ILLOGICALITY BY ANY OTHER NAME: THE HIGH COURT'S DECISION IN FTZK AND HOW TO USE IT

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FTZK v Minister for Immigration and Border Protection[1] (*FTZK*) is a decision of the High Court, delivered just over a year ago. I think it is one of those cases where it is hard to believe that the Court really meant what it said. I will explain my perplexity by arguing that *FTZK* is a missed opportunity to settle jurisprudence on reasons and rationality in administrative decision-making and then ask whether the High Court has gone too far in its rejection of 'rigid taxonomies' in the grounds of judicial review.[2]

Who is FTZK?

FTZK is a Chinese national who entered Australia in 1997 on a temporary business visa.[3]

Later that year, Chinese authorities arrested two men on charges of kidnapping and murder of a 15-year-old boy. The two men apparently gave statements implicating FTZK. A warrant was issued for FTZK's arrest. The warrant and statements were provided to Australian authorities in support of his extradition. His co-accused were executed.[4]

Meanwhile, FTZK applied for a protection visa[5] — that is, he claimed to be a refugee. His claim fell to be assessed by reference to s 36 of the *Migration Act 1958* (Cth), which provides for protection visas for non-citizens 'in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention'.[6] It is in this context that he was assigned the acronym 'FTZK'.

FTZK's claim was refused by a delegate of the Minister, whose decision the Administrative Appeals Tribunal (the AAT) affirmed. FTZK then disappeared into the community for four years until he was apprehended and taken into immigration detention.[7]

FTZK then succeeded on judicial review of the AAT's decision.[8]

On remitter, the Refugee Review Tribunal (the RRT) made another jurisdictional error and the matter was again remitted.[9] This time, the RRT decided that FTZK was entitled to a protection visa subject to the question of whether art 1F of the United Nations *Convention Relating to the Status of Refugees*[10] (the Convention) applied. Lacking the jurisdiction to determine this,[11] the RRT remitted the matter to the Minister for further consideration.[12]

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Article 1F of the Convention provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee …

There being no issue that murder is a 'serious non-political crime',[13] the only issue was whether there were 'serious reasons for considering' that FTZK was responsible.[14] The Minister's delegate found that art 1F applied.[15] FTZK again sought review in the AAT.[16]

The AAT's decision

The AAT affirmed the decision under review, giving four reasons in as many paragraphs:

> First I have taken into account the allegations contained in the documents provided by the government of China …
>
> Secondly, on the basis of the evidence of the Applicant I am satisfied that he left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a visa to do so …
>
> Thirdly, I am satisfied that the Applicant was evasive when giving evidence as to his religious affiliations in Australia and China and I am satisfied that he was not detained and tortured in China as he alleges …
>
> Fourthly, I have taken into account also that the Applicant attempted to escape from detention in 2004, shortly after his application for a long term business visa was refused …[17]

Whereas the first of these reasons is based on direct evidence, the remainder are based on indirect or circumstantial evidence. Their relevance would appear to be via what is commonly referred to as 'consciousness of guilt reasoning'.[18]

The AAT then remarked:

> The conclusion I have reached is based on the totality of the evidence … it is the combination of factors which gives rise to reasons of sufficient seriousness to satisfy art 1F …[19]

Argument on review

FTZK applied for judicial review. His application was heard by a Full Federal Court.[20] He argued, in essence:[21]

- that the AAT's *reasons* contain no 'consciousness of guilt' findings;
- therefore, no such findings were made;
- therefore, reasons 2, 3, and 4 were based on material that was not *probative*;
- therefore, they were 'irrelevant considerations';
- the AAT took them into account;
- this affected the outcome; and
- therefore, the AAT fell into jurisdictional error.

The emphasised words each carry considerable jurisprudence,[22] which might have been determinative of FTZK's argument. Before we examine this jurisprudence, it is worth digressing to consider the broader 'framework of rationality' of which they are both part.

A framework of rationality

In *Minister for Immigration and Citizenship v Li*[23] (*Li*), French CJ spoke of a 'framework of rationality' that implicitly attends statutory grants of power.[24] It is required by the 'rules of reason' and includes, but is not limited to, an implicit command to exercise statutory discretions reasonably.[25]

An essential component of this framework of rationality must be a requirement to reason logically. There is, of course, nothing novel in this. For example, in *Minister of Immigration and Ethnic Affairs v Pochi*[26] (*Pochi*), Deane J said:

> There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a tribunal if, in the outcome, the decision-maker remained free to make an arbitrary decision. … I respectfully agree with the conclusion of Diplock LJ that it is an ordinary requirement of natural justice that a person bound to act judicially 'base his decision' upon material which tends logically to show the existence or nonexistence of facts relevant to the issue to be determined.[27]

Whereas Deane J saw logicality as an incident of natural justice, in *Hill v Green*[28] Spigelman CJ saw it as a presumption of statutory interpretation:

> In my opinion, where a statute or regulation makes provision for an administrative decision in terms which do not confer an unfettered discretion on the decision-maker, the courts should approach the construction of the statute or regulation with a presumption that the parliament or the author of the regulation intended the decision-maker to reach a decision by a process of logical reasoning and the contrary interpretation would require clear and unambiguous words.[29]

What does his Honour mean by 'a process of logical reasoning'? I think these words connote basic concepts of evidence and proof which, stripped of their formal rules, are no less relevant to administrative decision-makers than they are to courts. As such, we may have regard to the basic tenets of logicality as pronounced in the latter context.

Evidence

With regard to evidence, the obvious starting point is the Uniform Evidence Law.[30] Admissibility depends on relevance, which in turn depends on rationality:

> **55 Relevant evidence**
>
> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. …
>
> **56 Relevant evidence to be admissible**
>
> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible.

