Reviewing judicial power for jurisdictional error: some recent migration cases

*Justice Craig Colvin**

At its heart, administrative law deals with the limits of governmental power. It concerns both the field of exercise of power and the manner in which power is exercised within that field. It does not concern what I will refer to as the content of the exercise of power. To intrude into matters of content would be to usurp power and undermine the very foundation on which the principles of administrative law rest. It would accrete to the court the power to do that which is entrusted by the law to others.

The three dimensions I have just described assume significance for these remarks: first, the field of power, sometimes termed 'jurisdiction'; second, the manner in which power is to be exercised, which requires an understanding of the characteristics of the power to be exercised, sometimes described, in the context of the statutory conferral of power, as 'the statutory task'; and, third, the content of the exercise of power, often referred to as 'the merits'.

Administrative law is concerned with the first and the second but not the third. Confusion can arise because jurisdictional error in its modern understanding, as developed in the context of the statutory conferral of power, concerns both the first (jurisdiction) and the second (the nature of the statutory task). Administrative law is the name given to the legal principles that concern keeping those with power within the limits of the conferral of that power, both as to its scope, in terms of subject matter and other pre-conditions; and its character, or attributes. The exercise of power must conform to the requirements of its conferral.

The fundamental importance of administrative law is not widely understood. Perhaps this is because it is a long time since we have experienced what it is like to live in a society where power is concentrated and can be exercised without any real constraint.

Fragmentation of power

Nevertheless, one of the keys to the success of modern democratic societies is the fragmentation of power. We are taught that power is separated into three arms — legislative, judicial and executive — but the intricacies of the division of power are far more delicate and detailed than is suggested by that broad sweep. Administrative law is important in keeping those divisions in place.

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In a moment I will focus on the limits upon judicial power, especially where there are specific legislative limits to jurisdiction. Before I do so, I thought I would try and place into context the way in which the fragmentation of power, and the marking out of its boundaries or limits, is fundamental to modern democracy. It ensures that no single actor or group of actors can dictate the course of government or the way in which society, ideas and culture develop over time. In very fundamental respects, our freedoms are not afforded by enforceable rights but rather by the curtailment of the exercise of power to interfere with them.

We are familiar with the idea of the Crown as the singular source of political and executive power. Our political history can be marked out by the course of events by which absolute sovereign power has been gradually pressed back, where the space created is then occupied by a vastly complex system in which power is divided up and spread thinly.

The Crown persists as the ultimate conceptual source of power, but the Queen has no ability to bring the divisions of power together. So in Australia our state and federal governments, despite their shared fount, each have separate constitutional existences and limits manifested in the understanding of the separation between the Crown in right of the Commonwealth and the Crown in right of each of the states. The Commonwealth *Constitution* marks out the boundaries of lawmaking and executive authority in a way that means the states have no say in the government of the Commonwealth and the Commonwealth has no power to control the governance of the states. Coordinated activities by all of them require intergovernmental agreement. The recent activities of what has been termed 'the National Cabinet' manifest these boundaries.

Her Majesty is a member of Parliament, but she sends her representative and by long tradition is no longer involved in parliamentary affairs. No minister, including the Prime Minister, takes executive power without being so appointed by Her Majesty's representative; and no law comes into effect without assent. The exercise of those remanent requirements of magisterial power is greatly limited by convention. However, if there were unconventional circumstances, the power of the sovereign and her governors has not been extinguished — a prospect which itself may be a protection against extreme excess in the exercise of power.

The elected members of Parliament do not bring forth their successors. Ultimately, it is for the electors of the country to choose the next members of Parliament. Importantly, the existing holders of power have no say in the conduct of the election. It is conducted by officials who act without interference and supervise a process the validity of which is subject to adjudication by the courts.

Those who are elected then choose, usually by a majority of their majority parliamentarians, the Prime Minister, who then determines the ministers by a process which itself is rarely autocratic.

We immediately see how intricate and complex the steps are and the many points at which there are, as Montesquieu would say, 'checks and balances'. They permeate democratic institutions.

Yet the fragmentation of power does not end with the establishment of our parliamentary system. It permeates the whole of society. There is a vast array of circumstances that give rise to issues about limits of power and degrees of independence. They include contexts as diverse as the exercise of police powers; the commencement of criminal prosecutions; the supervision of the conduct of members of the armed forces; the powers of corruption commissions; the availability of access to governmental records; the expenditure of public funds; the imposition of taxation; the characteristics of citizenship; the content of school curricula; the regulation of commerce; the allocation of public housing and mining rights; access to water and fisheries; and the extent to which there is freedom to speak on political affairs or freedom of movement in the course of a pandemic.

