Judicial Review of Tribunal Decisions: Lessons and Warnings

a paper delivered by Mark Robinson SC for the AAT in Sydney 26 June 2019

This paper broadly covers judicial review of tribunal decisions. Since I am based in NSW, it has a NSW focus. Much of what I will say will relate to the tribunal itself. However, there are many examples of exactly the same applicable principles of judicial in the work of the High Court of Australia, the Federal Court and the State Supreme Courts that highlight the relevant lessons and warnings we shall touch on today.

Let's start at the top.

The High Court recently discussed the nature of the Commonwealth Administrative Appeals Tribunal ("AAT") administrative merits review jurisdiction and said, in *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 at [14] to [15]:

> The enactment of the AAT Act established a new and substantially unprecedented regime of administrative merits review, distinguished principally by the AAT's jurisdiction to re-exercise the functions of original administrative decision-makers. The question for determination by the AAT on the review of an administrative decision under s 25 of the [*Administrative Appeals Tribunal Act 1975* (Cth)] AAT Act is thus whether the decision is the correct or preferable decision. That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker. As Bowen CJ and Deane J held in *Drake v Minister for Immigration and Ethnic Affairs*, however, and has since been affirmed by this Court in *Shi v Migration Agents Registration Authority*, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.
>
> Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker. As Kiefel J observed in *Shi*, identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in

> connection with the decision. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision. (footnotes omitted)

See also, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117]); at [96] to [100] (per Hayne and Heydon JJ); at [30] to [32], [33] to [38],[39] to [42] (per Kirby J).

In *Frugtniet*, Australian Securities and Investments Commission ("ASIC") made a banning order against the appellant under the *National Consumer Credit Protection Act 2009* (Cth) having determined that he was not a fit and proper person to engage in credit activities. The appellant had a number of "spent convictions" within the meaning of the *Crimes Act 1914* (Cth), Pt VIIC: a criminal record in the United Kingdom in 1978 of 15 counts of handling stolen goods, forgery, obtaining property by deception and theft (for which he had served two years imprisonment). There was also a finding by a Victorian Magistrates court in 1997 that he had committed an offence of obtaining property by deception, for which he was fined $1,000 but no conviction was entered. On merits review, the AAT affirmed ASIC's decision, taking into account the spent convictions on the basis that they were "evidence of dishonest conduct that [was] relevant under the policy guidelines". The Federal Court appeal was dismissed as was the Full Federal Court appeal.

The High Court allowed the appeal (all 7 justices) holding that the AAT cannot take spent convictions into account. It was held that ASIC could not take it into account at first instance and the AAT, standing in ASIC's shoes, exercising its power, could not as well (at [51]). Interestingly, the Court also held the AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker (at [15]). How that is going to work in practice will be interesting.

Also this year was *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252. The AAT had determined three matters each affirming a Ministers delegate's refusal of a protection (refugee) visa. The three appeals concerned notification made under section 438(2) of the *Migration Act 1958* (Cth). Section 438 made provision for the Secretary of the Migration Department to provide the Tribunal with notice concerning "secret" documents and advice, disclosure of which would be contrary to the public interest, material that "should not be disclosed" or confidential documents. The Tribunal was permitted to

"have regard to" the said material (section 438(3)(a)) and if it thinks appropriate, to disclose "any matter contained in the document" to the applicant(section 438(3)(b)) (but not the documents or advice themselves). The Tribunal could then make a direction under section 440 to ban publication or disclosure of the said documents. The fact of notification had not been disclosed to the three review applicants during the tribunal's review.

The three AAT decisions ignited a war in the High Court over the question of "materiality" in jurisdictional error in judicial review cases.

The majority, Bell, Gageler, Keane JJ, held that the fact of notification to the Tribunal under section 438 triggered an obligation of procedural fairness on the part of the tribunal to disclose that fact to the applicant for review. Breach of that obligation constituted jurisdictional error on the part of the tribunal if, and only if, the breach was "material". The breach was material only if it operated to deny an 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. The onus was on the applicant to establish this. The question for the court on judicial review of the tribunal's decision is whether there was a realistic possibility that the decision could have been different if the notification had been disclosed (at [2], [38], [45] and [49]).

The minority, Nettle and Gordon JJ, held that the question of materiality should not form a part of identifying jurisdictional error. It should be considered at the end, after error is found and as part of the question of the Court's discretion in judicial review (at [90]).