Further, where the Uniform Evidence Law considers relevance as a matter of degree, it employs the concept of 'probative value':

> ***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue …[31]

The word 'rational' is not defined in the legislation and is not squarely tackled in any case. However, the drafters of the Uniform Evidence Law had emphatically endorsed a body of

'rationalist' evidence law literature,[32] which essentially says that A is probative of B if it can be *deduced* from A that B is more likely than it otherwise would have been.[33]

Proof

Proof is all about how we reason from evidence.[34] We do so directly where a 'primary' finding of fact is a 'fact in issue' in the proceedings. Otherwise, where we must make further 'intermediate' findings, we reason circumstantially. In this context, it is common to speak of 'chains' of inferences.

It takes only one illogical inference to break a chain of inferences, with the result that it no longer contributes to proving a fact in issue. If no other chains support the fact in issue, the proof collapses. Otherwise, it is merely weakened.

In *FTZK*, as we have already seen, there were four parallel chains supporting the AAT's finding of 'serious reasons'. In such cases, it is often impossible to tell which, if any, of the chains are critical. But the AAT's remark that no one factor would suffice to constitute 'serious reasons' made it possible to debase its decision by attacking three of its four reasons. This is what FTZK set about doing.

Against this background, let us consider the two areas of jurisprudence that would appear to be most relevant to FTZK's arguments on judicial review.

Reasons

The cornerstone of FTZK's case was that the AAT's reasons contained no reference to 'consciousness of guilt'. This directs attention to the AAT's obligation to give reasons.

Section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides, relevantly:

> (1) … the Tribunal … shall make a decision in writing …
>
> (2) … the Tribunal shall give reasons either orally or in writing for its decision …
>
> (2B) Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

From these obligations fall three questions:

(1) What standard is required?
(2) What are the consequences if the AAT falls short of that standard?
(3) How does one know whether this has happened — that is, how does one tell apart:
    (a) irrational reasoning that is exposed by adequate reasons; and
    (b) rational reasoning that is obscured by inadequate reasons?

The standard required

In 2006, French J (as his Honour then was) said of s 43:

> The obligations set out in s 43 are not necessarily discharged by merely setting out findings on material questions of fact, referring to the evidence on which those findings are based and then stating a conclusion. … the Tribunal will have discharged its duty under s 43 if its reasons disclose its findings

> of fact, the evidence on which they were based and the logical process by which it moved from those findings to the result in the case.[35]

More recently, in *Wingfoot Australia Partners Pty Ltd v Kocak*[36] (*Wingfoot*), the High Court said:

> The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.[37]

Consequences

On the question of what follows from inadequate reasons, the High Court said:

> A Medical Panel which in fact gives reasons that are inadequate to meet the standard required … fails to comply with the legal duty imposed on it by s 68(2) and thereby makes an error of law. Inadequacy of reasons will therefore inevitably be an error of law on the face of the record of the Medical Panel and certiorari will therefore be available …[38]

There is no federal equivalent to s 10 of the *Administrative Law Act 1978* (Vic), which operated in *Wingfoot* to expand the 'record' of the decision to include any statement of reasons.[39] That this may affect the availability of certiorari on judicial review is no matter where, as in s 44 of the AAT Act, there is the alternative of an appeal on a question of law. *FTZK*, however, concerned a decision made under the Migration Act, which contains not only a privative clause[40] but also an express abrogation of s 44.[41]

Migration applicants must therefore show jurisdictional error.[42] This gives rise to the question of whether a failure to give reasons goes to jurisdiction.

This is a question of statutory interpretation, and the answer is probably 'no'.[43] This puts applicants in the same position as in *Re Minister for Immigration and Multicultural Affairs; Ex parte Palme*[44] (*Palme*), where the High Court said:

> Failure to provide reasons may also be reviewed in this Court and compliance by the Minister with the statutory duty may be ordered. The reasons then provided may furnish grounds for prohibition under s 75(v) in respect of the visa cancellation decision. But what is not provided for is for a prosecutor, as in this case, to bypass that earlier step utilising mandamus, and to impeach the visa cancellation decision itself for want of discharge of the duty to provide reasons.[45]

Palme is not a case that applicants tend to invoke. They probably do not suppose that the AAT will respond to judicial scrutiny by producing a set of reasons that discloses jurisdictional error.[46]

Instead, they argue that the AAT's reasons are a true reflection of its actual process of reasoning. Indeed, in *FTZK*:

> Mr Nash summarised the applicant's position by saying that the Tribunal had clearly and fully set out its reasons and those reasons disclosed that it had taken into account 'matters not probative and therefore irrelevant and ha[d] misconstrued its function'.[47]

This squarely takes us back to the question posed earlier: how to tell apart irrational reasoning that is exposed by adequate reasons; and rational reasoning that is obscured by inadequate reasons.

Where lies the error?

Applicants contending that the error lies in the reasoning often invoke statutory commands to record 'findings on material questions of fact'. These are found throughout the Migration Act and the broader Commonwealth statute book.[48]

This well-worn path follows *Minister for Immigration and Multicultural Affairs v Yusuf*[49] (*Yusuf*), in which the High Court was called upon to interpret a similar obligation in s 430 of the Migration Act, viz:

> Where the Tribunal makes its decision on a review (other than an oral decision), the Tribunal must make a written statement that:
> (a) sets out the decision of the Tribunal on the review; and
> (b) sets out the reasons for the decision; and
> (c) sets out the findings on any material questions of fact; and
> (d) refers to the evidence or any other material on which the findings of fact were based …

Chief Justice Gleeson said:

