A WORKABLE FORMULATION FOR JURISDICTIONAL ERROR IN AUSTRALIA?

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Since the introduction of the privative clause in s 474 of the *Migration Act 1958* (Cth), Australian courts have taken the view that s 474 does not protect 'jurisdictional errors'.[1] The obvious follow-up question is 'what is a jurisdictional error?', but that question is one that courts in the common law world have been unable to answer. The High Court's recent decision in *Hossain v Minister for Immigration and Border Protection*[2] (*Hossain*) gives some kind of optimism that a solution is at hand. However, I still argue that the distinction between jurisdictional and non-jurisdictional error is unnecessarily complex at best and illusory at worst, and Australian law would still do well to rid itself of the concept altogether.

Judicial interpretation of 'jurisdictional error'

The purpose of successive amendments made to pt 8 of the *Migration Act 1958* (Cth) since 1994 demonstrate an attempt by successive governments to reduce the scope for judicial review of migration decisions. However, the judgement in *S157/2002 v Commonwealth*[3] (*S157*) made it clear that s 474 of the Migration Act will not protect a decision affected by a 'jurisdictional error'. The question now is what that term means.

It is well known that the distinction between jurisdictional and non-jurisdictional errors of law has been abolished in the UK.[4] That is, all errors of law are regarded as going to the decision-maker's jurisdiction. In Canada, the Supreme Court has not quite been able to bring itself to abolish the distinction altogether, but the possibility has been canvassed. In particular, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* Rothstein J, writing for the majority, stated 'it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identify the appropriate standard of review'.[5] Regardless, not one Supreme Court decision since the crucial case of *Dunsmuir v New Brunswick*[6] has turned on whether a decision-maker has committed a jurisdictional error or has simply made an unreasonable decision.

Australian courts, however, maintain that there is still a difference between jurisdictional and non-jurisdictional errors but that nearly all errors of law will be jurisdictional errors. Keifel J attempted to explain the difference between jurisdictional and non-jurisdictional errors in *Linett v Australian Education Union* as follows:

> The distinction between jurisdictional error and a 'mere error of law' is maintained, the latter being one which has been arrived at on an issue that has been entrusted to the inferior court or tribunal to decide for itself, even if the decision is wrong.[7]

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Despite this reasoning, there does not seem to have been a case in Australia decided since *Plaintiff S157/2002 v Commonwealth*,[8] at any judicial level, that has turned on whether an identified error of law is jurisdictional or not. That is, there has not been a decision since *S157*, until the recent cases that we will discuss shortly, that has found the existence of an error of law but has found that it is not a jurisdictional error.[9] It is notable that a well-known decision on the scope of jurisdictional errors, *Minister for Immigration and Multicultural Affairs v Yusuf*[10] (*Yusuf*), gave only an expressly non-exhaustive list of such errors and, more recently, in *Kirk v Industrial Relations Commission (NSW)*[11] (*Kirk*), the High Court has stated that 'it is neither necessary, nor possible, to mark the metes and bounds of jurisdictional error'.[12] That is, a jurisdictional error is whatever a court says it is. Further, if s 474 of the Migration Act does not demonstrate that a 'migration decision' is an 'issue that has been entrusted to the inferior court or tribunal to decide for itself', what on earth does?

Federal Court decisions

Ratumaiwai

One attempt to distinguish between a jurisdictional and non-jurisdictional error came in *Ratumaiwai v Minister for Immigration and Multicultural Affairs*[13] (*Ratumaiwai).* This was a case involving judicial review of a decision to refuse to find that a visa applicant was a 'special needs relative', and Hill J found as follows:

