Common Grounds of Jurisdictional Error in Applications for Judicial Review of Decisions Made Under Part 7 of the *Migration Act 1958* (Cth)

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A. INTRODUCTION

1. Applications for judicial review of decisions made by the Administrative Appeals Tribunal under Pt 7 of the *Migration Act 1958* (Cth) (**the Act**) provide an abundant source of administrative law jurisprudence in Australia. Combined with the compulsory use of pseudonyms in all federal judicial proceedings arising out of applications for protection visas,[1] this abundance of caselaw creates an ocean of jurisprudential alphabet soup, the vastness of which makes it seem virtually unnavigable, even for experienced judges and specialist migration lawyers. The difficulty is compounded by the general unwillingness of both the High Court and the Federal Court to speak in terms of 'grounds', 'categories' or 'taxonomies' of judicial review and to refer only to the broad concept of 'jurisdictional error' – the (sometimes ill-defined) touchstone that circumscribes the constitutionally entrenched jurisdiction of the High Court to engage in judicial review of Commonwealth administrative action (as well as the statutory jurisdiction of the Federal Court and the Federal Circuit Court to engage in judicial review of most decisions made under the Act). To lawyers who were taught at university that administrative law is essentially a series of well-defined categories of judicial review – being, for the most part, the categories of error referred to by the High Court in *Craig v South Australia*[2] – this approach can seem incomprehensible, making a difficult area of law even more impenetrable.

2. However, in recent years, the High Court has enunciated a conceptual approach to jurisdictional error that emphasises that the essential question is whether the decision maker has failed to comply with some express or implied precondition to the exercise of a statutory power, and has done so in circumstances where compliance with that precondition could realistically have led to a different result. Part 7 of the Act – like

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1 Act, s 91X.
2 (1995) 184 CLR 163 at 179.

any other set of statutory provisions – necessarily imposes a finite number of discrete preconditions to the exercise of the decision-making power conferred by it. By analysing the statutory text and the leading authorities, it is possible to identify what the most important of these preconditions are and thus to identify (albeit non-exhaustively) a series of commonly invoked categories of judicial review in cases arising from decisions made under Pt 7. This paper attempts to catalogue some of the most common categories of jurisdictional error in cases arising under Pt 7 and deals with:

2.1 Grounds of review that arise from the Tribunal's implied obligation to engage with the substance of an applicant's case in a legally rational manner.

2.2 Grounds of review that arise from the Tribunal's obligation to assess the applicant's case by reference to a correct interpretation of the criteria for granting a protection visa.

2.3 Grounds of review that arise from the discretionary procedural powers expressly conferred on the Tribunal (specifically by ss 424, 427 and 438 of the Act).

2.4 Grounds of review that arise from the procedural obligations expressly imposed on the Tribunal (specifically by ss 424AA, 424A and 425 of the Act).

3. The paper concludes with a discussion of the burgeoning jurisprudence on the subject of 'materiality' and its relevance to judicial review of decisions made under Pt 7 of the Act. Finally, it should be noted that this paper deals with the provisions of the Act *in its current form*. While the basic concepts discussed in this paper are applicable to judicial review of decisions made under previous iterations of the Act, some important changes have been made to the Act in recent years. In particular, readers new to migration law should be aware that the statutory definition of 'refugee' discussed at paragraph 7 below was inserted into the Act by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**the Amending Act**), the relevant provisions of which commenced on 18 April 2015.

Applications for protection visas made before that date are governed by the provisions of the Act as they stood before the commencement of the Amending Act.[3]

B. THE SUBJECT MATTER OF PART 7 OF THE ACT

B-1 OVERVIEW

4. Broadly speaking, Pt 7 provides a mechanism for seeking review of any decision by the Minister administering the Act[4] refusing to grant the applicant a 'protection visa'.[5] There are some significant exceptions to this.[6] However, as the subject of this paper is judicial review of decisions made under Pt 7, it is not necessary to deal with those exceptions here. For the purposes of Pt 7, the term 'protection visa' includes a 'permanent protection visa', a 'temporary protection visa' and a 'safe have enterprise visa'.[7] Before turning to the specific provisions of Pt 7, it is necessary to say something further about the types of decisions to which it applies and about the statutory criteria for protection visas.

B-2 PRIMARY DECISION OF APPLICATION BY MINISTER

5. Section 47(1) of the Act provides that the Minister 'is to consider a valid application for a visa.' Section 65(1) confers upon the Minister power to grant or refuse an application for a visa. For present purposes, s 65(1) provides that if, after considering a valid application for a visa, the Minister is satisfied that the criteria for the grant of the visa have been satisfied,[8] the Minister 'is to grant the visa'.[9] If not, the Minister 'is to refuse to grant the visa.'[10] It follows that s 65 of the Act 'imposes upon the minister an obligation to grant or refuse to grant a visa, rather than a power to be exercised as

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3 In these cases, the word 'refugee' takes its meaning directly from Art 1A of the 1951 *Convention Relating to the Status of Refugees* (as amended by the 1967 *Protocol Relating to the Status of Refugees*) (see footnote 17 below), which must be interpreted by reference to the former s 91R of the Act.

4 In practice, decisions with respect to the grant or refusal of protection visas are made by delegates of the Minister. However, as a matter of law, such decisions are deemed to be made by the Minister: see *Acts Interpretation Act 1901* (Cth), s 34AB(c).

5 See the definition of 'Part 7-reviewable decision' in s 411 of the Act.

6 See ss 411(1)(c), 411(1)(d), 411(2) and 411(3).

7 Act, s 35A.

8 Act, s65(1)(a)(ii).

9 Act, s 65(1)(a).

10 Act, s 65(1)(b).

a discretion.'[11] If, after having made relevant findings of fact, the Minister concludes that an applicant satisfies the criteria for the grant of a visa, the Minister *must* grant the visa. Otherwise, the Minister *must* refuse to grant it.

B-3 KEY STATUTORY CRITERIA: REFUGEE STATUS AND COMPLEMENTARY PROTECTION STATUS

6. In its present form, the Act itself provides for various classes of protection visa.[12] Regulations made under the Act may also prescribe additional classes of protection visa.[13] The key criteria[14] for the grant of a protection visa are the 'refugee criterion' and the 'complementary protection criterion'. One of these[15] must generally[16] be satisfied in order for an applicant to be entitled to a protection visa. The two criteria are set out in s 36(2) of the Act, which provides that:

> A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
>
> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being

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11 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224 at 232 [37] (Gummow and Hayne JJ).

12 Act, ss 35A(2), (3) and (3A).

13 Act, s 35A

14 These are not the only criteria: s 36(1A)(a). Thus to meet the criteria for the grant of a protection visa, an applicant must also be someone who 'is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security' (s 36(1B)) and who 'is not a person whom the Minister considers, on reasonable grounds (a) is a danger to Australia's security; or (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community' (s 36(1C)).

15 Act, s 36(1A)(b).

16 Sections 36(2)(b) and (c) go on to provide that additional criteria for the grant of a protection visa are that the applicant is:

> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa of the same class as that applied for by the applicant; or
>
> (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (aa); and
>
> (ii) holds a protection visa of the same class as that applied for by the applicant.

> removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
>
> …

7. As can be seen from the terms of s 36(2), two concepts are of central important to its operation. They are the concept of 'refugee' status and the concept of a 'real risk [of] significant harm'. The former concept derives from the 1951 *Convention Relating to the Status of Refugees* (as amended by the 1967 *Protocol Relating to the Status of Refugees*) (**the Convention**),[17] aspects of which are now codified in the Act. Thus s 5H(1)(a) of the Act provides that:

> For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a ***refugee*** if the person:
>
> (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
>
> (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

8. Section 5J(1) goes on to provide that:

> For the purposes of the application of this Act and the regulations to a particular person, the person has a ***well-founded fear of persecution*** if:
>
> (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
>
> (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
>
> (c) the real chance of persecution relates to all areas of a receiving country.

9. To constitute persecution, the act or course of conduct that the applicant fears must involve 'serious harm'.[18] This is defined (non-exhaustively) to include such matters as

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17 Art 1A of the Convention provides that 'the term "refugee" shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

18 Act, s 5J(4)(b).

'a threat to the person's life or liberty'[19] and 'significant economic hardship that threatens the person's capacity to subsist'.[20]

10. The elements of complementary protection status derive from ss 36(2)(aa), 36(2A) and 36(2B) of the Act. In accordance with s 36(2)(aa), the expression 'significant harm' is central to the operation of the complementary protection criterion. Section 36(2A) provides that a person will suffer 'significant harm' if he or she will suffer one of five identified forms of harm, including arbitrary deprivation of life, torture, 'cruel or inhuman treatment or punishment' (**CITP**) and 'degrading treatment or punishment' (**DTP**). CITP, DTP and torture are in turn defined in s 5 of the Act:

> ***cruel or inhuman treatment or punishment*** means an act or omission by which:
>
> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
>
> but does not include an act or omission:
>
> (c) that is not inconsistent with Article 7 of the Covenant;[21] or
>
> (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.
>
> …
>
> ***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:
>
> (a) that is not inconsistent with Article 7 of the Covenant; or
>
> (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.
>
> …

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19 Act, s 5J(5)(a).
20 Act, s 5J(5)(d).
21 The 'Covenant' is the *International Covenant on Civil and Political Rights*: Act, s 5.

> ***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:
>
> (a) for the purpose of obtaining from the person or from a third person information or a confession; or
>
> (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
>
> (c) for the purpose of intimidating or coercing the person or a third person; or
>
> (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
>
> (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
>
> but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

11. Finally, s 36(2B)(c) sets out a series of exceptions that limit the circumstances in which an applicant will meet the complementary protection criterion:

> However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
>
> (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
>
> (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
>
> (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

12. Aspects of these statutory provisions are discussed below.

B-4 ELEMENTS OF REFUGEE STATUS AND COMPLEMENTARY PROTECTION STATUS

i) RELEVANCE OF MOTIVATION OR INTENTION

13. It follows from the text of the Act that there are significant differences between the refugee criterion and the complementary protection criterion. For the purposes of the Act, refugee status is dependent on the existence of a 'Convention nexus'.[22] That is, refugee status is something that attaches to a person who has a well-founded fear of 'conduct undertaken for reasons specified in the Convention'[23] (as codified in the Act) and which depends on the existence of 'an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm.'[24] It follows that for the purposes of the Act, 'if the peril a claimant faces – however wrongful it may be – cannot somehow be linked to her civil and political status and resultant marginalization, the claim to refugee status must fail.'[25]

14. Neither attitude nor motivation is an *element* of the complementary protection criterion. It is therefore correct to say that, as a general proposition, 'no Convention "nexus" is required to attract the operation of the complementary protection criterion.'[26] However, the intentions and motivations of human actors may still be relevant to the question whether an applicant is at risk of significant harm as defined in the Act. Thus where relevant form of significant harm at issue is torture, the 'purpose' of the putative torturer is determinative of whether the statutory definition is met. In the case of CITP and DTP, the statutory definition is only met if a human actor has an 'actual, subjective' intention to cause pain, suffering or extreme

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22 The expression 'Convention nexus' is ubiquitous in the jurisprudence concerning refugee status: see, for example, *SZYBR v Minister for Immigration and Citizenship* (2007) 96 ALD 1 at 9-11 [23]-[29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *SZUEP v Minister for Immigration and Border Protection* (2017) 160 ALD 35 at 39 [22]-[24]; *AON15 v Minister for Immigration and Border Protection* [2019] FCAFC 48 at [3] (Besanko J); *DKX17 v Federal Circuit Court of Australia* [2019] FCAFC 10 at [89].