In the end, the result was the same for each of the 5 justices. Each of the Tribunal's decisions was upheld.

An Administrative Law Overview

The full range and scope of administrative law process and remedies should be first identified. At its broadest, administrative law at the Federal level relates to or concerns the following:

1. ***Self-help*** remedies or processes may be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not). It can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision or a letter-writing campaign.

2. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to look at and re-make the subject decision (usually afresh). Sometimes it is done without a statutory provision, as a matter or practice or policy.

3. ***Need the Documents? - Freedom of Information*** (under the *Freedom of Information Act 1982* (Cth));

4. ***Breach of Privacy? - The Privacy Commissioner***, the *Privacy Act 1988* (Cth);

5. ***Maladministration? - The Ombudsman*** – under the *Ombudsman Act 1976* (Cth) whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the Government);

6. ***Corrupt Conduct? - The Independent Commission Against Corruption*** **(**Still waiting on a Federal version);

7. ***Ex gratia or act of grace payments*** – When someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal proceedings. Payments are discretionary in nature and it is for Ministers to determine individual applications (see "Discretionary Compensation Mechanisms" Finance Circular No. 2006/05 to all agencies under the *Financial Management and Accountability Act 1997* (Cth) – the Scheme for Compensation for Detriment caused by Defective Administration (**the CDDA Scheme**));

8. ***External Independent Merits Review*** - is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and

concerns a "*remaking*" of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the AAT is a leading example of an independent, external merits review body. The leading case on the nature of external merits review is *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; and

9. ***Judicial Review*** – testing the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities. These proceedings known as "*judicial review*" of administrative action are usual dealt with by the all the superior courts in Australia Supreme/Federal/High. This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. Also relevant is the codified version of the grounds of judicial review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Administrative law did not develop in a vacuum. It was developed by the courts in England and Australia over 500 years and for good reason. Its purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as to keep check on executive decision-makers so as to ensure they all acted lawfully and within the meaning, scope and purpose of their legal powers. Primary tenets of administrative law have developed over time. Overall, they are to ensure that in the making of administrative decisions, there is:

a. legality (judicial review and merits);
b. fairness; (judicial review and merits)
c. participation (merits);
d. accountability; (merits)
e. consistency; (merits)
f. rationality; (judicial review and merits)
g. proportionality (judicial review and merits); and,
f. impartiality (judicial review and merits).

The usual aim of an **external merits review** process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time,

improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of **judicial review** in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the "*legality/merits distinction*".

Judicial Review of Administrative Action

The leading academic text in this area is 1,212 pages long – Aronson, Groves and Weeks, Judicial Review of Administrative Action and Government Liability, 6th ed, 2017 (Lawbook Co, Sydney).

Framework and Procedure

The jurisdiction of superior courts by way of judicial review of administrative action was developed by the courts in accordance with the common law or general law. It involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).

The relief granted (which is discretionary) may be to quash or set aside the decision, declare the decision invalid or void and, in some cases, to remit the decision to the original or primary decision-maker for re-consideration according to law (sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal).

While judicial review lies largely in the realm of the common law, its existence in the States is constitutionally entrenched and protected by section 73 of the Commonwealth *Constitution* (see, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 and, "*The Centrality of Jurisdictional Error*", Hon J Spigelman AC (2010) 21 Public Law Review 77). Because judicial review is protected by the Constitution, it cannot be taken away by any State legislation (at least for correction for jurisdictional error).

At the federal level, the same "entrenching" was identified and achieved in *Plaintiff S157-2002 v Commonwealth* (2003) 211 CLR 476.

The grounds for judicial review are still evolving through decisions of various courts and many of these grounds overlap.

Early identification of the most appropriate ground or grounds of judicial review is the key to success in this area, providing one has also sought the appropriate remedy and the discretionary factors are not adverse.

The discretionary factors apply at the end of a case.

Even if an applicant establishes legal error, the Court has discretion as to whether or not to grant a remedy. The discretionary factors are these. A remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the AAT);
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made[1]; also;
- an applicant should not have acquiesced in the conduct of proceedings known to be defective. An applicant cannot "*sleep on their rights*" - they should make an election to challenge or no longer participate in the executive or court-like process below.

In *R v Kelly; Ex parte Victorian Chamber of Manufactures* (1953) 88 CLR 285 (at 309), Fullagar J termed the discretion as follows:

> "The writ issues neither as of course nor as of right. It may be refused to a person prima facie entitled to it, if good reason is shown for a discretionary refusal."