> [27] It is clear from the transcript that the Tribunal considered, and rejected, the claim of the applicant that the giving of financial assistance qualified him as a 'special need relative' within the meaning of that expression. Even although the Tribunal Member did not deal with the issue of financial assistance in the reasons for decision, as he was obliged to do under s 430(1)(b) of the Act, it is clear that the Member did not fail to consider the question. He did consider it and rejected it. So, it cannot be said that the Tribunal Member failed to take into account financial assistance as a relevant consideration …
>
> [28] The distinction between error of fact and error of law is a fine one. While it is true that the ordinary English meaning of a word is a question of fact, so that a Tribunal which defines the word wrongly does not make an error of law, what was involved in the present case was whether it was open to the Tribunal to find that a person who gave financial assistance to a nominator came within the expression 'special need relative' …
>
> [29] In my view, once it is seen that the Tribunal has addressed the issue of financial assistance, however, even if in so doing it has made an error of law, that error is not, in my opinion, a jurisdictional error.[14]

The conclusion reached by Hill J was nevertheless equivocal and did not explain why the error of law in question, assuming that one had been made, was not a jurisdictional error. A number of cases since this decision was handed down have stated that making an error of fact is not a jurisdictional error, but they do not make it clear whether that error is a non-jurisdictional error of law.[15]

SZIZO

Another case that might have come *close* to making a distinction between a jurisdictional and non-jurisdictional error, but ultimately did not do so, was *Minister for Immigration and Citizenship v SZIZO*[16] (*SZIZO*). In that case, the Court distinguished between 'mandatory' and 'facilitative' provisions of the Refugee Review Tribunal (RRT) Codes of Procedure and found that the RRT had not committed a jurisdictional error despite an apparent breach of

s 441G of the Act. That is, the High Court found the existence of 'core' and 'non-core' provisions in the Codes of Procedure to be a way to relax the strict compliance approach to the codes, without actually distinguishing between jurisdictional and non-jurisdictional errors.

An attempt at an explanation: MZYZA

In 2013 a brave attempt to distinguish between jurisdictional and non-jurisdictional errors was made by the Federal Court in *Minister for Immigration and Citizenship v MZYZA*[17] (*MZYZA*). In this case, a Department of Immigration and Citizenship (DIAC) decision to refuse a protection visa was upheld by the RRT, which had been concerned with the authenticity of certain documents, including a letter supporting the applicant's claimed facts. The RRT had put to the applicant that it was 'very easy to obtain false documents in India'[18] but made no explicit finding that the specific letter in question was fraudulent. As a result, the Federal Magistrates Court found that the RRT had made a jurisdictional error. The Minister had argued that the 'weight' to be given to the letter was a matter for the RRT and that the RRT had implicitly decided to give it little or no weight. However, the Federal Magistrate found as follows:

> I do not accept the submission that the Tribunal implicitly decided to give the letter little or no weight. There is no indication in the Tribunal's reasons for decision of any cognisance of the letter in the part of the Tribunal's reasons that records its reasons for decision, as opposed to its summary of the background. It seems to me that the Tribunal overlooked the letter while weighing up the evidence and formulating its decision, as opposed to setting out the background to the case.[19]

The Federal Magistrate went on to find that the letter was a crucial piece of evidence and that the RRT may have reached a different conclusion had it turned its mind to the matter.[20] The RRT decision was therefore set aside.

Tracey J upheld the Minister's appeal in the Federal Court. His Honour did so primarily on the basis that a mere defect in the reasons for a decision is not a ground of jurisdictional error[21] and that it was clear from the RRT's reasons that it rejected the applicant's claim to be a member of a certain political party.[22] Tracey J summed up as follows:

> Even if it is accepted that the Tribunal failed to have regard to the contents of the letter, I do not consider that such a failure constituted jurisdictional error. The Tribunal was bound to have regard to and assess the first respondent's claim to have been persecuted because of the political and religious beliefs attributed to him ... It did so. It was not suggested that the failure (if there was one) to refer to the contents of the letter occurred because the Tribunal had misdirected itself as to the proper scope of its deliberations or by failing to identify the relevant claims and integers of the claims raised by the first respondent. It was not bound to consider each and every piece of evidence which related to those claims.[23]

