review": *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 271 per Brennan CJ, Toohey, McHugh and Gummow JJ. However, a beneficial approach to the Tribunal's reasons does not require the Court to assume that a vital issue was addressed when there is no evidence of this: *SZCBT v Minister for Immigration & Multicultural Affairs* [2007] FCA 9 at [26]; *MYOA v Minister for Immigration and Citizenship* [2012] FCA 1462 (20 December 2012).

Jurisdictional Error

9. There are many cases that consider "jurisdictional error." (To get a feel for the area if it is helpful to read some of the cases on austlii). In basic terms, jurisdictional error involves decision maker exceeding limits on decision-making power; in terms of (i) procedural limits of power and (ii) substantive content limits of power. Therefore, decision maker did not have authority or jurisdiction to make the decision made.

10. The High Court case in *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 is a foundation case on the nature of jurisdictional error. If an administrative tribunal:-

> Falls into "an error of law which causes it" to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

11. See also *Minister for Immigration & Multicultural Affairs v Yusuf & Anor* (2001) 206 CLR 33; [2001] HCA 30: different types of errors identified in Craig may overlap and permit more than one characterization of the error; what is important is that the error affects the exercise of power (cf erroneous fact findings: *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303; [2010] FCAFC 51 at [28].

12. After assessing the decision properly and thoroughly you will ask yourself a number of questions and consequently may be able to identify an error. You may also find that the errors overlap and are capable of more than one characterization. Below are **some examples of 'categories' of errors** that have been considered by the Courts. Note that these cases, in the main, deal with Refugee Review Tribunal decisions. There is presently little case law in respect of IAA decisions. No doubt this will develop over time and there will be considerable scope for argument, with particular attention paid to the statutory provisions. Some of the concepts, and the errors discussed below, may have some application or relevance to your consideration of IAA decisions.

Failure to perform statutory task

13. What is its task? See provisions of the *Migration Act* (part 7 – review of protection visa decisions)? Has the Tribunal misunderstood its task on review?

14. The Tribunal's task on review (s414) is to form, for itself and on the material before it, the requisite state of satisfaction under s65 (satisfaction of criterion for grant of visa).

Putting aside complementary protection the criterion is the one set out in s36(2)(a) of the *Migration Act* which picks up Art 1 of the Refugees Convention.

15. Whether the criterion applies is a predictive exercise involving speculation as to circumstances in the future on the basis of material in the present, and what has happened to the person in the past: as discussed in *Chan* and *Guo's* case (see citations above).

16. The task for a court on review is not to assess the quality of the Tribunal's reasons, but rather to consider what the Tribunal's reasons, as they are, reveal about the Tribunal's performance of its statutory task: *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114 (16 October 2013).

Application – examples

17. Did the Tribunal consider the applicant's claims on review for itself and thereby discharge the statutory task imposed on it? Second Tribunal member effectively cut and paste findings of first Tribunal. In such a case 'it will be necessary to examine not only the extent of the copying, but its nature, context and degree … the Court must then decide whether it is satisfied that the Tribunal brought its own independent mind to bear on what would be the correct or preferable decision on the review': [31]. In this case, the Court was not satisfied that the second member had considered the applicant's claims 'afresh'; indicated by the substantial cutting and pasting and also the purported formation of her own opinions and/or findings, based on the earlier members reasons: *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133.

18. *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114 (16 October 2013): No consideration of developments as recorded in country information – the consideration (or lack of consideration) by the Tribunal indicated that it misunderstood, or failed to undertake, its task. **'**Although in one sense this might be described as a "failure to consider" most recent country information, or a failure to consider a claim about increased risk of persecution on return to Zimbabwe, in our opinion the error is, fundamentally, a failure to form the state of satisfaction (one way or the other) required for the purposes of the review in respect of the criterion in s36(2)(a). Judicial review of the formation, by an inferior tribunal, of the state of satisfaction required by the empowering provision may be, as the High Court pointed out in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) (at [64]) best described as a "functional exercise" (citing Jaffe, 1957). Affixing a pre-existing label or meta-description to what a decision-maker did in purported exercise of a statutory power, for example "a failure to consider", may assist the analysis, although it may also provide a distraction' (@ [46]).

19. The Tribunal's findings in terms of a discrete, specific claims (ie threatening calls being made) were inadequate to discharge the Tribunal's review function; Tribunal made

findings on the basis that, ‘even if the threatening calls had been made as alleged, [the applicant] was able to ‘deal’ with them by changing his number and ceasing to answer calls. Tribunal failed to analyse the threats or what significance they had to the applicant’s other (or broader) claims – eg if the threats had been made, were they connected to his alleged associations and therefore did he remain a ‘person of interest’: *SZTQP v Minister for Immigration and Border Protection* [2015] FCAFC 121 at [53].

