

# Can a non-material error be jurisdictional?

Joe Edwards reports on *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34

What is a jurisdictional error? The High Court went once more unto the breach in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, exploring the concepts of ‘jurisdictional’ and ‘non-jurisdictional’ error, and offering an interestingly ‘modern’ take on the old distinction.

## The facts

Mr Sorwar Hossain (the appellant), a citizen of Bangladesh, arrived in Australia in 2003 on a student visa. When this visa expired in 2005, he remained in Australia as an unlawful non-citizen (several applications for a protection visa were unsuccessful).

In 2010, the appellant met a woman who became his de facto partner, and in 2015, he applied for a partner visa. A delegate of the Minister refused this application and the appellant then sought merits review in the Administrative Appeals Tribunal (AAT).

The AAT affirmed the delegate’s decision on the basis that two criteria prescribed by the *Migration Regulations 1994* (Cth) for the grant of a partner visa had not been met:

- The first criterion required an application for a partner visa to be made within 28 days of the applicant ceasing to hold a previous visa, unless the decision-maker was satisfied that there were ‘compelling reasons’ for not applying the 28-day requirement (the timing criterion). The AAT found that the timing criterion was not met because the appellant had not applied for a partner visa within 28 days of him ceasing to hold a previous visa (i.e., his student visa) and there were no compelling reasons, as at the time that he applied for the partner visa, for not applying the 28-day requirement.
- The second criterion required an applicant for a partner visa not to have ‘outstanding debts to the Commonwealth’, unless the decision-maker was satisfied that ‘appropriate arrangements’ had been made for payment (public interest criterion). The AAT found that the public interest criterion was not met because the appellant had outstanding debts to the Commonwealth related to his various protection visa applications (which he said he intended to pay but in fact had made no arrangements to pay).

## Federal Circuit Court

The appellant sought judicial review of the AAT’s decision in the Federal Circuit Court. By this time, two matters were common ground. The first was that the AAT had made an error of law in relation to the timing criterion by addressing the question of whether there were compelling reasons for not applying the 28-day requirement as at the time the appellant applied for a partner visa, rather than as at the time of its own decision. The second was that the appellant, shortly after the AAT’s decision, had paid his outstanding debts to the Commonwealth.

The Minister argued that the AAT’s error in relation to the timing criterion was not a jurisdictional error, because the AAT’s failure to be satisfied that the public interest criterion was met provided a separate and independent basis on which the AAT was bound to affirm the delegate’s decision. The Federal Circuit Court rejected the Minister’s argument on the basis that it involved ‘unbundling’ the AAT’s reasons for decision into ‘impeachable’ and ‘unimpeachable’ parts. The Federal Circuit Court also held that there was no discretionary reason to withhold relief because the appellant had, since the AAT’s decision, settled his debts to the Commonwealth, and so the public interest criterion would no longer present a barrier to the grant of a partner visa. The Federal Circuit Court quashed the AAT’s decision and remitted the appellant’s application for review to the AAT for determination according to law.

## Full Court of the Federal Court

The Minister appealed to the Full Court of the Federal Court, repeating essentially the same argument he made before the Federal Circuit Court. By a 2:1 majority, the Full Court allowed the appeal (Flick and Farrell JJ; Mortimer J dissenting). The majority justices accepted that the AAT’s error in relation to the timing criterion was ‘jurisdictional’. However, their Honours nevertheless concluded that the AAT ‘retained jurisdiction or authority’ to affirm the delegate’s decision because of ‘the separate and discrete point going to [the public interest criterion]’.

## The High Court

The appellant appealed to the High Court, which unanimously dismissed the appeal, although for reasons quite different to those adopted by the majority of the Full Court of the Federal Court. Chief Justice Kiefel and Gageler and Keane JJ delivered joint reasons; Edelman J delivered separate reasons, with which Nettle J substantially agreed.

## Kiefel CJ, Gageler and Keane JJ

The plurality justices began their reasons with a discussion of the concepts of ‘jurisdiction’, ‘jurisdictional error’ and ‘non-jurisdictional error’ (at [17]ff). Their Honours noted that the concepts were difficult and apt to be misunderstood. However, their Honours noted that the concepts could not be avoided altogether because they describe the ‘constitutionally entrenched minimum content’ of the jurisdiction to review both State and Commonwealth executive and judicial power (at [20]–[22]). Their Honours also doubted that an attempt to reframe the distinction between ‘jurisdictional’ and ‘non-jurisdictional’ errors in ‘entirely new language’ would be helpful, especially once proper account were taken of the fact that ‘jurisdictional error’ is not a ‘metaphysical’ term, but rather a ‘functional’ one that expresses the gravity of the legal error at issue (at [22]; see also [18]–[19] and [25]).