His Honour added that the letter 'did not, in my view, amount to evidence of pivotal importance, or as being so fundamental to the first respondent's claim, that a failure to give consideration to its contents caused jurisdictional error'.[24]

The analysis given by Tracey J is very thorough, but he himself admits that 'value judgments are involved in determining whether material can be regarded as so "fundamental" or so "important" or so "overwhelming" that a failure to have regard to it constitutes jurisdictional error'.[25] It still seems apparent that courts have a lot of discretion in determining whether something is a 'jurisdictional error' or not, and *MZYZA* still does not provide an example of a

decision turning on a classification of something found to be an error of law as jurisdictional or not.

A pragmatic approach: SZUNZ

Finally, the decision of the Full Federal Court in *SZUNZ v Minister for Immigration and Border Protection*[26] (*SZUNZ*) has the potential to go some way towards resolving the question of whether an error of law is 'jurisdictional' or not. While the decision in *SZUNZ* did not *turn* on this distinction, it may have proposed a means by which jurisdictional and non-jurisdictional errors can be distinguished.

In short, the Full Federal Court in *SZUNZ* appears to have taken the view, for the first time, that an error of law will not be a *jurisdictional* error unless it has an impact on the tribunal's final decision. In this case, the Full Federal Court was concerned with the interpretation of s 36(2)(aa) of the Act and, in particular, the means by which a stateless person's country of former habitual residence was to be determined.

All three judges were critical of the RRT's interpretation of s 36(2)(aa) of the Act and its interpretation of the definition of 'receiving country' in s 5. Despite this, each of the three judges (Buchanan, Flick and Wigney JJ) found that the RRT's decision was made on the facts of the case, and its incorrect interpretation of the Act ultimately made no difference to the final decision. However, *SZUNZ* lacks a clear majority judgement, despite the Full Federal Court unanimously dismissing the appeal, as each gave a separate judgement. This means that there was still no unambiguous differentiation between jurisdictional and non-jurisdictional errors.

Buchanan J found that the RRT had erred in its interpretation of s 36(2)(aa) but that it had not made a jurisdictional error, as its error ultimately played no part in its final decision, which was based primarily on the facts of the case.[27] His Honour therefore takes the boldest approach of the *SZUNZ* bench, finding that the RRT committed that rare species of legal error — a non-jurisdictional error of law — because its misinterpretation of ss 5(1) and 36(2)(aa) of the Migration Act, an error of law, did not affect the overall result to the applicant. Buchanan J stated:

> The RRT apparently took the view that it was obliged to proceed on the basis that whether the appellant was 'an habitual resident' of a country for the purposes of s 36(2)(aa) was to be determined 'solely' by reference to the law of that country as the definition, on a literal reading, might appear to suggest. If that was the approach that was taken then, in my respectful view, it was an error but (for reasons to be developed) was not one which was a jurisdictional error in the circumstances of the present case.[28]

Flick J went close to endorsing the views of Buchanan J but was more equivocal about whether the RRT had committed an error of law in the first place — his Honour took the 'even if this is an error of law, it is not a jurisdictional error' way out. However, Flick J seems to agree with Buchanan J in principle that an error of law that does not impact on the overall decision is not a jurisdictional error. Wigney J avoided the issue, simply stating that the RRT committed no jurisdictional error in coming to the conclusion that it did.

The *SZUNZ* approach was more recently given support in *Minister for Immigration and Border Protection v SZUXN*,[29] in which Wigney J (a member of the SZUNZ bench) set aside a decision of the Federal Circuit Court[30] which found a decision of the RRT to be

unreasonable. Wigney J did hedge his bets somewhat, finding that the RRT decision was not unreasonable and then going on to find that, in any event, the impugned passages of the decision were not a 'foundational element' or 'critical' to the RRT's decision.[31] This meant that no jurisdictional error had been committed.