Not only is power fragmented in this way but the nature and characteristics of power that may be exercised is also curtailed. Just because I may be the Minister for Mines does not mean that I have free reign to decide who will be entitled to the grants of mining tenements and interests. Even where I have power to grant tenements in the public interest, it is a power that must be exercised in a particular way with regard to particular considerations. I cannot decide the allocation by the toss of a coin. If I purported to do so, I would be within the field of my jurisdiction but would not be exercising the kind of power that I had been given. I would not be undertaking the required task. The way in which the power entrusted to me was to be exercised would require a judgement or assessment to be made by reference to matters of public interest indicated by the subject matter of the Act. It is a particular kind of power and I would have no authority to exercise a different type of power.

It is this curtailment of power that is just as fundamental as the fragmentation of power. It ensures that those entrusted with power exercise it properly, for proper purposes and in the manner and respects in which it was entrusted. That is, it ensures that they exercise the kind of power they have been given and not some other type of power.[1]

Exercise of power

Democracy depends upon both the fragmented and the curtailed exercise of power. Those with power must be kept within the field of their jurisdiction and must conform to the requirements as to the manner of exercise of power.

However, just as fundamentally, the merits or content of the exercise of power are entirely a matter for the repository of the power. In keeping the boundaries as to the exercise of power, it is essential that judges do not, in the name of upholding the law, appropriate to themselves the discharge of the power entrusted to others.[2] Otherwise, power could be usurped and all the efforts at fragmentation and curtailment would be brought undone. The authority of those who have been entrusted by law with the responsibility to formulate the policies, form the judgements, assess the available material and reach the conclusions as to whether power should be exercised in a particular instance must be respected. It forms part of the

1 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J). Even a power to conduct a lottery in order to determine which amongst competing applicants was to be allocated a mining tenement where priority was ordinarily afforded to the applicant who was first in time might give rise to questions as to whether there was uncertainty about whether the applications were lodged at the same time: *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149.

2 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

fundamental insights expressed by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[3] as to the role of policy in guiding the decision-making process by an independent statutory tribunal acting in the shoes of another who has authority to formulate such policies.

These are all reasons why it is both interesting and fundamentally important to practise in the field of administrative law and why its other name, 'public law', is apt. It is the field of law that protects people from excesses in the exercise of power. It means that many institutions must come together before there can be fundamental change. It protects against tyranny and dictatorship and limits the extent to which there are islands of power that are free from scrutiny or oversight.[4]

Exercise of judicial power for jurisdictional error

I will turn now to the main subject of this article, which concerns the review of the exercise of judicial power for jurisdictional error, as addressed in some recent migration cases. I speak on the topic because I have been involved in the making of some of those decisions. It is for others to bring analysis and critique. However, I will seek to place them within the wider arc of what has been happening in administrative law.

As has been recently stated, the contemporary understanding of jurisdictional error is the product of propositions embraced incrementally in decisions of the High Court in the final decade of the last century. Its exposition was described by Kiefel CJ and Gageler, Keane and Gleeson JJ in the recent decision in *MZAPC v Minister for Immigration and Border Protection*[5] ('*MZAPC*') in the following terms:

> Though the concept of jurisdictional error is rooted in our constitutional history, only in this century has jurisdictional error come to be articulated as an explanation of the scope of the constitutionally entrenched original jurisdiction of this Court to engage in judicial review of the actions of Commonwealth judicial and executive officers, and hence the scope of the statutory jurisdiction conferred in identical terms on other courts created by the Commonwealth Parliament, and as an explanation of the scope of the constitutionally entrenched supervisory jurisdiction of State Supreme Courts to engage in judicial review of the actions of State judicial and executive officers.[6]

The reference to 'the scope of the statutory jurisdiction conferred in identical terms' is to provisions in the *Migration Act 1958* (Cth). It is the use of that statutory technique in s 476 and s 476A that has generated a large body of case law concerned with the nature and extent of review for jurisdictional error. It is why migration cases have significance for the fundamentals of administrative law. Section 476 confers upon the Federal Circuit and Family Court of Australia ('Curcuit Court') the same jurisdiction as the High Court under the

3 (1979) 2 ALD 634.
4 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 575 [99] ('*Kirk*').
5 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17.
6 Ibid [27] (citations omitted).

