EDITORIAL: MATERIALITY AND JURISDICTIONAL ERROR

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I THE DECISION IN *HOSSAIN V MINISTER FOR IMMIGRATION AND BORDER PROTECTION* (2018) 92 ALJR 780

On 15 August 2018, the High Court published its reasons in *Hossain v Minister for Immigration and Border Protection* ('*Hossain*').[1] In that case, the appellant's application for a partner visa was refused by both the Minister at first instance, and then the Administrative Appeals Tribunal ('AAT') following merits review. To be granted a partner visa, the appellant needed to satisfy two criteria: that he had lodged his application within 28 days of his previous visa expiring, and that he had no outstanding debts to the Commonwealth unless arrangements for repayment had been made. The AAT found that the appellant had not satisfied either criterion.[2]

The appellant then applied for judicial review of the AAT's decision in the Federal Circuit Court. Before the Federal Circuit Court, it was common ground that the Tribunal had made an error of law by applying the second criterion based on the circumstances at the time the application was made, as opposed to the circumstances at the time the Tribunal made its decision. As a result, it was held that the AAT committed a jurisdictional error, even though the first criterion provided an independent ground to reject the application.[3] The majority of the Full Court of the Federal Court overturned this conclusion on appeal.[4]

The High Court agreed with the conclusion of the Full Court; however it did so for slightly different reasons. The plurality of Kiefel CJ, Gageler and Keane JJ focused on the concept of jurisdictional error and made two salient points. The first was that the concept of jurisdictional error, which is fundamental to judicial review in Australia, was not just concerned with the existence of an error by a decision maker. It is also concerned with the gravity of any error.[5] The second was that to determine whether a particular error was one that took the decision maker outside of the jurisdiction conferred by statute, it was necessary to consider the proper construction of the statute.[6] It followed from this that a statute conferring power on a decision-maker was ordinarily to be construed as 'incorporating a threshold of materiality' before departure from it would lead to invalidity.[7] In other words, an error committed by a decision-maker would usually not be jurisdictional if it could not have made a

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1 (2018) 92 ALJR 780.

2 Ibid 784 [4]–[5] (Kiefel CJ, Gageler and Keane JJ).

3 Ibid 785 [9]–[11] (Kiefel CJ, Gageler and Keane JJ). See *Hossain v Minister for Immigration and Border Protection* [2016] FCCA 1729.

4 *Hossain* (2018) 92 ALJR 780, 785 [12]–[15] (Kiefel CJ, Gageler and Keane JJ). See *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31.

5 *Hossain* (2018) 92 ALJR 780, 787 [25].

6 Ibid 787 [27].

7 Ibid 788 [29].

difference to the decision in question.[8] This conclusion is of course subject to the proper construction of the statute.

Edelman J similarly reasoned that the legislature was unlikely to intend that an immaterial error would render a decision invalid. His Honour grounded this analysis through considering a line of cases that attempted to explain the distinction between errors that invalidate a decision, and those that do not.[9] To this extent, Edelman J's reasoning is almost identical to the joint judgment. However, there are two additional points canvassed by his Honour that are worth mentioning. First, his Honour accepted that an error will usually be material if there was a possibility that it could have changed the outcome. However, his Honour noted that there were 'unusual circumstances' where an error will be material irrespective of whether this test is satisfied, such as where there is an extreme denial of procedural fairness.[10] Second, his Honour drew a distinction between the concept of materiality in jurisdictional error, and the residual discretion of the court to deny relief. Whilst it is accepted that certiorari can be denied if its grant would be futile, Edelman J explained that this analysis generally occurs on a prospective basis, whereas materiality analysis is backward looking.[11] His Honour then applied this concept of materiality similarly to the joint judgment to find that there was no jurisdictional error.[12] Nettle J substantially agreed with the reasons of Edelman J.[13] His Honour's separate judgment primarily emphasised that an error may be jurisdictional even if it did not deprive the applicant of the chance of a positive outcome.[14]

II COMMENT

In practice, the decision in *Hossain* may not have significant implications. This is because the concept of materiality is not novel in judicial review, and therefore incorporating it into the analysis of whether an error of law is a jurisdictional error may simply be restating and repurposing a requirement that already existed. For example, the court has the discretion to refuse to grant relief even if a jurisdictional error has been established. One basis on which this discretion has been exercised is that it would be futile to provide the relief sought because, for example, if the matter was reconsidered according to law the same decision would inevitably follow.[15] Even before the question of a remedy arises, there are suggestions that certain grounds of review have an inherent materiality threshold. For example, the High Court has suggested that certain claims (but arguably not every claim) that procedural fairness has been denied require the applicant to establish that a different outcome may have been reached if there was no such breach.[16] In other words, a claim for procedural fairness will fail in some cases if the breach was immaterial such that it could not

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8 Ibid 788 [30].

9 Ibid 794–6 [67]–[71] citing *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

10 *Hossain* (2018) 92 ALJR 780, 795–6 [72].

11 Ibid 796 [74].

12 Ibid 797 [79].

13 Ibid 789 [39].

14 Ibid 789 [40].

15 As discussed by Edelman J at ibid 796 [73]–[74].

16 See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 342 [58]–[59] (Gageler and Gordon JJ).

have made a difference to the final outcome. There have been similar suggestions that this also applies in a claim that a relevant consideration was improperly ignored.[17]

Nonetheless, in my view the decision is of interest for two reasons.