The High Court decision in *Hossain*

***Decisions of the delegate and the Administrative Appeals Tribunal*[32]**

Mr Hossain was a national of Bangladesh who made a valid application for a partner visa in Australia. The delegate refused the application on two grounds — firstly, Mr Hossain was unlawful at the time of his application and did not meet the criteria for grant of a visa prescribed by sch 3 of the Regulations;[33] and, secondly, Mr Hossain owed a debt to the Commonwealth which was not the subject of repayment arrangements, meaning he did not meet Public Interest Criterion 4004 (PIC 4004).[34]

Mr Hossain sought review from the Administrative Appeals Tribunal (AAT), which affirmed the refusal decision. Significantly, the AAT found that 'Mr Hossain had not applied within 28 days of ceasing to hold a previous visa and was satisfied that there were no compelling reasons as at the time of the application for not applying the criterion'.[35] Further, there was no evidence that Mr Hossain had repaid his debt to the Commonwealth, despite his stated intention to do so.

Lower court decisions

Mr Hossain then appealed against the AAT's decision to the Federal Circuit Court. By that time, Mr Hossain had paid his debt to the Commonwealth.[36] Moreover, the Minister accepted that the AAT had made an error of law in its application of sch 3 of the Regulations. The AAT had found that there were no compelling reasons not to apply the sch 3 criteria at the time of Mr Hossain's application, where the true test was whether compelling reasons existed at the time of decision. The latter approach had been found to be the correct one in *Waensila v Minister for Immigration and Border Protection*,[37] and the Minister conceded the error. However, the Minister argued that because, on the facts available to the AAT at the time, Mr Hossain could not meet the requirements for grant of the visa in any event, the error was not jurisdictional in nature. That is, because the decision of the AAT would have been the same in any event, its error of law was not a jurisdictional error. It appears that the Minister did not refer to *SZUNZ*,[38] but the argument nevertheless seems to be drawn from that decision.

The Federal Circuit Court rejected the Minister's argument, refusing to split the AAT's reasoning into 'impeachable and unimpeachable parts'.[39] On the Minister's appeal, the Full Federal Court gave a very confusing decision, with the majority categorising the AAT's error as jurisdictional but nevertheless upholding the appeal on the basis that the 'Tribunal's error had not stripped [it] of authority to make the decision to affirm the delegate's decision'.[40] At para 23, Flick and Farrell JJ stated:

> In the circumstances of the present case, it is respectfully concluded that any legal error on the part of the Tribunal — be it characterised as jurisdictional or otherwise — in respect to the construction and application of the phrase 'compelling reasons' for the purposes of cl 820.211(2)(d)(ii) did not have any

> of the consequences that the Tribunal's decision to refuse the visa was a nullity or that the Tribunal was stripped of all authority or jurisdiction to make that decision or that the Tribunal was incapable of determining a separate and discrete point, being the conclusion expressed in respect to Public Interest Criterion 4004.[41]

Their Honours added that '[e]ven where jurisdictional error is exposed, a decision may only be regarded as a nullity if the error strips the decision-maker of authority to make the decision'.[42] With all due respect to Flick and Farrell JJ, if this reasoning had been allowed to stand, an already meaningless distinction between jurisdictional and non-jurisdictional errors would have been joined by a concept that some jurisdictional errors invalidate a decision and some do not, at which point many Australian administrative lawyers would have simply surrendered. The High Court in *Hossain*, thankfully, squashed this concept when it stated that 'the majority in the Full Court was therefore wrong to distinguish between a decision involving jurisdictional error and a decision wanting in authority … [t]hey are one and the same'.[43]

Mortimer J dissented, both in reasoning and the result. Her Honour found that the error was jurisdictional in nature and that the only remaining issue was whether relief would be futile because of Mr Hossain's previous failure to meet PIC 4004. Because Mr Hossain could now demonstrate that he did in fact meet the requirements of PIC 4004, an order of certiorari was not futile and that order should therefore be granted.[44]