Constitution in respect of migration decisions as defined. Section 476A overrides s 39B of the *Judiciary Act* 1903 (Cth) and s 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and limits the jurisdiction of the Federal Court in the same way, in respect of certain other decisions under the Migration Act.

The practical effect of these two provisions is that in many instances the rights of parties to seek review in respect of decisions made under the Migration Act are confined to those instances where those parties can demonstrate jurisdictional error.

The decisions to which I will make particular reference today concern what may be viewed as a further limitation. It is expressed in s 477 of the Migration Act and says that any application to the Circuit Court for a remedy in the exercise of the jurisdiction conferred by s 476 must be made to the Court within 35 days of the date of the migration decision. Section 477(2) then provides that time may be extended if an application is made in writing and the Court is satisfied that it is necessary in the interests of justice to make an order extending time. In short, it is a provision that governs the circumstances in which an applicant can review a migration decision once 35 days has passed from the making of the decision. It is a relatively short period of time, especially for an applicant who is in detention and may face language and cultural difficulties in obtaining assistance. The protection afforded by s 477(2) preserves the jurisdiction of the court, in the sense that it ensures that it is not brought to an end simply by the expiry of time.[7] It enables the merits of a claim of jurisdictional error to be brought to account in determining whether to extend time.

There is no right of appeal from a decision of the Circuit Court refusing to extend time. This has led to a number of applications to review, for alleged jurisdictional error, decisions made by Circuit Court judges refusing to extend time.

The cases raise interesting issues as to the characteristics of judicial power and the extent to which judicial decisions that do not have the standing of a superior court of record (generally labelled 'inferior courts') are amenable to review for jurisdictional error.

In *MZAPC* the core propositions of the contemporary understanding of jurisdictional error in relation to 'administrative decisions made by an executive officer whose decision-making authority is conferred by statute' were expressed by the majority in the following terms:

> The constitutionally entrenched jurisdiction of a court to engage in judicial review of the decision, where that jurisdiction is regularly invoked, is no more and no less than to ensure that the decision-maker stays within the limits of the decision-making authority conferred by the statute through declaration and enforcement of the law that sets those limits. To say that the decision is affected by jurisdictional error is to say no more and no less than that the decision-maker exceeded the limits of the decision-making authority conferred by the statute in making the decision. The decision for that reason lacks statutory force. Because the decision lacks statutory force, the decision is invalid without need for any court to have determined that the decision is invalid.[8]

7 *Cf Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476, 537 [173] (Callinan J); *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 671–2 [53]–[55].

8 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 [29] (citations omitted).

The last sentence just quoted sums up a significant reformulation of the approach to invalidity that has been developed by the High Court in recent cases. Invalidity is not a question that is tacked on at the end. Rather, it is a consequence of the analysis as to whether there has been jurisdictional error. If a limit to power is exceeded in a way that is material then it lacks

authority and is therefore invalid. For administrative decision-makers exercising authority conferred by statute, invalidity and excess of jurisdiction are the joint outcome of a single process of analysis.[9]

In *MZAPC* their Honours then continued:

> The statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation. Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation.[10]

Notice the significance given to the terms in which power is conferred by statute and the description of the principles of statutory interpretation as evolving common law principles. We have seen natural justice, unreasonableness and materiality each cast as matters of statutory interpretation. We have also seen the development of the principle of legality when it comes to statutory construction, which often assumes significance when it comes to understanding the ambit of statutory authority that is conferred in a particular instance.

The summary given in *MZAPC* makes clear that we should not see jurisdictional error as an external body of common law principles compliance with which is imposed upon statutory decision-makers. In that respect, it is not like the law of negligence or enforceable promises. Rather, it is a body of law that is concerned with understanding the legal limits to the conferral of power and the keeping of repositories of power within those limits. It recognises that, in the present day and age, particularly in the field of Commonwealth law, the source of the authority being exercised by the executive is often conferred by legislation or circumscribed by legislation or both. As a result, administrative law is not a constraint upon legislative power. Rather, it recognises that the extent of the exercise of legislative power is manifested by words. Parliament does not confer power beyond the language used. The principle of legality says that if Parliament wants to interfere with fundamental existing rights then it must do so plainly.[11]

It also means that the questions to be considered when jurisdictional error is alleged are contextual. They are posed by the particular characteristics of the power being exercised

9 There remain instances where it may be necessary to consider whether the failure to conform to a statutory requirement that does not involve the exercise of a power of discretion may result in invalidity. See, eg, *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510 [61]–[66] (Kiefel CJ; Bell, Gageler and Keane JJ).

10 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 [30].

