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Tribunal Case Update

This issue opens with two cases in which the Federal Court applied the principles laid down by the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 ([24]-[27]) concerning the standard of consideration which a decision maker must give to representations made to it by a party. In each case the Court found that the AAT had failed to meet the requisite standard. [The principles are summarised in our case note on *BCC21 v Minister for Immigration, Citizenship and Multicultural Affairs*].

In *BDF17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, the respondent argued that they were entitled to give no weight to corroborative evidence proffered by a party who had been discredited. The argument relied on *Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002* [2003] HCA 30 [49], [12]. The Federal Court held nothing in that judgment excused the tribunal's failure to make a separate evaluation of the corroborative evidence in the first instance.

Turning to tribunal procedures; in *Sunaust Properties Pty Ltd v The Owners - Strata Plan No 64807*, the NSW Court of Appeal held that the NCAT Appeal Panel was empowered to reopen its own published final decision where it was satisfied it had failed to resolve a substantive jurisdictional issue before it.

In *Davis v NSW Minister for Health* the NCAT Appeal Panel determined that the circumstance that the proceeding would be of no practical effect could justify a finding that it was 'lacking in substance', and could also be a consideration in the exercise of the Tribunal's discretion to dismiss, for the purposes of s 55(1) of the NCAT Act.

Queensland is one of three Australian jurisdictions which have legislated to require a 'public authority' to give 'proper consideration' to any human right relevant to a decision to be made. In *ST v State of Queensland (Dept of Education)* the Queensland Industrial Commission applied a Victorian authority on what is meant by 'proper consideration'.

In *Minister for Primary Industries and Regional Development v Scali*, the Supreme Court of South Australia held that a finding that there were exceptional circumstances was not a discretionary decision. In the particular statutory context, the existence of exceptional circumstances was a jurisdictional fact.

In *Medical Board of Australia v Arunkalaivanan* the Supreme Court of Western Australia Court of Appeal determined that illogicality or irrationality in fact-finding that is critical to a Tribunal's ultimate conclusion will amount to an appealable error of law under s 105(2) of the *State Administrative Tribunal Act 2004* (WA).

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Duty to consider representations

In reviewing the refusal of a protection visa, the AAT failed to have regard to a Pakistani police report produced by the applicant which, the Federal Court found, was corroborative of his claim to be in need of protection from the Taliban. The Court found that, given the materiality of the AAT's error, it was a jurisdictional error. The Court discussed the tribunal's duty to consider representations made to it with reference to the recent decision of the High Court of Australia in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 ([24]-[27]).

BCC21 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1072

Federal Court of Australia (Goodman J), 13 Sept 2023

The appellant, a citizen of Pakistan, entered Australia on a student visa and subsequently applied for a protection visa. His application was refused by a delegate of the first respondent ('the Minister'). The Administrative Appeals Tribunal ('the Tribunal') subsequently affirmed the Minister's decision. A judge of the then Federal Circuit Court ('the primary judge') dismissed the appellant's application for judicial review of the Tribunal's decision ([28]). He appealed to the Federal Court from the primary judge's decision.

Before the Tribunal

The appellant sought the protection visa on the basis that he would be at risk of being killed by the Taliban if he returned to Pakistan. He claimed that he had refused or resisted attempts by the Taliban to recruit him, and that his cousin had been shot dead by armed men while driving the appellant's father's car to a wedding in Islamabad in July 2016. The appellant claimed that he was the intended target of that attack.

In support of his claims, he provided a document purporting to be a report by Pakistani police concerning information provided to the police by the appellant's father relating to the murder of the cousin ('the police report'). The police report also referred to a statement by the appellant's father that he had received phone calls threatening that the appellant would be killed.

In its reasons for decision ('Reasons'), the Tribunal found that the appellant was not a truthful or credible witness (Reasons [25], cited [13]). It found no credible evidence to suggest that there was a real chance that the appellant would experience serious harm amounting to persecution if he returned to Pakistan (Reasons [36], cited at [25]). The Tribunal said that it placed little evidentiary weight on the police report 'given the high level of document fraud in Pakistan' (cited at [8]).

The appeal grounds

Before the Federal Court, the appeal grounds were that:

1. the Tribunal was obliged to consider the police report and failed to do so; and
2. the Tribunal failed to consider his representation that he feared harm from the Taliban in part because his cousin had been killed in circumstances where he had been mistaken for the appellant.