Failure to deal with an "integer" of a claim

20. Whether a circumstance is a separate integer, thus requiring the Tribunal to deal with it specifically in their reasons, is often a question of fact and degree, having regard to the particular circumstances of a given case. Is it a key issue or component of the applicant's refugee claims?

21. The onus of making out an argument that the decision maker failed to consider the claims made and the material relied upon rests on the Applicant: *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1 at [67], [2011] HCA 1; 241 CLR 594 at 616 per Gummow J.

22. A requirement, whether imposed by common law or by statute, to consider a claim involves a decision-maker to engage in "an active intellectual process directed at that representation or submission": *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451 at 462 per Black CJ. See also: *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs [*2005] FCAFC 134, 147 FCR 51.

23. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on: *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244.

24. Obligation to respond to a substantial, clearly articulated argument relying upon established facts: *Dranichikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 26; (2003) 197 ALR 389. Not obliged to deal with claims that were not articulated or which did not "arise clearly" on the material before him: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1; [2004] FCAFC 263 at [58]-[61]).

25. The finding of a failure to deal with a claim is an inference not too readily drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may also be unnecessary to make a finding on a particular matter if subsumed in findings of greater generality or if the factual premise upon which a contention rests has been rejected: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184 at [47].

26. First, reasons are to be read as a whole. Second, reasons are to be read fairly. Third, reasons are not to be read as if each paragraph is self-contained and necessarily sequential. But, having so stated, it will always be a question of construction as to what a decision-maker actually did decide in a particular case, and for what reason: *WZAVQ v Minister for Immigration and Border Protection* [2016] FCA 188**.**

Application – examples

27. In considering an applicant's case as against complementary protection criterion, the Tribunal is entitled to rely on findings of fact expressed elsewhere in its decision record. However, some care must be taken to disaggregate any such factual findings from findings relevant to the Refugees Convention. In the current case disregarding such conduct pursuant to s.91R(3) of the Act, does not mean it can be similarly disregarded for the purposes of the complementary protection criterion. In this case, the Tribunal accepted that the applicant had engaged in homosexual activities in Australia however invoked s.91R(3). Under complementary protection, the Tribunal simply referred to its earlier findings and its 'disposition of that matter with reference to its statement '[a]s noted above' relied upon the application of s.91R(3) of the Act: *SZUDH v Minister for Immigration and Anor* [2016] FCCA 413 at [34].

28. A failure to deal with the more general claim of feared persecution on the grounds of Tamil ethnicity: *SZQII v Minister for Immigration and Citizenship* [2012] FCA 402 (22 February 2012).

29. A failure to consider a claim based on applicant's status as a "returnee from Iran" and that he was culturally or socially changed by his long stay in an urban environment; only considered whether he would be imputed with political opinions and western affiliations: *MYOA v Minister for Immigration and Citizenship* [2012] FCA 1462 (20 December 2012).

30. A failure to consider whether an applicant had a well-founded fear of persecution on return to Sri Lanka because he had departed that county illegally; as opposed to failed asylum seeker ground: *Minister for Immigration and Citizenship v MZYLE* (No 2) [2011] FCA 1467 (19 December 2011).

31. The Tribunal's failure to consider whether imprisonment which it had found likely to occur would indeed constitute significant harm within the meaning of the Complementary Protection provision: *MZZQE v Minister for Immigration & Anor* [2014] FCCA 1642 (19 August 2014).

32. Failure to consider conscription ground raised only at RSA hearing; (however note importance of IMR opening unqualified statement): *MZYQZ v Minister for Immigration and Citizenship* [2012] FCA 948 (31 August 2012).

Failure to consider a factual claim and/or factual claim misstated

33. A wrong finding of fact is not jurisdictional error: *Minister for Immigration; ex parte Cohen* (2001) 177 ALR 473 at 482 [36].

34. Also not an error that the decision maker failed to give sufficient weight to an aspect of the applicant's evidence: *Minister for Immigration v Khadgi* (2010) 190 FCR 248.

35. "An error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering the applicant's claims is not jurisdictional error, so long as the error, whoever it be, does not mean that the RRT has not considered the applicant's claims": *Minister for Immigration and Citizenship & Anor v SNPG* (2010) 115 ALD 303; [2010] FCAFC 51 at [28].