Ordinarily then, the grounds of judicial review are known as:

- error of law amounting to identification of the wrong question,
- ignoring relevant material,

1 See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [91]-[92] per Kirby J.

- relying on irrelevant material or, at least, in some circumstances,
- making an erroneous finding or reaching a mistaken conclusion,

leading to an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a "**jurisdictional**" error of law.

Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under common law or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and they enliven a superior Court's exercise of its supervisory jurisdiction over statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases –except for (possibly) denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

Examples of jurisdictional errors of tribunals and executive decision-makers include identifying a wrong issue; asking a wrong question; ignoring relevant material; relying on irrelevant material; or an incorrect interpretation and/or application to the facts of the applicable law, ***in a way*** that affects the exercise of power (see: *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [60] to [70]; and *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at [81] to [83].

The words there "in a way" are in bold for good reason.

It must be something that moves the Court to find for vitiating legal error. It most go to power.

Jurisdictional errors that may be committed by a tribunal or executive body (post *Craig's case*) that will always be corrected by a Superior Court (as extended by the High Court

decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [61]-[63]) can also be discussed as follows:

- The definition of "*jurisdictional error*" in *Craig's case*, is not exhaustive (*Kirk's* case also held this at [60] to [70]).
- The categories of jurisdictional error are not closed - *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at [81].
- Those different kinds of error may well overlap.
- The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question, and ignoring relevant material.

If an error of this kind is made, the decision-maker did not have authority to make the decision that was made. He or she did not have jurisdiction (or power) to make it - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53].

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The remaining traditional grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness – including actual bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
2 improper purpose;
3 bad faith;
4 irrelevant/relevant considerations;
5 duty to inquire (in very limited circumstances);
6 acting under dictation;
7 legal unreasonableness - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332;
8 proportionality (not presently available, except via legal unreasonableness);

9 no evidence;
10 uncertainty;
11 inflexible application of a policy (without regard to the individual merits of the application);
12 manifest irrationality or illogicality (possibly a sub-branch of legal unreasonableness);
13 failure to afford a "proper, genuine and realistic consideration" of material; and,
14 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.

How the Grounds of Judicial Review Operate

These grounds of judicial review each operate on their own to quash administrative or tribunal decisions.

Alternatively, the different kinds of errors may sometimes overlap - *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] (per McHugh, Gummow and Hayne JJ). They can also combine, such that, for example, unreasonableness can be characterised in a number of ways in judicial review. A decision affected by actual bias might lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord a reasonable opportunity for a person to be heard might contravene a statutory requirement to accord such a hearing. It might also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account – see, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [26] per (French CJ).

Further, it is also the case that that some decisions may be considered legally unreasonable in more than one sense and that "*all these things run into one another*" on occasion - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] (per Hayne, Kiefel and Bell JJ); citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

Other Tips and Lessons from Judicial Review Cases

Try to use the language of the statute or statutory instrument you are dealing with.

It is trite, but the original language can often get lost in the reasoning and this is dangerous. In *IAG Ltd t/as NRMA Insurance v Chahoud* [2019] NSWSC 767 (Bell P) cited the "warning" issued by Basten JA in *Dominice v Allianz Australia Insurance Ltd* (2017) 81 MVR 249 at [12] in the following terms:

> "The abandonment of the statutory language in favour of a paraphrase is to be deprecated. It did not lead to error in the present case, but it could well do so in other circumstances. The statutory language is not obscure, nor difficult to apply. ***Conclusions expressed in accordance with the language of the statute are less likely to invite applications for judicial review***." (my emphasis)

Try to avoid formulaic or template expressions, sentences or paragraphs.

They add little to a decision and generally do not shore up an otherwise invalid decision. For example, one Minister determined the following:

> "I considered all relevant matters including (1) an assessment against the character test as defined by s 501(6) of the Act and (2) all other evidence available to me, including information provided by, or on behalf of Mr Sabharwal"

The Full Federal Court said, in *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [74(d)] (per Perram, Murphy and Lee JJ):

> "The primary judge was correct in rejecting that formulaic statement as sufficient to show that the Minister in fact considered the psychologist's report or to show that the Minister gave the report proper, genuine and realistic consideration."

And (at [81]):

> "We would be cautious in drawing an inference that a relevant matter was considered based on such a formulaic statement, standing alone, but it does not stand alone in the present case."

See also: *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170 at [32] and [194].

