

# Before the High Court

## The Limits of Fairness and Fact-Finding in Judicial Review: *MZAPC v Minister for Immigration and Border Protection*

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### Abstract

The appeal to the High Court of Australia in *MZAPC v Minister for Immigration and Border Protection* raises important questions about how, and why, applicants for judicial review of administrative decisions must prove that a legal error was material, in the sense that it deprived them of the possibility of a different outcome. The current approach to proving materiality invites a review court to engage with a decision on its merits so as to determine whether an applicant has discharged this onus of proof. This column argues that approach fails adequately to vindicate legal limits on public powers, and, as such, is both a source of injustice and incorrect at a level of principle.

### I Introduction

Materiality has long been used by review courts as a tool of analysis in administrative law, both in the identification of jurisdictional errors and in the exercise of the court's discretion to grant relief. Recently, it has attracted renewed interest in light of the High Court of Australia's ruling that an error *must* be material to be jurisdictional in nature.<sup>1</sup> Yet, how is materiality to be proved, and by whom? More importantly, does the proof of materiality promote or undermine the protection of individuals from unfair exercises of public power?

These questions arise in a novel form in *MZAPC v Minister for Immigration and Border Protection*,<sup>2</sup> which now comes before the High Court of Australia.<sup>3</sup> The decision concerns the review by the then Refugee Review Tribunal under pt 7 of the

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This Before the High Court column is based on a case note for which the author was awarded the 2019 Sir Peter Heydon Prize for the best undergraduate contribution to the *Sydney Law Review* unit of study in the field of Constitutional, Administrative or International Law.

<sup>1</sup> *Minister for Immigration v SZMTA* (2019) 264 CLR 421 ('SZMTA'), 444 [44] (Bell, Gageler and Keane JJ), applying the principle in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134–5 [29]–[31] (Kiefel CJ, Gageler and Keane JJ). Contrast the dissenting view in *SZMTA* at 455–60 [81]–[95] (Nettle and Gordon JJ).

<sup>2</sup> *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024, [20] ('MZAPC (FCA)').

<sup>3</sup> High Court of Australia, Case No M77/2020 ('MZAPC').

*Migration Act 1958* (Cth) (*Migration Act*) of the Minister for Immigration and Border Protection's refusal to grant a protection visa. During its review, the Tribunal failed to disclose to the applicant that the Minister asserted a form of public interest immunity in certain materials given to the Tribunal. These materials were potentially adverse to the applicant, and, on the applicant's submissions on appeal, were capable of contributing to the Tribunal's findings regarding the applicant's credibility. Nevertheless, the Federal Court of Australia held that the appellant had failed to prove that the Tribunal's reasoning was affected by the adverse materials; thus, any unfairness that resulted from the Tribunal's failure to disclose the public interest immunity claim did not involve a jurisdictional error.

In the appeal from *MZAPC (FCA)*, the High Court must authoritatively decide how an applicant is to establish the materiality of a breach of procedural fairness, where the breach relates to a failure to disclose materials adverse to the applicant. In doing so, the High Court will be required to clarify aspects of its recent judgment in *Minister for Immigration v SZMTA*. In *SZMTA*, the Court held that a breach of procedural fairness due to non-disclosure of an invalid public interest immunity claim was immaterial to the outcome of the decision.<sup>4</sup> This column argues that the High Court should use this opportunity to reframe the applicant's burden of proof with respect to materiality. Given the recent significance of materiality as a precondition to jurisdictional error, it is vital that the method of establishing materiality is principled. This appeal vividly demonstrates that the current approach is far from principled, for it undermines the statutory scheme to afford participation rights to applicants in the decision-making process and thereby fails to achieve any purported aim of practical justice.