Duty to consider representations: the principles

Goodman J referred to the principles laid down by Kiefel CJ, Keane, Gordon and Steward JJ in

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17 ([24]-[27]) regarding the nature of the Tribunal's obligation to consider representations made to it. The principles stated by their Honours, to which Goodman J referred at [37], are summarised as follows:

1. '… [A] decision-maker must read, identify, understand and evaluate the representations' ([24]).
2. '… [T]he decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them' ([24]).
3. Having done that, '[t]he weight to be afforded to the representations in a matter for the decision-maker' ([24]).
4. 'The decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims made" …' ([24]).
5. 'The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them' ([25]).
6. 'None of the [above principles] detracts from … the established principle' that if it is found that 'the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument … that may give rise to jurisdictional error' ([27]).

Did the Tribunal meet the standard?

After considering the principles and the Tribunal's Reasons, Goodman J was satisfied that the Tribunal did not have regard to the police report ([40]). The document was significant because it purported to be a police record of contemporaneous statements by the appellant's father that were corroborative of the appellant's claim that he was at risk of being killed by the Taliban ([41], [42]). The Reasons contained nothing to indicate, expressly or by inference, that the Tribunal had considered the report ([43]). There was no finding about its veracity or authenticity ([47]). If the Tribunal had considered the report and assessed it as being without probative value, it is expected that it would have stated its view and given reasons for it ([47]).

Was the error material?

Goodman J was satisfied that the Tribunal's failure to consider the police report was material in the sense that there was a realistic possibility that its decision might have been different if it had considered that corroborative evidence ([50], [51]).

Conclusion and orders

His Honour concluded that the Tribunal committed a material error in failing to consider the police report and that it was a jurisdictional error. The decision was set aside and the matter remitted to the Tribunal.

BFD17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCA 887

Federal Court of Australia (Burley J), 2 August 2023

The appellants, a mother and son from Nigeria, applied for protection visas. The first appellant claimed to fear harm if returned to Nigeria, on the ground that she and her son were attacked and beaten in their family home after she confronted the leader of the local Boko Haram group about its attempt to recruit her son. The second appellant also claimed to have been attacked in that incident and feared that he would be forcibly recruited by Boko Haram if required to return to Nigeria.

In support of their claims, the appellants relied on sworn statements from witnesses ('the corroborative evidence'). Statements were provided by the first appellant's daughter who witnessed the attack and a neighbour who took the appellants to hospital after the attack.

A delegate of the respondent minister rejected the applications for protection visas. The Administrative Appeals Tribunal ('the Tribunal') affirmed the delegate's decision. The Tribunal rejected the appellants' claims regarding the difficulties they claimed to have experienced with Boko Haram and their reasons for fearing return to Nigeria. The Tribunal found that the appellants had 'fabricated claims and concocted evidence to achieve an immigration outcome' (quoted at [12]). In view of its findings about the Appellants' credibility, the Tribunal determined to give no weight to the corroborative evidence.

The appellants applied for judicial review of the Tribunal's decision by the Federal Circuit and Family Court of Australia (Division 2) ('FCFC'). Before the FCFC, the appellants contended that the Tribunal fell into jurisdictional error by failing to give 'proper, genuine and realistic consideration' to the corroborative evidence ('primary ground one') ([16]). They also argued that the Tribunal had erred in making findings without any logical or rational basis (primary ground two). A judge of the FCFC ('the primary judge') rejected both grounds and dismissed the application.

Grounds of appeal to the FCA

The appellants appealed to the Federal Court of Australia, arguing that the primary judge erred in failing to find that the Tribunal had made the following errors:

1. the Tribunal failed to 'read, identify, understand and evaluate the corroborative evidence' and failed to bring its mind to bear on this evidence ('appeal ground 1'), and
2. the Tribunal made findings as to the appellants' credibility that lacked any logical or rational basis or were unsupported by probative evidence ('appeal ground 2').

Appeal ground 1 was amended from primary ground one to align it with views expressed by the High Court in *Plaintiff M1/2021 V Minister for Home Affairs* [2022] HCA 17 [22]-[27] regarding the level of engagement with a party's representations which a decision maker is required to demonstrate. Kiefel CJ, Keane, Gordon and Steward JJ said that the use of formulations such as 'proper, genuine and realistic consideration' and 'active intellectual process' have the danger of inviting a reviewing court to stray beyond the proper limits of judicial review into reviewing the merits of the decision ([26]). While the requisite level of engagement varies according to the statutory context, their Honours observed that 'there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations' ([24]).

The Court's consideration of the grounds

Appeal ground 1 – the corroborative evidence

Burley J found that there was some basis for the Tribunal to conclude that the appellants' claims lacked credibility ([45]). The issue was whether, notwithstanding its view on the appellants' credit, the Tribunal erred by failing to 'read, identify, understand and evaluate the corroborative evidence' ([46]).