23 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302 [25] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

24 *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 (Burchett J, O'Loughlin and R D Nicholson JJ agreeing), cited with approval in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 284 (Gummow J).

25 James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed, 2014) at 362.

26 *AON15 v Minister for Immigration and Border Protection* [2019] FCAFC 48 at [3] (Besanko J).

humiliation.[27] The 'intention' to inflict pain or extreme humiliation is conceptually distinct from the 'purpose' involved in performing torture. In this regard, 'the relevant intention in respect of the harm complained of must be an actual subjective intention by the actor *to bring about the victim's pain and suffering* by the actor's conduct.'[28] The actor need not intend to cause pain, suffering or degradation for any particular reason.

15. Motivation may also be relevant in determining whether a risk of significant harm in the form of 'arbitrary deprivation of life' falls within the scope of the exception created by s 36(2B)(c) of the Act. In this regard, the question whether any person would have a specific motivation for depriving the applicant of their life may affect whether that risk is properly characterised as one faced by the population of the applicant's receiving country generally within the meaning of s 36(2B)(c).[29] Whether the exception in s 36(2B)(c) applies to an applicant's case falls to be determined *after* the decision maker has decided that there is a real risk that the applicant will suffer significant harm if he or she is removed to a receiving country.[30] It follows that where a claim is made on the basis of the complementary protection criterion and it appears to the decision maker that s 36(2B)(c) may be relevant, the determination of the claim takes place in two stages: at the first stage, the decision maker must decide whether there is a real risk that the applicant will suffer significant harm if he or she is required to return to his or her receiving country. If such a risk exists (or if the decision maker assumes in the applicant's favour that such a risk exists), the decision maker must decide whether it is nevertheless *affirmatively satisfied* that the risk is one faced by the population of the applicant's receiving country generally (as opposed to the population

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27 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 369 [15], 372 [26] (Kiefel CJ, Nettle and Gordon JJ). See also *AVQ15 v Minister for Immigration and Border Protection* (2018) 361 ALR 227 at 246 [72].

28 *ACL15 v Minister for Immigration and Border Protection* [2016] FCA 1318 at [66] (emphasis added).

29 For example, the risk of random terrorist attacks lacking any specific motivation or target may be one that affects the population of a country generally: *SZTES v Minister for Immigration and Border Protection* [2014] FCCA 1765 at [25]; *AKG16 v Minister for Immigration and Border Protection* [2016] FCCA 1656 at [15]; *BZAHE v Minister for Immigration and Border Protection* [2016] FCCA 518 at [54]; *SZSPT v Minister for Immigration and Border Protection* [2014] FCCA 1388 at [16].

30 Of course, a decision maker may be found to have engaged with the substance of s 36(2B)(c) even if it has not referred to the provision in explicit terms. However, this will only be the case where the decision maker has in fact made findings that engage with the substance of s 36(2B)(c): see *SZSXE v Minister for Immigration and Border Protection* (2014) 145 ALD 79 at 89 [61].

of some specific part of that country) *and* that it is not a risk faced by the applicant personally.[31]

ii) SUBJECTIVE FEAR AND OBJECTIVE RISK

16. In determining whether a person satisfies the refugee criterion, the determinative question is usually whether 'there is a real chance that the [applicant] will be persecuted if he returns to his country of nationality.'[32] However, in addition to satisfying this *objective* 'real chance' test, an applicant who claims to be entitled to a protection visa on the basis of refugee status must also demonstrate that he or she holds a *subjective* fear of persecution.[33] Whether the subjective fear must be held for a Convention reason – or, alternatively, whether the existence of a Convention nexus only becomes relevant when the Tribunal comes to apply the *objective* 'real chance' test – is perhaps unsettled. However, the preferable view seems to be that the applicant need only express a subjective fear of conduct that amounts to serious harm, not a subjective fear that that harm will be inflicted for a particular reason. Thus in *SDAQ v Minister for Immigration and Multicultural Affairs*, Cooper J stated that refugee status requires 'the existence of a subjective fear of persecution, and it must be shown that this fear is held by the relevant person in fact, and that this fear is a fear of persecution for a Convention reason'.[34] However, Finkelstein J stated that:

> It is only when consideration is given to the latter [objective] condition that it becomes necessary to determine whether the persecution is for a Convention reason. What must be established is an objective connection between the feared persecution and a Convention reason ... There is nothing in the definition, when read in isolation, or read in the context of the Convention as a whole, which requires the refugee to accurately pinpoint which Convention reason governs his case.[35]

17. On this point, Carr J agreed with Finkelstein J, stating that '[t]here may be cases where a person does not know why the authorities have persecuted him, or are likely to do

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31 The two elements of s 36(2B)(c) are cumulative and must both be found to exist if the provision is to apply. The fact that a risk of harm is not faced by an applicant personally does not mean that it is deemed to be faced by the population of the receiving country generally.

32 *Chan v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 at 389 (Mason CJ). See also (1990) 169 CLR 379 at 398 (Dawson J), 407 (Toohey J), 429 (McHugh J).

33 *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [29]; *SZQNO v Minister for Immigration and Citizenship* [2012] FCA 326 at [48].

34 (2003) 129 FCR 137 at 143 [12].

35 (2003) 129 FCR 137 at 151 [48].

so. In those circumstances, all that person can do (and all he or she needs to do) is to place the facts which give rise to his or her fear before the decision-maker.'[36]

18. An applicant's subjective characteristics may also be relevant in determining whether a form of harm would constitute 'serious harm' for the purposes of the refugee criterion. In this regard, the question whether a form of harm identified by an applicant in fact constitutes 'serious harm' must be determined by reference to the principle that 'international human rights law not only allows, but actually requires, careful scrutiny of particularised circumstances';[37] that is, '[b]oth the convention and [the former] s 91R of the Act embody an approach which is concerned with the effects of actions upon persons in terms of harm *to them*.'[38] Thus in *SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs*, Tamberlin J observed that:

> It is obvious that the impact and circumstances surrounding the application of a national policy may impact differently on different persons so that in one instance the impact may constitute persecution but in other cases the impact may not be so substantial as to amount to Convention persecution.[39]

19. It follows that 'the evaluation of whether what a person claims to fear is "serious harm" will be a question of fact and degree, often complicated and quite specific to the individual concerned'.[40] This is not to say that an applicant's 'thin skin' can operate to turn minor or trivial harm into serious harm. It simply means that objectively assessable attributes that are personal to an applicant, such as their 'age and frailty',[41] may cause a matter that would otherwise be minor in nature to constitute serious harm. To take another example, the question whether 'sexual harassment and unwanted physical contact, as well as threats of gender-based violence' constitute serious harm may depend on the applicant's 'personal circumstances, including her vulnerabilities, in connection with gender-based violence, sexual harassment and unwanted physical contact'.[42]

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36 (2003) 129 FCR 137 at 149 [33].
37 James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed, 2014) at 198-9.
38 *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 635 (French CJ, Kiefel, Bell and Keane JJ) (emphasis added).
39 [2005] FCA 143 at [21].
40 *SZTEQ v Minister for Immigration and Border Protection* (2015) 145 ALD 577 at 612 [153].
41 *SZBBP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 5 at [35].
42 *AGA16 v Minister for Immigration and Border Protection* [2018] FCA 628 [44]-[45].

20. Insofar as the complementary protection criterion is concerned, the test is essentially objective – the question is simply whether the Minister (or the Tribunal) has 'substantial grounds' for believing that the applicant will be at a real risk of significant harm if they are returned to their receiving country. An applicant thus need not have or express any subjective fear of significant harm in order to satisfy the complementary protection criterion. However, whether the applicant has expressed such a fear may determine whether they are held to have in fact made a claim based on the complementary protection criterion.[43] Medical and other conditions affecting an individual applicant may also be relevant to whether treating the applicant in a particular way would be objectively cruel, degrading or humiliating (and/or to whether the relevant intention or purpose would exist).

iii) OFFICIAL QUALITY AND PRIVATE ACTION

21. In the context of the refugee criterion, the word 'persecution' connotes conduct having an 'official quality'. In most cases, the persecution that an applicant claims to fear will be something inflicted by government actors, such as police or members of the armed forces. However, harm inflicted by 'non-state actors' may also constitute persecution. For example, gendered violence inflicted in an atmosphere of 'state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law' may constitute persecution.[44] This is because 'the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality.'[45] It follows that determining whether a well-founded fear of persecution exists in an applicant's case may require the relevant decision maker to consider 'not only the policy position of the [relevant] government and the police hierarchy, but also whether, in practice, the police are able to provide adequate protection against actions such as those about which' the applicant has expressed a fear.[46]

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43 *AJL16 v Minister for Immigration and Border Protection* [2019] FCA 255 at [40], [61].

44 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 12 [26] (Gleeson CJ). See also (2002) 210 CLR 1 at 29 85] (McHugh and Gummow JJ), 39 [117] (Kirby J).

45 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 (Brennan CJ); *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [19] (Gleeson CJ, Hayne and Heydon JJ).

46 *SZAYT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 857 at [64].

22. Insofar as the complementary protection criterion is concerned, '[t]here is no reference to an official capacity requirement in any of the paragraphs [of ss 5 and 36(2A) of the Act], which set out, exhaustively, what constitutes significant harm.'[47] It follows that 'if [an] act or omission is sufficient to amount to one of the defined harms, that is sufficient under the legislative scheme for the harm to amount to "significant harm" including "torture", even if carried out by a non-State actor.'[48] The same position applies with respect to DTP and CITP. In accordance with the principles set out at paragraph 14 above, where it is alleged that significant harm will be inflicted by a non-state actor, it is the intention of the non-state actor that is relevant, not that of any hypothetical government official.[49] However, the question whether the infliction of significant harm would have an official quality may still arise in determining whether one or more of the exceptions enumerated in s 36(2B) applies to the applicant's case. For example, if the risk of significant harm derives from the conduct of a non-state actor, it may be easier for the Minister (or the Tribunal on review) to be satisfied that the applicant could avoid that harm by relocating within their receiving country[50] or by appealing to national or local authorities for protection.[51]

iv) FORWARD LOOKING TEST

23. Finally, both the refugee criterion and the complementary protection criterion look to what *will* (or is likely to) happen to the applicant if they are required to return to their country of nationality or receiving country. The forward-looking nature of the tests – and the relevance of findings with respect to *past* events to the determination of protection visa claims – is discussed in detail at Part F-2 below.

