

FACTS AND EVIDENCE IN ADMINISTRATIVE LAW: DOES IT MATTER?

A. INTRODUCTION

1. In this paper, we address ourselves to facts and evidence in administrative law decision-making, in particular, recent authority about when errors of fact will amount to jurisdictional error.
2. Late last year, as the Fates would have it, the Full Federal Court delivered two refugee appeal decisions which concerned these very issues: *CQG15 v Minister for Immigration and Border Protection*¹ ('*CQG15*') and *ARG15 v Minister for Immigration and Border Protection*² ('*ARG15*').³ We will use these decisions to distil and illustrate some of the points discussed today.
3. In Part B, we set out a short account of the relevant background facts and contentions from *CQG15* and *ARG15* and some unexceptional propositions about the role of facts and evidence in administrative decision-making and the task of administrative tribunals. In Part C, we look at when fact-finding errors may amount to jurisdictional error. We focus on 'jurisdictional fact' cases, both in respect of jurisdictional facts as objective or actual preconditions, and as states of satisfaction. In relation to the latter, we consider the notion of 'reasonableness review' and the requirement that findings, including about credibility, are based on logical and probative evidence, and/or are not illogical or irrational. We touch too on when ignoring evidence may constitute jurisdictional error, an issue which arises in *ARG15*.
4. While courts are more willing to venture into more nuanced areas of factual controversy to find jurisdictional error, they remain circumspect about crossing the line into merits review. The ultimate question is always, 'does it matter?':⁴ error of fact will not amount to jurisdictional error unless it is sufficiently significant to bear on the exercise of jurisdiction. We also note certain tensions:

¹ [2016] FCAFC 146.

² [2016] FCAFC 174.

³ We note that because the jurisprudence in this area is predominantly developed in the migration and refugee context, most of the decisions we refer to, including these two, arise in that context.

⁴ Or, as Kristen Walker QC recently put it: 'How bad was the error?': see Kristen Walker QC, 'Jurisdictional Error Since Craig', (2016) 86 *AIAL Forum* 35, at 45.

if decision-makers are not bound by evidentiary rules and standards, why should their decisions be found deficient because findings fall short of rolled gold standards? Second, the learning urges that one not construe tribunal reasons with ‘an eye attuned to the perception of error’.⁵ Yet the courts, with respect, seem to subject them to precisely this in order to demonstrate jurisdictional error. Witness the decisions in *CQG15* and *ARG15*.

B. BACKGROUND MATTERS

CQG15 AND *ARG15*: FACTS AND CONTENTIONS

5. In *CQG15*, the appellant from Afganistan claimed fear of persecution by the Taliban because of his Hazara ethnicity and Shi’a faith. He relied on a number of violent attacks on, and threats of harm and injury to, himself and family members. The Tribunal disbelieved him. It made various adverse credibility findings about him. It said:⁶

Taken separately by themselves, none of the concerns about the [appellant’s] credibility which the Tribunal has discussed above would necessarily be determinative of that issue. However, considered cumulatively, these concerns lead the Tribunal to find that the [appellant] is not a witness of truth and the account of events on which his protection claims are based is false.

6. On review, the appellant argued that it was not open to the Tribunal to find that he was not a witness of truth because it had found that none of the concerns about his credibility, taken separately, would necessarily be determinative of the issue. Surprisingly, it was argued that the inconsistencies identified were minor in nature and that there were no findings of falsity at all.⁷ Therefore, there was no logical and probative basis for the ultimate finding that the evidence was false, or in the alternative, such a finding was illogical and/or irrational. The primary judge dismissed the application, considering that the statement went to the overall question of whether he was telling the truth. The court said:⁸

The credibility of an applicant is a matter *par excellence* for the Tribunal. The proposition that the adverse finding in relation to the applicant not being a

⁵ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

⁶ *CQG15* at [23] (the Court).

⁷ *CQG15* at [48].

⁸ *CQG15 v Minister for Immigration and Border Protection* [2016] FCCA 886 at [27]-[28].

witness of truth and that the basis upon which his claims were advanced was false cannot be said to be illogical. Further, that finding had a probative basis on the evidence before the Tribunal. Further, the adverse findings were not ones that could be said to be irrational or illogical.

7. In *ARG15*, the appellant⁹ mother from Pakistan claimed to fear harm as a member of a particular social group (women). She said that her father-in-law had threatened to kill her for insulting him when she had called the police to an altercation in Australia in 2011 and because a ‘Jirga’¹⁰ in Pakistan headed by her father-in-law had declared her a ‘black woman’ who must be killed. The Tribunal rejected the claims on the basis that they, and the evidence in support, lacked credibility. On appeal it was argued that the Tribunal erred because it made findings that were not based on probative evidence and which were legally unreasonable; it failed to consider country information provided by the appellants’ solicitor; and it misapprehended certain evidence and then used its erroneous findings about the evidence to make negative credibility findings.¹¹
8. There was no dispute between the parties about the applicable principles in either case, with both appeals turning on the application of the principles to the particular facts. The Full Court unanimously dismissed the appeal in *CQG15*,¹² but allowed it in *ARG15* on two of the five grounds argued.¹³

FACTS & EVIDENCE IN ADMINISTRATIVE DECISION-MAKING¹⁴

9. Facts and evidence are fundamental to administrative decision-making. Evidence is the material before the decision-maker, made up of the information provided by applicants or third parties, and information obtained independently

⁹ The appellants comprised the mother and her children. The husband/father had been part of the proceeding at earlier stages but was not a party to the appeal.

¹⁰ A tribal assembly that makes decisions according to Islam: *ARG15* at [3].