The respondent minister had submitted that the case fell within the circumstances considered in *Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002* [2003] HCA 30 [49], in which McHugh and Gummow JJ recognised that a decision maker may give no weight to corroborative evidence provided by a party who had been discredited ([54]). The respondent had conceded that nothing in that judgment relieved the decision maker from first making a separate assessment of the corroborative evidence ([56], [57], citing *Minister for Immigration and Citizenship v SZNSP* [2010] FCAFC 50 [37] and *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94 [45]).

His Honour found that the statements of the first appellant's daughter and of the neighbour purported to be direct evidence from witnesses who observed the events at the heart of the appellants' claims. These statements were consistent with each other and supported the appellant's evidence ([61]). The Tribunal did not discuss the statements, but merely said that it attached no weight to them given the lack of credibility of the appellants' evidence ([59]).

In his Honour's view, the Tribunal failed to demonstrate any reasoning or analysis of the evidence of the witnesses nor any cogent reason for rejecting it ([60]). Moreover, the Tribunal's finding was 'tantamount to a conclusion that the evidence of both witnesses [was] a fabrication' ([61]). Something more than a decision to attach no weight to a person's evidence is required to support a positive finding that the evidence is fabricated ([62], citing *BTF15 v Minister for Immigration and Border Protection* [2016] FCA 647 [56] (Katzmann J), *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 268 (Brennan, Dawson, Toohey and Gaudron JJ).

The Court found that appeal ground 1 was made out ([37]).

Appeal ground 2- unreasonableness, illogicality or irrationality

The Court held that the findings as to the appellants' credibility did not approach the level required to establish jurisdictional error on the ground that they were unsupported by probative

evidence or lacked a logical or rational basis ([66]). Accordingly, the primary judge did not err in rejecting this ground ([71]).

Orders

The Court allowed the appeal. The orders made by the FCFC were set aside, the order of the Tribunal was quashed, and mandamus was issued requiring the Tribunal, differently constituted, to determine the application for review according to law.

Power of tribunal to re-open its decision

Tribunal Acts often have a 'slip provision' which empowers the tribunal to direct a registrar to amend the text of its decision or statement of reasons to correct an error. Section 63(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) empowers the presiding member, if satisfied that there is an 'obvious error' in the text of the notice of the decision or statement of reasons, to direct a registrar to alter the text.

In the following case, the NSW Court of Appeal held by a majority that s 63 did not empower the tribunal to reopen its decision in order to address substantive issues which it had not previously considered. However, the Appeal Panel had power to reopen its decision under s 38 of the Act which empowers the Tribunal to determine its own procedure subject to the Act and rules. Having regard to the circumstances and the guiding principle' in s 36, the Appeal Panel exercised its power to reopen correctly.

Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners - Strata Plan No 64807 [2023] NSWCA 188

New South Wales Court of Appeal (Meagher and Stern JJA, Basten AJA), 14 Aug 2023

In 2000, the developer of a strata title scheme for buildings sold the caretaker management rights to the applicant ('The Caretaker') for up to 25 years ('the Caretaker Agreement'). In 2020, the Owners Corporation of the strata scheme ('the OC') applied to the Civil and Administrative Appeals Tribunal ('the Tribunal') for an order under s 72(1)(a) of the *Strata Schemes Management Act 2015* (NSW) ('the 2015 Act') terminating the Caretaker Agreement ('the termination application'). The Tribunal made a termination order.

The Caretaker appealed to the Appeal Panel of the Tribunal. By Grounds 1 and 2 of the appeal notice, the Caretaker contended that the Tribunal's termination powers under s 72 of the 2015 Act did not extend to an agreement made prior to 2003. On 27 July 2022, the Appeal Panel upheld Ground 3 of the appeal 'the July decision'). It remitted the matter to the Tribunal without considering Grounds 1 and 2, stating that it was 'not necessary' for them to do so ([14).

The OC applied to have the matter relisted, objecting to the remittal to the Tribunal without resolving the challenge to its jurisdiction to determine the termination application as raised in Grounds 1 and 2. Without relisting the matter, the Appeal Panel decided on 27 October 2022 to make a direction under s 63 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the Tribunal Act'). In that decision the Appeal Panel rejected Grounds 1 and 2, thereby upholding the Tribunal's jurisdiction to hear the termination application ('the October decision'). The Appeal Panel directed the Registrar to forward the October decision to the parties to be read in conjunction with its July decision.

The Caretaker applied to the Court of Appeal for leave to appeal on a question of law from the Appeal Panel's October decision.

The Appeal Panel's power to reopen its decision

The Court held that the Appeal Panel was correct in its finding that the Tribunal had jurisdiction under s 72 of the 2015 Act to determine the OC's application to terminate the Caretaker Agreement.