C. PROCEDURE FOR REVIEW UNDER PART 7 OF THE ACT

24. Where a valid application is made for review of a decision under Pt 7, the Tribunal *must* (subject to certain immaterial exceptions) review the decision.[52] On review, the

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47 *BPF15 v Minister for Immigration and Border Protection* [2018] FCA 964 at [79].
48 *BPF15 v Minister for Immigration and Border Protection* [2018] FCA 964 at [88].
49 *BPF15 v Minister for Immigration and Border Protection* [2018] FCA 964 at [105].
50 Cf Act, s 36(2B)(a).
51 Cf Act, s 36(2B)(c).
52 Act, s 414.

Tribunal has all the powers that the Minister had in making the primary decision[53] and may affirm the Minister's decision, vary it, or set it aside and substitute a new decision.[54]

25. In conducting a review under Pt 7, the Tribunal 'is not bound by technicalities, legal forms or rules of evidence' and 'must act according to substantial justice and the merits of the case'.[55] These broad exhortations do not themselves confer any powers or impose any obligations on the Tribunal.[56] Rather, the Tribunal has the specific powers and obligations conferred and imposed upon it by the other, more specific, provisions of Pt 7. Thus ss 424(1) and (2) confer upon the Tribunal the discretionary power to obtain information relevant to its review of a decision:

> (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
>
> (2) Without limiting subsection (1), the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information.

26. Section 427(1) confers further discretionary powers on the Tribunal:

> For the purpose of the review of a decision, the Tribunal may:
>
> (a) take evidence on oath or affirmation; or
>
> (b) adjourn the review from time to time; or
>
> (c) subject to sections 438 and 440, give information to the applicant and to the Secretary; or
>
> (d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.

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53 Act, s 415(1).
54 Act, s 415(2).
55 Act, s 420.
56 See, for example, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49] (Gleeson CJ and McHugh J), 635 [77] (Gaudron and Kirby JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 343 [12] (French CJ), 372 [96], 373 [98] (Gageler J).

27. In addition to conferring discretionary powers on the Tribunal, Pt 7 imposes certain obligations on it. The most important of these are set out in ss 424A, 424AA and 425. Section 425 provides that, subject to certain exceptions,[57] the Tribunal 'must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.'[58] In giving notice to the applicant that they are invited to appear at a hearing, the Tribunal must notify the applicant of the effect of s 426(2),[59] which provides that the applicant 'may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.'

28. Section 424A(1) requires the Tribunal to put certain information to an applicant in writing:

> Subject to subsections (2A) and (3), the Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
>
> (c) invite the applicant to comment on or respond to it.

29. The requirements of s 424A(1) do not apply to certain types of information. Thus s 424A(3) provides that:

> This section does not apply to information:
>
> (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
>
> (b) that the applicant gave for the purpose of the application for review; or

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57 Act, s 425(2).
58 Act, s 425(1).
59 Act, s 426(1).

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non-disclosable information.[60]

30. Further, s 424A(1) does not apply if the Tribunal instead complies with the procedure set out in s 424AA(1),[61] which provides that:

> If an applicant is appearing before the Tribunal because of an invitation under section 425:
>
> (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) if the Tribunal does so—the Tribunal must:
>
> (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
>
> (ii) orally invite the applicant to comment on or respond to the information; and
>
> (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
>
> (iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

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60 The expression 'non-disclosable information' is defined in s 5:
non-disclosable information means information or matter:
(a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
(i) prejudice the security, defence or international relations of Australia; or
(ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or
(b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or
(c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;
and includes any document containing, or any record of, such information or matter.

61 See Act, s 424A

31. Section 438 further limits the circumstances in which the Tribunal is required to provide information to an applicant. Thus pursuant to s 438(2), the Secretary to the Minister's Department may give the Tribunal information subject to a notification that the Minister has certified that the information should not be disclosed[62] or that the information was given to the Minister's Department in confidence.[63] Where this occurs, the Tribunal *may* (but is not required to) have regard to the information[64] and *may* disclose it to the applicant.[65]

32. Finally, s 430(1) of the Act requires that the Tribunal give a written statement of its decision, which must set out the Tribunal's reasons for reaching the decision[66] and its findings on any material questions of fact,[67] and must refer to the material on which those findings were based.[68]

D. JURISDICTIONAL ERROR GENERALLY

33. To the extent consistent with the Commonwealth Constitution, the jurisdiction of courts to review most decisions made under the Act is excluded by s 474. However, the Federal Circuit Court has jurisdiction to grant a writ of *certiorari* quashing a decision made under Pt 7 of the Act if the decision is affected by jurisdictional error (together with a writ of *mandamus* remitting the matter to the Tribunal to be determined according to law). In this regard, s 476(1) of the Act provides that, subject to certain exceptions that are not presently material, 'the Federal Circuit Court has the same original jurisdiction in relation to migration decisions[69] as the High Court has

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62 Act, s 438(1).
63 Act, s 438(2).
64 Act, s 438(3)(a).
65 Act, s 438(3)(b).
66 Act, s 430(1)(b).
67 Act, s 430(1)(c).
68 Act, s 430(1)(d).
69 The term 'migration decision' is defined in s 5 of the Act to include a 'privative clause decision' or a 'purported privative clause decision.' The terms 'privative clause decision' and 'purported privative clause decision' are in turn defined in ss 474 and 5E. Thus s 474(2) provides, relevantly, that:

> In this section:
>
> ***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Section 5E(1) provides that:

under paragraph 75(v) of the Constitution.' The High Court's jurisdiction under s 75(v) of the Commonwealth Constitution extends to 'all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth', and includes the power to grant a writ of *certiorari* where this is necessary to facilitate the issue of a writ of *mandamus* requiring an administrative decision maker to 'remake' a decision according to law.[70] This 'jurisdiction to grant s 75(v) relief where there has been *jurisdictional error* by an officer of the Commonwealth cannot be removed.'[71] It follows that the Federal Circuit Court has jurisdiction to quash a decision made under Pt 7 of the Act if it is affected by jurisdictional error (and only if it is affected by jurisdictional error).

34. While textbooks and university subjects on the subject of administrative law are generally organised by reference to a taxonomy of 'grounds' or 'categories' of error, courts in Australia have shied away from speaking in such terms. Thus in *Kirk v Industrial Relations Commission (NSW)*, six members of the High Court rejected the idea that *Craig* (or any other a case) provides a 'rigid taxonomy'[72] of categories of jurisdictional error and stated that '[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.'[73] More recently, however, the High Court has provided a conceptual definition of jurisdictional error that stresses two elements: non-compliance with a precondition to (or condition on) the exercise of statutory power and 'materiality'. Thus in *Hossain v Minister for Immigration and Border Protection*, Kiefel CJ, Gageler and Keane JJ stated that, in a generic sense, jurisdictional error 'refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been

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> In this Act, ***purported privative clause decision*** means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:
>
> (a) a failure to exercise jurisdiction; or
>
> (b) an excess of jurisdiction;
>
> in the making of the decision.

70 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-1 [14], 117 [84] (Gaudron and Gummow JJ), 135 [142], 137-8 [151]-[152] (Kirby J), 139 [157] (Hayne J).

71 *Plaintiff S157/2002 v The* Commonwealth (2003) 311 CLR 476 at 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

72 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

73 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.'[74] Determining what preconditions the repository of a statutory power must comply with before exercising the power – and whether the decision maker has complied with them – is a matter of construing the relevant statutory scheme and applying it to the facts (as found by the court engaging in judicial review).[75] This is the first step in determining whether the decision maker has fallen into jurisdictional error. The second step involves determining whether the relevant failure was material, in the sense that the decision could realistically have been different if the decision maker had complied with the relevant precondition to the exercise of its power.[76] The issue of materiality is discussed in detail at Part G below.

E. READING THE TRIBUNAL'S REASONS FOR DECISION

35. Generally speaking, the most important document in an application for judicial review of a decision made under Pt 7 of the Act is the document setting out the Tribunal's reasons for decision, which are published pursuant to s 430 of the Act. Two important points should be made about the process of reading the Tribunal's reasons for decision.

36. First, s 430 does not oblige the Tribunal to *make* findings of fact. That is, it does not impose a 'requirement to make a finding on every question of fact which is regarded … on judicial review of the Tribunal's decision, as being material.'[77] But this does

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74 (2018) 359 ALR 1 at 7 [24].
75 (2018) 359 ALR 1 at 8 [27].
76 (2018) 359 ALR 1 at 9 [29]-[31]. See also *Minister for Immigration and Border Protection v SZMTA* (2019) 163 ALD 38 at 41 [4], 50 [45]-[46] (Bell, Gageler and Keane).
77 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331 [9] (Gleeson CJ). See also (2001) 206 CLR 323 at 349 [77] (McHugh, Gummow and Hayne JJ).

not mean the presence or absence of findings of fact in the Tribunal's reasons is unimportant. In this regard:

36.1 If the Tribunal 'does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material.'[78]

36.2 To state that s 430 does not impose an obligation to make findings of fact 'is not to say that the Federal Court [or the Federal Circuit Court] has no jurisdiction to deal with cases in which it is alleged that the Tribunal failed to make some relevant finding of fact … [A] complaint of that kind will often amount to a complaint of error of law or of failure to take account of relevant considerations.'[79]

37. It follows that the question whether the Tribunal has made findings of fact with respect to a particular matter may be highly relevant to the question whether it has fallen into jurisdictional error. This issue is dealt with further at Part F-1 below.

38. Second, reasons published by the Tribunal pursuant to s 430 of the Act are to be read in accordance with the ordinary principles applicable to the reasons of an administrative decision maker. It follows that '[t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error' and that '[t]he Court will not be concerned with looseness in the language of the tribunal nor with unhappy phrasing of the tribunal's thoughts.'[80]

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78 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330 [5] (Gleeson CJ). Chief Justice Gleeson's statement of the law has been cited with approval many times: see, for example, *Minister For Home Affairs v HSKJ* (2018) 363 ALR 325 at 337 [43]; *Singh v Minister for Immigration and Border Protection* [2018] FCAFC 184 at [14]; *AYX17 v Minister for Immigration and Border Protection* [2018] FCAFC 103 at [61] (Tracey and Mortimer JJ).

79 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 349-50 [78] (McHugh, Gummow and Hayne JJ).