## II The Statutory Framework and Facts

Under pt 7 of the *Migration Act*, an applicant is entitled to review of a decision of a delegate of the Minister to refuse or cancel a protection visa.<sup>5</sup> Upon the lodgement of a valid application for review,<sup>6</sup> the Administrative Appeals Tribunal (previously the Refugee Review Tribunal) must review the decision.<sup>7</sup> Section 418 of the *Migration Act* imposes a procedural obligation upon the Secretary of the Department to provide all documents that are relevant to the review to the Registrar for the purpose of giving the documents to the Tribunal. The Tribunal is then obliged to consider the merits of the decision under review in light of evidence provided to it by the Secretary, in addition to evidence the Tribunal obtains for itself.<sup>8</sup> In addition, the applicant is entitled under s 423 to give the Tribunal a written statement and written arguments in relation to the decision under review.

Section 438 of the *Migration Act* imposes a further procedural duty upon the Secretary to notify the Tribunal if the Minister determines that the section applies in relation to a document provided for the Tribunal's consideration. Section 438 is

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<sup>4</sup> *SZMTA* (n 1) 445–6 [45]–[50] (Bell, Gageler and Keane JJ).

<sup>5</sup> *Migration Act 1958* (Cth) s 411(1)(c)–(d) (*Migration Act*).

<sup>6</sup> *Ibid* s 412.

<sup>7</sup> *Ibid* s 414(1).

<sup>8</sup> *Ibid* s 424(1).

enlivened by one of two preconditions: first, under s 438(1)(a), if the Minister certifies that disclosure of any matter contained in the document would be contrary to the public interest; and second, under s 438(1)(b), if the document was given to the Minister in confidence. Upon notification that s 438 applies, the Tribunal has a discretion under s 438(3)(a) to have regard to the document for the purpose of exercising its powers and an additional discretion under s 438(b) to disclose to the applicant any matter in the document. Section 422B(2) of the *Migration Act* further provides that s 438 is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters with which s 438 deals.

Significantly, s 438 of the *Migration Act* gives rise to procedural *discretions*, rather than mandatory duties. Nevertheless, the High Court in *SZMTA* and several Federal Court judgments have recognised the ‘obvious unfairness’ caused by a Tribunal’s failure to positively exercise or decline to exercise its discretion under s 438.<sup>9</sup> The plurality in *SZMTA* explained this unfairness in the following terms:

The very fact of notification ... changes the context in which the entitlement of the applicant under s 423 ... falls to be exercised.

The entitlement under s 423 extends to allowing the applicant to present a legal or factual argument in writing either to contest the assertion of the Secretary that s 438 applies to a document or information, or to argue for a favourable exercise of one or both of the discretions conferred by s 438(3). This entitlement, at least in those specific applications, is capable of meaningful exercise only if the applicant is aware of the fact of a notification having been given to the Tribunal.<sup>10</sup>

The appeal from *MZAPC (FCA)* arose in relation to an application to the Tribunal for review of the decision of a delegate of the Minister to refuse a protection visa. Prior to the lodgement of that application, a delegate of the Minister had notified the Tribunal that s 438 applied to certain materials that had been given to the Tribunal. The contents of the materials included a Victorian Police court outcomes report in relation to the applicant, which showed that the applicant had been convicted of a number of driving-related offences, and one offence of ‘State false name’.<sup>11</sup> Upon the Tribunal’s affirmation of the delegate’s decision to refuse the protection visa, the applicant sought judicial review of the Tribunal’s decision before the Federal Circuit Court of Australia,<sup>12</sup> which dismissed the application for reasons that are not relevant to this appeal.

Subsequently, the applicant appealed to the Federal Court of Australia, on the sole ground that the failure by the Tribunal to disclose the s 438 notification was procedurally unfair. The applicant further submitted that it could be inferred from the Tribunal’s adverse credibility findings against the applicant that the Tribunal had taken the s 438 notification information into account, and on that basis the Tribunal’s

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<sup>9</sup> *MZAOL v Minister for Immigration and Border Protection* [2019] FCAFC 68, [74] (Bromberg, Farrel and Davies JJ) (*MZAOL*). See also *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1, 12–13 [49]–[53] (Beach J); *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305, 317 [51]–[52] (The Court).