In *IAG Ltd t/as NRMA Insurance v Chahoud* [2019] NSWSC 767, Bell P said (at [62]) that:

> "True it is that a formulaic recitation of a statutory test is not conclusive evidence that the test as stated has in fact been applied."

This reasoning also applies to standard paragraphs and template decisions – see, for example, *Lek v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 43 FCR 100 at 122.6 (Wilcox J); *Wu v Minister for Immigration & Ethnic Affairs* (1994) 48 FCR 294 at 296E-297B (Wilcox J); *Minister For Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 266; *Salter* v *West Moreton Community Corrections Board* [2007] QSC 29; *Chumbairux* v *MIEA* 91986) 74 ALR 480 at 493 and *MIEA* v *Tangle* (1983) 48 ALR 566 at 571.

In 2012, a Tribunal's decision was quashed by the Full Federal Court for the Tribunal copying almost in whole, the written submissions of the Commonwealth and publishing it as its own decision. The Tribunal decision was 59 paragraphs and, with the exception of a small number of words, phrases and sentences, it was taken verbatim and without attribution from the Commonwealth's written submissions (*LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166 at [5] (North, Logan, Robertson JJ)).

The case concerned, effectively a strike out of the applicant's application under section 42A(5)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth), for failure within a reasonable time to comply with a direction by the Tribunal.

The Tribunal dismissed the applicant's substantive application on the strike out. Unfortunately, the Tribunal did not update the written submissions it copied and those submissions made no reference at all to the evidence and submissions of the applicant on the strike out application. The Full Court quashed the Tribunal's decision and set out some guidelines for the way copied text should be used by the Tribunal and considered by the Court (at [91]-[92]).

In *Abboud v Minister for Immigration and Border Protection* (2018) 74 AAR 214 (Jagot J) the Federal Court set aside a Tribunal decision on a partner visa under the *Migration Act 1958* (Cth). There was a married couple. The woman married a Lebanese born Australian citizen, who had previously been granted a protection visa on the basis of his homosexuality and associated fear of persecution in Lebanon. They missed the date to file the partner visa

application and the visa could not be granted, unless, on appeal to the AAT it was satisfied that there were compelling reasons for not applying the 28-day lodgement criterion.

The Tribunal reached the conclusion that the marriage relationship had never been "a genuine, continuing and exclusive spousal relationship" as envisaged by section 5F of the *Migration Act 1958* (Cth) and that the married couple were not credible witnesses. The Tribunal decided that there were no compelling reasons not to apply the 28-day criterion and it affirmed the respondent's decision. The Tribunal, in its decision, took the view that "*the gay rights movement has … fought for the acceptance of homosexuality as a sexual orientation from birth*" and that a man born homosexual can, therefore, never enter into a genuine spousal relationship with a woman. Rather, according to the Tribunal, the appellant's spouse had chosen to be homosexual at the time of his protection visa application and was now choosing to be heterosexual. The Federal Circuit Court affirmed the Tribunal's decision.

The Federal Court allowed the appeal and quashed the AAT decision. If held that "decision-making process of the AAT miscarried" (at [1]). It held (at [5]) that the AAT failed to properly satisfy itself about critical facts due to irrational or illogical reasoning or it failed to engage with the material before it and there was jurisdictional error. In the present case, the "gay rights movement" had no relevance to the circumstances of the marriage of the appellant and her spouse, and there was no evidence that the appellant's spouse had chosen to be either homosexual or heterosexual. By adopting the premise that a man born homosexual could never enter into a genuine spousal relationship with a woman, the Tribunal disabled itself from engaging with the material before it, drawing the conclusions that there was no genuine relationship between the appellant and her spouse and that they were not credible witnesses. Alternatively, the Tribunal's reasons demonstrated extreme illogicality. The approach of the Tribunal constituted jurisdictional error.

In *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175 (Kenny, Kerr and Perry JJ) the AAT had affirmed a decision by the delegate of the first respondent, the Minister for Immigration and Border Protection (the Minister), <u>not</u> to grant the appellant a Protection (Class XA) visa (the visa) under s 65 of the *Migration Act 1958* (Cth) (the Act). The decisions of the delegate and the AAT addressed only the question of whether the appellant should be granted a protection visa on the ground that he was a person to whom Australia owed complementary protection obligations so as to satisfy the criteria under

section 36(2)(aa) of the Act. The appellant claimed that, by reason of his homosexuality, he would be at risk of harm in India if he were required to return (AAT's reasons at [74]). The AAT did not accept that the appellant was homosexual and, on that basis, rejected his claim to fear a real risk of significant harm.