80 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

F. COMMON GROUNDS OF JURISDICTIONAL ERROR

F-1 THE IMPLIED OBLIGATION TO ENGAGE WITH THE APPLICANT'S CASE

i) OVERVIEW

39. Perhaps the most commonly pursued ground of judicial review in proceedings arising under Pt 7 of the Act is that which is often referred to by the shorthand expression 'failing to consider a claim'. But it is perhaps better to conceive of this ground as involving a failure by the Tribunal to perform its 'irreducible jurisdictional task'[81] by engaging in a meaningful way with the case advanced by the applicant. That is, 'failing to consider a claim' is a particular form of constructive failure to exercise jurisdiction that arises where the Tribunal makes a decision in breach of an implied precondition that requires it engage with the applicant's case before purporting to exercise its power to affirm or set aside the Minister's decision. This type of error may arise not only where the Tribunal fails to consider a 'claim', but also where it fails to consider a submission or an item of evidence. In this regard, the Federal Court has emphasised that it is not possible to reduce the ways in which the Tribunal may fail to lawfully perform the review required by s 414 of the Act to a series of 'categories or formulas'[82] and that 'there are many ways, actual or constructive, of failing to consider the claim.'[83]

40. The obligation of the Tribunal to engage with the case put before it by the applicant arises from the nature of its jurisdictional task. At a fundamental level, conducting a true 'review' under Pt 7 of the Act requires the Tribunal to 'form, for itself and on the material before it, the requisite state of satisfaction under s 65 of the *Migration Act* in respect of the criterion (or criteria) for a visa in issue before it.'[84] In the case of an application for a protection visa, this requires the Tribunal to undertake 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 applicant] in the past.'[85] Where the

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81 *Hong v Minister for Immigration and Border Protection* [2019] FCAFC 55 at [70] (Bromwich and Wheelahan JJ).
82 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 127-8 [98].
83 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 128 [98].
84 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 442 [32].
85 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 443 [33].

application is based on the refugee criterion, this predictive exercise is engaged in for the purpose of determining whether 'there is a real chance that the refugee will be persecuted if he returns to his country of nationality.'[86] Insofar as the application is based on the complementary protection criterion, the predictive exercise is engaged in for the purpose of determining whether there is a real risk that the applicant will suffer significant harm if they are returned to their receiving country.

41. The proper performance by the Tribunal of this predictive exercise requires 'a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant.'[87] As a matter of law, 'there is no clear distinction in each case between claims and evidence.'[88] Thus whether material is characterised as a claim, an item of evidence or a submission, in determining whether a failure by the Tribunal to deal with that material amounts to a failure to perform the review required by ss 65 and 414, '[t]he fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error.'[89]

ii) FAILING TO CONSIDER OR MISINTERPRETING A CLAIM OR SUBMISSION

42. While there is no precise legal distinction between claims, evidence and submissions, it is still useful to draw a rough distinction between the 'claims' advanced by an applicant and the material relied on by the applicant to support those claims. In this regard, it is much easier for an applicant to establish that the Tribunal has fallen into jurisdictional error by failing to consider a 'claim' than it is to establish that it has fallen into jurisdictional error by failing to consider an item of evidence. Thus there is abundant authority for the proposition that '[t]o make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on' and that the Tribunal will fall into jurisdictional error if it fails to 'address and deal with how the claim was put to it', even if it only fails to do so 'in part'.[90]

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86 *Chan v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 at 389 (Mason CJ). See also (1990) 169 CLR 379 at 398(Dawson J), 407 (Toohey J), 429 (McHugh J).

87 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 444 [38].

88 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 130 [111]; *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545 at [24].

89 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 130 [111].

90 *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 at 153 [42] (Allsop J, Spender J agreeing). See also *NABE v Minister for Immigration and Multicultural and Indigenous Affairs*

43. The word 'claim' does not appear in the Act and is not a term of art. It is 'no more than a label emphasising the need for an applicant who seeks the favourable exercise of power to put forward the basis on which she or he seeks it to be exercised, and some probative material to support that basis'.[91] That is, a 'claim' is simply 'the case that the [applicant] advanced as to why his Visa Application should succeed'.[92] However, to say that *an applicant* must identify a basis for the exercise of the power is 'not to insist such identification occur through evidence directly from a visa applicant, although of course that is one obvious and regular way in which a claim may be made.'[93] Rather, a claim 'may be inferred from the existing evidence, or it may be part of the instructions provided to a representative and communicated in such a way.'[94] Thus '[i]n some circumstances, a representative may formulate a "claim" on behalf of a visa applicant, but whether or not that is the correct characterisation for what has occurred will be a matter of fact in each particular case.'[95]

44. It follows that whether a particular claim has been made by an applicant is a question of fact. That question 'cannot be assessed in a vacuum' and requires attention to the material presented by the applicant to the Minister and the Tribunal over time.[96] In determining whether a claim as been made, it must be remembered that the Tribunal's task on review is to conduct a proceeding that is 'not adversarial, but inquisitorial' in nature.[97] While this does not mean that the Tribunal is obliged to 'make the applicant's case for [them]',[98] the nature of the Tribunal's function nevertheless imposes upon it obligations that are different from those that apply to courts.[99] In particular, it follows from the inquisitorial nature of the Tribunal's task that an application for review under

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(No 2) (2004) 144 FCR 1 at 18 [57]; *AAY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89 at [18].

91 *AJL16 v Minister for Immigration and Border Protection* [2019] FCA 255 at [64] (emphasis in original).

92 *AAA18 v Minister for Immigration and Border Protection* [2019] FCA 1045 at [55].

93 *AJL16 v Minister for Immigration and Border Protection* [2019] FCA 255 at [61].

94 *AJL16 v Minister for Immigration and Border Protection* [2019] FCA 255 at [61].

95 *AJL16 v Minister for Immigration and Border Protection* [2019] FCA 255 at [61].

96 *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89 at [18(e)].

97 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 75 ALD 1 at 14 [57] (Gummow and Hayne JJ).

98 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170; *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151 at 172 [60]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 75 ALD 1 at 14-5 [58] (Gummow and Hayne JJ).

99 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224 at 245 [73] (Kirby J); *NBMB v Minister for Immigration and Citizenship* (2008) 100 ALD 118 at 120 [7].

s 414 of the Act is not be treated 'as an exercise in nineteenth century pleading'.[100] Rather, '[t]he question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.'[101] This means the Tribunal 'must consider the case that arises from the evidence before it, regardless of how that case is specifically put by the applicant' and that it 'is bound to consider a case on a basis not articulated by the applicant if it is raised by the evidentiary material that is before the Tribunal or by the Tribunal's findings based on that evidence.'[102] However, the relevant claim must be 'plain on the face of the material before' the Tribunal[103] – the Tribunal 'is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it.'[104]

45. The Tribunal may also constructively fail to exercise its jurisdiction if it fails to engage with a submission advanced by the applicant. In the context of the refugee criterion, a 'submission' is best described as 'a "*substantial, clearly articulated argument*" that, if accepted, might establish a well-founded fear of persecution for a Convention reason'.[105] That is, it is an argument as to why the applicant's 'claim' to be at risk of persecution should be accepted on the basis of the evidentiary material before the Tribunal. Thus in *SZSSC v Minister for Immigration and Border Protection*, Griffiths J stated that:

> [T]he duty to review obliges the tribunal to consider and deal with submissions of substance which are clearly articulated. As noted above, in assessing whether a submission is one of substance it may be relevant to take into account whether it relies upon an established fact, but that is not the only way in which that requirement may be met. Substantiality might also be established by the fact that, for example, a submission has been made in direct response to an important issue which the tribunal has raised which bears upon the state of the satisfaction which it is required to meet under s 65 of the Act.[106]

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100 *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 411 at 416 [17]; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 19 [60].

101 *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 411 at 416 [18]; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 19 [60].

102 *MZWDG v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 497 at [38].

103 *SZUTM v Minister for Immigration and Border Protection* (2016) 241 FCR 214 at 226 [37].

104 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 19 [60].

105 *DWR16 v Minister for Immigration and Border Protection* [2019] FCA 2021 at [82].

106 (2014) 142 ALD 150 at 174 [81(a)].

46. Because the Tribunal must deal with the claims that were in fact made by the applicant, and the submissions made in support of those claims, it may constitute jurisdictional error for the Tribunal to fail to 'properly apprehend' a claim or submission and thus to fail to deal with the claim or submission that was actually put by the applicant.[107]

47. Finally, while the fact that an applicant was represented before the Tribunal by a lawyer or migration agent may have some bearing on 'the way the Tribunal is expected to conduct the proceeding and in the way it would read and approach submissions',[108] its significance is 'non-determinative'[109] in deciding whether a particular claim or submission was in fact made by the applicant.

iii) FAILING TO CONSIDER OR MISINTERPRETING AN ITEM OF EVIDENCE

48. Failing to engage with an item of evidence may also amount to a failure to perform the review required by ss 65 and 414 of the Act. In determining whether this is the case, '[t]he fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error.'[110] That is, 'whether the Tribunal is obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document.'[111] This test directs attention to 'considerations including the circumstances of the case, the nature and cogency of the material, and the place of the material in the assessment of the claims.'[112] It follows from this that the fact that information is not mentioned in the Tribunal's reasons does necessarily not mean it has been overlooked or that the Tribunal has fallen into jurisdictional error; it may simply mean that the Tribunal 'considered the matter but found it not to be material.'[113]

49. While it is not possible to set out precisely when failing to deal with (or misinterpreting) evidentiary material will give rise to jurisdictional error, a useful

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107 *BDJ15 v Minister for Immigration and Border Protection* (2017) 158 ALD 39 at 47 [50].
108 *MZZUT v Minister for Immigration and Border Protection* [2015] FCA 141 at [18]; *MZZQY v Minister for Immigration and Border Protection* [2015] FCA 883 at [27].
109 *MZZUT v Minister for Immigration and Border Protection* [2015] FCA 141 at [18].
110 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 130 [111].
111 *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [77].
112 *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110 at [52].
113 *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at 75 [34].

summary of the principles that emerge from the cases arising under Pt 7 of the Act appears in the judgment of Victorian Court of Appeal in *Chang v Neill*:

> The authorities to which we have referred establish that a factual error may constitute jurisdictional error if it amounts to a constructive failure to perform the statutory function conferred on the decision-maker. As the Full Court of the Federal Court emphasised in *MZYTS*, this is not a failure to take into account a relevant consideration in the *Peko-Wallsend* sense. Factual errors that may constitute jurisdictional error include a failure by the decision-maker to have regard to relevant factual material and the taking into account of such material in a manner that misconstrues its nature or effect (the latter may be described as a constructive failure to have regard to the material). Whether such a factual error amounts to a constructive failure to perform the statutory function conferred on the decision-maker will depend on the importance of the material to the exercise of the function and the seriousness of the error. Jurisdictional error will be committed if the subject matter, scope and purpose of the statutory function indicate that taking into account the relevant material — properly construed — is an essential feature of a valid exercise of the function.[114]