Application - examples

36. The Tribunal's conclusion that the UNP Letter was fabricated was greatly influenced by the Tribunal's mistake in thinking that the UNP Letter had not been provided to the Delegate or been sent to the Tribunal only after the Tribunal's letter of 5 September 2001, the s 424A letter. While it is impossible to know whether the Tribunal's assessment of the appellants' credibility would have been different if the error about the UNP Letter had not been made, or had been corrected, it is not possible to say that the error could not have affected the outcome: *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 (20 June 2005).

37. Tribunal misunderstood applicant's evidence; made an implausibility finding on the basis that the Taliban would not have assisted his uncle, a Hazara man, in a land dispute, when in fact this claim was never made by the applicant. Court considered - the reviewer's error in this case cannot be seen as peripheral. It was central to the reviewer's rejection of the applicant's claim to fear his uncle and the Nasr Party: *SZQZD v Minister for Immigration & Anor (No.2)* [2013] FCCA 1912 (18 December 2013).

Failure to consider material (as opposed to integer)

38. A failure to consider material and a failure to give material adequate weight are different issues:- *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 (12 April 2013) per Robertson J.

39. Whether obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document: *VAAD v Minister for Immigration* [2005] FCAFC 117 (cf *MZXSA v Minister for Immigration and Citizenship* [2010] FCAFC 123; (2010) 117 ALD 441.

40. The weighing of various pieces of evidence is a matter for the Tribunal: *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48 (15 December 2010) at [33]; *Minister for Immigration v Khadgi* (2010) 190 FCR 248.

41. The selection and weight of country information is a matter for the Tribunal: *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11]-[13] ; *Applicant NABD of 2002 v Minister for Immigration and Multicultural Affairs and Another* [2005] HCA 29; (2005) 216 ALR 1 at [8] per Gleeson CJ and *NBKT v*

Minister for Immigration and Multicultural Affairs and Another [2006] FCAFC 195; (2006) 156 FCR 419 at [81]-[84].

42. If the decision-maker has actual notice of a recent and significant matter affecting the question whether the applicant for a protection visa has a well-founded fear of persecution in his or her country of origin, the subject-matter, scope and purpose of s 36(2)(a) require the decision-maker in evaluating the claim to consider this information: *SZJTQ v Minister for Immigration and Citizenship* [2008] FCA 1938; (2008) 172 FCR 563; (2008) 107 ALD 552 per Rares J.

Application – examples

43. Hearsay; erroneous basis for rejecting material: see *SZIEW v Minister for Immigration and Citizenship* **[**2008] FCA 522; (2008) 101 ALD 295 at [14] per Madgwick J; *SZQVM v Minister for Immigration and Citizenship* [2013] FCA 5 (15 January 2013*)* per Lander J at [95]-[104].

44. The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of the error (failure to consider academic transcript then went to issue of credibility): *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 (12 April 2013) per Robertson J at [111]. Note in this case, leave application refused - *Minister for Immigration and Citizenship v SZRKT and Anor* [2013] HCATrans 251 (11 October 2013) per Keane J: "… The learned Federal Court judge, Justice Robertson, in a careful judgment was at pains to make it clear that to ignore relevant material is not necessarily to fall into jurisdictional error. His Honour's conclusion was based upon his Honour's view of the significance of the error that was made in this particular case. The decision below turned on the evaluation of the significance of matters of fact for the decision by the Tribunal…" (also endorsed in *MZYTS* at [111] referring to *SZRKT*: "by disavowing any jurisdictional/non-jurisdictional distinction between claims and evidence and instead finding, correctly in our respectful opinion, that the "fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error".)

45. A failure to refer to an earlier interview constituted a failure to have regard to relevant material, which was so fundamental to go to jurisdiction: *WAFP v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 319 (24 December 2003).

Denial of procedural fairness

46. 'The basic principle with respect to procedural fairness is that a person should have an opportunity to put his or her case and to meet that case that is put against him or her': *Re MIMA; Ex Parte Miah* (2001) 206 CLR 57 at 86, [99],

47. In the ordinary case, an opportunity should be given to a person affected by a decision to deal with any adverse information that is 'credible, relevant and significant'***:*** *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321. A party affected by a decision must be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material: *SZBEL v Minister for Immigration & Multicultural Affairs* [2006] HCA 63; (2006) 231 ALR 592 at [32].

48. 'Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision: *Minister for Immigration & Citizenship v SZGUR* [2011] HCA at [9].