The Court was divided on the question of whether the Appeal Panel had power under s 63 of the Tribunal Act to make the October decision. The section empowers the presiding member, if satisfied that there is an 'obvious error' in the text of the notice of decision or statement of reasons, to direct a registrar to alter the text.

Stern JA noted that s 63(3)(b) provides that 'an error arising from an accidental slip or omission' can be an 'obvious error'. Her Honour found that the Appeal Panel in its July decision made

an 'error' in remitting the matter to the Tribunal without considering the jurisdictional issue. The error arose from 'an accidental failure' to consider whether the issues raised in Grounds 1 and 2 of the appeal notice affected the Tribunal's jurisdiction to redetermine the termination application on remittal. Her Honour found that the 'error' arising from the 'accidental failure to consider' was an 'obvious error' within the scope of s 63 ([50]).

Basten AJA (Meagher JA agreeing) held that s 63 was not wide enough 'to permit the reopening of a decision in order to address substantive issues which [the tribunal] had not previously addressed' ([154],[159]). His Honour noted that s 63 conferred power on the presiding member, acting singly, to direct the alteration. This suggested that the power did not extend to substantive issues which had not been considered by the Tribunal ([154]). Moreover, a substantive error would not readily be described as an 'obvious error' ([155]).

Basten AJA found that the October decision was not an alteration of the text of the July decision, but a new decision determining a previously unaddressed challenge to the Tribunal's jurisdiction ([158]). The Appeal Panel erred in purporting to act in the exercise of a power under s 63. However, his Honour found that the Appeal Panel was empowered to reopen its decision by its broad procedural powers under s 38 of the Tribunal Act ([157].

> In the absence of any indication in the Tribunal Act that the Appeal Panel is not able to reopen a decision once pronounced, there will be circumstances in which it may do so and, indeed, circumstances where it should do so. Such a power will fall within the breadth of the procedural powers conferred on it under s 38 ([160]).

Where the Tribunal was satisfied that it had failed to address a substantive issue before it, it acted appropriately in reopening the decision to give effect to the 'guiding principle' in s 36(1) of the Tribunal Act 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings' ([160], [162]). Had the Appeal Panel failed to resolve the challenge to the Tribunal's jurisdiction, it would have delayed the final resolution of the proceedings and increased the cost [162]). His Honour concluded that decision to reopen the July decision was correct [163]).

The Court unanimously granted leave to appeal and dismissed the appeal.

Dismissal of proceeding: 'lacking in substance'

In the following case the NCAT Appeal Panel considered the scope of the Tribunal's power under s 55(1) of the NCAT Act to dismiss a proceeding on the basis that it is 'lacking in substance'. While the phrase appears in similar provisions in many Acts, the Appeal Panel recognised that it had to be construed in its particular statutory context in the NCAT Act. It was also relevant to consider the nature of the jurisdiction which the Tribunal is called on to exercise.

In the matter before it, the Appeal Panel considered that the circumstance that the proceeding 'would be of no practical effect' could justify a finding that it was 'lacking in substance', and could also be a consideration in the exercise of the Tribunal's discretion to dismiss.

Davis v NSW Minister for Health [2023] NSWCATAP 211

Civil and Administrative Tribunal of NSW Appeal Panel (Armstrong J, President, and A Britton, Deputy President), 28 July 2023

The applicant Ms Davis sought review by the Civil and Administrative Tribunal ('the Tribunal') of a direction contained in a Public Health Order ('PHO') made by the NSW Minister of Health ('the Minister') which made it an offence for a 'health care worker' to work as such from specified dates unless the worker had received COVID-19 vaccination ('the Vaccination Direction'). The PHO was subsequently repealed and replaced by three consecutive orders, the last of which expired on 19 June 2022. Ms Davis was a health care worker and was subject to the Vaccination Direction at the time it came into effect. On 8 December 2021 her employment was terminated after she failed to provide evidence of vaccination.

The Minister applied for dismissal of the application on the basis that there was no longer any operative order affecting the applicant.

On 26 October 2022, the Tribunal dismissed the application under s 55(1)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') as being 'lacking in substance' ('the Dismissal Decision').

Section 55(1) of the NCAT Act states that

> The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances—
>
> … (b) if the Tribunal considers that the proceedings are frivolous or vexatious of otherwise misconceived or lacking in substance …

Ms Davis sought leave to appeal the Dismissal Decision. By Ground 1 of her appeal, she argued that a finding that the proceedings 'would be of no practical effect' could not justify a conclusion that the proceedings are 'lacking in substance' for the purpose of s 55(1)(b) of the NCAT Act.

Construction of 'lacking in substance'

The Appeal Panel observed that the phrase 'lacking in substance' must be construed in its particular statutory context, the NCAT Act ([50]).