The appellant had presented a significant volume of material to corroborate his claim (including independent witnesses) but the AAT found he was not homosexual and he was not entitled to a visa. The appellant said the Tribunal had dismissed the evidence of his 16 witnesses without any logical, rational or probative basis. He argued that the Tribunal decision was tainted by jurisdictional error. It was held by the Full Federal Court that the Tribunal decision demonstrated extreme illogicality and lacked an intelligible foundation. It is affected by jurisdictional error (at [4], [41]). The Full Court set out some of the relevant principles as to legal unreasonableness in credit and credibility cases. It said (at [30]) (in summary, authorities omitted):

1 While findings as to credit are generally matters for the administrative decision-maker, this does not mean that such findings as to credit are beyond scrutiny on judicial review. The question of whether a credibility finding is tainted by jurisdictional error is a case specific inquiry, and is not assessed by reference to fixed categories or formulae. In each case it is necessary to analyse in detail what the decision-maker has decided.

2 Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as legal unreasonableness or reaching a finding without a logical, rational or probative basis (ARG15 at [83](d)). In this regard, Crennan and Bell JJ explained in Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 (SZMDS) (at [135])that:

> . … A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence **or if there is no logical connection between the evidence and the inferences or conclusions drawn**. (Emphasis added.)

3 Jurisdictional error may be established where a finding on credit on an objectively minor matter of fact constitutes the basis on which the decision-maker rejects the entirety of an applicant's evidence and claims. And, unwarranted assumptions by a

Tribunal as to matters relevant to the formation of a view on the credibility of a corroborative witness may cause the Tribunal to disbelieve and disregard that evidence and may constitute a failure to duly consider the question raised by the material put before it. Equally, jurisdictional error may be established by a process of reasoning which damns a man's credibility by reference, materially, to a false factual premise concerning a critical document.

4 Findings or reasoning along the way to reaching a conclusion by the decision-maker that are illogical or irrational may establish jurisdictional error. An irrational or illogical finding, or irrational or illogical reasoning leading to a finding, by the Tribunal that the review applicant was not a credible or honest witness may in some circumstances lead to a finding of jurisdictional error. That would particularly be the case where the adverse credibility finding was critical to the Tribunal's decision that it was not satisfied that the applicant met the criteria for the grant of a visa. While it is frequently said that findings as to credit are entirely matters for the Tribunal, such findings do not shield the Tribunal's decision-making processes from scrutiny.

5 A high degree of caution must, however, be exercised before finding that adverse findings as to credit expose jurisdictional error in order to ensure that the Court does not embark impermissibly upon merits review. As such, to establish jurisdictional error based on illogical or irrational findings of fact or reasoning, "extreme" illogicality must be demonstrated measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions. Thus, even emphatic disagreement with the Tribunal's reasoning would not be sufficient to make out illogicality.

In *Tuimaseve v Minister for Immigration and Border Protection* (2018) 74 AAR 192 (Moshinsky J) the Minister cancelled the applicant's visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth). The applicant applied for review by the AAT. One of the issues on the review concerned an incident that occurred while the applicant was in immigration detention on Christmas Island. He claimed that a man ran at him with a knife and that he knocked the man out in self-defence. Without first providing a copy of the footage to the applicant or the Tribunal in advance, the Commonwealth tendered video footage of the incident for the purpose of impugning the applicant's credibility. The Tribunal admitted the

video footage and affirmed the decision to cancel the applicant's visa. The Federal Court held that there was a denial of procedural fairness as the Commonwealth had waited till the applicant had finished his evidence and closed his case. Further, there was a breach of sections 37 and 38AA of the *Administrative Appeals Tribunal Act 1975* (Cth) (about lodging relevant documents). Those sections reflect a policy of requiring decision-makers to disclose relevant documents to the other party to avoid "ambush" (at [77]).