49. "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice": *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte* **Lam** (2003) 214 CLR 1 at [37].

50. Common law natural justice hearing rule excluded in relation to the matters dealt with in Division 4; however does not exclude those aspects of the common law of natural justice that are not dealt with by Division 4, such as the bias rule: see *Minister for Immigration & Multicultural & Indigenous Affairs v Lat* (2006) 151 FCR 214 at [64]-[67]); *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1388; (2005) 146 FCR 562 at [27]; *Saeed v Minister for Immigration and Citizenship* (2010) HCA 23. Also, importance of arguing, and giving content, to s.425 of the Act when dealing with AAT decisions.

51. The relevant question is not whether the decision maker's conclusions were correct, but rather whether the process was right: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Anor* (2005) 225 CLR 88 at 97 [19].

52. The central importance cannot be underestimated of ensuring that a hearing before the Tribunal is conducted in a procedurally fair manner. That is when a claimant has the opportunity of advancing for consideration before an independent decision-maker an account of the claims being made. Findings of fact will then be made against which the law is to be applied. Unless that hearing is conducted in a procedurally fair manner and in accordance with the strictures imposed by the *Migration Act* and findings of fact made, a claimant will have no real chance of laying the factual foundation upon which rights will be determined. (*AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193 (23 December 2015) application dismissed [47])

53. No universal requirement that a party who has initially been given the opportunity of an oral hearing need necessarily be also entitled to be heard by the final decision-maker. Whether the rules of natural justice or procedural fairness require any oral hearing depend on the facts and circumstances of each individual case and depends upon the practical requirements of procedural fairness in the circumstances of the cases: *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40 (4 November 2015) (in this case, Court found applicant had a legitimate expectation of a further hearing – for unknown reasons first reviewer who conducting interview could not continue).

Application – examples

54. Material interpreting errors constituted the Tribunal's failure to comply with s.425 of the Act. Note – it is critical to take into account the process in which the Tribunal engaged, as well as the Tribunal's reasoning: *SZUEW & Anor v Minister for Immigration & Anor* [2016] FCCA 378. (For interpreting errors see law as summarised by Griffiths J in *WALN v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 131.

55. Data breach case – 'procedural fairness is not satisfied by giving a person a hearing if the person does not know why he is being heard, about what or by whom: *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, see in particular paragraph [99].

56. Denial of an adjournment application before the RRT constituted a denial of procedural fairness (or unreasonable): *Minister for Immigration and Citizenship v Li* [2013] HCA 188 at [18]. See also recent application in *MZAHC & Ors for Immigration & Anor* [2016] FCCA 340 (here court stated it's relevant, when considering a refusal to grant an adjourned in the unreasonable sense, to consider the whole history of the proceedings. Here, refusal lacked an intelligible basis. The applicant wished to avoid her previous experience of the tribunal (where bias was found) and obtain documents in relation to the formation of a new State Government in her home country.

57. Failure to raise matters with the applicant at Tribunal that had been accepted in his favour by the delegate: *SZBEL*.

58. Failure to raise relocation – the Tribunal was meant to provide the appellant with a sufficient opportunity to give evidence and present arguments relating to relocation, including the reasonableness of relocation: *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133 (31 October 2013).

Unreasonableness or illogicality

59. “Mere preference for a different result, when the question is one on which reasonable minds may come to different conclusions" is not a sufficient reason for overturning a judicial decision upon a review: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 48; *Minister for Immigration and Citizenship v* **SZJSS** [2010] HCA 48; (2010) 243 CLR 164 at 34]-[36].

60. The Tribunal is not precluded from developing some skepticism as it performs its task, based on the evidence and other material before it, so long as it also approaches the review of the delegate’s decision with a mind open to persuasion, and goes about its task in a procedurally fair way in accordance with the requirements of the *Migration Act* and the common law: @ [50] *MZZJO v Minister for Immigration and Border Protection* [2014] FCAFC 80 (4 July 2014).

61. The threshold is high: *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58 at [2]; *MZYOI v Minister for Immigration and Citizenship* [2012] FCA 868 at [165], 130 ALD 256 at 283.

62. “No rational or logical decision maker could arrive on the same evidence … Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case”; ... the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; (2010) 84 ALJR 369; (2010) 266 ALR 367; [2010] HCA 16 per Crennan and Bell JJ at [30].

63. The decision maker is obliged to exercise, fairly, its core function of reviewing a-fresh and on the merits, the decision concerning the visa application: see *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

64. Arguable that it is not required that illogicality and unreasonableness are to be only considered in relation to the end result as opposed to any anterior findings of fact: *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 (12 April 2013) at [145]-[151].