<sup>10</sup> *SZMTA* (n 1) 441 [30]–[31] (Bell, Gageler and Keane JJ).

<sup>11</sup> *MZAPC (FCA)* (n 2) [20].

<sup>12</sup> *MZAPC v Minister for Immigration* [2016] FCCA 1414.

decision was affected by jurisdictional error.<sup>13</sup> The Minister, as first respondent to the appeal, conceded that the Tribunal's failure to disclose the s 438 notification constituted a denial of procedural fairness of the kind identified in *SZMTA*.<sup>14</sup> Nevertheless, the Minister relied upon *SZMTA* to submit that the error was immaterial to the outcome of the decision because the information was irrelevant or alternatively because the Tribunal could be presumed to not have taken the s 438 information into account.<sup>15</sup> The Federal Court, constituted by Mortimer J alone, accepted the Minister's submission, holding that the denial of procedural fairness was immaterial and as such did not provide grounds for review.<sup>16</sup>

### III The Decision and Issues on Appeal

In *MZAPC (FCA)*, Mortimer J held that where there is an admitted non-disclosure of a s 438 notification, and the information subject to the notification is adverse to the applicant, the applicant must follow a two-step process to establish materiality by proving: first, that the Tribunal had regard to the s 438 information; and second, that 'the outcome of the review could have realistically been different' if the notification had been disclosed to the applicant.<sup>17</sup> Mortimer J considered that this two-step process was required on the approach of the majority of the High Court in *SZMTA*, read with the full Federal Court decision in *MZAOL v Minister for Immigration and Border Protection*.<sup>18</sup> Her Honour ultimately concluded that the applicant had failed to discharge that burden of proof, due to the absence of any indication that the Tribunal's assessment was affected by the court outcomes report.<sup>19</sup>

Three key issues are to be determined by the High Court in the appeal from *MZAPC (FCA)*. The first issue is whether Mortimer J correctly stated the approach to proving materiality required by *SZMTA*. The answer to this question raises a second key issue: whether the approach in *SZMTA* is correct at a level of principle. The third issue on appeal is whether the approach in *SZMTA* was correctly applied by Mortimer J to the facts of the case. This column focuses exclusively on the first two issues, in order to argue for a more cogent approach to matters of proof in the assessment of materiality.

In *SZMTA*, the majority comprising of Bell, Gageler and Keane JJ held that an assessment of materiality is 'an ordinary question of fact in respect of which the applicant bears the onus of proof'.<sup>20</sup> This assessment 'is to be determined by inferences',<sup>21</sup> drawn from expectations as to 'the course of the regular administration of the Act'.<sup>22</sup> From this statement of principles, the majority extrapolated the following presumption: 'the Tribunal can be expected in the ordinary course to treat

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<sup>13</sup> *MZAPC (FCA)* [17]–[22].

<sup>14</sup> *Ibid* [30].

<sup>15</sup> *Ibid* [31]–[32].

<sup>16</sup> *Ibid* [58]–[59].

<sup>17</sup> *Ibid* [50].

<sup>18</sup> *Ibid* [50]–[51].

<sup>19</sup> *Ibid* [58].

<sup>20</sup> *SZMTA* (n 1) 445 [46].

<sup>21</sup> *Ibid* 445 [46].

<sup>22</sup> *Ibid* 445 [47].

a notification by the Secretary that [s 438] applies as a sufficient basis for accepting' that s 438 applies to the information, in which case the Tribunal can further be expected to leave that information 'out of account in reaching its decision'.<sup>23</sup> The majority conceded that the presumption could be displaced by 'some contrary indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence'.<sup>24</sup> However, in absence of any such indication, the presumption that the Tribunal paid no attention to the s 438 information in reaching its decision applied.