11 *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 [19]–[20] (Gleeson CJ); *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196, 307–311 [307]–[314] (Gageler and Keane JJ).

and the terms (often statutory) in which it is conferred.[12] If Parliament's expression is to be carried into effect then the repository of the statutory power must be kept to the requirements of the statute. Equally, the decisional freedom of the repository must be respected.

Repositories of power

As important as the terms in which decision-making power is expressed are the characteristics of the repository of that power. Power may be conferred on many different types of bodies. For example, it may be conferred on a minister, a statutory officer, a statutory corporation, an independent statutory tribunal, a specialist tribunal, an inferior court or a superior court of record. The characteristics of the repository of the power tell you something about the quality or character of the power to be exercised. If power is conferred on a court then a particular type of decision is required to be made. It will have particular qualities and characteristics. It is not enough that the court acts within the limit of its jurisdiction and only decides the types of cases that it is authorised to determine. There is a further dimension involved, which concerns the way in which the court decides and the manner in which it exercises its authority. These characteristics of its authority must also be met if it is to act within jurisdiction.

In the case of judicial powers this has an expansive aspect. Courts make final determinations of the facts and the law. They have authority to do so. The authority is necessary in order for the decisions of courts to have the finality that is characteristic of a judicial determination. The authority of a judge is more ample than that of an administrative decision-maker. Put another way, the extent of the merits jurisdiction of a court is ample or considerable. It is greater than that of an administrative tribunal. If Parliament entrusts a decision to a court then the extent of that authority must be respected by all others, including other courts. As Brennan J said in *Attorney-General (NSW) v Quin*[13] in dealing with administrative decisions:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
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> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.[14]

12 The approach is not confined to the exercise of statutory power and applies also to the exercise of prerogative power: *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1992) 31 CLR 421; *Williams v Commonwealth of Australia* [2012] HCA 23; (2012) 248 CLR 156; and *Williams v Commonwealth of Australia (No 2)* [2014] HCA 23; (2014) 252 CLR 416.

13 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

14 Ibid 36.

Equally, it may be said that one court has no power to correct error by another court in decision-making. Correction of error is a matter for appeal.[15] If there is no right of appeal then judicial decisions speak with finality of a kind that is characteristic of judicial power.[16] Judges identify the issues and determine the facts and the law to be applied. The judicial determination brings further debate to an end. Judges have authority to make a final decision on the matters that need to be determined in order to deal with the subject matter in dispute.

Principles of jurisdiction and jurisdictional error as applied to inferior courts

This brings us to the specifics of our present topic: the statutorily conferred jurisdiction of inferior courts; in particular, the extent to which principles of jurisdictional error apply to the decisions made by judges of those courts. By using 'inferior' I adopt the terminology of hierarchy that is usual in this particular field, to distinguish the nature of such courts from superior courts of record.

We need to begin with the High Court's decision in *Craig v South Australia* ('*Craig*'),[17] which differentiated between inferior courts and other tribunals. The following passage from the decision has been quoted often:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.[18]

Notice the two distinct aspects of jurisdictional error: first, a mistaken assertion or denial of jurisdiction — that is, a court acting outside the field of its authority or not acting on the basis of an incorrect view that it lacks authority; and, second, a misapprehension by the court of the nature or limits of its functions or powers in cases where it does have authority. This is a reference to what I have described as being the characteristics of the power being exercised by the decision-maker; those matters which curtail the power being exercised. What we see is that jurisdictional error by inferior courts is not confined to instances where the court exceeds the limits of what would generally be described as its jurisdiction: *there can be jurisdictional error by a court even when it has jurisdiction.*

It is this second aspect that can give rise to difficulty. When will there be jurisdictional error by a court that has jurisdiction to deal with the particular application that is before it? The reasons in *Craig* go on to say that jurisdictional error is at its most obvious where an inferior court acts wholly or partly outside 'the theoretical limits of its functions and powers'.[19] Their Honours give the example of an inferior court with civil jurisdiction hearing a criminal charge or making an order which it lacked power to make, such as where the only remedy it could give was damages. That is the first aspect.

15 *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle and Edelman JJ); *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301, 316–18 [45]–[53] (Perram J, Allsop CJ and Markovic J agreeing); *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424, 432–40 [11]–[39] (Allsop J, Drummond and Mansfield JJ agreeing).

16 *State of New South Wales v Kable (No 2)* [2013] HCA 13; (2013) 252 CLR 118 [34].

17 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').