> When the Tribunal prepares a written statement of its reasons for decision in a given case, that statement will have been prepared by the Tribunal, and will be understood by a reader, including a judge reviewing the Tribunal's decision, in the light of the statutory requirements contained in s 430. The Tribunal is required, in setting out its reasons for decision, to set out 'the findings on any material questions of fact'. If it does not set out a finding on some question of fact, that will indicate that it made no finding on the matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material.[50]

The plurality said:

> The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review …[51]

Justice Gaudron said:

> if in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, it is to be assumed, consistently with the clear directive in s 430 of the Act, that the Tribunal has not regarded that question as material. And depending on the matter in issue and the context in which it arises, that may or may not disclose reviewable error.[52]

All of their Honours emphasised the obligation to state 'findings on material questions of fact'. For Gaudron J, this *demands* an inference that anything not mentioned was in fact not material. For Gleeson CJ and the plurality, it supports — perhaps even compels — such an inference. But it is a matter for the court, in all the circumstances, whether to draw it.

At this point, we might recall that to not draw a *Yusuf* inference is to take the approach of the High Court in *Wingfoot* and *Palme* by:

(a) finding that the obligation to give reasons has not been fulfilled;[53] and
(b) asking what follows from this.

These are polar opposite approaches. The choice between them can affect the answer to the question of whether the decision is affected by reviewable error. Yet neither in *Yusuf* nor subsequently has the High Court given any guidance as to when each approach is to be applied. What, then, are practitioners and other courts to do when faced with a decision that appears to be amenable to either approach?

Before turning to *FTZK*, let us consider, as a comparator, the Full Federal Court case of *Minister for Immigration and Citizenship v SZLSP*[54] (*SZLSP*). In that case, the applicant claimed that he would be persecuted as a Falun Gong practitioner if he returned to China. The RRT tested this claim by asking the applicant a series of questions about Falun Gong. It later concluded that '[h]e answered none of them correctly'.[55] However, it did not set out in its reasons what the questions were, what the applicant's answers were or what it understood the correct answers to be. Also, it did not identify the textbook that it used to test the applicant.

Justice Kenny clearly identified the choice between two competing inferences:

> Had there been any 'evidence or … other material' on which the Tribunal's finding regarding the first respondent's knowledge was based, the Tribunal, aware of its obligations under s 430(1)(d), would presumably have referred to it. The inference arises that the Tribunal's decision was not based on findings or inferences of fact grounded upon probative material and logical grounds. The question is whether the Court should draw this inference, or the contrary inference that the Tribunal's finding was logically based on probative material to which it has not referred in the reasons.[56]

Her Honour noted that, unlike *Ex Parte Palme*, which involved 'a complete failure to give reasons', '[t]he Tribunal here *has* provided a written statement of reasons which to all appearances complies with s 430'.[57] Her Honour concluded:

> the choice here is between an inference that material to which the Tribunal did not refer *and which does not appear in the record* was not part of the material on which the Tribunal based its finding … and an inference that unidentified material, not mentioned in the Tribunal's written statement *and not in the record*, provided a basis for the Tribunal's finding. Having regard to s 430, the first inference is self-evidently stronger than the second …[58]

The emphasised references to the 'record' are interesting, for they take her Honour away from a strict *Yusuf* inference and some way towards the uncontroversial proposition that it is an error of law to make a finding of fact for which there is no evidence.[59]

Turning to *FTZK*, s 43(2B) of the AAT Act, which bound the AAT, contained an equivalent obligation to s 430 of the Migration Act. But *FTZK* was in a different category in that there was no doubt about the evidence base. There was clearly material before the AAT that was capable of supporting consciousness of guilt reasoning. Indeed, there had been argument before the AAT as to whether such reasoning was to be preferred.[60]

The majority, comprising Gray and Dodds-Streeton JJ, focused on what the evidence was objectively capable of showing:

> On an objective basis, all of the findings of fact stated in [70]–[72] of the Tribunal's reasons for decision are capable of showing that the applicant fled China shortly after the criminal offences had been committed, and took steps to ensure that he would not be sent back to China. The Tribunal clearly regarded these facts as demonstrating the applicant's consciousness of his guilt of the criminal offences and desire to escape from the consequences of his criminal conduct. It was unnecessary for the Tribunal to express this link in order to make it exist.
>
> …
>
> The Tribunal's failure expressly to state the basis of the relevance of factors it took into consideration thus did not rob them of objective relevance.[61]

Their Honours concluded:

> the Tribunal implicitly recognised and found that the factors in [70], [71] and [72] were relevant as evidence of flight and consciousness of guilt. The Tribunal's observations at [69]–[73] can bear no other logical construction.[62]

This is the very antithesis of a *Yusuf* inference.

We may contrast their Honours' judgment with that of Kerr J, dissenting. His Honour, like Kenny and Rares JJ in *SZLSP*, recognised the need to choose between competing inferences:

> one cannot construe what the High Court said in *Yusuf* as elevating, to a fixed rule of law, the proposition that a reviewing court must always conclude that any matter not mentioned by a tribunal was not considered by it to be material. The way a decision is expressed, read fairly and in context, will sometimes show that a tribunal has made a particular finding despite there being no mention of it in its reasons.[63]

His Honour noted the Minister's submission that he should take the latter approach in light of what had transpired before the AAT.[64] But, for his Honour, that context cut the other way:

> If the Tribunal's findings had been responsive to that dispute one would have expected the learned Deputy President to have said something about those contentions and to have stated his conclusion.[65]

His Honour concluded:

> the Court cannot place weight on mere speculation. Nothing in the text, form, structure or context of the learned Deputy President's reasons provides sufficient justification for this Court to infer that the Tribunal made findings adverse to the applicant that it did not express. There is no reason to suppose that the Tribunal did other than hear the extensive argument pressed on behalf of the Minister that such findings should be made but refrained from making them.[66]

It is difficult to imagine an approach more diametrically opposed to that of the majority.