Mortimer J also stated that, in the alternative, the two visa criteria at issue at the AAT were not entirely independent of each other. If the AAT had applied the sch 3 criteria correctly and been satisfied that there were compelling reasons for not applying the criterion at the time of decision, the AAT might have decided to delay making its decision until such time as Mr Hossain was able to satisfy it that he had either paid his debt to the Commonwealth or entered into an arrangement with the Commonwealth for payment to occur. Mr Hossain had therefore missed out on a genuine opportunity for the grant of the visa he sought, and the error was jurisdictional for that reason also.[45]

Decision of the High Court

Majority judgement

The High Court majority judgement was given by Kiefel CJ and Gageler and Keane JJ. Their Honours described the concept of the jurisdictional error as a 'terminological tangle'[46] and noted that, under the regime set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), the term had almost fallen into disuse. Only the introduction of s 474 into the Migration Act required its resuscitation.[47] In particular, their Honours noted that '[f]or so long as there remains a necessity for courts to fall back on constitutionally entrenched minimum jurisdictions to engage in judicial review of administrative action, however, the traditional distinction between jurisdictional and non-jurisdictional error cannot be avoided'.[48] In other words, so long as governments attempt to find ways around s 75 of the *Constitution*, the courts will use whatever means are necessary to ensure that this cannot happen.

The majority judges described the term 'jurisdiction' as meaning 'the scope of the authority that is conferred on a repository'[49] and that a 'jurisdictional error', therefore, is a 'failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been 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'.[50] Presumably this includes requirements such as natural justice, which courts presume to be a requirement of administrative decision-making unless it is specifically excluded by the enabling statute.[51] For all intents and purposes, a decision affected by jurisdictional error is 'no decision at all', 'void' or 'invalid'.[52]

Finally on this point, the majority stated that the 'question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute'.[53] That is, whether an error is 'jurisdictional' or not can only be determined by examining the decision-maker's enabling legislation.

While it is correct that the decision to grant or refuse a visa is predicated, under s 65 of the Migration Act, on the Minister's satisfaction as to whether the criteria for the grant of that visa have been met or not, the point remains that 'the Minister's state of satisfaction or of non-satisfaction is in each case conditioned by a requirement that the Minister or his or her delegate, or the Tribunal forming its own conclusion on review, must proceed reasonably and on a correct understanding and application of the applicable law'.[54] The key point of the judgement comes in para 35, which states as follows:

> Here the Tribunal breached that implied condition[55] by misconstruing and misapplying the criterion which related to the timing of the making of the application. The breach, however, could have made no difference to the decision which the Tribunal in fact made to affirm the decision of the delegate. That was because the Tribunal was not satisfied that the public interest criterion was met, and, on the findings which the Tribunal made, the Tribunal could not reasonably have been satisfied that the public interest criterion was met. The Tribunal in those circumstances had no option but to affirm the decision of the delegate.[56]

The result was that the AAT's error 'in construing and applying the criterion relating to the timing of the making of the application did not rise to the level of a jurisdictional error'.[57]

Finally, the joint judgement also rejected the approach of Mortimer J in the Full Federal Court, stating that there could not have been any obligation on the AAT to adjourn the hearing to see if Mr Hossain would pay his debt to the Commonwealth, because it simply did not believe that he would.[58] The High Court, impliedly at least, seemed to regard this as a finding that was open to the AAT.

Edelman J

Edelman J also dismissed the appeal, holding that the Tribunal's error of law was not material in that it was neither fundamental nor an error that could have affected its ultimate decision. This 'lack of materiality', in his Honour's words, had the effect that the AAT's misconstruction of sch 3 of the Migration Regulations was not a jurisdictional error.[59] Interestingly, none of the judges in the High Court referred to *SZUNZ*, but this comment from Edelman J closely mirrors that decision.

Edelman J considered the requirements for granting a writ of certiorari to quash a decision affected by jurisdictional error and stated that 'this appeal requires consideration of the reasons that a writ of certiorari is generally ordered in respect of a decision made under statute, so as to appreciate the nature of the requirement of materiality that was the focus of

the appeal'.[60] That is, his Honour took the view that the 'materiality' of the AAT's error, in the sense of whether it made a difference to the overall result for the applicant, was a crucial issue to be considered.