¹¹ *ARG15* at [36]. In the Federal Circuit Court, the appellant mother had represented herself and her family, and raised issues that essentially concerned the form of the Tribunal’s reasons, such as typographical errors and the failure to record some of the oral evidence. The primary judge dismissed the application, concluding that the errors were not sufficient to find jurisdictional error because they could not have affected the outcome of the decision: *ARG15 v Minister for Immigration and Border Protection* [2016] FCCA 1086. The appellants raised new grounds of appeal in the Full Court.

¹² The Court, comprising McKerracher, Griffiths and Rangier JJ, delivering a joint judgment.

¹³ The Court, comprising Griffiths, Perry and Bromwich JJ, delivering a joint judgment.

¹⁴ See generally M Kelly, *LawBrief: Administrative Law* (Lawbook Co. 2015), ch 8. See also Robin Creyke & John McMillan, *Control of Government Action* (LexisNexis Butterworths, 3rd ed: 2012) at Ch 12.

by the tribunal.¹⁵ Fact-finding is the process of determining what the facts are in a given case, upon which findings a decision-maker determines whether a claimant meets the relevant statutory criteria. Fact-finding usually involves assessing credibility. As noted in *CQG15* at first instance, credibility findings may be critical, if not determinative.¹⁶ Fact-finding is an indispensable part of administrative decision-making.

10. Merits review bodies are creatures of statute. The Act concerned will govern the processes by which they are to make decisions. In general, statutes require that decision-makers act fast and informally and in a way that is fair, accessible and without undue technicality.¹⁷ Thus, they are not bound by the rules of evidence. They may inform themselves on any matter in any manner as they see fit or is appropriate.¹⁸ Unlike judicial decision-making, there is no ‘onus of proof’. Nor do decision-makers decide matters ‘on the balance of probabilities’.¹⁹ As the Full Federal Court recently said, the burden of proof is a ‘concept buried in common law rules of evidence and the practice and procedure of superior courts of law entrusted with resolving disputes between parties to litigation’ and as ‘a general proposition’, does not apply to administrative decision-making.²⁰ But this does not mean that the applicant or claimant has no role in making their case. It remains for:²¹

... the claimant to present evidence and advance arguments adequate to enable the decision-maker to make a decision favourable to the claimant. There is no burden upon the decision-maker to make out a case that the claimant has failed adequately to advance.

¹⁵ For example country information in refugee matters.

¹⁶ See *CQG15 v Minister for Immigration and Border Protection* [2016] FCCA 886 at [27]-[28]).

¹⁷ See generally *Administrative Appeals Act 1975* (Cth), ss 2A and 33; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(d).

¹⁸ *Administrative Appeals Act 1975* (Cth), s 33; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(b) and (c).

¹⁹ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 (Brennan CJ, Toohey, McHugh and Gummow JJ). See also *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425.

²⁰ *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 62 [63], [65] (*‘Sun’*) (Flick and Rangiah JJ with whom Logan J generally agreed). See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [10] (French CJ) and *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 at [34] (Hayne J).

²¹ *Sun* at [69] citing also Middleton J in *SZLVZ v Minister for Immigration and Citizenship* [2008] FCA 1816 at [24] where his Honour observed that it ‘is for an applicant to provide evidence and arguments in sufficient detail to enable the decision maker to establish the relevant facts’ and that the ‘decision maker is not required to make the applicant’s case for him or her’.

11. As you know, the task of the tribunal is to ‘arrive at the correct or preferable decision’ on the basis of the whole of the evidence and submissions before it and any other information obtained by the tribunal itself.²² The tribunal has to be “‘reasonably satisfied” on each component issue’.²³ Most administrative bodies are required to prepare a written statement of reasons for their decisions. This usually includes the requirement to set out ‘the findings on any material questions of fact’ that refers to ‘the evidence or any other material’ on which those findings were based.²⁴ This obligation has become instrumental when it comes to finding errors of fact that amount to jurisdictional error.²⁵

C. JURISDICTIONAL ERROR: FACTS & EVIDENCE

12. Jurisdictional error will occur where the decision-making body fails to exercise the jurisdiction conferred on it. This may be because the body actually declined to make the decision; alternatively, and more often, it is a ‘constructive failure’ to exercise jurisdiction. That is to say, the decision is made in a factual sense but as a result of the error the body failed to exercise the jurisdiction conferred upon it.²⁶ The difficulty is being more precise about the kind of error that will amount to a jurisdictional error or a failure to exercise jurisdiction.
13. Of the non-exhaustive list²⁷ of errors set out in *Craig v South Australia*,²⁸ we are concerned only with when making ‘erroneous findings’ amounts to jurisdictional error in relation to tribunal decisions. As the High Court said, it is

²² *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [10] (French CJ); *Bushell v Repatriation Commission* (Brennan) (1992) 175 CLR 408 at 425.

²³ Robin Creyke & John McMillan, *Control of Government Action* (LexisNexis Butterworths, 3rd ed: 2012) at [12.2.19].

²⁴ See eg *Administrative Appeals Act 1975* (Cth), s 28; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 46; *Migration Act 1958* (Cth), s 430.

Administrative Appeals Tribunal Act 1978 (Cth), s 28; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 46.

²⁵ As Basten said (writing extra-judicially), the obligation to provide a written statement of reasons has been the greatest contribution made by statutory schemes: The Hon John Basten, ‘Standards of Review – An Australian Perspective’ (Seminar given to the Canadian National Judicial Institute in (2010) at p 3. Available at: <http://www.austlii.edu.au/au/journals/NSWJSchol/2010/22.pdf>

²⁶ Kristen Walker QC, ‘Jurisdictional Error Since Craig’, (2016) 86 *AIAL Forum* 35 at 38 referring also to Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [41]: ‘A constructive error may be disclosed when a tribunal ‘misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form’.