The Full Federal Court also split (albeit the other way) in *SZLSP*, where Buchannan J, in dissent, found that the AAT had failed in its obligation to give reasons.[67]

What is splitting the Court? Whether to draw a *Yusuf* inference is a matter of degree, impression and empirical judgment. But a contributing factor must surely be the lack of guidance from the High Court as to when it is appropriate to do so.

Irrationality

Before we look at what the High Court did in *FTZK*, let us see what followed from the *Yusuf* inferences drawn by the majority in *SZLSP* and by Kerr J in *FTZK*. In particular, was there jurisdictional error and, if so, of what species?

A useful starting point is the decision of Mason CJ in *Australian Broadcasting Tribunal v Bond*[68] (*Bond*):

> in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*.
>
> But it is said that '[t]here is no error of law simply in making a wrong finding of fact': *Waterford v The Commonwealth*, per Brennan J. Similarly, Menzies J observed in *Reg v District Court; Ex parte White*:
>
> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'
>
> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[69]

This classic statement, in apprehension of what is commonly referred to as 'merits review', directs attention to the evidence base rather than actual reasoning.[70] It is a view which survives today courtesy of the decision of Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*[71] (*SZMDS*).

SZMDS was yet another refugee case where there appeared to be a step missing in the AAT's written statement of reasons. The applicant argued that it was a jurisdictional error, on a question of jurisdictional fact, to engage in a process of reasoning that was 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[72] The context for this was s 65 of the Migration Act, which requires the Minister to grant a visa if 'satisfied' that the applicant meets all of the requirements, some of which are themselves expressed in terms of the Minister's satisfaction.

The applicant invoked a line of authority in which Gummow J was the common thread.[73] Sitting as Acting Chief Justice, his Honour combined with Kiefel J carefully to distinguish *Bond* as an *Administrative Decisions (Judicial Review) Act 1977* (Cth) case that was not concerned with jurisdictional fact finding:

> the first respondent does not assert any general ground of jurisdictional error of the kind disfavoured by Mason CJ where there were alleged deficiencies in what might be called 'intra-mural' fact finding by the decision-maker in the course of the exercise of the jurisdiction to make a decision. The apprehensions respecting 'merits review' assume that there was jurisdiction to embark upon determination of the merits. But the same degree of caution as to the scope of judicial review does not apply when the issue is whether the jurisdictional threshold has been crossed.[74]

SZMDS would have cemented illogicality as a ground of jurisdictional fact review were it not for Crennan and Bell JJ, who held:

> 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision-maker could arrive on the same evidence.[75]

This conclusion appears to be indistinguishable from that of Mason CJ in *Bond*,[76] with the result that illogicality is not a 'ground' of judicial review so much as a waypoint to a finding of 'no evidence'. Focus shifts away from the AAT's reasoning towards the evidence that was before it — in particular, is this evidence base known and, if so, can it support the impugned conclusion?

Let us now turn to consider *SZLSP* and *FTZK*.

In *SZLSP* Kenny J, having drawn a *Yusuf* inference, went on to find that:

> On the face of the Tribunal's written statement, the Tribunal's conclusion that the first respondent's answers were not correct was not grounded in probative material and logical grounds.[77]

This involved, as part of the *Yusuf* inference, a refusal to entertain the argument — which, by definition, could not be refuted — that it was possible to reason logically from the (unknown) evidence base to the AAT's conclusions.[78]

FTZK was altogether different. As already discussed, there were four independent strands of reasoning. The first of these — the direct evidence of alleged eyewitnesses — required no intermediate findings of fact to realise its probative value. As such, it was clearly possible to reason logically from the evidence base to the AAT's decision, with the result that the judgment of Crennan and Bell JJ in *SZMDS* stood in the applicant's way.[79]

Justice Kerr dealt with this by accepting the applicant's argument that things 'lacking any probative value' were 'irrelevant considerations' that the AAT was bound not to consider.

Putting to one side the question of whether this involves an unorthodox view of irrelevant considerations,[80] it is one which necessarily captures *all* illogicality within the concept of irrelevant considerations, for a chain of inferences that includes something that is 'not probative' is, by definition, illogical reasoning.[81] As such, his Honour's judgment appears to provide a total way around *SZMDS*.

SZMDS had in fact been invoked in *FTZK* — not by the applicant but, defensively, by the Minister.[82] Justice Kerr thus acknowledged both the ground and the debate that had 'raged' as to its availability and scope.[83] But his Honour abstained from the debate, saying:

> Decisions of administrative tribunals are frequently challenged on overlapping grounds. Arguments for illogicality can overlap with those put forward to establish that a decision-maker took into account irrelevant considerations. But each of those grounds is premised on different intellectual footings. Perhaps aware of the *SZMDS* debate and wishing to avoid its complexities, Mr Nash QC, for the applicant, did not rely on illogicality or irrationality as grounds to seek review.
>
> Mr Nash confined his criticism of the Tribunal to the proposition that its reasons disclosed that it had taken into account irrelevant considerations and submitted that it had thereby misconstrued its function. The Court is required to deal with what the applicant asserted, not what he did not.[84]

The High Court decision in *FTZK*

Before turning to the High Court, it is worth taking a moment to recapitulate. The applicant in *FTZK* argued that, absent certain findings in its *reasons*, the AAT must have relied, in its *reasoning*, on matters lacking in probative value. This called for the Court to engage (as Kerr J did) with the question of whether it was appropriate to draw a *Yusuf* inference and, if so, to examine critically the AAT's reasoning in light of this inference.