50. One specific type of evidentiary material that will ordinarily have to be considered by the Tribunal if it is to perform its statutory task is 'country information' that deals with reports of persecution or significant harm in the country to which the applicant claims to fear returning. This is because the Tribunal's jurisdictional task requires it to have regard to 'the ongoing circumstances on the ground' in the relevant country,[115] which necessarily requires the Tribunal to assess any country information 'put forward by the visa applicant in support of the specific claim (and, of course, any contradictory information to which the tribunal chose to make reference), including the most recent material and [make] a decision about whether or not things had changed, were changing, were likely to change or had stayed much the same.'[116] Thus in *ARG15 v Minister for Immigration and Border Protection*, it was held that the Tribunal had fallen into error by failing to have regard to country information that 'was cogent and more current as at the date of the Tribunal's decision than the other country information which was relied upon by the Tribunal.'[117]

51. However, this does not mean that the Tribunal falls into error if it fails to consider all of the country information placed before it by an applicant. The Tribunal is not 'required to address specifically every instance of apparently pertinent but

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114 [2019] VSCA 151 at [92].
115 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 444 [38].
116 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 444 [38].
117 (2016) 250 FCR 109 at 128 [71].

contradictory country evidence.'[118] Thus, for example, the Tribunal does not fall into error if it fails to explicitly consider new country information that is consistent with other, older country information relied upon by it.[119] The extent to which the Tribunal is required to consider country information also depends on the nature of the claims made by the applicant and on the Tribunal's other findings. For example, the Tribunal will not fall into jurisdictional error if it fails to explicitly consider country information concerning persons who belong to a group that the applicant does not claim to belong to (or which the Tribunal has found the applicant does not belong to).[120]

52. Another type of evidence that may have to be specifically dealt with by the Tribunal if it is to discharge its jurisdictional task is 'corroborative evidence' placed before the Tribunal to provide independent support for an allegation of fact made by the applicant. Thus in *WAIJ v Minister for Immigration and Multicultural Affairs*, Lee and Moore JJ said that:

> [I]t will not be open to the tribunal to state that it is unnecessary for it to consider material corroborative of an applicant's claims merely because it considers it unlikely that the events described by an applicant occurred. In such a circumstance the tribunal would be bound to have regard to the corroborative material before attempting to reach a conclusion on the applicant's credibility. Failure to do so would provide a determination not carried out according to law and the decision would be affected by jurisdictional error.[121]

53. However, this is subject to the observations of McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*:

> It cannot be irrational for a decision-maker, enjoined by statute to apply inquisitorial processes (as here), to proceed on the footing that no corroboration can undo the consequences for a case put by a party of a conclusion that that case comprises lies by that party. If the critical passage in the reasons of the tribunal be read as indicated above, the tribunal is reasoning that, because the appellant cannot be believed, it cannot be satisfied with the alleged corroboration. The appellant's argument in this court then has to be that it was irrational for the tribunal to decide that the appellant had lied without, at that earlier stage, weighing the alleged corroborative evidence by the witness in question. That may be a preferable method of going about the task

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118 *SZSQL v Minister for Immigration and Border Protection (No 2)* [2015] FCA 1118 at [45].
119 *SZSWD v Minister for Immigration and Border Protection* [2015] FCA 1271 at [40].
120 *SZSQL v Minister for Immigration and Border Protection (No 2)* [2015] FCA 1118 at [46].
121 (2004) 80 ALD 568 at 575 [27].

> presented by s 430 of the Act. But it is not irrational to focus first upon the case as it was put by the appellant.[122]

54. Thus the mere fact that the Tribunal proceeds to determine that little weight should be given to corroborating evidence *after* it has determined that it considers the applicant not to be a credible witness does not of itself demonstrate legal error. But 'this does not mean that the finder of fact can ignore the allegedly corroborative material and fail to consider it in an intellectually active way.'[123]

iv) WHAT DOES IT MEAN TO 'CONSIDER' A CLAIM, SUBMISSION OR ITEM OF EVIDENCE?

55. The Federal Court has emphasised on many occasions – both in the context of Pt 7 and in other contexts – that considering an applicant's case requires the Tribunal to 'engage in an active intellectual process', such that 'statements of a formulaic kind or sweeping statements that all representations and documents have been considered' are unlikely to demonstrate the degree of engagement necessary for the Tribunal to avoid constructively failing to exercise its jurisdiction.[124] Indeed, there is substantial authority for the view that considering an applicant's claim according to law will usually require the Tribunal to make at least some findings with respect to the key questions of fact raised by the claim (and by the submissions and items of evidence relied on to support it). For example, in *Minister for Immigration and Ethnic Affairs v Guo*, six members of the High Court stated that:

> In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.[125]

56. In the Federal Court, it has been said to follow from this observation that '[i]f an applicant relies on past experience, then the [Tribunal] must evaluate what he or she

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122 (2003) 73 ALD 1 at 12 [49].

123 *BZD17 v Minister for Immigration and Border Protection* (2018) 161 ALD 441 at 453 [45]. See also *BXK15 v Minister for Immigration and Border Protection* [2018] FCAFC 76 at [7]-[18] (North and Charlesworth JJ.

124 See, for example, *Hands v Minister for Immigration and Border Protection* (2018) 364 ALR 423 at 432 (Allsop CJ).

125 (1997) 191 CLR 559 at 575. See also *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 231 [34] (Sackville J, North J agreeing),

says about that experience' and that 'such an evaluation is ... the logical starting point for the Tribunal's deliberation.'[126] Thus in *NAQG v Minister for Immigration and Multicultural and Indigenous Affairs*, the applicant placed before the Tribunal documents that purported to be copies of charges that had been falsely brought against him by the government of Bangladesh for political reasons. The Tribunal referred to evidence that forgeries of such documents could easily be obtained. However, it made no explicit finding as to whether the documents relied on by the applicant were authentic. In finding that the Tribunal had fallen into jurisdictional error, Allsop J stated that:

> If the Tribunal has not made a finding about the documents in question it has failed, in my view, to complete its jurisdictional task. It simply cannot conclude that there are no false charges only upon disbelieving the first appellant's evidence, without making a finding upon documents which on their face prove the fact that there are such charges.[127]

57. Similarly, in *AGA16 v Minister for Immigration and Border Protection*, Moshinsky J considered that the Tribunal's failure to make findings with respect to central questions of fact had caused it to fall into jurisdictional error:

> [T]he Tribunal failed to make findings about two critical issues in relation to this claim. These were:
>
> (a) whether, if the appellant was required to return to Egypt, there was a real chance that she would experience gender-based violence, sexual harassment or unwanted physical contact; and
>
> (b) if so, whether gender-based violence, sexual harassment or unwanted physical contact would amount to "serious harm" or "significant harm" to the appellant.
>
> In the absence of findings about these critical issues, it may be inferred that the Tribunal did not consider, or did not sufficiently consider, these issues. Given the materiality of these issues to the Tribunal's overall conclusion, the absence of such findings is a matter of substance, not the form of the Tribunal's decision record.[128]

58. More recently, a five-member Full Court stated (albeit not in the context of Pt 7 of the Act) that:

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126 *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 254 [134] (Kenny J).

127 [2004] FCA 1631 at [41] (emphasis added).

128 [2018] FCA 628 at [42]-[43].

> Giving meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm … requires more than the [decision maker] simply acknowledging or noting that the representations have been made. Depending on the nature and content of the representations, the [decision maker] *may be required to make specific findings of fact*, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law.[129]

59. Against this, Snaden J recently stated in *AAG16 v Minister for Immigration and Border Protection* that the Tribunal is under no obligation to 'make and record findings on intermediate factual or evidential issues.'[130] Similarly, in *CAR15 v Minister for Immigration and Border Protection*, a Full Court stated (albeit *obiter*) that addressing the applicant's claim that she could not relocate within Nigeria because she would be left homeless if she attempted to do so 'did not require that [the Tribunal] record, in explicit terms, a finding one way or the other about whether or not the appellant would be homeless if returned to Lagos; but it did require that the Tribunal undertake an "active intellectual process directed at that claim".'[131] As such, the precise extent of any obligation on the part of the Tribunal to make findings of fact in dealing with an applicant's claims and submissions may be said to be at least somewhat unclear.

60. Where the Tribunal makes findings with respect to past events that are alleged by the applicant to have occurred, it is not limited to finding that an event did or did not occur. Rather, in some cases, the Tribunal's degree of satisfaction that a past event *did not* occur will be sufficiently low that it will be required to entertain the possibility that the event *did* occur and to engage in the 'predictive exercise' of assessing the applicant's claims on this basis.[132] The making of such findings is sometimes referred to as applying the 'what if I'm wrong?' test. However, there will be no need for the Tribunal to apply this test where it has no 'real doubt' that a past event did not in fact occur.[133]

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129 *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [39] (emphasis added).

130 [2019] FCA 1214 at [54].

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132 *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 238 [55] (Sackville J, North J agreeing), 255 [137] (Kenny J). See also *DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641 at 652 [36].

133 *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 238 [56] (Sackville J, North J agreeing), 255 [137] (Kenny J). See also *DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641 at 652 [36].

61. Finally, the failure to explicitly set out findings with respect to a specific factual issue does not necessarily mean that no such findings were made. For example, '[i]t may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected.'[134] The question whether an issue was in fact implicitly addressed by the Tribunal is different from the question whether addressing the issue could have made any difference to the Tribunal's decision.[135]

F-2 IRRATIONAL FINDINGS OF FACT

62. In order to decide whether to affirm or set aside the decision under review, the Tribunal must determine whether the applicant in fact meets the refugee criterion and/or the complementary criterion. Reaching this state of satisfaction involves making a finding on a question of jurisdictional fact, such that the Tribunal's jurisdiction is not lawfully exercised if the state of satisfaction is reached in a manner that is legally irrational, in the sense that it is not 'based on findings or inferences of fact supported by logical grounds.'[136] The principles relevant to judicial review of jurisdictional fact finding on the grounds of manifest irrationality or illogicality were summarised by a Full Court of the Federal Court in *ARG15 v Minister for Immigration and Border Protection*:

> [F]or a decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reason, "extreme" illogicality or irrationality must be shown "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 and against the framework of the inquiry being as to whether or not there has been jurisdictional error on the part of the Tribunal". Illogicality or irrationality in that extreme sense may be considered not only in relation to the end result*, but also extends to fact finding which leads to the end result*, albeit that … the overarching question is whether the decision was affected by jurisdictional error.[137]

63. The types of findings of fact that may be affected legal irrationality are unconfined. Thus it is correct to say that '[a] finding of fact founded simply upon a conclusion that a witness is not to be believed is no more immune from judicial scrutiny than is any

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134 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [47].