18 Ibid 177.

19 Ibid.

Importantly, for our purposes today, the reasons go on to deal with what are described as less obvious instances. They deal with preconditions to jurisdiction and then they say:

> Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues [the statute conferring its jurisdiction] and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.[20]

This is not concerned with going outside the jurisdiction of the court. It is concerned with making a decision which is based upon a misunderstanding of the nature of the functions and powers of the court.

The cases we are concerned with today are in that territory where the line is difficult to draw. Importantly, their Honours also described what was within jurisdiction for an inferior court. They said that the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, where they involve matters which the court has jurisdiction to determine.[21] Therefore, errors in the identification of relevant issues, in the formulation of relevant questions and in the determination of what is and what is not relevant evidence, will not ordinarily constitute jurisdictional error. They are usual characteristics of judicial power. They form part of the authority conferred upon a court. It is why judicial power is sometimes described as ample.

So, if an inferior court is within jurisdiction, a misconstruction of a statute will only be jurisdictional if it causes a misconception of the nature and extent of the judicial power that is being exercised. Otherwise, errors as to the legal principles to be brought to bear in deciding the case will not be jurisdictional.

In *Kirk v Industrial Court (NSW)*[22] ('*Kirk*') the High Court reaffirmed the statement of principle in *Craig* but cautioned against viewing *Craig* 'as providing a rigid taxonomy of jurisdictional error'.[23] The court in *Kirk* also stated that there was a 'need to focus upon the limits of [the inferior court's] functions and powers'. It said that those limits are real 'and are to be identified from the relevant statute establishing [the inferior court] and regulating its work'.[24] That terminology is significant because of what was then said by the court.

The principles expressed in *Craig* were affirmed in *Kirk* in a manner that appears to give emphasis to the second category of jurisdictional error. In *Kirk*, the examples given in *Craig* of less obvious jurisdictional error were restated in the following terms:[25]

20 Ibid 177–8.
21 Ibid 179–80.
22 *Kirk* (n 4).
23 Ibid 574 [73].
24 Ibid 573–4 [72].
25 Ibid 573–4 [73].

a. the absence of a jurisdictional fact;

b. disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored);

c. misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

The point was again made that it may be particularly difficult to delineate jurisdictional error from mere error where a court's misconstruction of a statute results in it misconceiving the nature of the function that it is performing or the extent of its powers in the circumstances of a particular case. The restatement of these principles by reference to the 'relevant statute' being the statute establishing and regulating the work of the inferior court is significant.

I note in passing that the caution expressed in *Craig* has significance for those instances where a statutory conferral of power on an administrative decision-maker is found to include authority to determine a question of law.[26] It is not always the case that an error of law by an administrative decision-maker will give rise to jurisdictional error.[27]

But returning to the issue at hand, in what circumstances might there be jurisdictional error in the exercise of judicial power by an inferior court? In particular, in what instances will there be a misconstruction of the relevant statute, thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case?

We are now ready to consider the first of our cases, *CZA19 v Federal Circuit Court of Australia* ('*CZA19*').[28]

The applicant was in immigration detention. His protection visa application was refused. The decision was affirmed by the Administrative Appeals Tribunal. Section 476 applied to the decision, so review in the Circuit Court was relevantly confined to jurisdictional error. Under s 477 any application to review was required to be within 35 days. An application was brought, but it was a few days late. As has been indicated, the Circuit Court can extend time if it is satisfied that it is necessary in the interests of the administration of justice to do so.

The Circuit Court judge approached the matter on the basis that the application was 34 days out of time (being a period calculated by reference to the day when it was accepted for filing, not when it was filed) and also on the mistaken assumption that there had been an application to review without any application for an extension of time. On that mistaken assumption, an oral application for an extension of time was permitted. The matter was adjourned to allow the application to be heard. The application was heard and refused.

26 See, for example, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; (2018) 264 CLR 1.

27 *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225, 235 [40].

28 *CZA19 v Federal Circuit Court of Australia* [2021] FCAFC 57 ('*CZA19*').

An application for review of the decision of the Circuit Court judge was heard by a bench of three judges that comprised the Chief Justice, Markovic J and me. It was observed that an error of law as to the scope of the provision that conferred jurisdiction was different from an error as to the law to be applied in the course of the exercise of judicial authority. Then, s 477(2) was found to confer jurisdiction in the relevant sense. It was described as a provision that conferred authority to extend the time within which a review could be undertaken. The authority that was conferred was to extend the time within which to undertake a review where 'it is necessary in the interests of the administration of justice'.