The High Court, across three separate judgments, did neither of these things. However, as a prelude to this critique, let us recall the 'framework of rationality' said by French CJ, in *Li*, to attend administrative decision-making generally.

The rationality requirement

In *FTZK*, four judges derived their rationality requirement not from any general framework but from the instant statute, by reference to art 1F. According to French CJ and Gageler J:

> The requirement that there be 'reasons for considering' that an applicant for refuge has committed such a crime indicates that there must be material before the receiving state which provides a rational foundation for that inference. The question for the decision-maker, and in this case the AAT, was whether the material before it met that requirement. To answer that question in the affirmative the AAT had to demonstrate a logical pathway from the material to the requisite inference.[85]

Their Honours went on to conclude that 'the AAT's process of reasoning did not comply with the logical framework imposed on its decision-making by art 1F(b)'.[86]

Justices Crennan and Bell took the same approach:

> undoubtedly the language of art 1F(b) and the scope and purpose of the Act obliged the tribunal not to rely on irrelevant considerations when considering whether there were 'serious reasons for considering' that the appellant (who qualified for protection under art 1A(2)) had committed the alleged crimes before entering Australia.[87]

It is, with respect, no doubt true that art 1F demands reliance on probative material. But, unless there are some administrate decision-makers who properly operate outside the 'framework of rationality', it is hardly necessary so to derive such a requirement.

The reasoning

All three judgments turned on the view that there was an alternative, innocent explanation for the facts as found by the AAT. According to French CJ and Gageler J:

> No [rational] connection was made or was able to be implied from the balance of the AAT's findings with respect to the conduct of the appellant in leaving China when he did, making false statements in support of his visa applications, or giving testimony to the AAT, which it did not accept, about his religious affiliations and fear of persecution if he returned to China. Those findings are consistent with the appellant having the purpose of leaving China and living in Australia. Whether or not they evidence a consciousness of guilt of the alleged offences was not the subject of any explicit finding by the AAT. Nor … is a finding on the part of the AAT that they evidence consciousness of guilt so apparent that the finding should be implied.[88]

Justice Hayne made a similar remark:

> As already indicated, none of the three other factors relied on by the tribunal could, in the circumstances of this case, logically support the conclusion which the tribunal reached. Each of those factors was as consistent with the appellant's innocence of the crimes alleged as it was with his guilt. Each could support the conclusion which the tribunal reached only if, considered separately or in conjunction with other matters, the appellant, by that conduct, impliedly admitted guilt of the crimes alleged. But once it is recognised that the appellant was found to have a well-founded fear of persecution for a convention reason, [the factors] are as readily explained by his desire to escape from China for innocent reasons as they would be by a desire to run away from the scene of a crime.[89]

Justices Crennan and Bell also identified an 'equally probable explanation':

> Here, the tribunal took into account (and treated as determinative) the timing of the appellant's departure from the PRC, lies told by the appellant both to obtain a visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living in Australia unlawfully. An equally probable explanation for all of these matters is a desire on the part of the appellant to live in Australia. That desire is not unique to the appellant, particularly as he has been found to fall within art 1A(2) of the Convention. A correct application of art 1F(b) to the facts required the tribunal to ask of the evidence before it whether that evidence was probative of 'serious reasons for considering' that the appellant had committed one or more of the alleged crimes.[90]

From this common base, their Honours simply concluded that the AAT misunderstood its statutory task.[91] Justice Hayne was most emphatic:

> The reasoning of the tribunal reveals error of law. None of the second, third or fourth factors identified by the tribunal could support a conclusion that there were 'serious reasons for considering' that the appellant had committed the crimes alleged against him. They could not support that conclusion because, in the circumstances of this case, none of those three factors was logically probative of the appellant's commission of the alleged crimes. Reliance upon those factors shows that the tribunal must have misconstrued the expression 'serious reasons for considering'.[92]

Inherent in these conclusions are a *Yusuf* inference (that is, that findings not mentioned were in fact not made) and a further inference that the AAT misunderstood its task.

Ironically, however, neither inference was stated, let alone explained.

The Yusuf inference

As we have seen, failure to disclose a 'logical path' does not necessarily mean flawed reasoning. To borrow a turn of phrase from *FTZK* itself, a gap in the logical path is, prima

facie, 'as consistent' with flawed *reasons* as it is with flawed *reasoning*. The outcome of the case thus turned critically on whether to draw a *Yusuf* inference or instead infer, as in *Wingfoot*, that the AAT had failed in its duty to record its 'actual path of reasoning'.

Justice Kerr recognised this below, as did Kenny and Rares JJ in *SZLSP*. Their Honours all explained their choice at some length.

It is unclear why the High Court did not consider it necessary to identify, let alone explain, its preferred inference.[93] In the result, lower courts remain without clear guidance on when it is appropriate to draw a *Yusuf* inference.

The further inference that the AAT misunderstood its task

Having determined (apparently via a *Yusuf* inference) that the AAT's decision lacked a 'logical pathway' because it relied upon matters that were 'not probative', the further inference that it misunderstood its task appeared (in all three judgments) to follow as a matter of course.

It is worth reflecting on how extraordinary this is. In essence, the High Court concluded that the AAT reasoned illogically because it failed to realise that its statutory task required it not to do this. That is another way of saying that it interpreted its statutory task as permitting it to reason arbitrarily.

This is an almost unreal inference. Yet the High Court draws it absent any further indicia and without giving any indication as to why. This is despite the availability of what would seem to be a far more likely inference: that the AAT simply messed up.