²⁷ See *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁸ (1995) 184 CLR 163.

only in ‘some circumstances’ that such errors will affect a tribunal’s exercise of power.²⁹ As a rule, there is no error of law in simply making a wrong finding of fact.³⁰ The usual exceptions are where the factual error involves a ‘jurisdictional fact’, or if there is no evidence to support the finding of fact.³¹ Otherwise, so long as the inference is open on the material, however inadequate, any error will not be unlawful. This includes where an inference was drawn as a result of illogical or unsound reasoning. As Mason CJ said in *Australian Broadcasting Tribunal v Bond*:³²

"Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law."

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.

(Italics appear in the original.)

14. Factual findings involving assessments about credit have typically been said to be matters exclusively for the decision-maker, not the court. As a consequence, they are very difficult to overturn for error.³³ In *CQG15*, the Federal Circuit Court dismissed the application for review for that very reason.³⁴

²⁹ *Craig* at 179.

³⁰ *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 (Brennan J). this was endorsed by the High Court in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 154 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

³¹ *The Queen v Australian Stevedoring Industry Board* (1953) 88 CLR 100 at 117 (Dixon CJ, William, Webb and Fullager JJ). See also, Creyke and McMillan at [12.2.2]. See also Kristen Walker QC, ‘Jurisdictional Error Since Craig’, (2016) 86 *AIAL Forum* 35.

³² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 (Mason CJ, with whom Brennan, Toohey and Gaudron JJ agreed quoting *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654 (Menzies J).

³³ See *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089 at [16] where Flick J cites McHugh J’s words from *Durairajasingham* and says: ‘These observations – or, at least, such parts of these observations as refer to findings on credibility being “the function of the primary decision maker par excellence” – have oft been since cited: e.g., *SZSBR v Minister for Immigration and Border Protection* [2013] FCA 1208 at [9] per Farrell J; *MZZSH v Minister for Immigration and Border Protection* [2014] FCA 1292 at [20] per Murphy J; *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534 at [20] per Logan J’.

³⁴ *CQG15 v Minister for Immigration and Border Protection* [2016] FCCA 886.

15. Courts generally grant tribunals a degree of latitude when it comes to dealing with evidence. Courts have said that the weighing of various pieces of evidence is generally a matter for the tribunal,³⁵ and ‘merely to ignore “relevant material” does not establish jurisdictional error’.³⁶ There is no obligation on decision-makers ‘to refer to every piece of evidence and every contention made by an applicant in [their] written reasons’; and, inferences should not be drawn that an issue or evidence has been overlooked simply because a piece of evidence was not expressly discussed in the course of the reasons for decision.³⁷
16. A justification sometimes offered by courts on review for leaving matters of facts/evidence to tribunals is the advantage that decision-makers have over the supervising courts in relation to evaluating the evidence and assessing credibility.³⁸ But our own experience is that if a court on review regards a tribunal’s fact-finding methodology is deficient, the court will be disposed to intervene. None, the less, courts are reluctant to become involved in factual and evidentiary controversies. This is consistent with the proper limits on judicial review and the separation of powers’ doctrine that requires courts not to intrude upon the merits of the decision.³⁹ We are talking about a distribution of function.
17. We turn now to the principles relating to jurisdictional fact. We shall address the question of an objective or actual fact. Then we shall address the question of a state of satisfaction.

JURISDICTIONAL FACTS—OBJECTIVE

18. A jurisdictional fact is a fact on which the court’s jurisdiction is predicated. In particular, it is an objective precondition to the exercise of jurisdiction, or the ‘actual existence of a state of facts’ as opposed to an opinion that the facts

³⁵ *SZJSS v Minister for Immigration and Citizenship* (2010) 243 CLR 164 at [33] citing *Abebe v Commonwealth* (1999) 197 CLR 510 at 580 (Gummow and Hayne JJ).

³⁶ *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [97].

³⁷ *WAEE v Minister for Immigration and Multicultural & Indigenous Affairs* (2003) 75 ALD 630 at 641 [46], [47] (French, Sackville and Hely JJ).

³⁸ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 292 (Kirby J).

³⁹ See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J). See also *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [97].

exist.⁴⁰ Jurisdictional facts may be trivial and straight-forward, such as where the precondition is that a person actually applies for the licence;⁴¹ but they may also be more complex, and involve an exercise of judgment.⁴² The focus in many cases in the early part of the 20th century was on ‘contestable questions of fact in the real world’, such as whether there was an interstate industrial dispute such that the former Court of Conciliation and Arbitration had jurisdiction under the *Conciliation & Arbitration Act 1904* (Cth).⁴³ The doctrine has recently been found to apply in the environmental context.⁴⁴ Errors of fact in cases which involve a ‘jurisdictional fact’ will always constitute jurisdictional error.

19. As Justice Leeming writes (extra-judicially), while there are always preconditions to the exercise of power, usually the donee of the power determines whether the precondition exists. The jurisdictional fact case is different for where the existence of jurisdictional fact is challenged on review, it will be the review court who will determine whether that fact does or does not exist, and evidence may be adduced for that purpose. Hence the court will find the facts for itself. In effect, review of jurisdictional fact cases may amount to a form of merits review.⁴⁵ The doctrine, therefore, has the potential to play an important part in an attack on a decision below.

20. Determining whether a precondition is or is not a jurisdictional fact is always a question of statutory interpretation.⁴⁶ As Spigelman CJ said, the Parliament can

⁴⁰ *Parisienne Basket Shoes Pty Ltd v Whyte* (1938 59 CLR 369 at 391 (Dixon J)).

⁴¹ For example, a mining exploration licence: see *Yarra Mining Pty Ltd v Eaglefield Holdings Pty Ltd* (2010) 41 WAR 134 at [41]-[61] cited in Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press: 2012) at 62, fn 81.