Contrary to the appellant's submissions in *MZAPC*,<sup>25</sup> it is difficult to read the majority's analysis in *SZMTA* as anything else but the clear statement of a presumption that applies in absence of evidence to the contrary. The presumption is critical to the majority's reasons in *SZMTA*, as it justified their Honour's finding that evidence of the s 438 information is relevant and admissible. The High Court in *SZMTA* has shown a clear intention to take into account the Tribunal's treatment of information in order to assess whether the outcome of the decision could have been different.<sup>26</sup> Since it is sufficiently clear that the majority created a presumption of general application and placed the onus of proof upon the applicant, then logically it follows that the applicant must overcome or disprove this presumption to show that the decision could realistically have been different.

The *SZMTA* majority's development of the law is not unprecedented. As noted by Daly, review courts have long recognised that the applicant must demonstrate a causal link between error and result to make their case for judicial review.<sup>27</sup> What is novel in the majority's approach is that proof of materiality requires proof of how the Tribunal in fact acted as well as whether the decision could realistically have been different. Contrary to the appellant's submission in *MZAPC*, there is little doubt that both aspects are required to make out a material error on the authority of *SZMTA*, and there is no indication that the applicant must prove any lesser standard. Mortimer J's statement in *MZAPC (FCA)* of the principles in *SZMTA* is correct.

#### IV The (Il)logic of the *SZMTA* Presumption

This column contends that the *SZMTA* presumption is flawed and ought to be reframed by the High Court for the following three reasons. First, the inferences drawn by the plurality are arguably inconsistent with the Tribunal's power to determine whether the notifications were validly made. Given that it is open to the Tribunal to form and act on its own view as to whether s 438 of the *Migration Act* applies to the documents, it is arguably likely that the Tribunal would not have disregarded the documents, but rather would have reviewed them for compliance with s 438. Thus, the likelihood that the Tribunal followed a procedure contrary to law is at least as strong as the probability that the Tribunal accepted the s 438

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<sup>23</sup> Ibid 445 [47].

<sup>24</sup> Ibid.

<sup>25</sup> *MZAPC*, 'Appellant's Submissions', Submission in *MZAPC v Minister for Immigration and Border Protection*, Case No M77/2020, 5 October 2020, 10–11 [25]–[28] ('Appellant's Submissions').

<sup>26</sup> *SZMTA* (n 1) 449–50 [63], 451–2 [70] (Bell, Gageler and Keane JJ).

<sup>27</sup> Paul Daly, 'A Typology of Materiality' (2019) 26 *Australian Journal of Administrative Law* 134.

notification at face value. Correspondingly, the distinction drawn in the Minister's submissions between the present case and *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>28</sup> does not hold true; simply because the Tribunal had 'no power'<sup>29</sup> to have regard to the notification without exercising a positive discretion to do so does not mean that the Tribunal did, in fact, ignore the information subject to the notification.<sup>30</sup>

Further, the explanation given by the Full Federal Court in *MZAOL* does little to dispel this criticism. In that case, the Court inferred that the Tribunal would appreciate that it could not have regard to the s 438 information without affirmatively exercising its discretion, and would only have regard to the information without disclosing it to the applicant with good reason.<sup>31</sup> Yet, as argued convincingly in the appellant's written submissions in *MZAPC*, it is illogical to assume that the Tribunal would appreciate the unfairness of having regard to the s 438 information without exercising a positive discretion or notifying the applicant, when it has failed to appreciate the unfairness of its failure to disclose the fact of notification.<sup>32</sup>

Second, the *SZMTA* presumption is flawed because the imposition of the burden of proof upon the applicant when combined with the operation of the presumption is inconsistent with the requirements of procedural fairness. As Nettle and Gordon JJ jointly explained in *SZMTA*, requiring the applicant to prove that the breach of a duty of fairness is material undermines the applicant's entitlement to know 'the playing field' or the statutory framework, which was held to be unfair by all members of the High Court in that decision.<sup>33</sup> In such circumstances, the very principle that statutory powers are exercised in accordance with statutory terms is 'put in doubt'.<sup>34</sup> This is not to suggest that the possibility of non-jurisdictional error is contrary to the rule of law;<sup>35</sup> rather, where the error consists of a failure to notify the applicant of a change to the statutory landscape, it is inappropriate to require the applicant to assess the materiality of the terms of the statute. The nature and implications of the type of unfairness that arose in both *SZMTA* and *MZAPC (FCA)* will be further considered below in Section V.