Moreover, different considerations may apply according to the particular jurisdiction of NCAT in which s 55 is being applied ([51]). For example, considerations of whether an application is 'not reasonably arguable' or 'based on an untenable proposition of fact or law' are generally not applicable in the Tribunal's jurisdiction to review administrative decisions on the merits, as the applicant is not required to demonstrate error in the decision under review. However, those conclusions could potentially be applied to an application brought in the Tribunal's general jurisdiction, such as an application under the *Anti-Discrimination Act 1977* (NSW) which alleges discrimination by conduct that does not amount to discrimination within the meaning of the Act ([51]).

The Appeal Panel agreed with the view of the Appeal Panel in *BDK v Department of Education and Communities* [2015] NSWCATAP 129 that 'a reasonably broad connotation' should be given to each of the four categories of proceedings listed in s 55(1)(b). In the view of the Appeal Panel, a finding that the proceedings 'would be of no practical effect' could justify a conclusion that the proceedings are 'lacking in substance' ([53]).

The Appeal Panel noted that s 55(1)(b) empowers the Tribunal to ensure that its processes are applied to resolving real disputes. It was arguably open to the Tribunal to have dismissed the proceedings on the basis that the passage of time and changed circumstances meant that any 'success' that might be achieved by Ms Davis would be without practical effect ([54]).

Exercise of the discretion to dismiss

The Appeal Panel noted that a decision to dismiss a proceeding under s 55(1)(b) requires a two-step process. The Tribunal must first decide whether a ground exists (such as that the proceedings are 'lacking in substance'). If the answer is in the affirmative, it must then consider whether to exercise its discretion to dismiss ([86]). The Appeal Panel found that the Tribunal did proceed to consider other factors as being relevant to the exercise of the discretion to dismiss. In exercising its discretion it was open to the Tribunal to weigh the 'consumption and diversion of NCAT's resources in favour of exercising the discretion' ([89]).

The Appeal Panel held that Ground 1 had insufficient prospect of success to warrant a grant of leave to appeal ([55]).

Order

Leave to appeal was refused.

Discretionary considerations and human rights

Queensland, the ACT, Victoria and New Zealand each have a human rights statute which recognises specified human rights. The State Acts include a provision prescribing that, subject to exceptions, a 'public authority' (defined to include a tribunal exercising administrative power) must give proper consideration to any human right that is relevant to the decision to be made': *Human Rights Act 2019* (Qld) ss 5–11, 13, pt 2, divs 2, 3, s 58(1), (2), (3); *Human Rights Act* 2004 (ACT) ss 5,6, 28, pt 2 divs 2,3, pt 5A *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ss 3(1), 4(1)(b),(j), 7, pt 2, ss 38, 39.

In the following case a Queensland tribunal was undertaking a limited form of appeal from a

decision of the State's Education Department. The tribunal was required to consider whether the decision under appeal was 'fair and reasonable', and found that it was neither.

The Appellant had less success with an argument that the Department's decision was invalid for breach of the *Human Rights Act 2019* (Qld) s 58(1) on the basis that the Department failed to give proper consideration to her human rights. The Commission discussed what 'proper consideration' entailed in this context, citing relevant Victorian case authorities on the equivalent provision in the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

The Appellant had not raised human rights in her submission to the Department, and the Department's decision did not mention any consideration of her human rights. The Commission did not accept that the matters raised by the Appellant regarding human rights rendered the decision unreasonable.

ST v State of Queensland (Dept of Education) [2023] QIRC 004

Queensland Industrial Relations Commission (McLennan IC), 10 January 2023

Section 133(1) of the *Public Service Act 2008* (Qld), ('the PS Act') empowers the chief executive of a department to transfer a public service officer of the department within the department. Pursuant to s 134(1) of the PS Act, the transfer 'has effect unless the officer establishes reasonable grounds for refusing the transfer to the satisfaction of the officer's chief executive.' Section 194(1) (d) of the PS Act permits an appeal to be made to the Queensland Industrial Relations Commission ('the Commission') against a decision to transfer a public service officer.

The Appellant ('ST') was employed as a teacher at School A by the Respondent ('the Department'). On 8 September 2022, ST received a notification from the Department that she had been selected for a required transfer to School B on 19 January 2023. School B was about 18 to 30 minutes driving time from ST's place of residence. On 11 October 2022 ST lodged a form requesting review of the decision to transfer her to School B. On 13 October 2022, she was informed that her review had been dismissed ('the Decision'). On 2 November 2022, ST filed with the Commission an appeal against the Decision.

Limited nature of the appeal

Pursuant to s 451(1) of the *Industrial Relations Act 2016* (Qld) ('the IR Act') the Commission conducted no hearing but received written submissions from the parties and decided the appeal on the papers.