His Honour emphasised that there were two overlapping categories of error that can lead to the grant of such an order. Firstly, there are 'errors that have the consequence that the decision maker had no authority to make the decision'; and, secondly, there are 'errors that appear on the face of the record', irrespective of such authority.[61] The first kind of error is the true 'jurisdictional error', which results in the invalidity of the decision, while the second is merely 'voidable' rather than void ab initio.[62] Edelman J explained the 'overlap' between the two categories as follows:

> The categories overlap because an error in the second category could mean that the decision itself was unlawful and without authority. But an error might also fall within the second category if a step in the process by which the decision was reached was unlawful, even where the decision was made with authority.[63]

In Australia, the key issue is not the overlapping categories but between errors characterised as jurisdictional or non-jurisdictional, certainly where a privative clause is involved. Edelman J agreed with the majority when he stated that making that distinction depends on the construction of the statute under which the decision-making power is exercised, with reference to its text, the background principles of jurisdiction and the history of judicial review, as well as common law principles such as 'the consequences of an error that a legislature will be taken to intend will usually depend on the gravity of the error'.[64] This is an interesting argument to make in a migration case, where the clear intention of the Parliament was that the decision should not be set aside except on the basis of the *Hickman*[65] errors.

Regardless, Edelman J found that the requirement that the error be material before certiorari is granted is common to both types of error. The instant appeal, Edelman J noted, focused on whether a non-material error was a jurisdictional error.[66] Edelman J then referred to a number of cases which his Honour regarded as standing for a 'materiality' requirement, including *SZIZO*,[67] *Kirk*,[68] *Craig v South Australia*[69] and *Yusuf*.[70] In particular, his Honour noted that, in *Yusuf*, 'McHugh, Gummow and Hayne JJ reiterated the usual implication that for an error to be jurisdictional, what "is important" is that the error is made "in a way that affects the exercise of power"'.[71] That is, the High Court itself had previously at least hinted that an error of law is not jurisdictional in nature unless it is material in some sense.

Edelman J then stated that 'an error will not usually be material, in this sense of affecting the exercise of power, unless there is a possibility that it could have changed the result of the exercise of power'.[72] Furthermore, 'materiality will generally require the error to deprive a person of the possibility of a successful outcome'.[73] In this case, s 65 of the Migration Act, which requires the decision-maker to be satisfied that an applicant fulfils the requirements, including the criteria in the Regulations, has the effect that 'the usual implications that an immaterial error will not invalidate a decision made under that section'.[74]

Edelman J, then, took the view that the essential issue was whether the AAT's error in reasoning on one criterion was material and therefore jurisdictional in nature if that error 'could not have affected the other criterion on which the visa was refused'.[75] In this case, the AAT's error did not deprive Mr Hossain of the possibility of a successful outcome, because he could not be found to have satisfied PIC 4004. The error was therefore not jurisdictional

and the decision of the Full Federal Court was to be affirmed (although on the basis of very different reasoning). His Honour did, however, leave open the possibility that some errors that do not affect the outcome of a matter may, nevertheless, result in a decision being set aside. Edelman cites as one example, 'for reasons that could include respect for the dignity of the individual', 'an extreme case of denial of procedural fairness'.[76] However, his Honour found that no such circumstances arose in this case.[77]

Finally, Edelman J also considered the approach of Mortimer J in the Full Federal Court. His Honour found that assessing the materiality of an error 'does not take place in a universe of hypothetical facts'[78] but instead on the basis of the existing facts before a decision-maker. At the time of the AAT's decision, those facts were that the debt remained unpaid and there were no arrangements to repay it. Consequently, the AAT's error did not deprive the appellant of a successful outcome, and it had to affirm the delegate's decision because the appellant had not satisfied the PIC. Its error on the construction of sch 3 was therefore immaterial and was not a jurisdictional error.[79]