It might be said that the relevant jurisdiction of the Circuit Court was conferred by s 476 and that s 477 simply regulates the procedure by which that jurisdiction may be accessed.[29] Whether that is the practical effect of s 477 might have significance for constitutional purposes where a provision like s 477 concerns the jurisdiction of a Ch III court. It might also have significance for whether s 476B of the Migration Act can operate according to its terms. It provides that the High Court must not remit a matter that relates to a migration decision to any court other than the Circuit Court.

However, even if s 476 states the extent of the relevant jurisdiction of the Circuit Court and s 477 regulates the procedure by which that jurisdiction may be accessed, s 477 operates as a limitation on the exercise of that jurisdiction. It is a power that is found in the statutory provisions that, in the language of *Kirk*, establish the body and regulate its work; and, in the case of migration decisions, that jurisdiction and its procedural regulation are conferred by s 476 and s 477.

In *CZA19* there were two grounds. The first was a complaint that the merits of the grounds of review had not been considered. That ground was not upheld. In making that finding, we said:

> In cases like the present, there is an important distinction between a claim that the Federal Circuit Court judge did not deal with the nature of the application that was made (on the one hand) and a claim that the Court on review should conclude that the Federal Circuit Court judge misunderstood the nature of the review grounds the subject of the application or their merit (on the other hand). A claim of the latter kind is unlikely to be a claim of jurisdictional error because to seek to identify the nature of the grounds and to assess whether they have merit for the purpose of determining whether it was necessary in the interests of justice to extend time is at the heart of performance of the (within jurisdiction) judicial task. Therefore, the mere fact that a proposed ground may not have been considered in the sense that a different view may be taken by other judges as to the nature and scope of the grounds is not jurisdictional. What is required in order to demonstrate jurisdictional error in such instances is a fundamental misunderstanding of the nature of the application such as where a judge addresses the wrong grounds, overlooks part of the grounds altogether or so fundamentally misunderstands the basis for the application that in effect the application is not considered.[30]

29 *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 671–2 [53]–[55].

30 *CZA19* (n 28) [34].

The second ground concerned the approach of the Circuit Court to the explanation for delay. We upheld that ground, finding:

> There was one application for an extension of time. The Federal Circuit Court judge thought it was oral and 34 days out of time; in fact it was in writing four days out of time. His Honour dealt with it on the basis of the former, not the latter. The fundamental nature of the misconception can be seen by the way his Honour expressed himself about it in [73]–[76] of his reasons: see [47] above. It was, from the nature of the application, a material misconception as to what the applicant was seeking the Court to determine.
>
> Consequently, the nature and character of the application has been so fundamentally misunderstood by the Federal Circuit Court judge as to lead to the conclusion that he was not dealing with the matter as placed before the Court.[31]

The decision in *CZA19* came after a number of single instance decisions where jurisdictional error had been found in the making of a decision to refuse to extend time under s 477(2).

In *EXU17 v Minister for Immigration and Border Protection*[32] Griffiths J allowed an application to review for jurisdictional error where an extension of time had been refused. The primary judge incorporated the principles as to an extension of time in which to appeal into the s 477(2) statutory task. There was no reference to the language of s 477(2) by the Circuit Court judge. Some of the reasons advanced in support of the application were not referred to in the reasons. His Honour found that the reasons evinced no appreciation of the statutory test to be applied under s 477(2) in determining such an application. His Honour said, 'In some cases the reasons for judgment may otherwise reveal that the primary judge sufficiently appreciated the terms and effect of a relevant statutory provision, but that is not the case here'.[33] His Honour went on to find:

> Nor do I consider that it may safely be inferred that a Judge of the FCCA would know these matters because of that court's heavy migration workload. The task of dealing with multiple migration cases serves to highlight the need for a primary judge to pause and reflect upon the significance of the immediate and relevant statutory framework within which judicial power is being exercised.[34]

In *Huynh v Federal Circuit Court of Australia*[35] I upheld an application to review for jurisdictional error where an extension of time was refused. In that case there had been a delay of 70 days. The application had been made on the basis of reasons that included the evidence of the applicant that she had not received the notification of the Tribunal's reasons because she had changed address. The reasons of the Circuit Court judge were to the effect that the applicant's explanation was that she was overwhelmed and this delayed the seeking of assistance to pursue an appeal. The evidence as to the change of address and the failure to receive notification was not considered. I found that the judge misunderstood in a fundamental way the factual basis for which the extension of time was sought.[36]

31 Ibid [57]–[58].
32 *EXU17 v Minister for Immigration and Border Protection* [2018] FCA 1675; (2018) 267 FCR 305.
33 Ibid 316–17 [46].
34 Ibid 317 [47].
35 *Huynh v Federal Circuit Court of Australia* [2019] FCA 891.
36 Ibid [47].