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<sup>28</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

<sup>29</sup> Minister for Immigration and Border Protection, 'Submissions of the First Respondent', Submission in *MZAPC v Minister for Immigration and Border Protection*, Case No M77/2020, 30 October 2020, 13 [35].

<sup>30</sup> *Ibid* 10–11 [28]; 12–13 [34]–[35].

<sup>31</sup> *MZAOL* (n 9) [75] (Bromberg, Farrell and Davies JJ).

<sup>32</sup> *Appellant's Submissions* (n 25) 14–15 [35]–[36]; *MZAPC*, 'Appellant's Submissions in Reply', Submission in *MZAPC v Minister for Immigration and Border Protection*, Case No M77/2020, 19 November 2020, 6–7 [14].

<sup>33</sup> *SZMTA* (n 1) 459–60 [93] (Nettle and Gordon JJ).

<sup>34</sup> *Ibid* 459 [93].

<sup>35</sup> The joint judgment made broader arguments with respect to parliamentary intention that have been rightly criticised by Burton Crawford as 'a step too far', particularly as the discretion to refuse relief, the very approach advocated by Nettle and Gordon JJ, is also vulnerable to these same criticisms: see Lisa Burton Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30(4) *Public Law Review* 281, 297.

Third, by developing a presumption that the applicant must disprove, the plurality in *SZMTA* also shifted the balance of curial assessment subtly towards refusal of relief. This is particularly the case where the presumption applies to adverse information. As noted by Mortimer J in *MZAPC (FCA)*, the effect of the burden of proof upon the operation of the presumption is to ‘make it difficult’ for the applicant, as without a clear statement in the Tribunal’s reasons, there is little possibility the applicant can prove how the Tribunal treated the adverse material.<sup>36</sup> Furthermore, this tendency is contrary to the previous stringent approach, whereby the refusal to grant relief for legal error was rare. Arguably, the majority’s articulation of the presumption corresponds to their reasons for creating a fact-finding role for the courts, which will be discussed in Section VI.

## V Reconceptualising Fairness through a Statutory Lens

The type of unfairness that arose in *SZMTA* and subsequently *MZAPC (FCA)* was the failure to be notified of an event that alters the procedural context,<sup>37</sup> or ‘playing field’,<sup>38</sup> of the Tribunal’s review. In *SZMTA*, the High Court found that a notification issued under s 438 of the *Migration Act* constrained the Tribunal’s ability to give weight to relevant documents given by the Secretary of the Department. Consequently, the failure to disclose the notification to the applicants necessarily gave rise to a lost opportunity for the applicants to advance their cases, for under s 423 of the *Migration Act*, the applicant is entitled to contest the Secretary’s notification that s 438 applied to the documents, or to argue that the Tribunal should exercise one of the discretions available under s 438(3).<sup>39</sup> The High Court thus held that a notification under s 438 created an obligation of procedural fairness to disclose the fact of notification to the applicant.<sup>40</sup>

This presentation of fairness differs in an important respect from the more conventional presentation of fairness in earlier High Court decisions. In the cases *Re Refugee Review Tribunal; Ex parte Aala*<sup>41</sup>, *Re Minister for Immigration and Multicultural Indigenous Affairs; Ex parte Lam*<sup>42</sup> and *Minister for Immigration and Border Protection v WZARH*,<sup>43</sup> the administrative decision-maker gave the applicants a statement of intention with respect to how the review would be conducted. The procedure indicated by the statement was not an express statutory requirement, although it foreshadowed a line of inquiry that the applicants then relied upon. The question that arose for the Court in each case was whether the failure of the decision-maker to abide by the statement of intention was unfair.<sup>44</sup>

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<sup>36</sup> *MZAPC (FCA)* (n 2) [49].