⁴² See *Timbarra Protection Coalition Inc v Ross Mining NL* (1998) 46 NSWLR 55 at 72. The example given there is that the test of whether a report was ‘substantially favourable’ to an employee was found to be an objective test: see *Sutherland Shire Council v Finch* (1969) 123 CLR 657 at 663 and 666.

⁴³ Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press: 2012) at 62-3. In 1912, Isaacs J also spoke of the actual existence of the industrial dispute as a jurisdictional fact in relation to the Commonwealth Court of Conciliation: *R v Court of Conciliation and Arbitration; Ex parte Taylor* (1912) 15 CLR 586 at 609.

⁴⁴ See for example, *Timbarra Protection Coalition Inc v Ross Mining NL* (1998) 46 NSWLR 55; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422.

⁴⁵ Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press: 2012) at 62.

⁴⁶ *Timbarra Protection Coalition Inc v Ross Mining NL* (1998) 46 NSWLR 55 at 63-64 (Spigelman CJ); *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) NSWLR 707 at [6] (Spigelman CJ). See also The Hon John Basten, ‘Standards of Review – An Australian Perspective’ (Seminar given to the Canadian

make ‘any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality)’.⁴⁷ If that statutory construction ‘process leads to the conclusion that Parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts’, the review court is required to give effect to that intention by inquiry into whether the fact or facts exist.⁴⁸

21. Although, as Spigelman CJ noted, actual jurisdictional facts may sometimes involve an opinion, as Leeming argues, the reference in a statute to terms such as “opinion” or “satisfaction”, tends to be decisive that the case will not involve a jurisdictional fact in the classic sense.⁴⁹ However, where the statute is silent, ‘there is apt to be a contestable question of construction as to the nature of the precondition’.⁵⁰
22. *Plaintiff M70*⁵¹ illustrates the point. The Act provided that ‘an officer may take a person to a country in which a declaration is in force’⁵² and the Minister had the discretion to declare that a specified country had the particular

National Judicial Institute in (2010) at p 3. Available at:
<http://www.austlii.edu.au/au/journals/NSWJSchol/2010/22.pdf>

⁴⁷ *Timbarra Protection Coalition Inc v Ross Mining NL* (1998) 46 NSWLR 55 at 64 (Spigelman CJ citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841 at 859-861).

⁴⁸ *Timbarra Protection Coalition Inc v Ross Mining NL* (1998) 46 NSWLR 55 at 63-64. The case concerned a development application that had to address any potential threat to endangered species, giving the public an opportunity to debate the issue. Whether there was such a threat to endangered species was held to be a jurisdictional fact.

⁴⁹ Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press: 2012) at 64. In those cases, the nature of judicial review will be different. For example, if in forming the state of satisfaction, matters that are required to be taken into account are not, the requisite state of satisfaction will not be met: eg *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [54]. See also for ‘reasonableness review’ below at [23].

⁵⁰ Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press: 2012) at 62. *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 149-150. Thus, in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 149-150 [35], the High Court said that principal reason for determining that the precondition to the exercise of power, namely whether the industry was noxious, was a jurisdictional fact, was because the legislation did ‘not define the criterion of operation as the opinion of the relevant authority’. The case involved an application by Collex Waste Management Services for approval to expand a waste treatment plan. The scope of the approval process depended on whether the waste treatment plan was classed as a “general” or “special” industry which in turn depended on if the industry was noxious.

⁵¹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 44.

⁵² *Migration Act 1958* (Cth), s 198A(1).

characteristics specified in s 198A(a)(i)-(iv) of the *Migration Act 1958* (Cth).⁵³ The key issue was whether the criteria in s 198A(3) were actual or objective ‘jurisdictional facts’ in relation to the exercise of the power to declare Malaysia as a country under and for the purposes of that section.⁵⁴ The alternative was that the criteria were not objective constraints on the power to declare a country, the only constraints being good faith and the purpose of the statute.⁵⁵ By majority, the High Court held that the criteria were jurisdictional facts. One reason for its so deciding was the language of the conditions and the absence of any reference in s 198A(3) to the Minister being ‘satisfied’ or forming an ‘opinion’.⁵⁶ The High Court was therefore able to determine for itself whether the jurisdictional facts were met. It found that they were not.⁵⁷

JURISDICTIONAL FACTS— A STATE OF MIND

23. If the use of the term ‘satisfaction’ is a sure way of construing a precondition as something other than an objective jurisdictional fact,⁵⁸ why do courts, including the Full Court in *ARG15*, speak of the state of satisfaction in s 65 of the *Migration Act* as a ‘jurisdictional fact’?⁵⁹ Courts, including some members of the High Court have used the same phrase, frequently, and confusingly, to refer to the state of satisfaction, a quite different concept.

⁵³ These included: that the relevant declared country (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection.

⁵⁴ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 44 at [107] (plaintiffs’ argument).

⁵⁵ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 44 at [108] (Minister’s argument).

⁵⁶ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 44 at [106].

⁵⁷ Permitting a UN body to operate was not sufficient protection as required by s 198A(3); the arrangement between Australia and Malaysia did not oblige Malaysia to provide the protections required under s 198A(3); Malaysia did not offer the legal protections required for the declaration under s 193A(3). See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 44 at [125], [126], [135] (Gummow, Hayne, Crennan and Bell JJ).

⁵⁸ See also *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [35].

⁵⁹ *ARG15* at [44]. See eg *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58 at [13].