Nettle J

Nettle J agreed substantially with the reasons of Edelman J, adding observations that there may be a range of circumstances where an error is jurisdictional even though a party is not deprived of the possibility of a successful outcome. In addition to Edelman J's example of respect for the dignity of the individual, discussed above, Nettle J added the possibility of a decision-maker who is required to address a single specific criterion making the error of addressing the wrong criterion.[80] That did not occur in this case because, while the Tribunal made an error of law in interpreting sch 3 of the Migration Regulations, it still retained jurisdiction to determine the application on the basis of the failure to meet PIC 4004.[81]

Finally, because of the wide range of potential errors within the variety of statutory schemes, it is not possible to derive an exhaustive list of errors that will or will not deprive a party of a successful outcome. Nettle J summed up by stating that '[p]erhaps the most that can or should be said on the subject is that, if an error is jurisdictional, in the scheme of things it will not infrequently be the case that it will deprive a party of a possibility of a successful outcome'.[82] His Honour would also have dismissed Mr Hossain's appeal.

Conclusions

One issue that the High Court does not address in *Hossain* is why, even given the constitutional issues referred to by the majority, it is necessary to retain the distinction between jurisdictional and non-jurisdictional errors at all. The obvious best solution to the intractable jurisdictional versus non-jurisdictional error of law conundrum is to abolish the distinction completely, as has been done in the UK[83] and canvassed in Canada.[84] Another approach is to regard all errors of law as jurisdictional in nature, meaning that any error of law will result in a decision being set aside, unless the grant of relief would be futile.

However, if Australian courts insist on retaining an increasingly theoretical distinction, the approach in *Hossain*, foreshadowed in *SZUNZ*, is quite a reasonable one — an error of law only goes to the decision-maker's jurisdiction if it has an impact on the final result. This is, of course, an argument I have made elsewhere.[85] This would still have the effect that all a court

would need to do is identify an error of law and then, if that error deprived the applicant of the possibility of a successful result, set the decision aside. There would, at least, be no need to go into arcane details about whether an error of law was jurisdictional or not before deciding whether the error in question was material, in the sense that it could have affected the outcome for the applicant. While Hossain is not, to my mind, the best solution to the jurisdictional/non-jurisdictional error conundrum, it is a workable one, and one that is worthwhile following, at least in the shorter term.