135 That issue is dealt with at Part G below.

136 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224 at 232 [38] (Gummow and Hayne JJ); *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at 330-1 [59] (Griffiths and Moshinsky JJ). See

137 (2016) 250 FCR 109 at 122 [47] (citations omitted, emphasis added); *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at 331 [62] (Griffiths and Moshinsky JJ).

other finding of fact.'[138] However, nothing in authority or principle limits the operation of the irrationality ground of review to findings made specifically about an applicant. Rather, a finding may be affected by legal irrationality whether it is made about an applicant, a country, an ethnic group, or some other person, place, group or thing. An irrational finding may even take the form of a generalisation with respect to the manner in which a particular dish is ordinarily prepared.[139] In such a case, while 'relying on … a generalisation does not by itself manifest irrationality, the generalisation itself might be irrational if no rational person would accept it as true and rely on it in making a decision.'[140]

64. Judging whether a generalisation is irrational may be difficult in circumstances where there is no evidence before the court that directly bears on the accuracy of the generalisation.[141] However, where there is such evidence, the question of irrationality must be considered by reference to that evidence and to the Tribunal's treatment of it, as well as the Tribunal's other findings of fact. For example, where there is evidence in the form of recipes from reputable culinary sources calling for the use of baking powder in crumbing a chicken schnitzel, the Tribunal cannot rationally find that baking powder is not a common ingredient in that dish, and on the basis of that generalisation be predisposed to disbelieve a person who claims to use the ingredient when preparing chicken schnitzel in his or her capacity as a professional cook.[142] Other types of reasoning that may be held to be legally irrational include:

64.1 Making a finding in circumstances where 'only one conclusion is open on the evidence, and the decision maker does not come to that conclusion'.[143] Thus a finding with respect to an applicant's sexuality may be legally irrational if

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138 *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 at 456 [20]. See also (2016) *CQG15 v Minister for Immigration and Border Protection* 253 FCR 496 at 508-9 [38].

139 *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at 333-4 [74] (Griffiths and Moshinsky JJ).

140 *SZSRG v Minister for Immigration and Citizenship* [2014] FCCA 173 at [78].

141 *SZSRG v Minister for Immigration and Citizenship* [2014] FCCA 173 at [76]-[79].

142 *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at 333-4 [74] (Griffiths and Moshinsky JJ).

143 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 649-50 [135] (Crennan and Bell JJ).

it is contrary to the evidence of every witness who gave evidence to the Tribunal, including witnesses who were independent of the applicant.[144]

64.2 Making a finding that is grounded not in probative evidence, but 'in speculation or guesswork, or (worse) assumptions based on material incapable of supporting those assumptions.'[145]

64.3 Making a finding where '[s]pecific independent evidence highly supportive of the applicant's case has been ignored in favour of irrelevant generalisations and suppositions based on little or no evidence.'[146]

64.4 Reaching '[a] conclusion, whether stated definitively or arising as a matter of generalisation … that is inherently inconsistent with another conclusion (in the sense that at least one of them must be wrong)'.[147]

65. In determining whether a decision is tainted by legal irrationality, it must be remembered that irrationality is concerned primarily with the substance of the Tribunal's findings of fact, not with the way they are expressed. Thus 'where a decision-maker gives reasons and those reasons do not reveal a logical or rational path of thought, but the decision is one to which some logical or rational mind could have come, even if no logic or rationality appears in the reasons given, a jurisdictional error will not be found.'[148] However, this does not mean that the Tribunal's other findings of fact can be ignored in determining whether a particular finding was supported by rational grounds or probative evidence. Thus in *SZWCO v Minister for Immigration and Border Protection*, Wigney J stated that:

> If … the illogicality or irrationality involved was extreme and significant, such that the adverse credibility finding was no longer supported by rational or logical findings or reasoning, that may be sufficient to support a conclusion that the Tribunal's ultimate finding, its lack of satisfaction that the visa applicant had satisfied the criteria for a protection visa, was affected by jurisdictional error. That would almost

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144 *DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641 provides an example of this type of finding.

145 *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132 at [111] (Mortimer J, Moshinsky J agreeing). See also 2019] FCAFC 132 at [107] (Mortimer J, Moshinsky J agreeing), [131] (Wheelahan J).

146 *Park v Minister for Immigration and Ethnic Affairs* (1996) 41 ALD 487 at 494.

147 *AAG16 v Minister for Immigration and Border Protection* [2019] FCA 1214 at [35].

148 *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1 at 4 [3] (Rares J). See also *MZYOI v Minister for Immigration and Citizenship* (2012) 130 ALD 256 at 283 [165].

> certainly be the case if the Tribunal's lack of satisfaction was not based on any independent finding that was unaffected by the illogicality.[149]

66. Thus a court hearing an application for judicial review cannot 'remake' the Tribunal's findings of fact in order to place its decision on a firmer logical footing – the fact that a finding might have been logically open if the Tribunal had made findings of fact other than those it in fact made will not insulate the finding from review if, when analysed in the context of the other findings the Tribunal *actually made*, it was manifestly irrational.

F-3 MISUNDERSTANDING THE CRITERIA FOR THE GRANT OF A PROTECTION VISA

i) OVERVIEW

67. The exercise of the power conferred by s 65 of the Act to grant or refuse a visa is 'conditioned by a requirement that the Minister or his or her delegate, or the Tribunal forming its own conclusion on review, must proceed ... on a correct understanding and application of the applicable law, which includes the criteria prescribed by the Migration Act and the Migration Regulations for the visa in question.'[150] It follows from this that any error in interpreting either the refugee criterion or the complementary protection criterion may be jurisdictional in nature, provided that the error is material to the Tribunal's decision.

ii) CONFLATING THE REFUGEE AND COMPLEMENTARY PROTECTION CRITERIA

68. Because the Tribunal must act on a correct understanding of the criteria for a protection visa, 'it is an error for the Tribunal to conflate the tests of persecution and complementary protection'[151] by, for example, focussing on the existence (or non-existence) of a Convention nexus in addressing the complementary protection criterion. This does not mean the Tribunal will always fall into jurisdictional error if it fails to explicitly apply the elements of the complementary protection criterion to an applicant's claim. For example, where an applicant advances a single claim the underlying facts of which are said to give rise to refugee and/or complementary

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149 [2016] FCA 51 at [67].

150 *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 at 10 [34] (Kiefel CJ, Gageler and Keane JJ).

151 *SZSSM v Minister for Immigration and Border Protection* [2013] FCCA 1489 at [98].

protection status, 'rejection of the Convention claims could be relied upon for the rejection of the appellant's claim for complementary protection.'[152] However, where a separate claim is 'articulated as a basis for a visa application based on complementary protection and material advanced to support the claim',[153] the ordinary jurisdictional requirements of Pt 7 apply. That is, the decision maker must consider each claim advanced by the applicant, and must do so by reference to the correct legal principles. A separate complementary protection claim may 'be based upon prevailing circumstances in a country of a kind that would expose a particular returnee to a risk of harm, even though there is no identified reason why the applicant for a protection visa might be targeted.'[154] While it is not necessarily correct to 'view such circumstances as unusual outside of war zones or anarchic places',[155] war zones and anarchic places are especially likely to be productive of viable claims for complementary protection status.[156]

iii) FOCUSSING ON THE PAST INSTEAD OF THE FUTURE

69. In determining whether the 'real chance' test is satisfied for the purposes of evaluating the refugee criterion, the Minister or the Tribunal will generally have to make 'findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future.'[157] However, making findings with respect to past occurrences is not a substitute for the predictive exercise required by the Act. Thus in *Applicant S395/2002 v Minister for Immigration and Multicultural Affairs*, Gummow and Hayne JJ stated that:

> Because the question requires prediction of what may happen, it is often instructive to examine what has happened to an applicant when living in the country of nationality. If an applicant has been persecuted for a Convention reason, there will be cases in which it will be possible, even easy, to conclude that there is a real chance

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152 *AOS18 v Minister for Immigration and Border Protection* [2019] FCAFC 140 at [16]. See also *SZSXE v Minister for Immigration and Border Protection* (2014) 145 ALD 79 at 87-88 [52]-[56].

153 *AOS18 v Minister for Immigration and Border Protection* [2019] FCAFC 140 at [18].

154 *AOS18 v Minister for Immigration and Border Protection* [2019] FCAFC 140 at [18].

155 *AOS18 v Minister for Immigration and Border Protection* [2019] FCAFC 140 at [19].

156 *CDY15 v Minister for Immigration and Border Protection* [2018] FCA 175 at [24].

157 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ). See also *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 231 [34] (Sackville J, North J agreeing).

> of repetition of that persecution if the applicant returns to that country. *Yet absence of past persecution does not deny that there is a real chance of future persecution*.[158]

70. Applying this principle, Lander J held in *SBZF v Minister for Immigration and Citizenship* that the Tribunal 'did not exercise the jurisdiction which is bestowed upon it under the Act' when it 'addressed the question of past conduct but did not consider the question of future conduct.'[159]

71. This is not to say that the Tribunal will always fall into jurisdictional error if it fails to give explicit consideration to the question of *future* persecution (or significant harm). In some cases, it will follow as a matter of course from the Tribunal's rejection of an applicant's claims with respect to *past* persecution or significant harm that it is not satisfied that there is a real risk or a real chance of similar conduct occurring in the future. Thus where an applicant's claim is based on his her membership of a broad group, 'the veracity of the person's account of what happened in the past may not be determinative of whether Australia owes that person protection obligations.'[160] By contrast, where an applicant's claim is based on facts unique to him or her as an individual, 'determination by the decision-maker as to the veracity of those claims may provide sufficient foundation for the necessary predictive and speculative exercise about what will happen to that person upon return to her or his country of nationality.'[161] The need to give explicit, separate consideration to the risk of future persecution is most likely to arise where there is reason to believe that, whatever the Tribunal may find was the situation in the applicant's country of nationality when he or she left, that situation is likely to have changed in a material way by the time he or she returns. In such a case, it will generally be incumbent on the Tribunal to make 'a decision about whether or not things had changed, were changing, were likely to change or had stayed much the same.'[162]

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158 (2003) 216 CLR 473 at 499 [74] (emphasis added). This statement has been cited with approval by the Federal Court on numerous occasions: see *SWCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1178 at [30]; *CDC15 v Minister for Immigration and Border Protection* [2017] FCA 18 at [11]; *CNC15 v Federal Circuit Court of Australia* [2017] FCA 1540 at [26].

159 (2008) 104 ALD 415 at 424 [52].

160 *MZZBG v Minister for Immigration and Border Protection* (2014) 142 ALD 531 at 537 at [30].

161 *MZZBG v Minister for Immigration and Border Protection* (2014) 142 ALD 531 at 537-8 [31].

162 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 444 [38].