24. According to our research, Gummow J first used the term in respect of the state of satisfaction in *Minister for Immigration and Multicultural Affairs v Eshetu*.⁶⁰ The reason given there was that the phrase was a ‘convenient’, if not ‘awkward’, way to refer to the ultimate finding that enlivens the decision-maker’s power, or jurisdiction.⁶¹ As such, it shares with the objective jurisdictional fact a significance; that is, it concerns the ‘ultimate finding’ that enlivens power, or upon which the tribunal’s jurisdiction turns.⁶² The key difference, however, is that the review court does not find the facts for itself. In the usual way, this is a matter of fact for the decision-maker to determine.
25. His Honour’s comments mark an important beginning of a new line of authority relating to ‘reasonableness review’ in which he advocated scrutiny of the tribunal’s statement of reasons to ensure the requisite degree of satisfaction (i.e. the jurisdictional fact) ‘was arrived at reasonably’. His Honour said:⁶³

Where the issue whether a statutory power was enlivened turns upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably, ... I would prefer the scrutiny of the written statement provided under s 430 by a criterion of "reasonableness review". This would reflect the significance attached earlier in these reasons to the passage extracted from the judgment of Gibbs J in *Buck v Bavone*. It would permit **review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds.** (Emphasis added.)

26. This new jurisprudence developed in *Re Minister for Immigration and Multicultural Affairs; Ex parte S20* (‘S20’),⁶⁴ when the applicant drew on Gummow J’s dicta to contend, as an independent ground of review, that the tribunal’s decision displayed jurisdictional error because the condition on which it depended ‘was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds’.⁶⁵ While unsuccessful on the facts,

⁶⁰ (1999) 197 CLR 611.

⁶¹ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130].

⁶² Martin Smith, “According to law, and not humour”: Illogicality and administrative decision-making after *SZMDS*” (2011) 19 *AJ Admin L* 33 at 42.

⁶³ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 656-7 (Gummow J). Gummow J drew on Deane J’s dicta in *Bond* where Deane J said that natural justice required administrative decision-makers to decide on the basis of ‘logically probative material’ and that this was required at every step in the decision-making process: (1990) 170 CLR 321 at 367. Deane J had also expressed similar views in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41. Deane J’s views were rejected by the majority in *Bond* (at 357).

⁶⁴ (2003) 198 ALR 50.

⁶⁵ *S20* at [34] (McHugh and Gummow JJ).

McHugh and Gummow JJ accepted the ground ‘for present purposes’.⁶⁶ Then in June 2004, in *Minister for Immigration and Multicultural Affairs v SGLB* (‘*SGLB*’),⁶⁷ Gummow and Hayne JJ, relying on *S20*,⁶⁸ picked up the applicant’s statement of grounds ‘as if it *did* constitute the test for opinions or satisfaction that is a precondition to enlivening the duty’. Their Honours said:⁶⁹

The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a ‘jurisdictional fact’ or criterion upon which the exercise of that authority is conditioned. ...

The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters **but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. If the decision did display these defects, it will be no answer that the determination was reached in good faith.**

27. Finally, we draw to your attention *Minister for Immigration and Citizenship v SZMDS* (‘*SZMDS*’),⁷⁰ in which Crennan and Bell JJ (who formed part of the the majority) accepted the submission that: ‘if illogicality or irrationality occurs at the point of satisfaction ... then this is a jurisdictional fact and a jurisdictional error is established’.⁷¹
28. However, Crennan and Bell JJ drew a boundary as regards merits review: ‘the test for illogicality or irrationality’ is to ask whether ‘logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding’ having regard to the evidence on which the decision is based, and a decision will not be illogical or irrational or unreasonable because a different conclusion is preferred on the evidence.⁷² These arguments failed. On the evidence, Crennan and Bell JJ said ‘a logical and rational decision-

⁶⁶ *S20* at [52], [37] (McHugh and Gummow JJ). The following year, in March 2004, in *WALJ*, the Full Federal Court also characterised a determination that was not ‘based on findings or inferences of fact that are grounded upon probative material and logical grounds’ as a ‘process lacking practical fairness or justice and would not be a process conducted according to law’: *WALJ v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2004) 80 ALD 568 at [22].

⁶⁷ (2004) 207 ALR 12.

⁶⁸ *S20* at [37] and [52].

⁶⁹ *SGLB* at [37]-[38] (Gummow and Hayne JJ); M Kelly, *LawBrief: Administrative Law* (Lawbook Co. 2015) at 370 noting that previously it had been the case that so long as the decision-maker reached the state of satisfaction in ‘good faith’, and not arbitrarily or capriciously, that would be sufficient. On the facts of the case, however, the appellant was unsuccessful.

⁷⁰ (2010) 240 CLR 611.

⁷¹ 119. In so doing, their Honours drew also on Deane J’s dicta from *Bond* (see fn 97).

⁷² *SZMDS* at [131] (Crennan and Bell JJ).

maker could have come to the same conclusion' as the tribunal did.⁷³ Gummow ACJ and Kiefel J disagreed, determining that the tribunal made a critical finding about the respondent's credibility on the basis of 'unfounded assumptions' about how homosexuals would behave, without any basis in the material to found such assumptions. Therefore, there was an 'absence of logical connection between the evidence and the reasons' and jurisdictional error.⁷⁴

29. While the High Court recently rejected the use of the phrase 'jurisdictional fact' in relation to the state of satisfaction,⁷⁵ it returned to the requirement for probative evidence in *FTZK v Minister for Immigration and Border Protection* ('*FTZK*').⁷⁶ The question was whether the evidence before the Tribunal was logically probative of 'serious reasons' for considering that the appellant had committed serious non-political crimes such that it was open to apply the exclusion in Article 1F of the Refugee Convention.⁷⁷ The Tribunal had identified four factors for reaching the 'conclusion that there were "serious reasons for considering" that the appellant had committed the crimes of kidnapping and murder' but said that:⁷⁸

"[a]ny one of the various factors would not have been sufficient to establish serious reasons" but that the "combination of factors" gave rise "to reasons of sufficient seriousness to satisfy" Art 1F of the Refugees Convention.