This is, of course, what the Minister urged, noting that such want of logic would not go to jurisdiction. In written submissions, he put it thus:

> Even if the Tribunal erroneously treated some facts that were not probative as being relevant to its task … that would not indicate that the Tribunal asked itself the wrong question. It would show only that the Tribunal may have reached an incorrect answer to the right question.[94]

Of course, the only reason that this would not go to jurisdiction is *SZMDS* and, in particular, the joint judgment of Crennan and Bell JJ. Yet this case was not cited by the High Court or even by the parties in argument. Its absence was conspicuous on two levels. First, as the latest word from the High Court on the illogicality ground of judicial review, it begged consideration given that allegations of illogicality lay at the heart of FTZK's argument. Secondly, its absence from argument was all the stronger given that it had been invoked by the Minister below and then discussed at some length by Kerr J. It is as if *SZMDS* was the elephant in the room: FTZK saying nothing out of fear that it would be applied; and the Minister saying nothing out of fear, perhaps, that it would be revisited.[95]

In particular, we might have expected some reference to *SZMDS* in the joint judgment of Crennan and Bell JJ. It was, after all, their Honours who, in that case, denied illogicality an existence independent from the 'no evidence' ground of judicial review. Yet in *FTZK* their Honours effectively blessed a freestanding logicality requirement by concluding that reliance on non-probative material shows a misunderstanding of the statutory task.

Moreover, in so doing, their Honours quoted from Kerr J below as follows:

> For a reviewing court to imply or infer critical findings of fact, not expressed in the decision-maker's reasons, would … 'turn on its head the fundamental relationship between administrative decision-makers and Chapter III courts exercising the power of judicial review'.[96]

But, in the quoted passage, Kerr J was dealing with the Minister's reliance upon *SZMDS* by, in effect, doubting that it really stands for what Crennan and Bell JJ had said. Thus, in the preceding paragraph, his Honour said:

> It is not to be supposed that the Minister was submitting that, provided this Court were to be satisfied that the Tribunal had before it evidence we might think was capable of supporting the conclusion the Tribunal had reached, the reasons actually given by the Tribunal can be ignored.[97]

Justice Rares made a similar remark in *SZLSP*. Referring to the RRT's statutory obligation to set out the evidence upon which its findings on material questions of fact were based,[98] his Honour said:

> It would be an inversion of the express requirement of the Parliament for this material to be identified, if the Court excused its omission by seeking to glean from the transcript some basis to uphold the decision that the tribunal did not begin to articulate. That would be to adopt a merits review.[99]

Conclusions

FTZK was an ideal case to shed light on the difficult question of when to draw a *Yusuf* inference. Instead, the High Court stoked other difficult questions: what to infer from illogicality, and why?

FTZK's argument that the AAT relied on material that was not probative was just another way of complaining about the logic of the decision. As such, the High Court might have called a spade a spade and dealt with its own judgment in *SZMDS*.

Against this, it might be said that *SZMDS* was not raised in argument. But it is still the law. It hardly needed to be drawn to the High Court's attention and, in any event, it was there in the judgment of Kerr J below.

It might also be said (and, indeed, was said by Kerr J) that different grounds of judicial review can overlap.[100] So much can be readily accepted in principle, but the principle should not be uncritically applied to a given case. In particular, where grounds overlap, they should either produce the same result or, if they produce different results, do so for an identifiable reason. This is, first and foremost, because decision-makers need to be able to know whether they are within jurisdiction.

More generally, we might call for sensible limits on the High Court's rejection, in *Kirk v Industrial Court (NSW)*,[101] of 'rigid taxonomies'. It is one thing to embrace the concept of new, evolving and overlapping grounds by saying that it is 'neither necessary nor possible to mark the metes and bounds of jurisdictional error'.[102] It is quite another thing to tolerate — indeed, to foster — uncertainty as to what follows from particular circumstances, especially from such a general conclusion as illogicality.

Where a court (whether or not by drawing a *Yusuf* inference) concludes that a decision-maker reasoned illogically, it needs to know how to approach the question of what follows. In *FTZK*, the High Court did not explain its surprising conclusion that the AAT's want of logic reflected a misunderstanding of its statutory task. This leaves the law in a state of uncertainty whenever a decision-maker is found to have reasoned illogically from material that was capable of supporting the conclusion reached. What is the court to do, especially if

FTZK and *SZMDS* are invoked on opposite sides of argument: apply *FTZK* as the newer decision or confine it to its facts and revert to *SZMDS*?

Such uncertainty in the law necessarily carries with it unpredictability for would-be applicants who are already aggrieved by an illogical decision. This is in no-one's interests.

Epilogue: How to use *FTZK*

As we have seen, shorn of language such as 'no logical pathway' and 'not probative', the point of departure in *FTZK*, for the conclusion that the AAT misunderstood its statutory task, was illogicality *simpliciter*.[103] In theory, then, the case should have broad applicability. However, to be sure, applicants should refer not merely to illogicality but to the absence of an intermediate finding of fact. This should be 'critical' in the sense that, without it, there is no longer a 'logical pathway' to a fact in issue.

Then it remains only to argue that the decision-maker 'must' have misunderstood their statutory task. This last link is, of course, hardly intuitive.[104] This may be why *FTZK* has not often been invoked. Indeed, it seems most often to be invoked as an adjunct to *Li* in arguing legal unreasonableness.[105]

Surprisingly,[106] the purest *FTZK* argument to date appears to have come from the Minister, in *Minister for Immigration and Border Protection v Farag*.[107]

Mr Farag applied for a protection visa while he was on a student visa. This application had not been determined when his student visa expired, causing him to become an unlawful non-citizen. He was ultimately granted a protection visa and, later, he applied for citizenship.[108] On this application, his period as an unlawful non-citizen was a problem. But there was a discretion, in cases of 'administrative error', to treat it as a period in which he was a lawful non-citizen.[109] The AAT exercised this discretion because the Department had sent Mr Farag a letter containing misleading information, with the result that Mr Farag had not 'taken additional steps by way of representations' to avoid this outcome.[110]

The Minister, invoking *FTZK*, argued that the AAT had failed to make any findings about what Mr Farag might have done to avoid becoming an unlawful non-citizen had he not been misinformed by the Department's letter. This gap in its reasoning showed that it had misunderstood its statutory task.[111]

Justice Robertson rejected this argument on the facts but added that, in any event, 'the reasoning in *FTZK* turned on the meaning of art 1F(b) of the Refugees Convention, especially the words: "there are serious reasons for considering"'.[112] It is not clear whether, in so distinguishing *FTZK*, his Honour was suggesting that the source of the rationality requirement matters or, rather, denying logicality a place in the framework of rationality.