In *CKX16 v Judge of the Federal Circuit Court of Australia*[37] Steward J granted relief in a case where an extension of time had been refused. His Honour said, 'If the FCC were to mistake its function under s 477(2), or if it were to apply an incorrect construction of the words of the provision, it would commit jurisdictional error'.[38] His Honour held that there had been a constructive failure to exercise jurisdiction because the decision had been made without considering the merit of a proposed ground of review as to the application of the complementary provisions of the Migration Act.[39]

Returning to *CZA19*, we said that these cases should be seen to be at the borderline and that:

> [t]hey do not establish a general principle that a failure to consider a ground that might be discerned after the event by a court on review as not having been addressed demonstrates jurisdictional error in cases where an applicant seeks to invoke the jurisdiction conferred by s 477(2) to extend time.[40]

Next, I turn to the decision in *MZABP v Minister for Immigration and Border Protection*.[41] In that case, an application for an extension of time under s 477 was refused in the Circuit Court. On review for jurisdictional error in the Federal Court, it was argued for the applicant (first raised in reply submissions) that there was error because the Circuit Court judge had considered whether the applicant 'could succeed' on any of the grounds when the correct legal test was whether any of the grounds were reasonably arguable or had reasonable prospects of success. Of course, the statutory provision makes no reference to whether grounds are arguable or have prospects of success. The argument was not reflected in the grounds and was found to be a matter that could not be considered as a basis for relief. Nevertheless, it was the subject of consideration in the reasons.

Mortimer J considered the various formulations concerning the degree to which merit in an application would need to be demonstrated on an application for an extension of time under s 477. Her Honour then said:

> Whichever description is chosen, the approach taken under s 477(2) should not be transformed into a de facto full hearing, especially where the outcome is not subject to any appeal as of right. The subject matter of s 477(2) is whether time for bringing a judicial review application, which is to be heard and determined in the ordinary course of the processes of the Federal Circuit Court, should be extended. The subject matter is not whether the applicant will ultimately be successful in impugning the merits review decision.[42]

In that respect, agreement was expressed by her Honour with similar views expressed by Wigney J in *SZTES v Minister for Immigration and Border Protection.*[43] Mortimer J observed that the reasons of the Circuit Court could be viewed as finally determining the grounds of review. Her Honour then said that whether the adoption of such an approach could properly be characterised as exceeding jurisdiction was a 'difficult question' and observed:

37 *CKX16 v Judge of the Federal Circuit Court of Australia* [2018] FCA 400.
38 Ibid [23].
39 Ibid [32].
40 *CZA19* (n 28) [35].
41 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585 (Mortimer J).
42 Ibid 598 [63].
43 *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 [82]–[85], [102].

> If, for example, [the Circuit Court judge] in the present case could be said to have taken the approach that it would only be in 'the interests of the administration of justice' to extend time if persuaded a ground of review would succeed, then this would in my opinion reflect such a fundamental misunderstanding of the discretion in s 477(2) as to represent a misapprehension of the nature of the power there conferred.[44]

The example given would be one where the extent of the jurisdiction was approached on the basis that it was narrower than a correct interpretation of the statute would indicate. Therefore, it would be an obvious case of jurisdictional error.

Jurisdiction to adopt a 'higher bar'

The more difficult question is whether it would be jurisdictional to adopt a higher bar than would be indicated by authorities concerned with what is required when evaluating the interests of the administration of justice; or whether, at its highest, it would be an error of law that is within jurisdiction, because an assessment of the degree of merit to be demonstrated was part of the authority of a person exercising judicial power.