⁷³ *SZMDS* at [136] (Crennan and Bell JJ). Justice Heydon agreed that there was no illogicality in the tribunal's decision and that the issue was one 'on which minds might differ'; the difference between the Tribunal and the Federal Court's view being one of 'degree, impression and empirical judgment. It did not stem from an error in logic' *SZMDS* at [78], [86] (Heyden J). Notably, his Honour also did not think that the 'state of satisfaction' was a jurisdictional fact.

⁷⁴ *SZMDS* at [43]-[53]. Note also their Honours' reiteration of the importance of the Tribunal's reasons for decision and in particular: 'The obligation is to set out the findings on what the RRT considers to be material questions of fact; this focuses upon the thought processes of the decision maker, and may disclose jurisdictional error' (citing *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 331-332 [10]).

⁷⁵ See *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 at [26] where French CJ, Bell, Keane and Gordon JJ said, referring to the decision in *Eshetu*: 'the formation by the Delegate of the state of satisfaction required by cl 202.222(2) establishes whether a visa is to be granted. *That state of mind is not readily seen as a jurisdictional fact* upon which the Delegate's authority to enter upon the determination of the application depends'. (emphasis added). See also at [66] where Gageler said: 'There is no dispute that each of pars (a) to (d) of cl 202.222(2) refers to a consideration which requires the exercise of evaluative judgment on the part of the decision-maker. *It would be nonsense to suggest that any of them refers to a "jurisdictional fact"*, the existence or non-existence of which is for the objective determination of a court. The evaluative judgment of the decision-maker gives content to each of them, provided the decision-maker conducts himself or herself according to law'. (emphasis added).

⁷⁶ (2014) 88 ALJR 754.

⁷⁷ If Art 1F applies, a person is excluded from Australia's protection obligations: see s 36(3) of the *Migration Act 1958* (Cth).

⁷⁸ *FTZK* at [26] (Hayne J).

Curiously, the reasons in *CQG15* suffer from the same vice, notwithstanding a different context. Although not expressly relying on *FTZK*, the appellant may have been encouraged by *FTZK*'s success.⁷⁹

30. The High Court held that the evidence before the Tribunal was not logically probative of 'serious reasons for considering' that the appellant had committed the relevant crimes. French CJ and Gageler J said that while the phrase does not require a finding that the person had actually committed a serious non-political crime, there must be material that 'provides a rational foundation for that inference'.⁸⁰ Hayne J said that three of the four factors identified by the Tribunal were not 'logically probative' of the alleged crimes and therefore could not support a conclusion that there were 'serious reasons for considering' the appellant had committed the crimes.⁸¹ The Court determined the decision was vitiated by jurisdictional error, not because the critical finding or the outcome was illogical or irrational, but because the Tribunal had misconstrued the 'serious considerations' test.⁸²
31. Along with *SZMDS*, we venture to state that *FTZK* is authority for the proposition that findings of fact or opinion have to be supported by logically probative evidence and not be illogical or irrational.⁸³
32. The Full Court in *ARG15* refers to more recent authority that to constitute jurisdictional error, the illogicality or irrationality must be *extreme*, measured against the standard that it is not enough that the question of fact is one on which reasonable minds may differ. It may also relate to fact-findings other than the ultimate fact, albeit they must lead to the end result or be sufficiently

⁷⁹ See above at [4].

⁸⁰ *FTZK* at [13].

⁸¹ *FTZK* at [31]. See also Crennan and Bell JJ at [96]. The Tribunal had relied on 4 things: 1) that the Chinese authorities alleged that the appellant had committed the crimes and they provided transcripts of interrogation of two men (later convicted of and executed for participation in the crimes) who alleged that the appellant was complicit in their crimes; 2) the finding that the appellant had left China shortly after the crimes were committed and that he had provided false information to Australian authorities in order to obtain a visa to travel to and enter Australia and that the appellant had "deliberately provided false information when applying to the Australian authorities for a protection visa"; 3) the finding that that the appellant was evasive in giving evidence about his religious affiliations and about what had happened to him in China before he left that country. The Tribunal concluded that the evidence was given in this way to strengthen his claim to remain in Australia; and 4) that the appellant had attempted to escape from immigration detention. See [27]-[30] (Hayne J).

⁸² *FTZK* at [31]. See also [13] and [19] (French CJ and Gageler J).

⁸³ See eg *Sevdalis v Director of Professional Services Review (No 2)* [2016] FCA 433 at [82].

serious to affect the end result.⁸⁴ Indeed, ‘the overarching question is always whether the decision was affected by jurisdictional error’.⁸⁵

CREDIBILITY

33. Before considering illogicality and irrationality applied in *CQG15* and *ARG15*, we note some of the principles collected in these cases about when credibility findings may amount to jurisdictional error.⁸⁶ Thus:

- (1) the oft quoted words of McHugh J that credibility findings are *par excellence* the function of the primary decision-maker do not mean that those findings are not susceptible to review for jurisdictional error on several potential grounds;⁸⁷ likewise, a finding of fact founded simply upon a conclusion that a person is not to be believed is no more immune from judicial scrutiny than is any other finding of fact;⁸⁸
- (2) the issue about whether credibility findings are tainted by jurisdictional error is a ‘case-specific inquiry’ rather than one that should be analysed by reference to fixed categories or formulas, and in each case, what the decision-maker has decided must be analysed in detail to determine whether or not a jurisdictional error has occurred;⁸⁹
- (3) adverse credibility findings may involve jurisdictional error on recognised grounds including reaching a finding without a logical or probative basis

⁸⁴ *ARG15* at [47], citing *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [151] (Robertson J) and observations in *BKE v Office of Children’s Guardian* [2015] NSWSC 523 at [113] (Beech-Jones J). cf. Martin Smith, “‘According to law, and not humour’: Illogicality and administrative decision-making after *SZMDS*” (2011) 19 *AJ Admin L* 33 at 42.