However, the plurality justices nonetheless found that the ‘traditional distinction’ could be expressed ‘in more modern language’ (at [23]–[24]; citations omitted):

Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in

order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have 'such force and effect as is given to it by the law pursuant to which it was made'.

Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been 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. To describe a decision as 'involving jurisdictional error' is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a 'nullity', in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'. To that extent, in traditional parlance, the decision is 'invalid' or 'void'.

Their Honours' reference to a failure to comply with statutory preconditions or conditions '*to an extent which results in a decision ... lacking characteristics necessary for it to be given force and effect by the statute*' is important, for it picks up their earlier discussion of jurisdictional error as 'an expression not simply of the existence of error but of the gravity of that error' (at [25]; emphasis in the original).

How grave, or of what 'magnitude', does non-compliance with statutory preconditions or conditions need to be before the resulting decision may be said to be one affected by jurisdictional error? Their Honours held that this question inevitably turns on the construction of the statute under consideration, read against the backdrop of common law principles (at [27]-[28]). However, ordinarily, a statute is 'to be interpreted as incorporating a threshold of materiality' (at [29]); that is, non-compliance with a statutory pre-condition or condition must be 'material' before it may be said to take a decision outside jurisdiction. Non-compliance

with a statutory pre-condition or condition 'cannot be material', at least ordinarily, unless compliance 'could have resulted in the making of a different decision' (at [30]-[31]).

Applying this formulation of jurisdictional error to the facts of the case, their Honours held that the AAT, in reviewing the delegate's decision, was required to form its own view as to whether to grant a partner visa to the appellant, and that the AAT was required to do so on the basis of 'a correct understanding and application of the applicable law', including the criteria prescribed by the Migration Regulations (at [34]). By 'misconstruing and misapplying' the timing criterion, the AAT failed to do this; it failed to comply with an obligation that conditioned the exercise of its statutory power (at [35]).

However, as their Honours continued, this failure 'could have made no difference to the decision which the [AAT] in fact made to affirm the decision of the delegate ...

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because the [AAT] was not satisfied that the public interest criterion was met, and, on the findings which the [AAT] made, the [AAT] could not reasonably have been satisfied that the public interest criterion was met' (at [35]). In other words, the AAT's error in relation to the timing criterion, while an error of law, was non-material: it made no difference to the outcome. It followed, in their Honours view, that the AAT's error 'did not rise to the level of a jurisdictional error' (at [37]).

#### Edelman J

Like the plurality justices, Edelman J engaged with some of the conceptual debates about the distinction between 'jurisdictional' and 'non-jurisdictional errors' (at [60] ff), although, it must be said, his Honour exhibited somewhat less enthusiasm than did the plurality justices for any attempt to 'modernise' the language used to understand the distinction (e.g., at [62]). Ultimately, however, his Honour's reasons focussed on the High Court's classic pronouncements on the meaning of the concept of 'jurisdictional error', including both *Craig v South Australia*

(1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (Kirk) (at [66]ff). On the basis of these decisions, his Honour concluded that 'jurisdictional error requires materiality' (at [66]). Moreover, while 'the issue will always be one of construction of the express or implied terms of the statute, 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. In other words, materiality will generally require the error to deprive a person of the possibility of a successful outcome' (at [72]).

On the facts of the case, Edelman J concluded that the statutory context required 'the usual implication that an immaterial error will not invalidate a decision' (at [76]). The question then became whether the AAT's error in relation to the timing criterion was 'material' or not (at [76]). His Honour answered that question in the negative: the AAT's error 'did not deprive the appellant of the possibility of a successful outcome' because the AAT was required, in any event, to affirm the delegate's decision on the basis of the public interest criterion (at [79]). Thus, the error was 'immaterial' and, it followed, 'not a jurisdictional error' (at [79]).

#### Nettle J

Justice Nettle agreed substantially with Edelman J's reasons (at [39]), but with an important caveat (at [40]; one which Edelman J also noted in passing at [72]). According to Nettle J, materiality is not invariably an essential requirement before an error may be characterised as 'jurisdictional'. His Honour gave two examples. First, 'where respect for the dignity of the individual may mean that a denial of procedural fairness should be regarded as a jurisdictional error regardless of the effect it may have had on the result reached by the decision maker' (at [40]). And secondly, 'where a decision maker is required to make a decision by reference to a single specified criterion and, in error, addresses himself or herself to the wrong criterion' (at [40]).

#### Conclusion

The High Court's decision confirms the common sense proposition that an error should not ordinarily be regarded as a jurisdictional error (and so as 'no decision at all') unless it is an error that actually 'matters'. As the plurality justices observed, decision-making is, after all, 'a function of the real world' (at [28]). However, the broader significance of the decision is likely to lie in the plurality justices' efforts, familiar since at least Kirk, to take some of the mystery out of the concept of 'jurisdictional error'.