First, it sheds greater light on the difference between a jurisdictional and non-jurisdictional error. It is clear that determining whether a decision maker has lapsed into jurisdictional error is not a simple process.[18] That is inevitable because the term itself is a label that, on its own, gives no real guidance as to when it should be applied.[19] The decision in *Hossain* provides one clear metric to determine whether an error of law amounts to a jurisdictional error. Of course, this is not an exhaustive test, and it is well accepted that the concept is not susceptible of a single definition or legal test.[20]

However, this concept of materiality can be applied to explain some earlier cases where the courts have concluded that an error of law was non-jurisdictional. For example in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,[21] the applicant argued that a failure to furnish reasons in accordance with the statute could invalidate the decision itself.[22] This argument was rejected because, inter alia, there was a time lag between the decision being made and the requirement to give reasons.[23] As explained by McHugh J, '[i]t is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision'.[24] The focus on the materiality and gravity of an error in *Hossain* can arguably explain why this is such a difficult proposition to accept. In other words, the failure to notify the applicant of reasons after a decision has been made could have no bearing on the decision itself, and hence it should be seen as entirely divorced from the substantive question put before the decision-maker.[25]

Another example is the line of cases that have held that even where a decision maker fails to consider a mandatory consideration, their decision may not be impeachable if the matter was so slight that it could not have made a difference at all.[26] Whilst later cases have made clear that materiality is an essential element to establish a jurisdictional error as a result of failing to consider a mandatory factor,[27] the decision in *Hossain* demonstrates that this reasoning can be extended to other grounds of

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17 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

18 See Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 123 (Kirby J).

19 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2015) 20 [1.110].

20 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 573.

21 (2003) 216 CLR 212 ('*Palme*').

22 Ibid 221 [31] (Gleeson CJ, Gummow and Heydon JJ).

23 Ibid 225 [44]–[45] (Gleeson CJ, Gummow and Heydon JJ), 227 [55] (McHugh J).

24 Ibid 225 [55].

25 The situation would be entirely different if reasons were not provided to the applicant because the decision-maker did not, in fact, have any reasons for making that decision. However, that inference was not open in *Palme*: ibid 224 [39] (McHugh J).

26 See, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

27 See, eg, *SZCOQ v Minister for Immigration and Multicultural Affairs* [2007] FCAFC 9, [20] (Buchanan J).

review.[28] Future cases may have to grapple with whether the materiality requirement attaches only to show that the consequence of an error of law is a jurisdictional one, or whether it is also a necessary precondition to show that there has been an error of law in some cases. This question is probably most relevant when considering requirements imposed by the common law, such as procedural fairness, where there may be greater uncertainty as to what is required in a given case. This distinction may be important when considering forms of review where a mere error of law will suffice.

Second, it forms the latest link in a long line of authorities that have held that to determine whether an error of law goes to the jurisdiction of a decision-maker, the question is ultimately one of statutory interpretation. However, the majority judgment recognised the difficulty of this process when their Honours wrote that:

> The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. *Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied.*[29]

In my view, this passage captures the difficulties that exist in determining whether a jurisdictional error has occurred. It is one thing to say that the limit of a decision-maker's jurisdiction is to be derived from the statute that confers that authority on them; it is another thing to actually engage in that analysis. As the majority recognises, this cannot be done by logic alone. One limit of the judgment in *Hossain* is that it is not immediately clear when and why a threshold of materiality will be implied, and if so, what that 'threshold of materiality' will be.[30] This is hardly surprising in light of the High Court's tendency to decide cases as narrowly as possible. Strictly speaking, all the Court was required to do was decide whether the threshold of materiality was implied in this case. Whilst the separate reasons of Edelman J and Nettle J gave examples where a jurisdictional error may be committed even though the party was not deprived of the possibility of a separate outcome, the examples given by their Honour are subtly different. Edelman J referred to a situation of an extreme denial of procedural fairness,[31] and Nettle J considered a hypothetical case where a decision-maker was required to consider a single criterion but addressed themselves in error.[32] Their Honours considered these to be examples where the materiality threshold would be satisfied even without proof that a different outcome may have been reached; they did not view these as examples where a threshold of materiality was displaced. In other words, their Honours not only accepted that materiality may be implied as a precondition for invalidity in a statute, but also seem to suggest that the content of that term may vary. It is clear that the meaning of that

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28 See also *Risi Pty Ltd v Pin Oak Holdings Pty Ltd* [2017] VSCA 317, [56] n 35 (Tate, Santamaria and Hansen JJA) where their Honours explained that the concept of a minor error not vitiating a decision had been applied to a number of distinct errors of law.

29 *Hossain* (2018) 92 ALJR 780, 787–8 [28] (Kiefel CJ, Gageler and Keane JJ) (emphasis added) (citations omitted).

30 Ibid 788 [30] (Kiefel CJ, Gageler and Keane JJ).

31 Ibid 795–6 [72].

32 Ibid 789 [40].

term not only depends on the type of breach in question, but also the statutory language itself. Whilst the decision in *Hossain* is certainly a sensible one, it remains to be seen how readily future cases will displace or modify the implication of materiality.