⁸⁵ *ARG15* at [47], citing *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [148] (Robertson J); *SZOOR v Minister for Immigration and Citizenship* (2012) FCAFC 58 1 at [84] (McKerracher J with whom Reeves J agreed); and *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516 at [52] (Wigney J).

⁸⁶ *ARG15* at [83] citing *CQG15* [36]-[44], referring also (among others) to *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198; *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089.

⁸⁷ These words derived from *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* 74 ALJR 405 (McHugh J). The Court also notes that McHugh J’s observations ‘were made in the specific context of a claim that the Tribunal had not complied with its statutory obligation under s 430 of the *Migration Act* to give reasons for its decision. Nothing said by McHugh J suggests that the Tribunal’s adverse findings on credibility are not amenable to judicial review on jurisdictional error grounds’. See *CQG15* at [37].

⁸⁸ *CQG15* at [40] citing Flick J in *SZVAP* at [20].

⁸⁹ *ARG15* at [83] citing Robertson J in *SZRKT* at [77].

or unreasonableness;⁹⁰ and, as with any finding, credibility findings must be rationally made and based upon facts having logical and probative weight;⁹¹

- (4) jurisdictional error may be exposed where a finding on credit on an objectively minor matter of fact is the basis for the tribunal's rejection of the applicant's entire evidence and/or the whole claim, and/or where minor or trivial inconsistencies (or omissions) in a claimant's evidence are used to support adverse credibility findings;⁹² and
- (5) the basis upon which a tribunal has made adverse findings, including adverse findings as to credit, must be adequately explained and a failure to do so may expose jurisdictional error.⁹³ Likewise, a finding that an applicant has lied will need cogent supporting material.⁹⁴

D. PRINCIPLES APPLIED

i) ILLOGICALITY/IRRATIONALITY & CREDIT

34. In *CQG15*, the Full Court rejected that the Tribunal's adverse credit findings were illogical or irrational or otherwise not based on probative evidence. It said that the appellant had read too much into the Tribunal's statement that "[t]aken separately by themselves, none of the concerns about the [appellant's] credibility which the Tribunal has discussed above would necessarily be determinative of that issue". The word 'necessarily' was a key part of the sentence and what the Tribunal essentially said was that "I do not have to determine whether any one of those inconsistencies or incongruities would be

⁹⁰ *ARG15* at [83].

⁹¹ *ARG15* at [83] referring to *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31].

⁹² *CQG15* at [41] citing Flick J in *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31] and at [43] citing Gordon J in *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198 at [25]-[26].

⁹³ See *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089 at [23].

⁹⁴ *CQG15* at [44] citing *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 at [27].

sufficient because I am satisfied, taking into account that there are a significant number of them, that the appellant cannot be believed”⁹⁵.

35. The appellant could also not demonstrate ‘extreme’ illogicality. It was therefore open to the primary judge to disagree that the implausibility and inconsistencies identified by the tribunal should not be described as ‘minor’. For example, saying first that the Taliban had not used force, and then saying that he had been seriously assaulted by them occasioning the need for hospitalisation was no minor matter: it was ‘absolutely central to the claim’.⁹⁶ Similarly the finding of ‘incongruity’ by the Tribunal about the Taliban not taking further action after February 2009, apart from visits to his pharmacy, was also not unreasonable given the claim that threats to kill were made. These matters were essential features of the claim to fear harm. As a result, they were not ‘minor’.⁹⁷
36. As to the contention that the Tribunal had to find ‘specific evidence of falsity’ before concluding that the appellant was not a witness of truth, the Full Court disagreed. It said that while it was preferable to not reach a conclusion that an applicant is a ‘liar’, unless strictly necessary, it did not mean the Tribunal fell into jurisdictional error. This was because there ‘was ample foundation in this instance for the Tribunal to reach the conclusion that the appellant was not a witness of truth’.⁹⁸
37. Equally, in *ARG15*, the Full Court rejected the claim that eight findings were not based on probative evidence or were unreasonable in that they were not open on the evidence. Having considered each of the findings, it determined that either there was some evidence (or some probative evidence) to support the relevant finding, that the finding was not entirely lacking in supporting material, or that the appellant misstated the Tribunal’s findings, or that there was some probative supporting evidence. The Full Court said that although there were three particulars about which the Tribunal did not ‘make explicit or direct

⁹⁵ Cf *FTZK*, where the Tribunal had said that none of the grounds was ‘sufficient’: see *FTZK* at [65].

⁹⁶ *CQG15* at [59]-[63]

⁹⁷ *CQG15* at [63]-[64]. The inconsistency between the claim in the appellant’s statutory declaration that the Taliban asked his sister for his whereabouts when they allegedly attacked her, and the denial in oral evidence was also said not to be a minor matter but one that pertained to his fear which in turn went to the heart of the matter.