Section 562B(2)-(3) of the IR Act provides that the Commission shall decide the appeal by reviewing the decision 'to decide whether the decision appealed against was fair and reasonable' ([10]). The appeal is not conducted as a de novo re-hearing on the merits, but as a review of the decision reached by the Respondent. Findings which were reasonably open to the decision maker are not to be disturbed on appeal, although the Commission may consider other evidence that was not placed before the decision maker ([10]-[12]).

In assessing the reasonableness of the decision under review, the Commission has regard to the legal test for 'unreasonableness' as formulated by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [63]-[76]. The question is 'whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances' ([13], citing Ryan J in *Gilmour v Waddell & Ors* [2019] QSC 170 [207]-[210]).

Was the Decision reasonable?

In considering the appeal, the Commission had regard to the Department's Guidelines which identified matters to be taken into account in making or reviewing decisions to transfer a teacher to another school. These matters include 'personal circumstances that preclude a teacher from moving either from their current location or residence' ('the Compassionate Guideline'). The Commission followed earlier Commission decisions, finding that the Compassionate Guideline is applicable to assessing whether reasonable grounds exist ([35]).

ST had submitted to the decision maker that she was undertaking fertility treatment requiring ongoing appointments and that the stress and demands of a transfer at the time would be detrimental and likely to cause her great mental and physical hardship.

The Commission found that the Decision was not reasonably open to the decision maker because it:

- did not adequately evidence consideration of ST's personal circumstances; and
- was unreasonably expedited by the Department with the result that ST was not able to provide supporting medical documentation which would have established reasonable grounds for ST's refusal of the transfer ([67]).

Was the Decision fair?

Moreover, the Commission was not satisfied that the process was procedurally fair as it resulted in the decision maker issuing a Decision without all the relevant evidence at hand ([46]).

Based on those factors, the Commission found that 'the decision-making process was unfair and the Decision lacked intelligent justification which rendered the outcome unreasonable' ([68]).

Human rights consideration

Although the Appellant succeeded on other grounds, the Commission considered ST's argument that 'the Decision is invalid because it contravened s 58(1)(b) of the *Human Rights Act 2019* (Qld) ('the HR Act') by failing to give proper consideration of a human right relevant to the decision, being the human rights recognised by ss 17, 26, 25(a), 29 and 37(1) of the HR Act. ([23]). The Commission appears to have taken this submission as one relating to whether the Decision was 'reasonable' ([66]).

The Commission found that the Respondent had provided no clear indication of whether human rights were taken into account in the Decision ([65]). It also noted that the Appellant did not identify any particular human right affected by the decision in her submission for review of the transfer prior to the making of the Decision ([136], [165]).

The Commission observed that the Decision lacked express mention of consideration of human rights ([64]). Noting that 'proper consideration' is not defined in the HR Act, the Commission referred to *Hutchison v State of Queensland (Queensland Health)* [2021] QIRC 317, in which Commissioner Pidgeon applied a decision of the Supreme Court of Victoria to interpret a similar provision in s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In *Castles v Secretary of the Department of Justice* [2010] VSC 310, Emerton J considered that the 'proper consideration' of a human right involves balancing public and private interests. Her Honour added that while it is insufficient to merely state in a decision that human rights have been taken into account,

> … it will be sufficient in most circumstances that there is some evidence that shows that the decision maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and the countervailing interests of obligations were identified ([185]-[186].

The Commission agreed with Commissioner Pidgeon in *Hutchison* that the decision maker is not required to write at length about the consideration of human rights, particularly if the decision maker considers that human rights are not affected ([65]).

Having examined the Appellant's submissions about the effect on her human rights, the Commission could not identify any reasonable ground therein that would warrant cancellation of the transfer ([65]-[66]).

Order

The appeal was allowed, the decision that the Appellant be required to transfer to School B was set aside, and the transfer was cancelled.

Whether a determination of 'exceptional circumstances' is a discretionary decision

It is not uncommon for a statute to provide for the application of a rule subject to a proviso that, if the decision maker finds exceptional circumstances in an individual case, they may depart from the rule to reach a different conclusion. Is the finding about whether exceptional circumstances exist a discretionary or a non-discretionary decision?

In the following appeal, the Supreme Court of South Australia held that SACAT's finding that there were exceptional circumstances was a non-discretionary decision. As such, the appropriate standard on appellate review is

whether the decision was correct. It is only if the decision involves an exercise of discretion that the Court applies the 'deferential' standard of appellate review in *House v The King* (1936) 55 CLR 499, 505 (cited [38]).