Endnotes

1 (2014) 310 ALR 1.
2 See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 574 [73] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ).
3 *FTZK v Minister for Immigration and Citizenship* [2012] AATA 312 (*FTZK* — AAT), [1]; *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158 (*FTZK* — FFC), 173 [62] (Kerr J); *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 (*FTZK* — HC), 16 [58] (Crennan and Bell JJ).
4 *FTZK* — AAT [6]; *FTZK* — FFC 173 [60]–[61], [63] (Kerr J); *FTZK* — HC 16 [59] (Crennan and Bell JJ).
5 *FTZK* — FFC 173 [64] (Kerr J); *FTZK* — HC 16 [60] (Crennan and Bell JJ).
6 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A.

7 *FTZK* — FFC 173 [64]–[67] (Kerr J); *FTZK* — HC 16 [60] (Crennan and Bell JJ).
8 See *FTZK* — HC 16 [61] (Crennan and Bell JJ); *FTZK* — FFC 173 [69]–[71] (Kerr J).
9 *FTZK* — HC 16 [61] (Crennan and Bell JJ).
10 *FTZK* — FFC 174 [72] (Kerr J); *FTZK* — HC 16 [61] (Crennan and Bell JJ).
11 See *Migration Act 1958* (Cth) s 500(1)(c)(i).
12 *FTZK* — HC 16 [61] (Crennan and Bell JJ).
13 *FTZK* — AAT [8]; *FTZK* — HC 21 [78] (Crennan and Bell JJ).
14 *FTZK* — AAT [7].
15 *FTZK* — AAT [2]; *FTZK* — FFC 174 [75] (Kerr J); *FTZK* — HC 17 [62] (Crennan and Bell JJ).
16 *FTZK* — FFC 174 [76] (Kerr J); *FTZK* — HC 17 [62] (Crennan and Bell JJ).
17 *FTZK* — AAT [69]–[72].
18 See *FTZK* — FFC 170 [44] (Gray and Dodds-Streeton JJ).
19 *FTZK* — AAT [73].
20 Discussed in *FTZK* — FFC 165–66 [22]–[27] (Gray and Dodds-Streeton JJ).
21 See *FTZK* — FFC 160 [1], 164 [19] (Gray and Dodds-Streeton JJ, referring to the argument that the AAT had regard to 'irrelevant considerations'), 172 [56]–[57], 177–78 [104]–[109] (Kerr J).
22 So do the words 'irrelevant considerations', but this is beyond the scope of this article.
23 (2013) 249 CLR 332.
24 Ibid 350 [26].
25 Ibid.
26 (1980) 44 FLR 41
27 Ibid 66–7. His Honour made similar remarks in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366.
28 (1999) 48 NSWLR 161.
29 Ibid 174–5 [72].
30 The Uniform Evidence Law has now been enacted, with variations which are not presently relevant, as: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Norfolk Island); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); and *Evidence (National Uniform Legislation) Act 2011* (NT).
31 See s 3(1) and the definition in the Dictionary at the end of each of the above enactments.
32 Australian Law Reform Commission, *Evidence (Interim)* [1985] ALRC 26, ch 11, 'Relevance'.
33 On the rationalist school see William Twining, *Rethinking Evidence* (Cambridge University Press, 2nd ed, 2006) 35–98.
34 See generally Andrew Palmer, *Proof and the Preparation of Trials* (Law Book Company, 1st ed, 2003).
35 *Secretary, DEWR v Homewood* (2006) 91 ALD 103, 111 [40]. Incidentally — on the assumption that an obligation to give reasons attends, and does not rise higher than, an obligation to give a reasoned decision — this passage suggests that logicality is indeed central to his Honour's 'framework of rationality'.
36 (2013) 252 CLR 480.
37 Ibid 501 [55] (the Court).
38 Ibid 493 [28] (the Court).
39 *Wingfoot* concerned the reasons of a Medical Panel for an opinion given under s 68 of the *Accident Compensation Act 1985* (Vic).
40 Section 474.
41 Section 483.
42 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
43 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 [68]–[70] (McHugh J). That case concerned s 430(1) of the Migration Act. His Honour considered, at [70], that the words '[w]here the tribunal makes its decision' presuppose that the AAT has already made a decision. If anything, this same presupposition is even stronger in s 43(2B) of the AAT Act. See also *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 387–8 [84]–[85] (Rares J).
44 (2003) 216 CLR 212.
45 Ibid 226 [48] (Gleeson CJ, Gummow and Heydon JJ); see also 228 [57] (McHugh J).
46 In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Palme* (2003) 216 CLR 212, the plurality (at 224 [41]) described this as a 'prudent apprehension'.
47 *FTZK* — FFC 177–8 [109] (Kerr J).
48 See eg *Migration Act 1958* (Cth) ss 368(1), 430(1), 501G; *Administrative Appeals Tribunal Act 1975* (Cth) ss 37(1), 43(2B); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(1); *Acts Interpretation Act 1901* (Cth) s 25D.
49 (2001) 206 CLR 323.
50 Ibid 330–1 [5]. At 332 [10], his Honour acknowledged that '[t]here may be cases where it is proper to conclude that the Tribunal has not set out all its findings' but gave no indication as to what these might be.
51 Ibid 346 [69] (McHugh, Gummow and Hayne JJ).
52 Ibid 338 [37].
53 The different results in *Wingfoot* and *Palme* show that this is just the beginning of the inquiry.
54 (2010) 187 FCR 362.
55 Ibid 366 [7].