F-4 FAILING TO COMPLY WITH S 424A OR S 424AA

72. Sections 424A and 424AA codify the Tribunal's obligation to put adverse material to an applicant, and thus limit what would otherwise be its implied obligation to give the applicant an opportunity to 'deal with adverse information that is credible, relevant and significant to the decision to be made.'[163] Sections 424A and 424AA are 'complementary', in the sense that 'the former section, if complied with, relieves the Tribunal of the duty imposed by the latter.'[164] Thus the Full Court of the Federal Court has stated that:

> The policy and purpose reflected in s 424A is that the Tribunal should be compelled:
>
> (a) To put the visa applicant on fair notice in writing of critical matters of concern to the Tribunal;
>
> (b) To ensure that the visa applicant understands the significance of those matters to the decision under review; and
>
> (c) To give the applicant a reasonable opportunity to comment on or to respond to those matters of concern.
>
> It is evident that the same policy and purpose underpin s 424AA.[165]

73. However, the obligation to put information to an applicant imposed by ss 424A and 424AA is quite limited. In particular, it is important to note that the obligation only extends to 'information' that 'would be' part of the reason for rejecting the applicant's claim and that it does not extend to information that is not about the applicant or some other specific person. In this regard:

73.1 First, the 'information' to which ss 424A and 424AA refer 'is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.'[166] That is, ss 424A and 424A are concerned with 'that of which one has been told or apprised, or

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163 *Kioa v West* (1985) 159 CLR 550 at 615 (Brennan J).

164 *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 514 at 417 [2] (Moore J). See also (2009) 174 FCR 514 at 430 [70], 531 [80] (Tracey and Foster JJ).

165 (2009) 174 FCR 514 at 430 [71] (Tracey and Foster JJ).

166 *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1 at 8 [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

informed.'[167] Subjective thought processes – such as 'disbelief of the [applicant's] evidence arising from inconsistencies therein'[168] – are not themselves 'information' that must be put to an applicant pursuant to s 424A or s 424AA.

73.2 Second, '[t]he use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance — and independently — of the tribunal's particular reasoning on the facts of the case.'[169] Thus for s 424A or s 424AA to apply in respect of information, the information must generally contain something that, on its face, is in the nature of a 'rejection, denial or undermining' of the applicant's claim.[170] For example, where the information in question shows that specific persons with a particular profile have been persecuted by the authorities in a country, but the Tribunal finds that the applicant does not have that profile, the information is not information that 'would be' the reason or part of the reason for rejecting the applicant's claim. Rather, it is information that might have been of assistance to the applicant, but that is rendered irrelevant by the Tribunal's findings.[171]

73.3 Finally, the effect of s 424A(3)(a) is that the Tribunal is not obliged to give an applicant written particulars of 'information about the social, political, religious and other conditions prevailing in a country relevant to an applicant's claim for refugee status' that is relevant only for the purpose of 'assessing whether other individuals who share his or her racial, religious, political, social or other attributes suffer treatment of a kind amounting to persecution on Convention grounds in that country.'[172] Because ss 424A and 424AA complement each other, the exception in s 424A(3)(a) extends to

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167 *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 259 [206] (Allsop J).

168 *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1 at 8 [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

169 *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1 at 7 [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

170 *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1 at 7 [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

171 See *BQL15 v Minister for Immigration and Border Protection* [2018] FCAFC 104 at [24].

172 *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80 at 95 (Kenny J).

s 424AA, meaning that the Tribunal is not generally required to put adverse 'country information' to an applicant for comment at all (whether in writing or orally).[173]

74. It follows that the circumstances in which an applicant will be able to demonstrate jurisdictional error in the form of a failure on the part of the Tribunal to comply with s 424A or s 424AA are narrow.

F-5 FAILING TO COMPLY WITH S 425

i) FAILING TO IDENTIFY AN ISSUE

75. In conducting a hearing under s 425 of the Act, the Tribunal is obliged 'to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made [and] to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.'[174] Unless the Tribunal raises with the applicant some novel issue or conclusion that was not considered by the Minister, 'the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review".'[175] The obligation of the Tribunal to comply with s 425 is thus 'met when the decision-maker identifies the relevant issue or if the issue has arisen before the [Minister's] Delegate.'[176]

76. The 'issues' that must be raised with an applicant pursuant to s 425 are different both from the 'criteria' for the grant of a protection visa and from the 'information' that must be put to an applicant pursuant to ss 424A and 424AA. For example, whether government policy in the applicant's country of nationality or receiving country has changed since the decision under review was made may be a novel issue that arises in the course of the Tribunal's review. If so, it must be drawn to the attention of the

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173 *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 514 at 432 [91]-[93] (Tracey and Foster JJ). See also *BXK15 v Minister for Immigration and Border Protection* (2018) 261 FCR 515 at 534 [72] (Logan J).

174 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-2; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

175 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 163 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

176 *AJV15 v Minister for Immigration and Border Protection* [2016] FCA 1210 at [37].

applicant. This was the case in *ABV16 v Minister for Immigration and Border Protection*, in which Bromberg J stated that:

> Having conducted a hearing on the basis that the Chinese government had a policy by which there were barriers to the registration of 'black children', and having on that basis (and fairly at the time of the hearing) invited no evidence or submissions on the status of that policy or its application to the appellant, the Tribunal came into knowledge that the policy was no longer in force. It was on that basis that the Tribunal found against the appellant. In the absence of countervailing circumstances, the Tribunal was obliged by s 425(1) to give notice to the appellant that the status of the policy was now in issue, and to invite the appellant to present evidence and make submissions at a hearing. Having not done so rendered hollow, and not meaningful, whatever opportunity to respond that had been provided by the Tribunal through the holding of the first hearing. The denial resulted in a practical injustice to the appellant.[177]

77. His Honour did not consider that the Tribunal's *prima facie* obligation to put this new issue to the applicant was negatived by s 424A(3)(a). In this regard, while the Tribunal's knowledge of the new 'issue' arose from country information, 'the Chinese policy change existed in the world as its own freestanding fact capable of forming the basis of an issue for the purposes of s 425(1). That it was reported, and hence came within the ostensible scope of s 424A(3)(a), cannot subsequently deprive it of that character.'[178]

ii) APPLICATION OF S 425 TO A SPECIFIC CLASS OF CASES

78. The operation of s 425 has been dealt with extensively in the context of claims by Tamil applicants who fear returning to Sri Lanka because they departed the country in breach of its *Immigrants and Emigrants Act* (**the IE Act**), and who therefore believe they will be imprisoned if they are required to return to that country. Because Sri Lankan Tamils constitute a large cohort of applicants for protection visas, it is useful to summarise some of the jurisprudence arising from these cases. Thus:

78.1 In *BXB15 v Minister for Immigration and Border Protection*, the Tribunal concluded that upon his return to Sri Lanka, the applicant would be required to pay a fine under the IE Act. Without seeking submissions as to whether he could pay any fine that was likely to be imposed on him, the Tribunal concluded that the applicant would have sufficient financial resources to pay

177 [2017] FCA 184 at [31].
178 [2017] FCA 184 at [31].

such a fine. This, the applicant submitted, deprived him of 'the opportunity to argue that he would not be able to pay the fine' and prevented the Tribunal from considering further potentially relevant questions, such as 'what the consequence would be if the applicant is unable to pay the fine. Could he pay in instalments? Would his bail be revoked? If so, how long might he be in prison for?'[179] Judge Harland accepted the applicant's submission that he had not been afforded the opportunity to address the question of his capacity to pay the fine and ordered that the Tribunal's decision be quashed.[180] However, it must be emphasised that in *BXB15*, Judge Harland expressly held that '[t]he issue of capacity to pay a fine does arise on the material' and that '[t]his is not a case where the applicant did not provide any material relevant to the issue of his capacity to pay a fine.'[181]

78.2 Similarly, in *Minister for Immigration and Border Protection v SZTQS*, the Tribunal found that the applicant would be required to provide a guarantor in order to be entitled to bail for an offence under the IE Act. The Tribunal concluded that a family member would act as the surety. This was despite the fact that 'no submissions were made, or evidence provided, on SZTQS's behalf regarding whether he had a family member who would provide surety for him, that matter not having been in issue before the delegate and not having been raised by the Tribunal.'[182] For this reason, Griffiths J held that the Tribunal's finding was not obviously open on the known material and that the failure to raise it with the applicant constituted a breach of s 425.

78.3 In *BEV15 v Minister for Immigration and Border Protection*, Bromwich J distinguished *SZTQS* from the case before him, noting that 'in distinction to this case, [the Tribunal's assumption that the applicant would produce a guarantor for bail] was not an issue otherwise known to that visa applicant. It did not apparently feature in his submissions to the delegate or Tribunal in that case.'[183] In the case before him, Bromwich J found that '[t]he appellant was squarely on notice of that assumption because it was directly raised with

179 [2017] FCCA 77 at [16].
180 [2017] FCCA 77 at [35].
181 [2017] FCCA 77 at [35].
182 (2015) 148 ALD 507 at 520 [66].
183 [2016] FCA 507 at [39].

him … He was given an opportunity to address the issue of bail being granted in post-hearing submissions, and took advantage of that opportunity. At no stage did he raise any problem with having a family member being a guarantor for bail, despite that being a requirement known to him via his advisors.'[184]

78.4 In *SZTAP v Minister for Immigration and Border Protection*, Robertson and Kerr JJ (with whom Logan J agreed) distinguished *SZTQS* on the basis that '[i]n the specific facts of this case, the Minister's delegate … had extensively set out the country information' from which the question of the applicant's ability to provide a surety arose. In those circumstances, the applicant had been afforded a sufficient opportunity to make submissions on the issue.[185] Similarly, in *ACC15 v Minister for Immigration and Border Protection*, Gilmour J considered that there had been no failure by the Tribunal to comply with s 425 of the Act because 'on the facts of this case, I do not accept that it was critical to the Tribunal's finding that the appellant could apply for bail and that bail was routinely given, that a family member was required to provide surety and that therefore it was plainly an issue for the Tribunal that the appellant's family would be able to provide surety for him as an [sic] determinative factor in the mind of the Tribunal.'[186]

79. While these judgments can provide useful analogies in other cases in which the applicant of the IE Act is relevant to the applicant's claim, it must be emphasised that each case concerning the application of the IE Act (and each case concerning the operation of s 425 generally) 'turns on its own facts'.[187]

iii) Failing to Provide an Interpreter

80. Finally, a hearing under s 425 must be one at which the applicant is able to make themselves understood. Thus 'if an applicant for refugee status is unable to give evidence in English, the effect of s 425(1)(a) is to necessitate the making of a direction, pursuant to s 427(7), that communication proceed through an interpreter.'[188]

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184 [2016] FCA 507 at [53].
185 (2015) 238 FCR 404 at 426 [81].
186 [2016] FCA 97 at [27].
187 *BEJ15 v Minister for Immigration and Border Protection* [2016] FCA 1033 at [45].
188 *Perera v Minister for Immigration and Multicultural Affairs* (1992) 92 FCR 6 at 17 [20].