In reaching this conclusion, the Court applied the authorities summarised by Gageler J in *Minister for Immigration and Border Protection v SZVFW* (2018) HCA 30, [37]). The question is not whether the decision requires an evaluative process. The crucial point was that the existence of exceptional circumstances was a precondition to the exercise of a power, a '"jurisdictional fact" that had to exist before a power was enlivened' ([43]).

In reviewing the correctness of SACAT's decision, the Court said that 'as SACAT is a specialist Tribunal, this Court would ordinarily give substantial weight to its findings' ([46], [64]). After weighing SACAT's finding in combination with other considerations, the Court decided that SACAT had erred in finding that there were exceptional circumstances.

Minister for Primary Industries and Regional Development v Scali [2024] SASC 4

Supreme Court of South Australia (Kimber J), 18 January 2024

The respondent, Mr Scali, was the holder of a Marine Scalefish Fishery licence which was subject to a quota unit entitlement determined by the appellant under s 55 of the *Fisheries Management Act 2007* (SA) ('the FM Act'). The appellant determined the allocation of quota on the basis of a formula in a gazetted Determination which provided that:

- each licence holder's quota was based in part on their 'eligible catch history', being their total catch history for five years out of the six-year reference period 2010-2016 as a percentage of the total eligible catch for all licensees; and
- if the appellant determined that exceptional circumstances apply to a licensee, it may allocate additional quota units to the licensee ([10]).

The appellant refused Mr Scali's application for additional quota units to be added to his licence, finding that there were no exceptional circumstances. On review of the appellant's decision, the South Australian Civil and Administrative Tribunal ('the Tribunal') found that S did have exceptional circumstances and remitted the question as to any additional quota entitlement back to the appellant.

The appellant appealed to the Supreme Court under s 71 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 71 on two alternative Grounds:

1. that the Tribunal erred in reaching a non-discretionary decision that S had exceptional circumstances; and
2. if the decision did involve the exercise of a discretion, the conclusion of exceptional circumstances was unreasonable.

Because the appeal to the Supreme Court under s 71 of the *South Australian Civil and Administrative Appeals Tribunal Act 2013* (SA) is by way of re-hearing, the appellant needed to establish that the Tribunal had made an error of law, or of fact, or of reasoning, in concluding that there were exceptional circumstances ([48], citing *Shah (a pseudonym) v Medical Board of Australia* [2022] SASC 140 [219].)

Was the conclusion as to exceptional circumstances a discretionary decision?

The first question was whether the decision was a non-discretionary one, which was the appellant's primary position in Ground 1. If so, the standard to be applied by a court undertaking appellate review is the 'correctness' standard as described by the High Court majority in *Warren v Combes* (1989) 142 CLR 531, 551-552. If, on the other hand, the decision involves an exercise of judicial discretion, the Court is required to apply the 'deferential' standard as stated in *House v The King* (1936) 55 CLR 499, 504-55, and summarised by Gageler J in *Minister for Immigration and Border Protection v SZVFW* (2018) HCA 30 [37] as follows:

> [M]embers of an appellate court cannot substitute on appeal a judgment which turns on their own exercise of discretion 'merely because they would themselves have exercised the original discretion, had it attached to them, in a different way'. For appealable error in the exercise of judicial discretion to be established, the appellate court must be satisfied that what was done by the primary judge in the judgment under appeal amounted 'to a failure to exercise the discretion actually entrusted to the court'.

In support of its contention that the decision was a discretionary one, the appellant relied on cases relating to the sentencing of offenders. Kimber J found that the sentencing process was different to the kind of decision required by the FM Act ([43]). The question before the Tribunal, being whether there were exceptional circumstances, was 'best characterised as a threshold, or a precondition, which if satisfied, permits a discretion to be exercised', a 'jurisdictional fact' ([43]). While it involved an evaluative process, the question required a yes or no answer, which could be either right or wrong. His Honour concluded that the question was non-discretionary.

Were there 'exceptional circumstances'?

Kimber J adopted the view of Wilcox J that 'exceptional circumstances' means 'something "out of the ordinary, special or uncommon" with respect to the regulatory scheme and the legislative context' ([51]; *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* [1988] FCA 670 [56]). In this case, the exceptional circumstances must provide reason to depart from the catch history in the six-year reference period and allocate additional quota units ([54]).

The Tribunal identified three circumstances which, viewed in combination, were said to be exceptional —

1. the lack of commercial return due to overfishing,
2. S's decision as a consequence to cease fishing, thereby diminishing his catch history, and
3. the decision of other licensees to keep fishing, thereby increasing their catch history ([55])

Kimber J accepted the appellant's argument that circumstance (1) could not be exceptional as it applied to all the licensees. Circumstances (2) and (3) are different responses to the first industry-wide circumstance. His Honour considered that one licensee's response to a general condition, in contrast to the response of other licensees, cannot be regarded as something exceptional ([61]-[63]).