<sup>37</sup> *SZMTA* (n 1) 440–41 [29] (Bell, Gageler and Keane JJ).

<sup>38</sup> *Ibid* 466 [115] (Nettle and Gordon JJ).

<sup>39</sup> *Ibid* 441 [30]–[31] (Bell, Gageler and Keane JJ).

<sup>40</sup> *Ibid* 440 [27] (Bell, Gageler and Keane JJ). 454 [78] (Nettle and Gordon JJ).

<sup>41</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (‘Aala’).

<sup>42</sup> *Re Minister for Immigration and Multicultural Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (‘Lam’).

<sup>43</sup> *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (‘WZARH’).

<sup>44</sup> *Lam* (n 42) 9 [24]–[25] (Gleeson CJ); *WZARH* (n 43) 340 [47] (Kiefel, Bell and Keane JJ).

In the nearly 20 years that have elapsed between *Aala* and *SZMTA*, there has been an incremental reorientation of the High Court's conceptualisation of administrative law. It is argued by administrative law scholars that the courts have sought to legitimise judicial review by grounding the courts' review in statutory interpretation.<sup>45</sup> This is not to say that the courts dispensed with legal norms entirely, however the focus of judicial review shifted in emphasis towards the statutory text and purpose. An important case that demonstrates this shift is *Saeed v Minister for Immigration and Citizenship*, in which the High Court found that a duty of procedural fairness could be implied from a strictly textual analysis of the statute, focusing upon the interrelation of the provisions to ascertain the purpose of each individual provision.<sup>46</sup>

While the outcomes of the traditional earlier cases differed, it is argued that the principles that underpinned those decisions were the same; the Court held that a finding of unfairness was contingent upon the existence of practical injustice, understood as the loss of an opportunity to make submissions. By contrast, the unfairness in *SZMTA* and *MZAPC (FCA)* arose from the applicant's lack of knowledge that a statutory mechanism had been enforced, which prevented the applicant from taking opportunities to respond afforded by the *Migration Act*.

Yet, although the High Court used the language of statutory interpretation to describe the duty of fairness owed to the applicant in *SZMTA*, the majority's analysis of materiality ultimately had the effect of undermining the statutory scheme itself — an ironic outcome for an ostensible statutory approach to jurisdictional error. The contradiction inherent in the majority's approach in *SZMTA* is best illustrated by contrast with the High Court decision in *Kioa v West*.<sup>47</sup> In that decision, a majority of the Court found that the Tribunal had breached its obligations of procedural fairness by failing to disclose its receipt of adverse information to the applicant, and that this breach was sufficient to establish jurisdictional error, regardless of whether the Tribunal took the information into account.<sup>48</sup> Indeed, Wilson J acknowledged in obiter dicta that 'it is difficult to see how even an emphatic reversal of the imputation contained in [the adverse material] could affect the result'.<sup>49</sup> Nevertheless, his Honour considered that to deny relief for a breach of the natural rules of justice would frustrate the purposes of the relevant legislation in that case, and be tantamount to condoning such a breach.<sup>50</sup> A comparison between *SZMTA* and *Kioa* clearly demonstrates the significance of the High Court's departure from its previous stringent stance. Not only has the High Court thrown doubt upon the primacy of statutory rules and duties, it now requires applicants to prove the materiality of the statutory breach in question.

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<sup>45</sup> Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153.

<sup>46</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 267 [41]–[42] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>47</sup> *Kioa v West* (1985) 159 CLR 550 ('*Kioa*').

<sup>48</sup> *Ibid* 629 (Brennan J). See also 588 (Mason J), 603 (Wilson J), 633 (Deane J).

<sup>49</sup> *Ibid* 603 (Wilson J).

<sup>50</sup> *Ibid*.