Proceeding without the aid of an interpreter in such a case constitutes jurisdictional error, on the grounds that 'the Tribunal lacks the jurisdiction to continue the hearing before it unless it provides an interpreter.'[189] It follows that s 425 requires that the applicant be provided with a 'substantially effective mechanism of communicating oral and written information, both from, and to, the [applicant]', which 'must be adequate to convey the substance of what is said, to a degree that the hearing can be described both as real and fair.'[190]

F-6 Failing to Exercise Discretionary Procedural Powers

81. Each of the discretionary procedural powers conferred upon the Tribunal by s 427(1) must be exercised reasonably.[191] For example, if an applicant is suffering from an illness and is temporarily unable to appear before the Tribunal, it may be legally unreasonable for the Tribunal not to adjourn the hearing of the applicant's case until after they have recovered.[192] Failure to exercise or consider exercising the power to call a witness may also cause the Tribunal to fall into jurisdictional error. Thus if an applicant requests that the Tribunal call a witness, 'the Tribunal must, through inquiries of the applicant, understand why the applicant wants the Tribunal to take evidence from the nominated person, and how that person's evidence is said by an applicant to relate to the Tribunal's review' and must give 'real and genuine consideration' to these matters.[193] If, after doing this, the Tribunal decides not to call a witness, it may still fall into jurisdictional error if the decision is unreasonable. For example, 'in many cases it will not be open to the Tribunal to refuse to obtain oral corroborating evidence on the sole basis of an assertion that the evidence could not affect the Tribunal's assessment of the appellant's credibility.'[194]

82. In each case, the question whether the Tribunal has unreasonably failed to exercise a discretionary procedural power must be answered by reference to the general principles governing judicial review of discretionary decisions for legal unreasonableness, which were summarised by a Full Court of the Federal Court in

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189 *Perera v Minister for Immigration and Multicultural Affairs* (1992) 92 FCR 6 at 17 [21].
190 *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 215 [9] (Allsop CJ).
191 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
192 See, for example, *SZUWM v Minister for Immigration and Border Protection* [2016] FCA 92 at [36].
193 *AYX17 v Minister for Immigration and Border Protection* [2018] FCAFC 103 at [48] (Tracey and Mortimer JJ).
194 *SZVBB v Minister for Immigration and Border Protection* [2015] FCA 1414 at [41].

Minister for Immigration and Border Protection v Eden. For present purposes, the relevant principles are as follows:

82.1 Review for legal unreasonableness is concerned with 'the lawful exercise of power.'[195] It 'does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision [sic] should be exercised for that of the decision-maker.'[196] In the exercise of any discretion, there is 'an area of "decisional freedom" within which a decision-maker has a genuinely free discretion'; a decision that falls within that area is 'within the bounds of legal reasonableness.'[197]

82.2 The boundaries of a decision maker's area of decisional freedom do not fall to be determined in a vacuum. Rather, '[t]he task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making.'[198]

82.3 The reasons for an administrative decision generally 'provide the focus for the evaluation of whether the decision is legally unreasonable.'[199] If they 'provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable.'[200] However, this will not always be the case. Thus unreasonableness may be established 'even if no error in the reasons can be identified.'[201] Ordinarily, this will occur where the reasons do not show how the decision was arrived at or where the intellectual process revealed by the reasons is not 'sufficient to outweigh the

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195 (2016) 240 FCR 158 at 171 [58] (citations omitted).
196 (2016) 240 FCR 158 at 171 [59] (citations omitted).
197 (2016) 240 FCR 158 at 171 [62] (citations omitted).
198 (2016) 240 FCR 158 at 171-2 [63] (citations omitted).
199 (2016) 240 FCR 158 at 172 [64] (citations omitted).
200 (2016) 240 FCR 158 at 172 [64] (citations omitted).
201 (2016) 240 FCR 158 at 172 [64].

inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes.'[202]

82.4 The assessment of legal reasonableness 'should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions.'[203] However, verbal formulations like '"plainly unjust", "arbitrary", "capricious", "irrational", "lacking in evident or intelligible justification", and "obviously disproportionate"' describe at least some of the circumstances in which the exercise of a discretion will be held to be legally unreasonable.[204]

83. How these principles are to be applied depends on the precise nature of the discretionary power that the applicant says the Tribunal unreasonably failed to exercise.

F-7 FAILING TO DISCLOSE THE EXISTENCE OF ADVICE GIVEN UNDER S 438

84. For a substantial period of time, the Tribunal routinely failed to disclose to applicants that it had received advice from the Secretary under s 438 of the Act to the effect that information given to the Tribunal should not be disclosed to the applicant. Following a protracted period of litigation over this issue, the principles relevant to the operation of s 438 were set out by a majority of the High Court in *Minister for Immigration and Border Protection v SZMTA*. The principles to be drawn from that judgment can be summarised briefly:

84.1 It is a breach of the Tribunal's obligation to afford procedural fairness to an applicant (and thus an error of law) for it to fail to disclose to the applicant the fact that it has received a notification from the Secretary under s 438(2)(a) of the Act.[205] However, such an error will not be held to be 'jurisdictional' in nature unless the applicant discharges an onus of showing that if the error had

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202 (2016) 240 FCR 158 at 172 [64] (citations omitted).
203 (2016) 240 FCR 158 at 172 [65].
204 (2016) 240 FCR 158 at 172 [65] (citations omitted).
205 (2019) 163 ALD 38 at 49 [38] (Bell, Gageler and Keane JJ). More recently, six members of the Court stated that 'the giving of a notification under s 438(2)(a) of [the Act] triggers an obligation of procedural fairness on the part of [the Tribunal] to disclose the fact of notification to an applicant for review under Pt 7': *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 at [1].

not been made, this could realistically have resulted in a different decision.[206] This question of 'materiality' is discussed further at Part G below.

84.2 Where the Secretary gives a notification to the Tribunal under s 438(2)(a) of the Act, the Tribunal can be presumed to act on the basis that s 438 'does in fact apply to a document or information to which the notification refers.'[207] In the case of a valid notification under s 438(2)(a), the Tribunal has no power to have regard to the information to which the notification applies unless it affirmatively exercises its discretion under s 438(3)(a) to do so.[208] It follows that '[a]bsent some contrary indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence, a court on judicial review of a decision of the Tribunal can ... be justified in inferring that the Tribunal paid no regard to the notified document or information in reaching its decision.'[209]

84.3 In determining whether the Tribunal's failure to disclose the existence of a notification under s 438(2)(a) was 'material' in the sense required to give rise to jurisdictional error, it is relevant to have regard to the content of the information to which the notification applied. In this regard, the content of the information will inform the court's determination both of whether the Tribunal in fact took the information into account in making its decision and of whether the information could have affected the outcome of the Tribunal's decision.[210]

85. As the Full Court observed in *MZAOL v Minister for Immigration and Border Protection*, it generally follows from *SZMTA* that an applicant 'cannot establish materiality unless they can demonstrate that the impugned information was taken into account by the Tribunal'.[211] The principles set out in *SZMTA* thus 'make it difficult for a person … to prove that a Tribunal took into account information in a s 438 notification that was potentially adverse to the appellant, if there is no

206 (2019) 163 ALD 38 at 41 [4], 49 [41], 50 [45]-[46], 51 [50] (Bell, Gageler and Keane JJ).
207 (2019) 163 ALD 38 at 50 [47] (Bell, Gageler and Keane JJ).
208 (2019) 163 ALD 38 at 46 [23] (Bell, Gageler and Keane JJ).
209 (2019) 163 ALD 38 at 50 [47] (Bell, Gageler and Keane JJ).
210 (2019) 163 ALD 38 at 51 [50] (Bell, Gageler and Keane JJ).
211 [2019] FCAFC 68 at [53], [66].

indication in the Tribunal's reasons of any consideration of whether to exercise the discretions in s 438(3).'[212] It follows that in many cases involving a failure by the Tribunal to disclose the existence of advice given by the Secretary under s 438, the requirement of materiality will not be met and jurisdictional error will not be established.

G. MATERIALITY

86. Pursuant to the principles set out in *SZMTA*, a party who alleges that an administrative decision is tainted by jurisdictional error bears the onus of showing that if the error had not been made, this 'could realistically have resulted in a different decision.'[213] This question of 'materiality' is judged by reference both to the case put before the decision maker and the decision maker's reasons.[214]

87. The preferable view appears to be that, subject to any express statutory indication otherwise, the principle of materiality is applicable to all forms of jurisdictional error, and not just to jurisdictional error in the form of failure to comply with the rules of procedural fairness (or some codification of those rules).[215] In the case of an error that relates to procedural fairness, it is not necessary for the applicant to 'adduce evidence in [the reviewing court] as to what he would have said or provided if he had been given the opportunity'.[216] The question is whether the issue or item of information that was not raised with the applicant was incorporated into the decision in some way, such that the applicant was denied the opportunity to respond to some matter that could have affected the result. However, the principle of materiality operates differently depending on the nature of the decision maker's error. Thus where the error consists of misinterpreting or failing to consider evidence, 'the additional requirement of materiality is unlikely to make much difference in practice ... That is because an error in relation to a factual matter, consideration of which is an essential feature of a valid

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212 *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [49].
213 *SZMTA v Minister for Immigration and Border Protection* (2019) 163 ALD 38 at 41 [4], 49 [41], 50 [45]-[46], 51 [50] (Bell, Gageler and Keane JJ).
214 *EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20 at [42].
215 *Chang v Neill* [2019] VSCA 151 at [100].
216 *DPI17 v Minister for Home Affairs* [2019] FCAFC 43 at [53] (Griffiths and Steward JJ). See also *Dharma v Minister for Home Affairs* [2019] FCA 431 at [61].

exercise of the relevant statutory function, will usually satisfy the materiality requirement.'[217]

88. Where the relevant error consists of failing to consider a claim, it is unclear whether the objective strength of the applicant's claim is relevant to the question of materiality. Thus, on the one hand, Colvin J has expressed the view that it would not ordinarily 'be an answer to a claim brought in the statutory context here under consideration that there had been jurisdictional error because the review task was not undertaken that the task did not extend to considering claims that did not meet some standard of merit as adjudicated by the court.'[218] Against this, in *Hong v Minister for Immigration and Border Protection*, Bromwich and Wheelahan JJ held that the Tribunal had not erred by failing to consider a claim advanced by the applicant, but that if it had, the 'objective inadequacies' affecting the claim were such that the Tribunal's failure to consider it would not have satisfied the materiality requirement.[219]

89. Finally, it should be noted that the question of materiality arises only when it is 'put in issue.' In the context of a proceeding arising under the Act, it appears that this expression means 'put in issue by the Minister'.[220] Thus materiality is not generally something that must be pre-emptively dealt with by the applicant. Rather, it should be addressed in reply if and when the Minister submits that an identified error does not meet the threshold of materiality.

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217 *Chang v Neill* [2019] VSCA 151 at [100].

218 [2018] FCA 1526 at [72]-[73].

219 [2019] FCAFC 55 at [72]. According to jade.io, this judgment is currently the subject of an appeal to the High Court. However, I have not to date been able to find any reference to the appeal on the Court's website.

220 *MZAOL v Minister for Immigration and Border Protection* [2019] FCAFC 68 at [40]; *FET18 v Minister for Home Affairs (No 2)* [2019] FCA 1524 at [29].