Endnotes

1 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
2 [2018] HCA 34.
3 (2003) 211 CLR 476.
4 *Anisminic Pty Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Pearlman v Governors of Harrow School* [1979] QB 56.
5 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] SCR 61, [42].
6 [2008] 1 SCR 190.
7 (2002) 191 ALR 597, 605.
8 (2003) 211 CLR 476.
9 Interestingly, French J came to a similar conclusion in 1993, when he wrote that '[w]hatever the proper interpretation of Anisminic it is clear that the High Court has maintained the distinction between jurisdictional error and error within jurisdiction. The distinction seems to have little work to do in the cases relating to the operation of privative clauses'. See Robert S French, 'The Rise and Rise of Judicial Review' (1993) 23 *Western Australian Law Review* 120, 128.
10 (2001) 206 CLR 323.
11 [2010] HCA 1.
12 (2010) 239 CLR 531, [71].
13 [2002] FCA 311. This was one of the cases considered in *NAAV v MIMIA* [2002] FCAFC 228.
14 [2002] FCA 311, [27]–[29].
15 See, for example, *SZGOW v Minister for Immigration and Anor* [2006] FMCA 1689; *SZINP v Minister for Immigration and Citizenship* [2007] FCA 1747; *M33 of 2004 v Minister for Immigration and Anor* [2007] FMCA 684; *MZYFO v Minister for Immigration and Anor* [2009] FMCA 1148; and *Patel v Minister for Immigration and Anor* [2011] FMCA 773.
16 [2009] HCA 37.
17 [2013] FCA 572.
18 [2013] FCA 572, [15].
19 *MZYZA v Minister for Immigration and Citizenship* [2013] FMCA 15, [23].
20 [2013] FMCA 15, [32].
21 [2016] FCCA 1729, [31] and [32].
22 [2016] FCCA 1729, [42].
23 [2016] FCCA 1729, [68].
24 [2016] FCCA 1729, [68].
25 [2016] FCCA 1729, [60].
26 [2015] FCAFC 32.
27 [2015] FCAFC 32, [32].
28 [2015] FCAFC 32, [28].
29 [2016] FCA 516.
30 *SZUXN v Minister For Immigration & Anor* [2015] FCCA 1268.
31 [2015] FCAFC 32, [71].
32 Much of this section is paraphrased from [4]–[10] of *Hossain*: [2018] HCA 34.
33 Migration Regulations, para 820.211(2)(d)(ii) of sch 2, provided that an applicant who did not hold a substantive visa at the time of application must meet cl 3001 of sch 3.
34 Migration Regulations, para 820.223(1)(a) of sch 2, required an applicant to meet, amongst other requirements, PIC 4004.
35 [2018] HCA 34, [7] (emphasis added).
36 [2018] HCA 34 [9].
37 (2016) 241 FCR 121.
38 [2015] FCAFC 32.
39 [2016] FCCA 1729, [20], referring to *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190, 1198.
40 [2018] HCA 34, [13], referring to the decision of the Full Federal Court in *Minister for Immigration Border Protection v Hossain* (2017) 252 FCR 31, [27]–[30].
41 (2017) 252 FCR 31.

42 At [24] (emphasis in original).
43 [2018] HCA 34, [26].
44 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31, [100].
45 (2017) 252 FCR 31, [75]–[76].
46 [2018] HCA 34, [17].
47 [2018] HCA 34, [21].
48 [2018] HCA 34, [22].
49 [2018] HCA 34, [23].
50 [2018] HCA 34, [24].
51 See, for example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
52 [2018] HCA 34, [24].
53 [2018] HCA 34, [27].
54 [2018] HCA 34, [34], citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651–654.
55 The condition referred to in para 34 — that is, that the decision must be made 'reasonably and on a correct understanding and application of the applicable law'.
56 [2018] HCA 34.
57 [2018] HCA 34, [37].
58 [2018] HCA 34, [36].
59 [2018] HCA 34, [46].
60 [2018] HCA 34, [60].
61 [2018] HCA 34, [61].
62 [2018] HCA 34, [63].
63 [2018] HCA 34, [61].
64 [2018] HCA 34, [64].
65 *R v Hickman, Ex parte Fox and Clinton* (1945) 70 CLR 598.
66 (1945) 70 CLR 598, [65].
67 [2009] HCA 37.
68 [2010] HCA 1.
69 (1995) 184 CLR 163, 179.
70 (2001) 206 CLR 323.
71 [2018] HCA 34, [71], citing *Yusuf*, (2001) 206 CLR 323, 351.
72 [2018] HCA 34, [72].
73 [2018] HCA 34.
74 [2018] HCA 34, [76].
75 [2018] HCA 34.
76 [2018] HCA 34, [72], citing in support *R (Osborn) v Parole Board* [2014] AC 1115, 1149; and *DWN042 v Republic of Nauru* (2017) 92 ALJR 146, 151.
77 [2018] HCA 34.
78 [2018] HCA 34, [78].
79 [2018] HCA 34, [79].
80 [2018] HCA 34, [40].
81 [2018] HCA 34, [41].
82 [2018] HCA 34, [42].
83 *Anisminic Pty Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Pearlman v Governors of Harrow School* [1979] QB 56.
84 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] SCR 61.
85 See also Alan Freckelton, 'Jurisdictional Errors and the Full Federal Court's Decision in *SZUNZ v Minister for Immigration and Border Protection*' (2015) 64 *Immigration Review Bulletin* 4.