His Honour recognised that as SACAT is a specialist Tribunal, it must give weight to its finding that there were exceptional circumstances([45]- [47], [64]). Having weighed that consideration along with the three circumstances, the court concluded that the Tribunal erred in finding that S had exceptional circumstances ([65]).

Orders

Kimber J granted permission to appeal, allowed the appeal, set aside the Tribunal's decision and substituted a decision with a finding that the respondent does not have exceptional circumstances.

Irrationality or illogicality in fact-finding as an error of law

In the following case the Western Australian Court of Appeal held that 'illogicality' or 'irrationality' in finding a fact that is critical to a tribunal's ultimate conclusion amounts to an error of law for the purposes of a statutory appeal on a question of law. The test for whether the reasoning is 'illogical' or 'irrational' in this sense is as stringent as in cases where the error relates to a finding about a jurisdictional fact.

Medical Board of Australia v Arunkalaivanan [2023] WASCA 136

Supreme Court of Western Australia Court of Appeal (Buss P, Vaughan and Hall JJA), 7 Aug 2023

The Medical Board of Australia ('the Board') referred the respondent medical practitioner ('the Practitioner') to the State Administrative Tribunal ('the Tribunal') under s 193(1)(a)(i) of the Health Practitioner Regulation National Law. The Board alleged that the Practitioner had behaved in a way that constituted professional misconduct in the course of a consultation with Patient A on 1 November 2018. The Board's allegations included the allegation that the Practitioner had touched the patient inappropriately for his sexual gratification.

The Tribunal was not satisfied that the Board had proved its allegations against the Practitioner to the requisite standard. Among other reasons, the Tribunal was not satisfied that that the evidence of Patient A was truthful, accurate or reliable. The Tribunal made orders that the Practitioner had no case to answer and

that no further action was to be taken in relation to the matter.

The appeal ground – error of law

The Board applied to the WA Court of Appeal ('the Court') for leave to appeal. Under Part 5 of the *State Administrative Tribunal Act 2004* (WA) ('the SAT Act'), an appeal of the kind brought by the Board requires leave to appeal and can only be brought on a question of law.

The ground of appeal relied upon by the Board was that the Tribunal's reasons for rejecting the evidence of Patient A were illogical and irrational, amounting to an error of law ([65], [66]).

Limited scope of appeal for errors in fact-finding

The Court accepted that while the right of appeal provided by SAT Act s 105(2) does not encompass mere questions of fact, legal errors in fact-finding may found an appeal on a question of law ([70]). The question is whether the Tribunal undertook its fact-finding process lawfully and within its authority ([71]).

The Court noted that there are several ways in which a decision maker's fact-finding may be unlawful. One way was where a finding of fact was made by a process of reasoning that was illogical or irrational ([72] – [77]). In this context, the words 'illogical' and 'irrational' mean that the reasoning is devoid of or contrary to logic, or not in conformity with the laws of correct reasoning ([77]). The test is stringent and a finding of such an error is not to be made lightly ([78], [91]).

It was not suggested by the Board that the error made by the Tribunal related to a jurisdictional fact. After considering *Haritos v Commissioner of Taxation* [2015] FCAFC 92 [212] and other intermediate appellate court decisions, the Court held that 'it should be accepted that illogicality or irrationality in fact-finding that is critical to an ultimate conclusion in the Tribunal will amount to an error of law that may be the subject of an appeal under s 105(2) of the SAT Act' ([93]). A challenge to a decision of the Tribunal on this ground of appeal is subject to the same stringent test as when illogicality or irrationality is relied upon to establish jurisdictional error in judicial review ([94]).

The Court's consideration

The Court accepted that the Tribunal's non-acceptance of Patient A's evidence about what occurred during the consultation of 1 November 2018 was critical to its ultimate conclusion that the Practitioner had no case to answer ([93]). The Tribunal had to assess her credit to determine whether to accept Patient A's account, which conflicted with the Practitioner's evidence. The Court accepted that illogical or irrational reasoning leading to a finding that Patient A was not an honest or reliable witness may establish an appealable legal error ([97]).

The Court rejected the Board's contention that the Tribunal's reasons for not accepting Patient A's evidence were illogical or irrational ([165]). It found that the Tribunal's reasoning was 'transparent, intelligible and defensible on the evidence' and provided 'an evident and intelligible justification for the Tribunal's conclusion' on the honesty, accuracy and reliability of Patient A's evidence ([166]).

Orders

The Court refused leave to appeal and dismissed the appeal.