In *O'Sullivan v Australian Securities and Investments Commission* (2018) 74 AAR 268 (Perram J) the Federal Court of Australia considered a Tribunal decision affirming a decision of the Australian Securities and Investments Commission ("ASIC") to prohibit the applicant from providing financial services for a period of seven years from the date of its decision and that he should be disqualified from managing a corporation for a period of five years. The Tribunal varied the ASIC decision by allowing the applicant to manage three family companies. Nearly a year after the matter had been argued in the Tribunal, the parties adduced an agreed statement of facts. And the applicant's representatives also provided a written submission two days later as to why fresh evidence, including the agreed statement of facts, should be taken into account by the Tribunal. Six months later, the Tribunal handed down its decision. It was apparent that it had failed to read the agreed statement of facts or considered the new submissions. Counsel for ASIC conceded (at [3]) that:

> "… the material was important and that the Tribunal had failed to respond to substantial clearly articulated arguments in consequence. The effect of that concession was that it followed that the Tribunal had denied Mr O'Sullivan procedural fairness. Both parties agreed this was the case and it is, in any event, well established: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [55], [58]" (relying on *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088 at [24] per Gummow and Callinan JJ, Hayne J agreeing at [95]).

In *SZQPY v Minister for Immigration and Border Protection* (2018) 74 AAR 343 (Colvin J) the Federal Court set aside another AAT decision based on credibility. The applicant was seeking a protection visa. He was a citizen of Bangladesh. He said he had a fear of persecution from members of a Muslim group on the grounds of religion by reason of his Buddhist background. The AAT held that the chance of the appellant suffering harm anywhere in Bangladesh as a result of being a Buddhist was remote and that appellant could

not be relied on as being genuine. The AAT therefore determined that Australia had no protection obligations in relation to the appellant and affirmed the Minister's decision.

He sought judicial review in the Federal Circuit Court and lost. In the Federal Court, the Court held that the factual findings of the AAT must be rationally made, based on probative material and logical grounds. It is a significant matter to conclude that a person is not a witness of truth and that, therefore, the whole of the testimony of the witness must be rejected. To reject the whole of the evidence there must be a foundation for the view that the whole of the evidence is so unreliable that it should be rejected. A considerable part of the material relied upon by the Tribunal in finding that the whole of the appellant's account was false is not of a kind that may be used by the Tribunal, in the proper discharge of its statutory fact-finding task, to support such a conclusion. It therefore follows that there was jurisdictional error in the Tribunal's decision, and the matter should be remitted to the Tribunal, differently constituted (at [22], [54], [112]).

The Court considered the authorities as to the nature of the Tribunal and said (at [27]) that the Tribunal;

> "(a) is not bound by technicalities or rules of evidence;
> (b) undertakes an inquisitorial task of administrative decision making which is to be distinguished from judicial decision making in an adversarial context;
> (c) must decide the facts based upon probative material;
> (d) may rely upon material that would not be admissible in adversarial Court proceedings and may use that material in a manner that would not conform to the requirements of the laws of evidence;
> (e) need not reason from that material in the way a Court would reason;
> (f) must reason in the manner that would be expected of an experienced legal practitioner or a person selected as a member of the Tribunal by reason of their special knowledge or skills;
> (g) must give reasons that are to be available in writing;
> (h) must describe in its reasons the findings on any material questions of fact;
> (i) must refer in its reasons to the evidence or other material which provided the basis for those findings, in the subjective view of the Tribunal; and
> (j) must reason rationally based on probative material and logical grounds."

The Court then said (at [28]- [29]):

> "These matters manifest a statutory intention that the Tribunal's fact-finding on an application for a protection visa is required to conform to the standard of reasoning and analysis that might be expected of a formally established independent specialist administrative tribunal with members who have appropriate legal qualifications and experience or have special knowledge or skills that enable them to provide considered

> reasons as to the factual basis for any decision of the Tribunal.
>
> Therefore, when it comes to deciding whether the decision is rational and reasoned in a logical manner and supported by probative material, these matters must be measured by reference to the above aspects of the statutory character of the decision-making to be undertaken. The standard or quality of factual decision-making required in order to properly perform the statutory task must reflect the particular statutory context."

The appellant gave evidence before the Tribunal. The Tribunal concluded that the appellant was not a witness of truth and rejected the whole of his account. His claim depended upon his own evidence. The main issue in the appeal concerned whether the Tribunal's finding that the appellant was not a truthful witness was made upon a sufficiently logical or probative basis, particularly whether it was based only upon minor omissions and purported inconsistencies in his evidence.

The Tribunal determined that there were four inconsistencies in the applicant's account and that the documents he relied on were falsely procured and they were not corroborative. The Tribunal determined he was not a witness of truth and his account was false.

The Court analysed each of the four inconsistencies (ion very great detail) and held that they were either not logical or rational and set the decision aside.

End