## VI Implications for the Courts' Fact-Finding Role

The High Court's resolution of the issues discussed above will have broader implications than these particularised facts might suggest, as the Court's formulation of fairness and materiality has formed the basis for the development of a potentially controversial fact-finding role for the courts. As discussed previously, the centrality of materiality to the courts' exercise of discretion to refuse relief is not a new development in judicial review.<sup>51</sup> It is also accepted that consideration of materiality requires an enquiry as to the statutory and factual context presented by the case.<sup>52</sup> However, *SZMTA* was the first High Court decision to provide guidance for fact-finding in order to determine the materiality of legal errors in judicial review.

The issue of whether fact-finding should be permitted is contentious because it disrupts the constitutional limits of judicial review. Traditionally, courts do not make determinations as to the weight or persuasive force of evidence, in order to avoid impinging upon the Tribunal's role to determine the merits of a decision. Rather, courts are required to consider the legality of a decision, understood as the decision-maker's compliance with statute and administrative law principles. Arguably, the effect of *SZMTA* has been to extend the limits of the Court's supervisory jurisdiction to allow for judicial review of what has traditionally been viewed as the merits of a decision.

The correlation drawn between the legal norms that inform the content of procedural fairness and the justification for fact-finding was further analysed in the plurality's judgment in *SZMTA*. The plurality quoted the unanimous High Court judgment in *Stead v State Government Insurance Commission* to emphasise that it is 'no easy task' to make a finding that 'a denial of natural justice could have had no bearing on the outcome' of the decision.<sup>53</sup> Yet this caution was immediately qualified by the plurality's insistence that the task 'is not impossible', supported by reference to the controversial judgment of McHugh J in *Aala*.<sup>54</sup> The citations of *Stead* and *Aala* are difficult to reconcile. *Stead* outlines a stringent, cautious approach to the courts' use of discretion to refuse relief, whereas the approach taken by McHugh J in *Aala* was arguably broader, stating that courts should refuse relief only when 'confident' that the outcome was unaffected by a breach of fairness.<sup>55</sup> In his analysis, McHugh J allowed himself to compare the strength of the evidence before the Tribunal to determine whether the breach of fairness affected the outcome.<sup>56</sup> The fact that McHugh J was the sole dissenting judge in *Aala*, with the rest of the High Court finding that the unfairness of the legal error attracted the Court's jurisdiction to grant relief, further emphasises the greater breadth of McHugh J's approach. The

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<sup>51</sup> See, eg, *WZARH* (n 43) 341–2 [56]–[57] (Gageler and Gordon JJ). See also Harry Anilius, 'Materiality: Marking the Metes and Bounds of Jurisdictional Error?' (2020) 27(2) *Australian Journal of Administrative Law* 88, 95, 102.

<sup>52</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6<sup>th</sup> ed, 2017) 484–9 [7.380].

<sup>53</sup> *SZMTA* (n 1) 264 [48]–[49] (Bell, Gageler and Keane JJ) quoting *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145–6 ('*Stead*').

<sup>54</sup> *SZMTA* (n 1) 264 [49] (Bell, Gageler and Keane JJ) citing *Aala* (n 41) 122 [104], 128 [122] (McHugh J).

<sup>55</sup> *Aala* (n 41) 122 [104] (McHugh J).

<sup>56</sup> *Ibid* 128 [122] (McHugh J).

plurality's reasons in *SZMTA* thus indicate a willingness to adopt a broader view of practical injustice and consequently a wider basis upon which to review documents for materiality than that allowed by previous High Courts.