56 Ibid 378 [50]. See also 386 [80] ff (Rares J).
57 Ibid 381 [59].
58 Ibid 381 [60] (emphasis added).
59 See eg Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, discussed below.
60 *FTZK* — FFC, 183–5 [146]–[153] (Kerr J).
61 Ibid 171 [45], [47].
62 Ibid [49].
63 Ibid 183 [145].
64 Ibid, 183–4 [146].
65 Ibid 184 [151].
66 Ibid 185 [158].
67 *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 396 [114]. His Honour went on to say that this defect did not go to jurisdiction: 396 [115]–[116].
68 (1990) 170 CLR 321.
69 Ibid 355–6 (citations omitted).
70 But see below, n 85.
71 (2010) 240 CLR 611.
72 Ibid 614.
73 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 71–3 [53]–[60]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 20–1 [37]–[38].
74 (2010) 240 CLR 611, 624 [38] (Gummow ACJ and Kiefel J).
75 Ibid 647–8 [130].
76 Albeit that their Honours did not cite *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 despite referring to it elsewhere. Indeed, their Honours cited no authority specifically in support of their conclusion at [130].
77 *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 384–5 [72].
78 Ibid 384 [69]. Her Honour specifically had regard to *SZMDS*, including the judgment of Crennan and Bell JJ at [130], albeit without attempting to extract a ratio or reconcile the different judgments.
79 By the time *FTZK* was argued, the Full Federal Court in *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1, [3], [16] (Rares J) and [85] (McKerracher J), had read the (arguably neutral) decision of Heydon J in *SZMDS* as forming a majority together with Crennan and Bell JJ.
80 See *FTZK* — HC, 13 [41]–[42] (Hayne J); cf 9 [19] (French CJ and Gageler J).
81 The inverse is not necessarily true (at least not if 'probative' has its Uniform Evidence Law meaning), for it is always possible to reason illogically from information that is *capable* of forming part of a logical proof.
82 *FTZK* — FFC 179 [115]–[116] (Kerr J).
83 Ibid 180 [122].
84 Ibid 180 [123]–[124].
85 *FTZK* — HC 7 [13].
86 Ibid 9 [19].
87 Ibid 25 [94].
88 Ibid 9 [18].
89 Ibid 12–13 [39].
90 Ibid 24 [91].
91 Ibid per French CJ and Gageler J at 5 [6] ('a failure on the part of the AAT to ask itself the question which Art 1F(b) required') and 9 [19] ('The AAT did not respond to the question it was required to ask'); Hayne J at 10 [25], 11 [31] and 13 [42]; and Crennan and Bell JJ at 25 [97] ('the tribunal misconstrued its functions and powers under art 1F(b)').
92 Ibid 11 [31].
93 Crennan and Bell JJ refer to this aspect of *Yusuf* but without (explicit) application: see *FTZK* — HC 24 [90].
94 Minister for Immigration and Citizenship, 'Appellant's Submissions', Submission in *Minister for Immigration and Citizenship v FTZK*, M143 of 2013, 13 December 2013, [20].
95 This is, to be sure, nothing more than conjecture.
96 *FTZK* — HC [67], citing Kerr J, *FTZK* — FFC at [118].
97 *FTZK* — FFC [117].
98 Section 430(1)(d).
99 (2010) 187 FCR 362, [95]. Similarly, in *Kaur v Minister for Immigration and Border Protection* (2014) 141 ALD 619, 645–6 [110], Mortimer J said that where reasons have been given 'it is the justification given in the reasons, and the intelligibility of the exercise of power as explained in the reasons, which the supervising court should examine' and 'for a supervising court to engage in finding and applying facts and reaching its own conclusions about how and why, through a different reasoning process, the exercise of power could be justified is tantamount to a re-exercise of the power by the supervising court'. See also *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 25 VR 324, 346 [63] (the Court).
100 *FTZK* — FFC 180 [123]. See also *FTZK* — HC 9 [19] (French CJ and Gageler J), 23 [85] (Crennan and Bell JJ). Similar remarks abound. See eg *Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ).
101 (2010) 239 CLR 531.

102 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–4 [71], [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
103 This goes further than Gummow ACJ and Kiefel J in *SZMDS*, who (as discussed above) would have limited the illogicality ground to jurisdictional fact review.
104 An identical conclusion was urged in *SZLSP* in respect of the AAT's reference to the unidentified textbook. Buchannan J said ((2010) 187 FCR 362, 394 [109]) that the link between this and 'the conclusion that the wrong question had been asked' was 'elusive'.
105 For example, *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83, [52] (Flick, Griffiths and Perry JJ); *Berryman v Minister for Immigration and Border Protection* [2015] FCA 616, [35] (Flick J); *Angkawijaya v Minister for Immigration and Border Protection* [2015] FCCA 450, [44] (Judge Driver).
106 The argument, had it succeeded, would have established *FTZK* as a powerful precedent for applicants.
107 [2015] FCA 646; see at [48]–[49].
108 The relevant facts are set out at [2015] FCA 646, [8]–[16].
109 *Citizenship Act 2007* (Cth) s 22(4A). See [2015] FCA 646, [17].
110 [2015] FCA 646, [21]–[26].
111 Ibid [48].
112 Ibid [49].