I should say that in this area there has been some debate about the extent to which the appropriate approach is to adopt an impressionistic assessment and whether the cases concerned with the grant of leave to appeal out of time should be applied by analogy. In that regard, I note the following statement by the five-member bench in *Porter as former trustee of the estates of Ghasemi and Kakhsaz v Ghasemi*:

> In most instances the Court undertakes a rough and ready assessment of the merits in considering whether to grant leave [to appeal]. It does so for the reasons explained in *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516. However, the degree to which there is close consideration of the merits will depend on the circumstances. A determination of a different character is made where the application is for an extension of time in which to review whether administrative action exceeds the bounds of statutory authority: see *BJM15 v Minister for Immigration and Border Protection* [2021] FCA 786 at [43]. In such cases, the party has not had the benefit of a judicial determination with its attendant characteristic of finality, an aspect which may affect the approach to both merit and delay in deciding whether it is in the interests of justice to extend time.[45]

The issue of whether demonstrating merit by applying a higher bar than was indicated by the authorities might amount to jurisdictional error was considered by Gageler J in a single-judge decision in the original jurisdiction of the High Court in *EBT16 v Minister for Home Affairs* ('*EBT16*').[46] In that case, a Circuit Court judge refused an application for an extension of time under s 477. It was claimed in the High Court that the Circuit Court had misunderstood the nature of the power to extend time because, amongst other things, the judge 'impermissibly decided the full merits of the plaintiff's case as opposed to making its decision based upon a preliminary assessment of the merits'.[47]

44 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585, 599 [68].
45 *Porter as former trustee of the estates of Ghasemi and Kakhsaz v Ghasemi* [2021] FCAFC 144 [40] (Allsop CJ; Markovic, Derrington, Colvin and Anastassiou JJ).
46 *EBT16 v Minister for Home Affairs* [2019] HCA 44.
47 Ibid [4].

However, in that case the Circuit Court judge found that the applicant had failed to demonstrate that there was any merit in the un-particularised grounds that the Tribunal had committed jurisdictional error. Understood in that light, Gageler J found that 'the Federal Circuit Court's decision to refuse the plaintiff an extension of time cannot be said to have gone beyond a threshold assessment of merit'.[48]

Significantly, though, given the present topic, his Honour went on to say:

> By rejecting the arguability of the second ground of the application on the basis on which it is put, I should not be understood to be expressing any view as to the correctness of the proposition, adopted by the Full Court of the Federal Court in *MZABP* … and accepted with circumspection by a differently constituted Full Court in *DMI16* … that the Federal Circuit Court would exceed its jurisdiction were the Federal Circuit Court to conclude that it was not necessary in the interests of the administration of justice to make an order under s 477(2) after undertaking a full assessment of the merits … Were I to have considered the proposition adopted in *MZABP* to have been dispositive of the present application, and were I to have entertained doubt about its correctness, the appropriate course would have been for me to refer the application or the relevant part of it to the Full Court of the High Court …[49]

This exposes the importance of considering closely the extent to which a failure to conform with what might be an accepted legal approach to the exercise of the power conferred by s 477 might be jurisdictional.

In the case referred to by Gageler J, *DMI16 v Federal Circuit Court of Australia*, [50] the members of the Full Court had said:

> The Minister accepted that, in the context of an application for extension of time, the Federal Circuit Court would fall into jurisdictional error if it approached the prospects of success as if it were making a final decision: *MZABP* at [62] (Mortimer J), whose approach was approved on appeal in *MZABP v Minister for Immigration and Border Protection* [2016] FCA 110 … Even assuming that the Minister's concession was rightly made (which it is unnecessary to decide), in our view the primary judge did not err in holding that the Federal Circuit Court examined the grounds at a 'reasonably impressionistic level' in considering whether … Ground 2 had any reasonable prospects of success. Nor was the reasoning of the Federal Circuit Court irrational.[51]

I note that in *EBT16* Gageler J found separately that it was not necessary to determine a question as to whether s 477 limits the exercise of the jurisdiction conferred by s 476 or whether it limits the scope of that jurisdiction. No doubt there remain issues to be determined as to the extent to which there can be review for jurisdictional error of decisions to refuse to extend time under s 477. In particular, there are issues as to whether there can be jurisdictional error by applying a standard that might be said to be too high, when considering the merits of the proposed grounds of review in the course of deciding whether the interests of justice mean that it is necessary to extend time.

48 Ibid [7].
49 Ibid [8].
50 *DMI16 v Federal Circuit Court of Australia* [2018] FCAFC 95; (2018) 264 FCR 454.
51 Ibid 471 [62].

Conclusion

The significant point for today's purposes is that the exercise of judicial power by inferior courts can be the subject of review for jurisdictional error, even where the decision is within the jurisdiction of the court. The circumstances in which such review may be open will depend upon the nature of the function or power being exercised by the court and the terms in which that function or power is conferred by the relevant Act. The conduct that may amount to jurisdictional error will be affected by the nature of the task. The exercise of subject matter jurisdiction gives rise to different questions to the exercise of a power to extend time that forms part of the conferral of jurisdiction expressed in s 476 and s 477 of the Migration Act.