⁹⁸ *CQG15* at [65]-[66].

reference to any material’ in support, and which ‘might be viewed as borderline in terms of their legal validity’, it was not prepared to hold it was not reasonably open to the Tribunal to make those findings or that they were illogical or irrational in the relevant sense. Hence these matters did not give rise to jurisdictional error. This was so even though the Court said that the findings were not factually correct, and were not consistent with country information placed before the Tribunal by the appellants. The Court said these were not matters that were sufficient to make good the particular grounds relied on.⁹⁹

38. Although the above demonstrates how difficult it is to successfully argue illogicality or irrationality in the relevant sense, in *ARG15*, the ‘misapprehension’ ground in fact succeeded. The appellants had argued that the Tribunal misunderstood the evidence about the mother’s dowry, particularly the evidence ‘relating to the contents of the nikahnama’ and that this formed the basis for the Tribunal’s serious conclusion that the appellant mother had sought to mislead the Tribunal.¹⁰⁰ Assessing this contention required ‘close attention’ to [20] and [23] of the Tribunal’s reasons, the revised transcript of the relevant exchanges between the tribunal and the appellant relating to the dowry and the translated terms of the nikahnama’.¹⁰¹ Thus, the Court:¹⁰²

- (1) first, set out what the Tribunal said, at [20] of its reasons:

The applicants provided a nikahnama (marriage certificate). **When asked who paid the dower of 1,000,000 rupees listed on the nikahnama, the wife stated that the dower was deferred and she did not get anything.** The Tribunal noted that the nikahnama states that she was paid 1,000,000 rupees in gold jewellery and that 500,000 rupees was deferred. The wife stated that her husband sent money to her mother to buy a bracelet and his aunt gave her a bangle.

(Emphasis in the original.)

- (2) second, repeated the Tribunal’s ‘serious finding’ (in [23]) that the mother had sought to mislead the Tribunal about the dowry:

The Tribunal considers that the wife sought to mislead the Tribunal about the dowry, stating that it was not paid when the nikahnama states that she received a significant payment in gold jewellery. Given this credibility concern, the

⁹⁹ *ARG15* at [48]-[55].

¹⁰⁰ *ARG15* at [82].

¹⁰¹ *ARG15* at [84].

¹⁰² *ARG15* at [85]-[90].

Tribunal does not accept that her mother paid for the wedding or that her father-in-law only attended briefly in casual clothes.

(Emphasis in the original.)

- (3) third, set out the available evidence relating to the ‘credibility’ concern, namely the relevant, albeit incomplete portions of the transcript and the nikahnama.
39. Before analysing the reasons and evidence, the Full Court noted that it ‘went without saying’ that the finding that the appellant misled the Tribunal was a ‘very serious finding’ and that that finding underpinned the ‘credibility concerns’ held by the Tribunal in relation to other matters.¹⁰³ Thus the finding had a cascading effect.
40. First, the Court analysed an exchange between the Tribunal and the appellant mother about her receiving the dower of 1, 000,000 rupees. Despite the transcript being incomplete, it said it was evident that a fair reading of the transcript suggested the appellant mother had said ‘He never give’ in response to the Tribunal’s question who paid and had denied that her father-in-law had paid her the money. Second, the Court scrutinised the discussion between the Tribunal and the appellant about whether she was paid in jewellery and, again, on a fair reading, said that the ‘transcript reveals that the appellant mother went to some lengths to explain that the limited jewellery which she did receive did not come from her father-in-law, but from other sources’.¹⁰⁴
41. The Full Court concluded that ‘in those circumstances, it should be accepted that there was no probative evidence to support the serious finding made by the Tribunal in [23], which finding was then itself used by the Tribunal to make further adverse findings concerning the appellant mother’s claims that her own mother had paid for the wedding and that the father-in-law had only attended briefly in casual clothes’. In the alternative, the Court said that the finding was irrational or illogical in the sense described in *SZMDS*.¹⁰⁵ Further, because the Tribunal made subsequent adverse credibility findings about the mother which relied, at least to some extent, on the earlier finding that she had misled the

¹⁰³ *ARG15* at [92].

¹⁰⁴ *ARG15* at [93]-[95].

¹⁰⁵ *ARG15* at [96].

Tribunal about the dowry, the Full Court held that the initial adverse finding could not be isolated, and the dependent findings were also infected by the legal flaws.¹⁰⁶ It concluded that in the circumstances, the error ‘was so serious and significant’ that it amounted to jurisdictional error.¹⁰⁷

ii) IGNORING EVIDENCE

42. Before concluding, we note that *ARG15* is a reminder that, as the High Court said, ‘jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power’.¹⁰⁸ While recognising it is not always jurisdictional error for the Tribunal to ignore relevant material, including corroborative evidence,¹⁰⁹ the Full Court agreed with the appellant’s contention that the Tribunal failed to consider relevant material (submissions and a recent Home Office report dealing with women and honour crimes in Pakistan country information) and that in the circumstances this amounted to jurisdictional error. This was because this material was highly cogent: it dealt with honour killing in Pakistan, the lack of state protection for women fearing honour crimes and jirgas, all things which were centrally relevant to, and corroborative of, the appellant’s claims.¹¹⁰

E. CONCLUSION

43. In conclusion, while it is evident that the jurisprudence has developed to make it more possible to make out jurisdictional error in respect of findings of fact, the decided cases show that to do so may be very difficult. As *ARG15* demonstrates, to show error on the ground that the finding is illogical or irrational or otherwise not supported by probative evidence, we, the practitioners, must sift carefully through the evidence before the tribunal and its reasons for decision. As we have endeavoured to state, tribunals should keep steadily in mind that standards of evidence are not entirely inapplicable. After

¹⁰⁶ See *ARG15* at [97].

¹⁰⁷ *ARG15* at [99].

¹⁰⁸ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351-352 (McHugh, Gummow and Hayne JJ). See *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [27].

¹⁰⁹ *ARG15* at [62], relying on Robertson J in *SZRKT* at [122].

¹¹⁰ *ARG15* at [56] – [76].

all, why shouldn't a tribunal's reasons be construed 'with an eye keenly attuned to the perception of error'?¹¹¹

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¹¹¹ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ). See also *SZMDS* at [35] (Gummow ACJ and Kiefel J) and *SZOOR* at [5] (Rares J).