65. The test for unreasonableness is strict as it must be established that the approach adopted by the decision maker was lacking in “evident and intelligible justification” or was “arbitrary, capricious or clearly unjust”: see *Minister for Immigration v Li* at [76] per Hayne, Kiefel and Bell JJ. Note Hayne, Kiefel and Bell JJ in their joint judgment at [68]: ‘… the legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship’s judgment may more sensibly be taken to

recognize that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.'

66. Note confining comments in recent case of *Stretton* - 'In reviewing a decision on the ground of legal unreasonableness, the Court's role is strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power': *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11.

Examples – application

67. Tribunal relied upon one line of a news report of February 2010 stating that in Nepal 'proselytising is banned and carries a three-year jail penalty, but no one thus far has been prosecuted.' This was said to be factually incorrect and not supported by other material. 'The law does not prevent the Tribunal from relying on information which is factually incorrect. The question is whether an intermediate decision, such as an intermediate finding of fact, which is illogical or unreasonable, might have been material to the ultimate decision on the review. If the impugned finding or reasoning was immaterial to the ultimate decision, it is difficult to see how the decision could be said to have been affected by jurisdictional error.' Reliance on the news report of February 2010 in this case was not immaterial to its decision on the review. Indeed, it was cited twice as to why it was not satisfied the applicant had a well founded fear of persecution: *SZUAL v Minister for Immigration & Anor* [2016] FCCA 347 at [18] and [19].

68. Extortion based claims; Tribunal concluded that the 'overriding aim' of the CID officers was 'simply to extort money from [the appellant's] mother' was to fail to grapple with WHY the mother was a target for extortion at all. 'To conclude that the reasons given by the Tribunal as to why it was not satisfied that the appellant was a person to whom Australia owed protection obligations were logical and rational would be to render that protection obligation largely ineffectual in cases grounded in claimed extortion for multi-faceted reasons which include being targeted for Convention-based reasons, if not to stand those protections on their head; the harm arose 'because the corrupt CID officers had identified them as family members of a person who was or who had suspected links to the LTTE: *SZTAP v Minister for Immigration and Border Protection* [2015] FCAFC 175 (9 December 2015) at [16] and [17] and [61].

69. Refusal to grant an adjournment: *Li.*

Credibility

70. Credibility findings are a matter par excellence for the relevant decision maker**:** *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J).

71. In a dispute adjudicated by adversarial procedures, it is not unknown for a party's credibility to have been so weakened in cross-examination that the tribunal of fact may well treat what is proffered as corroborative evidence as of no weight because the well has been poisoned beyond redemption**:** *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (@ 49).

72. In certain cases (though limited), assessment of credibility can amount to jurisdictional error: *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at 88-89 [4] (Gleeson CJ); *VAAD v Minister for Immigration* [2005] FCAFC 117 at [79].

73. 'An assessment of credibility is not necessarily linear.' 'Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive': *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs*. 'Decision making is a complex mental process. Disbelief of a litigant or witness on one point might carry over to affect the decision-maker's disbelief of the same person on other points. Contrary-wise, establishing that an initial disbelief of a person's credibility on one matter was erroneous might convince a decision-maker of the need to revisit other conclusions and to look at the person's entire evidence in a new light': *Applicant NAFF of 2002 v Minister for Immigration and Multicultural Affairs* [2004] HCA 62; (2004) 221 CLR 1 at [8].

Application – examples

74. IPA decision. Failure of the IPA to put to the applicant a contrary statement as to where alleged sexual abuse took place constituted a denial of procedural fairness. The applicant may have given an explanation that would have satisfied the IPA that the inconsistency did not manifest carelessness with the truth: *SZUJN v Minister for Immigration & Anor* [2016] FCCA 362 at [22].

75. … The foundation of the rejection of the claims was by a supposed process of reasoning which, in significant and central respects, was no process of reasoning at all. The documents were rejected by assertion largely bereft of any reasoned foundation, as can be seen from a reading of them and the application of a very modest amount of common sense. The selective, unexplained and unreasoned concentration on the so-called unsatisfactory answers on religion and the unreasoned assertion of what flowed from them, ignoring in this process the balance of the answers was not so much illogical, as unreasoned assertion lacking any intellectual foundation. To assert conclusions of this kind in this way may be seen as not to engage in a reasoning process, but to assert conclusions by a process that is no more than an intuitive, arbitrary or capricious response to the task: *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 328 (22 December 2004).*

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