In *SZMTA*, the High Court entered into a debate that until recently had been mostly limited to extra-judicial writing. Gageler, prior to his appointment to the High Court, considered that '[k]eeping administrative decision-makers within the express limits of ... statute ... is as uncontroversial as it is mechanical'.<sup>57</sup> He nonetheless questioned whether the implications drawn from statute by the courts, for example that of materiality or fairness, were 'truly value-free'.<sup>58</sup> Chief Justice French similarly demonstrated an awareness that judicial review required a kind of analysis that came dangerously close to the function of the decision-maker, by creating a taxonomy of 'factual merits review' and 'legal merits review'.<sup>59</sup> Justice Robertson proposed a modified classification of judicial review as 'consideration of the merits but not a decision on the merits',<sup>60</sup> to support his contention that the courts' discretion is not outside scope where it is sufficiently connected to a statutory framework.<sup>61</sup>

A common thread between these extra-judicial statements is the necessity of statutory interpretation in the legitimisation of judicial review. By contrast, the Court in *SZMTA* extended its supervisory jurisdiction by reference to legal norms. Although the Court used the language of statutory interpretation, the underlying basis for fact-finding and the Court's refusal to grant relief lay in the Court's focus upon practical justice. Moreover, while it is true that the High Court has always, to some extent, sought to give effect to practical justice through judicial review, the basis articulated by the plurality in *SZMTA* is subtly broader than the more stringent approach of earlier High Court decisions.

Arguably, the weaknesses exposed in the *SZMTA* approach by *MZAPC (FCA)* further undermine this rationale for the courts' review of s 438 material. The effect of the majority's view of jurisdictional error, as applied in *MZAPC (FCA)*, is to create a legal framework that is weighted against applicants. If the terms of the materiality enquiry are subtly shifted towards refusal of relief, then the courts' review of s 438 information and its effect upon Tribunal decisions will be correspondingly predisposed to some extent against finding that the documents could have made a difference to the outcome of the decision. This puts in jeopardy the fundamental aim of judicial review: to protect applicants from implied and express breaches of legislative requirements, in order to preserve certainty and equality before the law.

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<sup>57</sup> Stephen Gageler, 'Impact of Migration on the Development of Australian Administrative Law' (2010) 17(2) *Australian Journal of Administrative Law* 92, 104.

<sup>58</sup> *Ibid* 105.

<sup>59</sup> Chief Justice RS French AC, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24, 34.

<sup>60</sup> Justice Alan Robertson, 'What is "Substantive" Judicial Review? Does It Intrude on Merits Review in Administrative Decision-Making?' (2016) 85 *AIAL Forum* 24, 30.

<sup>61</sup> *Ibid* 30, 37.

## VII Conclusion

Before the High Court reached its decision in *SZMTA*, commentators on judicial review noted that the purposes of fairness and jurisdictional error were unclear,<sup>62</sup> lacking a unifying conceptual framework.<sup>63</sup> *SZMTA* has gone some way to showing how functional concerns can be accommodated within a statutory or formalist paradigm, although commentators continue to criticise the lack of coherence in the High Court's approach.<sup>64</sup> The appeal from *MZAPC (FCA)* builds upon these cases by questioning whether and how evidence before a Tribunal can be relevant to the courts' exercise of discretion.

This column has sought to demonstrate that the *SZMTA* approach to establishing the materiality of procedural unfairness in migration merits review decisions is wrong in principle and should be reconsidered in the upcoming appeal in *MZAPC*. There are significant difficulties in the present approach, which requires review applicants to overcome a presumption that a decision-maker who has failed to afford procedural fairness, has nonetheless acted in a way that neutralises the procedural unfairness. This presumption operates to compound the injustice of the procedural unfairness, undermines the statutory scheme, and skews the court's fact-finding on materiality towards the merits of the decision. In *MZAPC*, the High Court must develop more cogent legal principles to guide evaluation of materiality, especially if this concept is to continue to operate as a precondition to jurisdictional error.

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<sup>62</sup> Matthew Groves, 'The Unfolding Purpose of Fairness' (2017) 45(4) *Federal Law Review* 653, 667.

<sup>63</sup> Matthew Alderton, 'When Jurisdictional Errors Are Not Remedied: Refusal of Constitutional Relief on Discretionary Grounds' (2015) 23(1) *Australian Journal of Administrative Law* 15, 24.

<sup>64</sup> Burton Crawford (n 35) 282.